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The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement (originally printed 2005)

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Lauren McLane, Symposium 2021 Keynote Speaker

Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys

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Letter from the Editors

The Connecticut Public Interest Law Journal is proud to celebrate its twentieth anniversary in the 2020-2021 academic year.

In honor of our twentieth anniversary, we have decided to re-print some our "greatest hits" from the journal's past. We hope that by showcasing some of our scholarship, we can honor the contributions of all those scholars and students who have helped to make our journal a success for the past two decades.

In this issue, this re-printing continues with *The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement* by Timothy L. Foden, first published in 2005. The editors chose this article because it was recently cited by Senators Whitehouse, Hirono, Blumenthal, Durbin, and Gillibrand in their *amicus curiae* brief in *New York State Rifle & Pistol Association, Inc. v. City of New York, New York* (140 S. Ct. 1525 (2020)). Mr. Foden's work exemplifies the way CPILJ has contributed to the discourse on issues of national import for the past twenty years. Please visit cpilj.law.uconn.edu to view our full archive.

Additionally, in Spring 2021, CPILJ was proud to present its annual symposium, *Does an Impartial Jury Exist? An Analysis of Implicit Bias in Jury Selection.* This issue includes an article from the symposium's keynote speaker, Professor Lauren McLane. Professor McLane's work, and the symposium itself, explores the crucial topic of implicit bias in jury selection and how Connecticut courts are a change leader in this vital area.

On behalf of the editorial board, I would like to thank all previous authors and editors of the Connecticut Public Interest Law Journal for their contribution towards twenty years of scholarship. We cannot wait to read what the journal publishes in the next twenty years.

Amanda C. Farrish
Editor-in-Chief
Connecticut Public Interest Law Journal, Vol. 20

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The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement

TIMOTHY L. FODEN[†]

I. INTRODUCTION

Perform a brief Westlaw or Lexis search on the freedom-based public interest movement and you will come up with very little, if anything at all. Similarly, the typical survey class on public interest law offers no information on the more conservative and libertarian wing of the public interest movement. This lack of readily available information prompts a number of questions. Who are the people behind such organizations? Why is it difficult to find information on their work? What is the movement's agenda?

[†] The author would like to thank Professor Richard Wilson for his encouragement of apeculiar topic that required a somewhat journalistic approach. The author would also like to thank Chip Mellor and Trent England for graciously meeting with him and sharing their views. Last, the author would like to thank Todd Young, who took the time to give detailed responses to many e-mail inquires.

A brief look at a few of these organizations reveals a number of different goals. Freedom-based public interest groups advocate for traditionally conservative causes. Groups such as the Institute for Justice and the Pacific Legal Foundation have launched litigation campaigns against such institutions as the welfare system and the environmental regulatory regime. Other organizations such as the Alliance Defense Fund litigate for the insertion of religious symbols and practices in public spaces. Running the gamut of conservative causes, the freedom- based public interest legal movement has co-opted the once exclusively liberal term, public interest.

The Orwellian name-game behind the self-asserted title "freedom-based public interest law movement"[1] ("FBPILM") is heavily responsible for the newly contested definition of public interest. The reason why there is a lack of ascertainable information on these groups is linked to their seemingly innocuous assumption of the term "public interest." When thinking of public interest, the average lawyer or law student thinks of the traditional liberal institutions such as the American Civil Liberties Union ("ACLU"), legal aid societies, and public defender services. However, organizations aimed at advancing conservative goals also refer to themselves as public interest organizations. This appropriation of a traditionally liberal name is the most likely source of confusion.

There is an important distinction between the freedom-based public interest organizations and those traditionally associated with the term public interest—ideology. The freedom-based public interest organizations, "reflect New Right values in the judicial system"[2] by striving to effect tenets of conservative policy through the courts. In their own terms, these tenets include the protection of economic rights, securing a place for religion in the public square, suing to protect "traditional moral values," and protecting the rights of private property owners.[3] Roughly translated, this means that the FBPILM opposes liberal economic policies, the presence and acceptance of liberal sexual attitudes, and attempts to develop land for the common good or forenvironmental purposes. These principles are in opposition to those traditionally connected with the public interest movement. Nonetheless, these organizations feel that their collective mission is truly in the public interest.

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[1] *See, e.g.*, Lee Edwards, *The First Thirty* Years, *in* BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT, 1 (Lee Edwards ed. 2004).

[2] Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1455 (1984).

[3] *See* EDWIN MEESE III, *Foreword*, *in* BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT, *supra* note 1, at iii.

This article will consider what I believe to be the next great issue in public interest law—the battle for the public interest. With a growing cadre of conservative institutions appropriating the title public interestand working to advance an agenda that is typically antithetical to groups that traditionally bear that label, battle lines are being drawn.

Historically, liberal public interest organizations faced opposing counsel representing the state or corporations. Now, however, thesepublic interest groups are more often finding themselves opposed bywell-funded and highly motivated conservative organizations. Equallyas interesting, the FBPILM also frequently positions itself in oppositionto the state, but in a different capacity than the traditional liberal groups.

This article not only seeks to answer broad questions on the origins and underlying ideology of the FBPILM and provide an objective account of the operations, goals, and methods of these organizations, but also to shape the current discourse by providing a critique that is neededin light of these organizations' ability to shape public perception through publication and public relations efforts. The article will give a brief history of the movement and a survey of some of the more prominent freedom-based public interest legal organizations and will also examine the extent to which conservative public interest groups have appropriated liberal methodologies and the concept of public interest law. Additionally, I will examine the FBPILM's concerted attack on the organizations and accomplishments of the traditionally liberal public interest movement. Finally, this article seeks to define the conservative legal movement's narrow conception of the public interest and how it reflects the movement's ideological foundations and the interests of the movement's founders.

II. WHERE DID THEY COME FROM?: THE ORIGINS OF THE FREEDOM- BASED PUBLIC INTEREST MOVEMENT

Much as the early traditional public interest groups were formedas a reaction against unjust social conditions, the freedom-basedmovement also emerged as a reaction to powerful social forces. In the case of the conservative public interest legal movement, however, the source of their motivation was the success of the traditional legal public interest movement.[4] The reactionary nature of the FBPILM, combined with its roots in the ideology of the "new right," gives the movement its primary identity.

Historically, public interest law was the province of organizations pursuing liberal causes.[5] Mostly originating at the turn of the twentieth century, organizations such as the ACLU, National Association for the Advancement of Colored People ("NAACP"), and the various legal aid

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[4] *See id.* at ii.

[5] Houck, *supra* note 2.

societies set the bar for the practice of public interest law with their successes in the courtroom. Traditional public interest organizationspioneered the use of litigation as a tool of social change. Covering a variety of social causes including segregation, free speech, and the incorporation of international human rights standards into American law, the efforts of these organizations culminated in a number of dramatic societal changes in the later half of the twentieth century. Much of this success took place in the 1960s and early 1970s, when traditional public interest groups saw huge gains in areas such as civil rights, rights of the accused, and environmental protection. Eventually, however, thesuccess of these groups also "set the stage for a backlash."[6]

This backlash came in the form of the birth of the FBPILM. Most commentators agree that the conservative public interest movement began in 1973 with the creation of the Pacific Legal Foundation ("PLF"). Indeed, many important leaders in the current FBPILM view the creation of the PLF as the seminal moment in the movement's brief history.[7] In 1971, the United States Chamber of Commerce ("Chamber") asked Lewis F. Powell, Jr., then a corporate lawyer practicing in Virginia, to draft a document explaining his views on problems facing the American business community. In response, Powell penned a vitriolic essay entitled "Attack on American Free Enterprise System" in which he decried "the greening of America" and labeled Ralph Nader the "single most effective antagonist of American business."[8] Further illustratingthe reactionary nature of the FBPILM, the Powell memorandum laid out an ambitious counter-offensive that called for the creation of conservative public interest groups to defend the business community in the courts. The Chamber widely disseminated the memorandum, and it was well-received by the leaders of the California Chamber of Commerce who eventually formed the network that gave birth to the Pacific Legal Foundation.[9]

This network consisted largely of California attorneys and civic leaders, many of whom were part of then-Governor Ronald Reagan's welfare reform team.[10] These leaders of California industry asked Ronald Zumbrun, the deputy director for legal affairs at the California Department of Social Welfare to draft a formal proposal that eventually became the Pacific Legal

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[6] Houck, *supra* note 2, at 1455-1456.

[7] Telephone Interview with Chip Mellor, Co-Founder and President, Institute for Justice(Nov. 23, 2004); Email Interview with Roger Clegg, Vice President and General Counsel, The Center for Equal Opportunity (Nov. 23, 2004); Telephone Interview withTrent England, Legal Policy Analyst, The Heritage Foundation (Nov. 24, 2004).

[8] Houck, *supra* note 2, at 1457. *See also* CHARLES A. REICH, THE GREENING OF AMERICA; HOW THE YOUTH REVOLUTION IS TRYING TO MAKE AMERICA LIVABLE(1970).

[9] Houck, *supra* note 2, at 1458-60.

[10] Edwards, *supra* note, 1 at 10-11.

Foundation's Articles of Incorporation.[11] Zumbrun and others felt that "a serious imbalance" existed in the public interest law field, so he, with the help of businessman John Fluor and future United States Attorney General William French Smith, set out to remedy the perceived imbalance.[12]

Fluor also had personal motivations to develop a legal foundation more amenable to his interests as a businessman. At the time of the PLF's founding, California business moguls like Fluor were increasingly troubled by the expansion of regulations affecting their investments, especially with regard to the environment. In 1972, environmental public interest groups used the courts to delay offshore oil drilling in the Gulf of Mexico and won injunctions against an Alaskan oil pipeline.[13] Following the creation of the PLF, Fluor's "stature and vision" would become a "key to the PLF's early success,"[14] but those attributes may not have been as important as his skills as a rainmaker. As stated by aformer PLF president, Fluor "almost single-handedly raised the seed money to get us launched. He got his ten buddies, or whatever it was, to return favors and give some money to open the doors."[15] With these kinds of business moguls responsible for the creation of the nation's first conservative public interest group, the logical conclusion is that the PLF was meant almost as a private law firm for corporate interests, ratherthan an organization dedicated to helping the larger general public.

The goals of the PLF were rooted in conservative ideology andthe private interests of its big business backers. Nowhere is this more obvious than in the statements of PLF members themselves. In addressing a gathering of corporate counsel in 1979, PLF Chairman Joseph J. Burris appealed to the crowd, "[b]ecause of our special position, and because many of you often prefer to maintain a low profile where direct confrontation with government agencies is concerned, we are the logical spearhead to do the job."[16] The early actions of the PLF "reflected the priorities of its sponsors", namely addressing growing environmental activism.[17] Included amongst these early tasks were the organizations' support for continued use of DDT, the use of public grazing lands without environmental review, advocacy for the use ofherbicides in national forests, and fending off what they considered overzealous environmentalists.[18] The

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[11] *Id*. at 11.

[12] *Id.* at 10-11.

[13] *See id*. Houck, *supra* note 2, at 1458-60.

[14] Edwards, *supra* note 1, at 11.

[15] Houck, *supra* note 2, at 1460.

[16] *Id.* at 1454-55.

[17] *Id.* at 1461.

[18] *Id.*

PLF would also advocate a significant reinterpretation of the Fifth Amendment's Takings Clause to protect private property rights.[19] The early operations of PLF and its ever-increasing budget demonstrated that "[b]usiness interests were being served" and that "[b]usiness interests were going to finance the service."[20]

The PLF's success against what it termed "radical environmental groups" prompted the foundation to expand its efforts to other regions of the U.S. To facilitate this expansion the founders of the PLF, with the help of the rainmaker Fluor and the ubiquitous Richard Mellon Scaife, created the nationwide National Legal Center for the Public Interest in 1975.[21] Viewing the term public interest as encompassing both ends of the ideological spectrum, the National Legal Center's purpose was to replicate the PLF model in other regions. It went on to found the Mountain States Legal Foundation, what is now the Atlantic Legal Foundation, and the Landmark Legal Foundation, covering the GreatPlains states, amongst others.[22] Again demonstrating the movement's historically reactionary roots, the National Legal Center helped create these regional organizations by meeting with regional chambers of commerce and informing them of "the clear and present dangers of public interest law" and asking them to help create a counter-force.[23]

Much like the early liberal public interest movement, thefreedom-based movement sought to create an image of the struggling upstart, capitalizing on the early financial disparity between the two ends of the ideological spectrum in the public interest field. Lee Edwards, a scholar at the Heritage Foundation, invoked this image when he discussed the organizational and funding gulf between liberal public interest groups and freedom-based organizations: "[a]s late as 1988, conservative legal groups had a total of fewer than 50 litigators andcombined budgets of less than $11 million, while their philosophicalopponents boasted hundreds of lawyers and federal and state funding in the hundreds of millions of dollars."[24] By 1989, however, the number of conservative public interest litigators equaled that of liberal public interest attorneys at that in 1969.[25]

Whether such a struggle for financial solvency ever took place is doubtful. A review of the financial interests behind the original regional

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[19] *Id.*

[20] Houck, *supra* note 2, at 1462.

[21] *Id*. at 1475-1476.

[22] Edwards, *supra* note 1, at 11.

[23] Houck, *supra* note 2, at 1476.

[24] Edwards, *supra* note 1, at 12.

[25] *See id*.

legal foundations, such as the PLF and the Mountain States Legal Foundation (MSLF), reveals that the FBPILM has a history of attracting generous benefactors. While there are numerous examples of corporate involvement in the genesis of freedom-based public interest groups, one example illustrates the point that "financial struggle" is a relative expression. The MSLF began in 1977 with a grant from the National Legal Center for the Public Interest (itself the recipient of donations by Texaco, Exxon, the three major automakers, and other corporateinterests) of $58,000.[26] In 1978, over 175 corporations made donations of $500 or more, and corporations such as Coors and Amoco supplemented these contributions with larger grants.[27] Within four years of its founding, MSLF had a gross revenue of $1,250,000.[28] Not only does it appear that organizations such as MSLF never truly struggled in terms of resources, the corporate funding behind such organizations "reflects the mission."[29]

Despite these infusions of cash, the FBPILM still perceives itself as engaged in a struggle against formidable opposition. These organizations view their challenges as greater than that of their liberal opponents, because the conservative groups must combat heavily staffed and funded government agencies that often team with the preexisting liberal or radical public interest organizations.[30] Additionally, conservative public interest groups believe that an activist judiciary and a liberal mass media further impede their path to success.[31] However, claims of struggle and hard financial times seem duplicitous considering that much of the FBPILM receives strong backing from business institutions.

The conservative legal movement enjoyed its first critical successes during the Reagan administration, in the mid 1980s. The conservative groups helped to successfully petition the Supreme Courtfor certiorari on a number of "individual rights" cases[32] and helped defeat three California Supreme Court justices in their bids for reelection.[33] The PLF claimed victory in a case that defeated privateproperty regulation using the Fifth Amendment takings clause.[34]

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[26] Houck, *supra* note 1, at 1476, 1478.

[27] *Id*. at 1478.

[28] *Id*.

[29] *Id.*

[30] Edwards, *supra* note 1, at 12-13.

[31] *Id*.

[32] *Id*. at 13.

[33] *See id.*

[34] *See id.* (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987)).

III. HISTORY: EXPANSION

Following the Pacific Legal Foundation's creation in 1973, public interest groups with a conservative or libertarian philosophy began to proliferate. These organizations began to tackle a number of issues that related to the larger conservative agenda. The LandmarkLegal Foundation, the Institute for Justice, and a number of other groups began to wage courtroom battles for school vouchers.[35] The Alliance Defense Fund spearheaded an attempt to preserve Judeo-Christian principles in American society.[36] Most recently, the FBPILM played a large role in the debate over affirmative action, with the Center for Individual Rights representing the petitioner in *Grutter v. Bollinger*,[37]one of the University of Michigan affirmative action cases.[38] The cornerstone of the movement, however, remains the so-called "battle for economic liberty," an effort by conservative legal groups to improve the business climate and lessen government regulation of business throughthe courts.

In the 1980s, a number of umbrella organizations began networking and coordinating the various issue-based conservative public interest litigation groups. Organizations like The Federalist Society, the Heritage Foundation, and the Cato Institute work to further themovement in a non-litigative capacity. The Heritage foundationprovides a forum for brief conferences, strategy sessions, and mootsconservative advocates appearing before the Supreme Court.[39] In addition, the Cato institute works through the media and other outlets to "change the climate of ideas" so that the public will become more receptive to the litigation efforts of the FBPILM.[40]

With the help of such umbrella organizations, the FBPILM has proliferated and diversified. In addition to the expanding cadre of public

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[35] *See id*. at 15-17.

[36] *See id*. at 18-19.

[37] Grutter v. Bollinger, 539 U.S. 306 (2003).

[38] *See* Brief for the Petitioner at 1, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

[39] Edwards, *supra* note 1, at 39; England Interview, *supra* note 7.

[40] Edwards, *supra* note 1, at 39.

interest groups addressing economic issues, groups addressing social issues from a conservative perspective have also become a force in this relatively young movement. Working ever closer to achieving organizational and financial parity with the traditional liberal organizations, the FBPILM is poised to become a viable ideological antagonist to groups originally recognized as public interest organizations.

IV. WHO ARE THEY? A BRIEF LOOK AT SOME OF THE CAUSES AND ORGANIZATION

The constituent groups of the Freedom-Based Public Interest Legal Movement now speak to a variety of social and economic issues. However, there is a somewhat distinct cleavage between those organizations with economic interests and those that focus on social issues. Working along this cleavage, this section looks to provide both a survey of FBPILM groups and a critique of their motives and ideological foundations.

A. The Alliance Defense Fund and "Religious Liberty"

The main force behind the social prong of the conservative public interest movement are groups fighting for self-termed "religious liberty." Groups like The Rutherford Institute, The American Center for Law and Justice (ACLJ), and The Becket Fund for Religious Liberty advocate for an increase in religion's place in American society and for its recognition in government.

While a number of these groups purport to support no particular religious sect, the clear majority advocate on behalf of evangelical Christianity. The Religious wing of the Freedom-Based Public Interest Movement began, primarily, with the efforts of evangelical Protestants and other Christians to fight what they perceived as an encroaching government threat to their ability to practice their faith in the United States.[41] The roots of the religious movement's litigation efforts date back to *Widmar v. Vincent*,[42] a case concerning the right of students to participate in a weekly evangelical Christian service at the University of Missouri-Kansas City. The religious public interest movement claimed *Widmar* as a success because the Court allowed the students to hold their service[43], rejecting what the movement termed an, "extreme 'separationof church and state.'"[44]

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[41] Alan E. Sears, *Defending Religious Liberty*, *in* BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT, *supra* note 1, at 67, *67*-68.

[42] Widmar v. Vincent, 454 U.S. 263 (1981).

[43] *Id,* at 277-78.

[44] Sears*, supra* note 41, at 67-68.

However, arguing in favor of increased tolerance of the Christian faith in the public square is only a segment of the religious public interest movement's agenda. These groups also oppose groups they feel are hostile to religion. For instance, groups like the Alliance Defense Fund ("ADF") feel particularly threatened by traditional liberal public interest organizations:

Groups such as the [ACLU] seized the opportunity to initiate a systematic campaign of litigation, disinformation, and intimidation to silence people of faith and stop government acknowledgement of religion with their extreme interpretation of the Establishment Clause.[45]

The argument that a rival organization is attempting to "intimidate" people of faith not only illustrates the reactionary foundations of even the social wing of the FBPILM, it showcases what groups like ADF feel is in the public interest: a less secular society and a watered down version of the establishment clause.[46]

Religious public interest groups' conception of the public interest also extends beyond their own practice of religion to other social issues. ADF has identified attempts to legalize pornography, and, "homosexual and other sexual behavior that most Americans [find] immoral or contrary to their faith and beliefs,"[47] as catalysts behind the growingreligious public interest movement. This illustrates the fact that these groups are not simply attempting to argue for religious freedom, but to "preserve a traditional American legal worldview rooted in Judeo- Christian principles."[48] It is clear from the above, that the religious wing of the FBPILM feels that the elimination of pornography and homosexuality and a return to traditional Christian values is in the public interest.

B. Economic Liberty and the Institute for Justice

The majority of freedom-based public interest groups are in pursuit of what they term economic liberty. These economic or business-based public interest organizations feel that government and environmental interests constrain free enterprise. Therefore, unbridled economic development and unrestricted use of private property are both in the public interest. Coincidentally, if the public interest benefits from the success of American business and economic liberty, so do the corporate economic backers of FBPILM organizations pursuing economic liberty.

The Institute for Justice (IJ) best articulates what the term economic freedom means to the FBPILM. Founded by William "Chip" Mellor and Clint Bolick in 1991, the IJ advocates, through litigation, for what it calls

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[45] *Id*. at 68.

[46] *See id. See also* U.S. CONST. amend. I.

[47] Sears, *supra* note 41, at 69.

[48] *Id.* at 73

"The Four Pillars of the American Dream." These pillarsare economic liberty, private property rights, free speech and school choice.[49] Housed in a beautiful office just a block from the White House, the IJ receives most of its $6.5 million dollar operating budget from individuals and family based foundations like the Scaife and Bradley foundations.[50]

When IJ speaks of economic freedom, it refers mainly to aiding the growth of entrepreneurship through deregulation and the abolition of arcane and encumbering laws. Such was the case when IJ took up the cause of Denver taxi cab drivers attempting to break through that city's taxi monopoly in the early 1990's.[51] There the Institute failed to achieve its goals of breaking up the monopoly entirely, but it was successful in creating a place in the market for its particular clients.[52] Economicfreedom, however, also means combating what the IJ views as "the flipside of economic liberty,"[53] welfare programs. In Camden, New Jersey, IJ combated the local Legal Service Corporation affiliates onbehalf mothers that "wanted off welfare" and wanted reform.[54]

Additionally, the IJ pursues a vigorous campaign against abuse of eminent domain laws. This program works with a subsidiary grassroots campaign known as "The Castle Coalition" to help private landowners facing the taking of their land in order to clear way for municipally sponsored private development.[55] In this capacity, the IJ helpsindividuals, often middle-class, who hope to retain their property or business. While these efforts do not necessarily reach out to a broadbase of the population, much of which continues to rent, they are nonetheless commendable.

Other economic liberty groups, however, do not necessarily share the IJ's relatively modest goals or middle-class client base. A 1984study by Professor Oliver A. Houck found that a majority of the cases litigated by PLF, Mountain States Legal Foundation, and the New England Legal Foundation did not qualify as public interest under the Internal Revenue Service's standards. This means that these cases were ones in which the clients could most likely afford the costs of litigation themselves, or there were sufficient connections between the case andthe interests of donors

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[49] Mellor Interview, *supra* note 7.

[50] *Id*.

[51] Press Release, Institute for Justice, Institute for Justice Files Test Case to Break Up Taxicab Monopoly, Protect Economic Liberty (Jan. 28, 1993), *available at* http://www.ij.org/economic_liberty/denver_taxi/1_28_93pr.html (last visited May 2, 2005).

[52] Mellor Interview, *supra*, note 7.

[53] *Id*.

[54] *Id*.; Chip Mellor, Institute For Justice, *Carry the Torch* (1996), *available at* http://www.ij.org/publications/torch/ctt_3_96.html (last visited May 2, 2005).

[55] Mellor Interview, *supra* note 7. *See also* http://www.castlecoalition.org.

to the organization.[56] An example of this kind of economic freedom litigation is the work of the Mountain States Legal Foundation which advocated positions that "directly benefited corporations represented on its board of directors, clients of firms represented in its board of litigation, or major contributors to" their budget.[57]

C. The Center for Equal Opportunity and the Issue of Affirmative Action

As indicated earlier, the freedom-based public interest movement weighed in heavily on recent debates over affirmative action programs. The FBPILM takes credit for stemming widespread "discrimination through quotas and other preferences."[58] A number of these organizations have litigated against affirmative action in high profile cases. The Mountain States Legal Foundation argued against affirmative action "set aside" programs in *Adarand Constructors v. Pena.*[59] Additionally, the Washington Legal Foundation played a leading role in *Podberesky v. Kirwan*,[60] a Fourth Circuit case challenging scholarships based on race and also filed a number of Amicus briefs in the case. And in 1997, the Individual Rights Foundation's represented a white police lieutenant against the city of Los Angeles in a race discrimination claim.[61]

The role of the FBPILM in the fight against affirmative action, however, is not limited to litigation. The Center for Equal Opportunity ("CEO") is a non-litigating organization that aims to eliminate racial quotas and preferences, and works to eradicate bilingual education and other "anti-assimilationist" policies.[62] Believing that affirmative action programs ultimately harm the beneficiaries, the group challenges such programs by writing letters to universities, municipalities, and corporations, and by alerting government bodies to discriminatory orillegal affirmative action programs.[63] Through these methods and others, non-litigating organizations push the FBPILM's conservative agenda in the area of affirmative action.

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[56] Houck, *supra* note 2, at 1460-1506, 1546.

[57] *Id*. at 1481.

[58] Roger Clegg, *Equality Under the Law, in* BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT, *supra* note 1, at 97.

[59] Adarand Constructors v. Pena, 515 U.S. 200 (1995).

[60] Podberesky v. Kirwan , 38 F.3d 147 (4th Cir. 1994); Clegg, *supra* note 58, at 114.

[61] Clegg, *supra* note 58, at 114-119; *see also* David Rosenzweig, *White LAPD OfficerAwarded $20,000 In Job Bias Lawsuit,* LOS ANGELES TIMES, July 16, 1998, at B5.

[62] Clegg Interview, *supra* note 7.

[63] *Id*.

V. HOW DO THEY DO IT?: METHODOLOGY AND CO-OPTION

Conservatives, and therefore the FBPILM, have had a long antipathy towards what they term judicial activism, so it seems counterintuitive that the movement would take up the method of the test case and other staples of traditional public interest litigation. However, that is exactly what the FBPILM has done. In co-opting the name public interest, conservative groups adopted some of the methods of the left and created new methods but such practices are antithetical to their conservative ideology that eschews any form of activism. In many ways, the conservative public interest law organizations patterned their practice on the work done by pioneering liberal organizations, albeit with better funding.[64] Through such actions, conservative organizations have co- opted the term public interest, turning it into an ideological battleground, rather than just another expression for leftist legal organizations.

A. Funding

Before looking into the methods which FBPILM groups utilize to attain their objectives, it is important to look at the funding that allows them to employ such methods. Much like their liberal opponents, conservative public interest groups receive a great deal of their funding from foundations.[65] Established by major corporations, these foundations contribute heavily to the operating budget of FBPILM organizations, particularly those with economic liberty objectives. Private foundations such as the Castle Rock and Scaife Foundations contribute approximately thirty-eight million dollars to these broad-issue organizations.[66] Unlike most traditional liberal public interest groups, however, many FBPILM organizations received substantial funding from large and diverse corporations drawn to their tax-exempt status.[67] While many organizations such as Institute for Justice, receive a small percentage of their funding from direct corporate contributions,[68] the Pacific Legal Foundation has directly solicited businesses.[69] Direct corporate contributions, plus the corporate origins of the family foundations raise questions as to whether the goals of these organizations comport with the interests of the entire public.

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[64] E-mail Interview with Todd Young, Southeastern Legal Foundation (Nov. 30, 2004).

[65] Houck, *supra* note 2, at 1456.

[66] *See* John P. Heniz et al., *Lawyer for Conservative Causes: Clients, Ideology, andSocial Distance*, 37 LAW & SOC'Y REV. 5, 22 (2003).

[67] Houck, *supra* note 2, at 1456

[68] Institution for Justice, *Institute Profile: Who We Are*, *at* http://www.ij.org/profile/inde x.html (last visited May 2, 2005).

[69] Houck, *supra* note 2, at 1462.

B. Methodology

1. Activism

What makes the conservative adoption of litigation so peculiar is the overall sentiment amongst conservatives that activism, both fromlawyers and judges, is normatively bad. An example of this feeling can be found in Lee Edwards' article about the FBPILM, "*The First Thirty Years*."[70] This article is littered with critical references to both activist judges who play the role of policy maker from the bench and activistlegal organizations that have deviated from providing everyday legalservices to the needy to staging frivolous impact litigation efforts. According to Trent England, a policy analyst at the Heritage Foundation, the concept of judicial activism causes some level of schism in the FBPILM.[71] While hard-line conservatives like Judge Posner go out of their way to defer to the political branches, England feels that mostconservatives believe in the right of judges to strike down unconstitutional legislation as long as they are not creating social policy.[72] This feeling is not universal, however, as the more libertarian groups of the FBPILM have come to embrace a more activist judiciary, flying in the face of the traditional conservative values.[73]

2. Test Cases and Selectivity

Advocating for a cause typically means employing the test case. Although the test case is a hallmark of activist liberal public interest work, the conservative groups have utilized this method with a great deal of selectivity. FBPILM groups are so highly selective when it comes to choosing clients for test cases, that questions arise as to whether these organizations are advancing their client's agenda or their own. Of course the cause/client dilemma also resonates within liberal circles,[74] but this does not detract from the contention that FBPILM groups may be advancing an agenda that is neither in their clients' interest nor in the public's.

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[70] Edwards, *supra*, note 1.

[71] England Interview, *supra* note 7.

[72] *Id.*

[73] *Id.*

[74] *See* Nancy D. Polikoff, *Am I My Client? The Role Confusion of a Lawyer*. 31 HARV.CIV. RTS.-CIV. LIB. L. REV. 443-469 (1996) (discussing the inner conflict of an attorney who is part of the Gay and Lesbian movement, but is also an "insider" in the legal system, representing movement members through a client-centered approach); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in Social Desegregation Litigation*. 85 Yale L.J. 470-493 (1976) (discussing the travails of litigating social desegregation cases where the lawyer must determine how to representthe diverse interests of individual clients and the class as a whole, as well as the dilemma of advancing a cause but not necessarily alleviating the plight of an individual client, and the ramifications of such decisions under the Rules of Professional Conduct.).

Chip Mellor, of the Institute for Justice, outlines hisorganization's requirements for accepting a case—"sympathetic clients," "outrageous facts," "evil villains," and "simple facts."[75] This formula is part of a strategic blueprint that helps the IJ play cases out in front of the media. Mellor, like any liberal public interest lawyer, acknowledges the difficulties of client/cause litigation, "there is always a potential conflict."[76] However, Mellor adds that because of the IJ's selectionrequirements, the client/goal conflict usually creates tension, but is rarelya problem.[77]

Other organizations display such a high degree of scrutiny inselecting their cases, that it is clear that the interests of the organization come first. For instance, the Southeastern Legal Foundation ("SLF") turns away ninety-seven percent of all case inquiries.[78] According to Todd Young of SLF, the organizations' "issue and case selection process does not contemplate the likelihood of financial support from" any contributors.[79] Nonetheless, the SLF seems to share many of the goals of its contributors. An early SLF case illustrates this point. In *Southern Appalachian Multiple Use Council v. Bergland* [80] the foundation represented a commercial lumber and mining organization in a challenge to a federal decision to withdraw parts of a U.S. forest from multipleuses. Several companies associated with SLF, including SLF board members and major contributors, stood to gain from the maintenance of the multiple-use classification.[81] Clearly, these organizations must have been within the three percent of clients that meet the SLF's stringent selection criteria.

3. Amicus Briefs

Another method that the FBPILM uses to obtain its goals is the filing of amicus briefs. The conservative public interest movement views the amicus curiae brief as an excellent tool to "counteract thegrowing tendency of . . . judges to succumb to pressure from liberal . . . sources to rule according to elitist 'fashions of the moment.'"[82] A good

example of the utility of the Amicus Brief was the affirmative action decision in *Grutter*. The Cato Institute, PLF, and the Center for Individual

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[75] Mellor Interview, *supra* note 7.

[76] *Id.*

[77] *Id.*

[78] Young Interview, *supra* note 64.

[79] *Id.*

[80] 15 ERC (BNA) 2049, 11 ELR 20679 (W.D.N.C. 1981).

[81] Houck, *supra* note 2, at 1500.

[82] Meese, *supra* note 3, at iv.

Freedom all filed briefs that echoed the argument made by the equally conservative Center for Individual Rights.[83] This is an example of the concerted efforts by conservative organizations to not only take upa fight with the liberal public interest organizations, but to challengethem using methods the liberals helped pioneer.

C. The Takings Clause

Despite the conservative animus towards activist judicial decision-making, the freedom-based public interest movement has successfully advocated for an expansive interpretation of the Fifth Amendment takings clause in order to accommodate their principles concerning private use of land.[84] The takings clause reads that property will not "be taken for public use, without just compensation."[85] This simple sentence has led to messy judicial doctrines. Commentators agree that the framers intended the clause to center on the physical invasion of property, such as harboring troops or the building of a road.[86] The clause was read quite conservatively until the early 1980s when the conservative public interest movement, fearful of environmentalists, began to use the doctrine not for compensatory purposes, but to oppose governmental regulation.[87] Employing the ideas of University of Chicago professor Richard Epstein, the FBPILM introduced the courts to an absolutist view of the takings clause, "if any part of a property interest [was] diminished, if you lost an inch of space or a dollar in value, [there is] a takings claim."[88] To effect this new doctrine, the movement set about creating "a new level of judicial intervention far greater than . . .we ever have had."[89] Not only was the goal here the transformation of long-standing doctrine, but, the results were favorable, with courts interpreting the doctrine to include partial and temporary takings.[90] It would therefore seem that conservative distaste for judicial activism does not apply when considering issues of private property.

D. Co-Option

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[83] *See* Brief for the Petitioner at 1, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

[84] Oliver A. Houck, *More Unfinished Stories:* Lucas, Atlanta Coalition, *and* Palila/Sweet Home, 75 U. COLO. L. REV. 331, 342-44 (2004).

[85] U.S. CONST. amend. V.

[86] Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551-52 (1870); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 515-16 (1998).

[87] Houck, *supra* note 84, at 342-44.

[88] *Id.* at 345 (citing RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)).

[89] *Id.*

[90] *Id.* at 346-347.

The co-option of liberal methods in achieving conservative goals raises the issue of whether the FBPILM has also co-opted the term public interest. Even the preeminent leader of the movement, former Attorney General Edwin Meese recognizes that, for some time, the term public interest was used to describe attorneys who were liberal in their political views.[91] It would therefore seem that conservative legal groups appropriated not only the litigation methods of the left, but also the name by which they are traditionally associated.

Unsurprisingly, the FBPILM does not believe that they have encroached on traditional liberal territory. Todd Young, of the SLF, states that conservative groups have "an equal or better" claim to the nomenclature public interest because of their representation of individual over group rights.[92] Trent England, of the Heritage Foundation believes that the conservative public interest movement is simply carrying on the fine tradition of public interest groups, like the NAACP, that, in recent decades have stopped pursuing what is truly in the public interest.[93] England feels that the left has not placed a brand upon the term public interest and that it is open to everyone's use.[94] While these groupsrecognize that public interest "was totally the province of the left," they feel that their goals are in the public interest and therefore, the term has evolved to take on new meaning.[95] This evolution narrows the definition of the public interest considerably, and in doing so, it co-opts and transforms conceptions of public interest law.

VI. WHO'S AGAINST US?: FIGHTING THE TENETS OF THE TRADITIONAL PUBLIC INTEREST MOVEMENT

Adding to the confusion created by the battle for the public interest title is the fact that the FBPILM positions itself to combat the traditional liberal organizations as often as possible. Considering the fact that the very genesis of the FBPILM was a reaction to the accomplishments of the left, this should not be surprising. All of the organizations polled for this article regularly find themselves on the opposite side of the courtroom from the traditional public interest organizations such as the NAACP and ACLU.[96] In fact, one leader of a conservative public interest organization was even quoted to say, "if I could meet on the Potomac River on a raft in the middle

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[91] Meese, *supra* note 3, at ii.

[92] Young Interview, *supra* note 64.

[93] England Interview, *supra* note 7.

[94] *Id*.

[95] Mellor Interview, *supra* note 7.

[96] *Id*.; Clegg Interview, *supra* note 7; England Interview, *supra* note 7; YoungInterview, *supra* note 64.

of the night with the ambassador of our counterparts on the left, and if we could agree to sever our roles, I would unhesitantly agree to such a treaty."[97] Although conservative organizations often find themselves in league with liberal groups on certain issues, the real story is the record of FBPILM attackson the traditional tenets of the public interest legal movement.

A. IOLTA

The idea of involuntarily relinquishing funds is abhorrent to most conservatives. Therefore, accounts that offer residual funds to expand legal services to the poor, known as Income on Non-Interest Bearing Lawyer Trust Accounts (IOLTA) were a logical target for conservative public interest groups.

Despite the fact that expanding legal services to the poor is a venerable public interest aim, The Washington Legal Foundation("WLF") initiated a number of nationwide lawsuits challenging IOLTA funds. Utilizing the expanded interpretation of the Fifth Amendment takings clause in tandem with the First Amendment, WLF argued that IOLTA coerced financial support for programs with which they disagreed (Legal Services Corporation) and took property without just compensation.[98] Although the Supreme Court narrowly found IOLTA programs to be constitutional,[99] WLF and a host of other conservative organizations have continued their attacks by lobbying individual state legislatures.[100]

B. Legal Services Corporation

Few traditional public interest organizations draw the ire of conservatives more than the Legal Services Corporation ("LSC"). The main charge these groups levy against LSC is that it has forsaken its clientele, the poor, in order to pursue quixotic campaigns of impact litigation. These arguments, and many others, come from a number of organizations in the FBPILM.

According to Chip Mellor, the Institute for Justice lobbied against the reauthorization of LSC in the mid-nineties.[101] IJ was not alone in this challenge. Kenneth Boehm, Chairman of the National Legal and Policy Center and a former executive at LSC has made a crusade out of eliminating the institution. Boehm has testified before the Commercial and Administrative Law subcommittee of the House Judiciary Committee about

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[97] Houck, *supra* note 2, at 1535.

[98] Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44WM. & MARY L. REV. 737, 771-73 (2002).

[99] Phillips v. Washington Legal Found., 524 U.S. 156 (1998).

[100] Weissman, *supra* note 98, at 774-75

[101] Mellor Interview, *supra* note 7.

the evils of the LSC, and recommends its eradication.[102] Boehm argues that LSC is an anachronistic haven ofactivists that use the program to advance a political and ideological agenda.[103] Boehm has also written law review articles decrying LSC's failure to reform in the face of Congressional demands.[104] Boehm and many of his conservative compatriots argue that regional and local legal aid groups perform LSC functions better and less politically.[105] Nowhere, however, does Boehm propose any solutions to improve access to justice as a result of LSC efforts.

C. Legal Clinics

Conservative public interest groups have also assailed student-run law school legal clinics. While some groups, like IJ have created business-oriented legal clinics, other groups have sought to limit theability of clinics to provide meaningful representation for clients. The most startling example of this was the attack on the Environmental Law Clinic at Tulane Law School.

The controversy began when the clinic agreed to represent a community of African Americans seeking to enjoin a Japanese company from building a factory in its already polluted community. Business organizations and the governor condemned the clinic and sought to amend the state's student practice laws. After numerous court battles,the Fifth Circuit Court of Appeals upheld the Louisiana Supreme Court's amended student practice rules forbidding students from representing clients whose income is two times greater than the poverty level.[106] Not only were the early attacks on the clinic and the student practice rules engineered by businesses and politicians interested in possible financial benefits, but the fight for greater restrictions was also stewarded through the appeals process by Washington Legal Foundation's own legal clinicat George Mason University Law School.[107]

The conservative public interest movement is reactionary in origins, purpose, and motives. As such, public interest law is no longer a synonym for legal groups but a battlefield. The battle extends beyond particular court

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[102] *Thwarting the Will of Congress: How the legal Services Corporation Evaded, Diluted, and Ignored Reform. Before the House Comm. on the Judiciary Subcomm.onCommercial and Admin. Law* (Feb. 28, 2002) (statement of Kenneth F. Boehm,Chairman, National Legal and Policy Center).

[103] *Id*.

[104] Kenneth F. Boehm, *The Legal Service Corporation: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321 (1998).

[105] *Id*. at 364.

[106] SCLC v. Supreme Court, 252 F.3d 781 (5th Cir. 2001). *See also* Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental LawClinic*, 4 WASH. U. J.L. & POL'Y 33, 91 (2000).

[107] Weissman, *supra* note 98, at 776-77.

cases, as the FBPILM has attacked liberal accomplishments such as LSC student-run legal clinics and IOLTA. The very tenets of the traditional public interest movement are threatened by the resources and will of the Freedom-Based Public Interest Legal Movement.

VII. THE PUBLIC WHO? THE FREEDOM-BASED PUBLIC INTEREST MOVEMENT'S CONCEPTION OF THE PUBLIC INTEREST

With the recent development of the conservative public interest movement, the term public interest has lost the meaning it once held. Liberal groups tend to frame the public interest in terms of access to justice, the defense of universally recognized human rights, and substantive equality. The FBPILM defines the public interest in terms of greater economic opportunity, protection of property rights, and the defense of traditional values. So what is the public interest? One must look to their conceptions of the public interest and provide an analytical critique.

The major FBPI organizations conceive the public interest as the vigorous enforcement of the individual liberties set forth in the Constitution.[108]To the FBPI, public interest means the freedom to use property in any way an individual desires, the freedom to seek rent, andto be free from unconstitutional quotas.[109]

Analyzing the FBPILM's conception of the public interest from a more critical perspective tends to narrow the definition. Essentially, free enterprise, Christian values, and the protection of private property are the core pillars of the FBPILM's definition of public interest. Though Edwin Meese may claim these values to be "the genuine public interest," it would appear that these interests do not apply to a large cross-sectionof the public. For instance, while IJ may believe that expanded entrepreneurship is in the public interest, this speaks little to those who have no desire to enter the business world. Additionally, protection of private property rights has next to no utility to the large renting population of the U.S. Lastly, the large swath of the population that does not practice evangelical Christianity has little concern for the place of the Bible in public affairs. Stated simply, the FBPILM conception of the public interest speaks primarily to business and property owners andconservative Christians who believe in an amorphous idea of traditional values.

The kind of representation that freedom-based public interest organizations provide is commensurate with this narrow idea of the public interest. The IRS defines a public interest legal firm for taxation purposes as

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[108] Mellor Interview, *supra* note 7.

[109] England Interview, *supra* note 7.

one that "provides access for unrepresented issues to the judicial system."[110] The IRS also recognizes that public interest means "representation of a broad public interest rather than a private interest."[111] The FBPILM represents issues that lobbyists, corporations, and religious organizations address fervently and are in no wayunrepresented. Furthermore, these interests are often primarily private in nature and are not always of broad public concern.

The organizations in the FBPILM concerned with social issues, such as the role of religion in the town square are not in search of the public interest. Even though a great number of people in the United States hold religious views, it does not follow that their greater interest is served by the installation of the Ten Commandments in municipal buildings or in the state's regulation of homosexual behavior and pornography. At heart, these organizations hope to benefit theevangelical Christian community and impose their unsolicited views upon the wider public.

With regards to the economic contingent within the FBPILM, it can be said that these groups mainly represent the interests of businesses. As previously mentioned, a 1984 study of business-oriented FBPILM organizations found that six out of eight organizations had a docket witha majority of cases that would not qualify as public interest for taxation purposes.[112] This illustrates the fact that these organizations, for themost part, represent business interests, not the broad public interest. In many cases, these organizations essentially function like private corporate law firms, rather than broad based public interestorganizations. In fact, private attorneys were at one time said to be upset with the Pacific Legal Foundation for attracting potential paying clients.[113] A statement by the first president of the Mountain States Legal Foundation, James Watt, reflects the FBPILM's myopic vision of the public interest, "[w]e're not broad based, we're narrow based; we believe in the free enterprise system."[114]

VIII. CONCLUSION

One commentator has remarked that the Pacific Legal Foundation was a public interest law firm in the same way that catsup was a vegetable under Reagan's school lunch guidelines.[115] This witty aphorism speaks to the title and very heart of this paper. The very forces that public interest pioneers fought against have appropriated the term and the movement to represent

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[110] Rev. Proc. 71-39, 1971-2 C.B. 575. Houck, *supra* note 2, at 1449.

[111] *Id*.

[112] Houck, *supra* note 2, at 1460-1508.

[113] *Id*. at 1515 (quoting BUSINESS WEEK, Sept. 6, 1976, at 42).

[114] *Id*. at 1479.

[115] *Id*. at 1544

their own interests. The interests of the freedom-based public interest legal movement are not the traditionally broad interests associated with public interest law. Considering the resources, ideological commitment, and resilience of these organizations, their official title is now of secondary importance. The traditional public interest movement must not concern itself with issues of nomenclature, rather it must conceive of new strategies to battle a new and formidable opponent.

Our Lower Courts Must Get in "Good Trouble, Necessary Trouble," And Desert Two Pillars of Racial Injustice—*Whren v. United States* and *Batson v. Kentucky*

LAUREN MCLANE[1†]

We must get in trouble, good trouble . . . use the law, use the law, use the Constitution to bring about a nonviolent revolution.

- Rep. John Lewis[2]

I. INTRODUCTION

On July 10, 2015, Sandra Bland was on the way to her alma mater, Prairie View A&M University, a historically Black university in Texas, to take a new job.[3] When Trooper Encinia's patrol car got into the lane behind her car, Sandra failed to use her signal to change lanes. At that point, under *Whren v. United States*, Trooper Encinia had probable cause to stop Sandra regardless of whether his actual motivation in stopping her was (explicitly or implicitly) tethered to racial profiling rather than to policing this extremely minimal traffic violation.[4]

When the trooper asked Sandra to get out of the car, she asked why.[5] Opening her driver's side door and standing in the door frame, Trooper

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[2] Am. Const. Soc'y Convention, *Highlights of Rep. John Lewis' Speech to 2013 ACS National Convention* (Nov. 21, 2013), https://www.acslaw.org/video/highlights-of-rep-john-lewis-speech-to-2013-acs-national-convention/

[3] Ray Sanchez, *Who was Sandra Bland*, CNN (July 23, 2015), https://www.cnn.com/2015/07/22/us/sandra-bland/index.html; David A. Graham, *How Many Sandra Blands Are Out There?*, THE ATLANTIC (July 22, 2015), https://www.theatlantic.com/national/archive/2015/07/how-many-sandra-blands-are-never-caught-on-video/399173/?gclid=EAIaIQobChMIvqWqubWE6wIVxsDACh0YsQVoEAMYASAAEgIQuvD_BwE; Bill Chappell, *Sandra Bland's Phone Video of Her Own Arrest Surfaces, Reviving Calls for New Inquiry*, NPR (May 7, 2019), https://www.npr.org/2019/05/07/721086944/sandra-blands-phone-video-of-her-own-arrest-surfaces-reviving-calls-for-new-inqu.

[4] *See* Whren v. United States, 517 U.S. 806 (1996).

[5] Chappell, *supra* note 3.

Encinia ordered Sandra to get "out of [the] car."[6] When Sandra asked why she was being apprehended, the trooper pointed his finger in her face, then drew his taser, and yelled, "Get out of the car now . . . I will light you up . . . get out, now!"[7] Sandra was not a suspect in an armed robbery, the car she was driving was not stolen, and she had no warrants for her arrest. She simply failed to use her signal. And she was Black. Three days later, on July 13, 2015, after having been arrested for allegedly "assaulting" Trooper Encinia and lingering in a jail cell for days as she could not make her $5,000 bail, Sandra was found dead.[8]

This story really began twenty-two years before Sandra's fateful meeting with Trooper Encinia, on June 10, 1993, in Washington, D.C., in the thick of the "War on Drugs."[9] Vice-squad police officers, who were tasked with investigating drug activity, were patrolling a "high drug area," and became suspicious of two young Black men in a dark Pathfinder.[10] The officers became suspicious when they passed the Pathfinder and observed the driver look down into the lap of the passenger.[11] With their eyes fixed on the Pathfinder, the officers noted that it remained at a stop sign for an "unusually long time" and so the officers executed a U-turn to get behind the truck.[12] Eventually, the officers stopped the Pathfinder and located drugs in the passenger's hands.[13]

It was readily apparent that the minimal traffic violations observed by the officers were not the actual reasons for the traffic stop. They had less than a hunch that the Pathfinder's youthful Black occupants were engaged in drug activity; however, they did have probable cause for the traffic violations, and, per our Supreme Court, that was all they needed.[14] In *Whren*, after criticizing the petitioners for asking the Court to design a test to combat "nothing other than the *perceived* danger" of the pretextual stop, the Supreme Court unanimously disregarded any actual harm in pretextual stops and gave police carte blanche to conduct traffic stops regardless of ulterior motives.[15]

Whren is harmful precedent created by our Supreme Court that has had

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[6] *Id*.

[7] *Id.*

[8] Graham, *supra* note 3.

[9] *Whren*, 517 U.S. at 808; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2010-2011) (describing President Reagan's "War on Drugs").

[10] *Whren*, 517 U.S. at 808.

[11] *Id.*

[12] *Id.*

[13] *Id*. at 809.

[14] *Id*. at 819.

[15] *Id.* at 814–15 (emphasis added).

repugnant real-world consequences.[16] It permits both explicit and implicit racial profiling. As a result of *Whren*, officers can and will—purposefully or unconsciously—decide to pull over the Sandra Blands rather than the Lauren McLanes of the world for minimal traffic violations.[17] Critically, that decision could be infused by explicit discriminatory thought or by implicit, unconscious bias. Specifically, strong empirical data demonstrates that based on the officer's engrained beliefs, opinions, and life experiences, he is much more likely to pull over African Americans than whites even if he does not specifically intend to do so.[18]

The harm in this rule of law is caused by an under-appreciation of the presence of systemic racism as well as implicit racial bias in our criminal justice system. The harm is more than the discriminatory thought or implicit bias of an officer; it is also a matter of life or death for African Americans. Many Black motorists have been killed at the hands of law enforcement after having been stopped for simple traffic violations.[19] *Whren's* over-inclusion of racial minorities as targets (defendants) in our criminal justice system not only offends basic notions of fairness and decency, but it is also deadly. Further, if that were not enough, the Supreme Court has also ensured that racial minorities, while over-included as defendants, will be over-excluded as decision-makers (jurors) in our criminal justice system. The impossible standards set out in *Batson v. Kentucky* and its progeny have made it impossible to secure a reasonably diverse jury box. This rule of law, too, suffers from the courts' ignorance (perhaps blissful) of systemic racism.[20]

What is systemic racism? First, it is a set of systems or processes that exist in our institutions, policies, thinking, and way of life that disadvantage racial minorities.[21] Next, while explicit bias is conscious racial bias manifested in one's attitudes, beliefs, and actions,[22] implicit biases can and

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[16] *See*, *e.g.*, FRANK R. BAUMGARTNER, DEREK A. EPP, & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE (2018) [hereinafter BAUMGARTNER et al.]; *see also* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021); David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways, An American Civil Liberties Union Special Report*, ACLU (June 1999), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways.

[17] The author, Lauren McLane, is white.

[18] *See*, *e.g.*, BAUMGARTNER et al., *supra* note 16, at 88.

[19] *See* Christopher Wright Durocher, *How the Supreme Court Helped Create "Driving While Black,"* POLITICO, (April 17, 2021), https://www.politico.com/news/magazine/2021/04/17/how-the-supreme-court-helped-create-driving-while-black-482530.

[20] *See* Batson v. Kentucky, 476 U.S. 79 (1986).

[21] *See* N'dea Yancey-Bragg, *What is systemic racism? Here's what it means and how you can help dismantle it,* USA TODAY (June 15, 2020), https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism-what-does-mean/5343549002/

[22] Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012).

do go unnoticed. Implicit biases have been defined as "attitudes and stereotypes that are not consciously accessible through introspection. If we [do] find out that we have them, we may indeed reject them as inappropriate."[23] Substantial research in the area of implicit bias has been conducted, and with the development of the Implicit Association Test (IAT), anyone can assess their implicit biases online these days.[24] Based on data collected through the IAT and examined by social psychologists, "implicit bias is pervasive (widely held), large in magnitude (as compared to standardized measures of explicit bias), dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are separate mental constructs), and predicts certain kinds of real-world behaviors."[25]

The under-appreciation of systemic racism and implicit racial bias is linked to "colorblindness." Colorblindness stretches far beyond the simplistic description of being "colorblind," i.e., where one claims to not see or be impacted by race.[26] Implicit biases are living proof that colorblindness does not exist.

> There is . . . simply too much evidence of automatic classification of individuals into social categories, including race, to maintain this position. To the contrary, race and ethnicity are highly salient and chronically assessable categories. Thus, when people claim colorblindness, they cannot be claiming perceptual colorblindness; instead, they are likely claiming to be cognitively colorblind.[27]

"Colorblind" individuals claim they do not treat any racial group different from the next and that they have no racial stereotypes.[28] There is strong evidence, however, opposing the idea that one can truly be colorblind.[29] Just as individuals cannot be colorblind, neither can our courts.

Nevertheless, our courts continue to rule as if colorblindness, although perhaps not real in practical life, somehow still exists within the four walls of our courthouses. *Whren* is one example of the courts sustaining a process that harms African Americans, causing them to be disproportionately over-

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[23] *Id*. at 1132.

[24] *See generally id.* at 1128–31 & nn.9–18; *see also* PROJECT IMPLICIT, IMPLICIT ASSOCIATION TEST (IAT), https://implicit.harvard.edu/implicit/takeatest.html (last visited 8/3/2020).

[25] Kang, et al., *supra* note 22, at 1130–31 & nn.15–18.

[26] *See id.* at 1184.

[27] Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law,* 58 UCLA L. REV. 465, 468–69 (2010).

[28] *Id*.

[29] *Id.* at 472–89.

included as targets (defendants) in the criminal justice system.[30] That is systemic racism. Another example is that despite our Supreme Court's efforts to diversify the jury box, it continues to be whitewashed due to *Batson v. Kentucky* and its progeny.[31] The merciless reality is that in addition to being over-included as defendants, African Americans are also over-excluded as jurors in our criminal justice system.

In *Batson*, the Supreme Court effectively made it easier to bury racial bias during jury selection.[32] Before *Batson* was decided, the Court was on notice that the problem of excluding racial minorities from juries was becoming less of an overt one and more of a problem with discrimination under the guise of race-neutral justifications for striking minority jurors from the jury.[33] The *Batson* court, ignoring any implicit bias impacting the prosecution's use of peremptory challenges, crafted a race-neutral test to treat an increasingly race-neutral problem.[34] The Court held that the prosecution must provide a "race-neutral" explanation for its strike of a minority juror if a challenge is raised by the defendant.[35] The confines of a "race-neutral" explanation were further delineated nine years later by the Supreme Court in *Purkett v. Elem*, where it held that the justification given by the prosecution did not even have to be possible or plausible.[36] Essentially, any reason, so long as it is not admittedly because the juror is a minority, will suffice.[37]

That the prosecution can offer any old reason for striking a racial minority from the jury has resulted in African Americans being disproportionately struck from the jury box because of their dress, demeanor, thoughts about law enforcement, past history with law enforcement or the criminal justice system, as well as due to a host of other reasons historically or implicitly intertwined with race.[38] Further, *Batson*'s requirement that "purposeful discrimination" must be demonstrated in order to prevail in a claim of racial discrimination during jury selection wrongfully discounts implicit racial bias and embraces the disproportionate exclusion

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[30] *See infra* notes 99–146 and accompanying text.

[31] *See infra* notes 147–167 and accompanying text.

[32] *See* Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

[33] *Id.* at 106 (Marshall, J., concurring) (citing People v. Hall, 35 Cal. 3d 161, 165 (1983); King v. County of Nassau, 581 F. Supp. 493, 498 (E.D.N.Y. 1984)).

[34] *See Batson,* 476 U.S. at 96–98.

[35] *Id.* at 97–98.

[36] Purkett v. Elem, 514 U.S. 765, 768 (1995).

[37] *See id.*; *see also* ALEXANDER, *supra* note 9, at 122–23.

[38] *See*, *e.g.*, BERKELEY L. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS, vi–vii (2020).

of racial minorities from the jury box.[39]

Both *Whren* and *Batson*, in spite of being decided during the rise of the racially motivated "War on Drugs" and mass incarceration in America, fail to account for systemic racism and implicit racial bias.[40] At this moment, Americans are marching and protesting for Rayshard Brooks, George Floyd, Breonna Taylor, Ahmaud Arbery, Sandra Bland, and too many other African Americans killed at the hands of police.[41] Americans are waking up to systemic racism (fueled by explicit and implicit racial bias) throughout our nation. Our criminal justice system and its outcomes have been severely impacted by systemic racism. One of those systems is in our courts with respect to the Supreme Court's decisions in *Whren* and *Batson*, two pillars of racial injustice in our criminal procedure jurisprudence.

Our courts should work to root out racial injustice. Specifically, the lower courts must get in "good trouble, necessary trouble."[42] The lower courts should refuse to follow Supreme Court precedents that sustain racial injustice in our criminal courts. Our judges are leaders in our communities across the country; they are administrators of justice, and they must not only issue statements, they must also send messages.[43] They can start by removing from the legal textbooks *Whren* and *Batson*, which reflect our courts' destructive endorsement of colorblindness and implicit bias.

Very rarely does the judiciary take a step beyond the four corners of the courthouse to comment on public events or social movements. In summer

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[39] *See Batson*, 476 U.S. at 98 (describing step three of Batson as the trial court having to determine if the defendant established purposeful discrimination); *see also* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38, at ix.

[40] It could reasonably be argued that these two decisions also fail to account for hidden overt racial discrimination as well. *See also* ALEXANDER, *supra* note 9, at 5–7, 60, 98.

[41] *See Washington Post Police Shootings Database, 2015-present day*, WASH. POST (2020), https://raw.githubusercontent.com/washingtonpost/data-police-shootings/master/fatal-police-shootings-data.csv; Malachy Browne et al., *The Killing of Rayshard Brooks: How a 41-Minute Police Encounter Suddenly Turned Fatal*, N.Y. TIMES (June 22, 2020), https://www.nytimes.com/video/us/100000007198581/rayshard-brooks-killing-garrett-rolfe.html; Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html; Rukmini Callimachi, *Breonna Taylor's Family Claims She Was Alive After Shooting but Given No Aid*, N.Y. TIMES (July 6, 2020), available at https://www.nytimes.com/2020/07/06/us/breonna-taylor-lawsuit-claims.html; Elliot C. McLaughlin, *Ahmaud Arbery was hit with a truck before he died, and his killer allegedly used a racial slur, investigator testifies,* CNN (June 4, 2020), https://www.cnn.com/2020/06/04/us/mcmichaels-hearing-ahmaud-arbery/index.html; *see also* Sanchez, *supra* note 3; Graham, *supra* note 3; Chappell, *supra* note 3.

[42] This is from an oft-cited message from Representative John Lewis. *See*, *e.g.*, John Lewis, *Together*, *You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), available at https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.hmtl

[43] *See Coach George Raveling on This Unique Moment in Time, How to Practice Self-Leadership, Navigating Difficult Conversations*, *and Much More (#438)*, THE TIM FERRISS SHOW (JUNE 8, 2020), https://tim.blog/guest/george-raveling/ (Coach Raveling describing the difference between statements and a message).

2020, as the Wall Street Journal noted, there was a "break with tradition."[44] At least six state supreme courts released statements about racism in America and the courts' role in the preservation of systemic racism.[45] Chief Justice Cheri Beasley of the North Carolina Supreme Court boldly stated that "black people are ostracized, cast out, and dehumanized."[46] She went on to comment, "[a]s chief justice, it is my responsibility to take ownership of the way our courts administer justice, and acknowledge that we must do better, we must be better."[47] That is key—our courts must do better, be better. Although these courts' statements should be applauded, in order to do and be better, the lower courts (and the Supreme Court) must reckon with their own reinforcement of systemic racism and use the law, use the Constitution to dismantle oppressive precedents.

This article is primarily a call to action for our lower courts to reject *Whren* and *Batson*. It applauds the efforts of state courts for interpreting state constitutions and precedents separately from their federal counterparts and promulgating protective court rules.[48] But, getting into "good trouble, necessary trouble" requires a far more direct message to our nation's highest court and, significantly, to the American people—outright rejection of precedents of racial injustice, such as *Whren* and *Batson*.

Part II of this article details the *Whren* and *Batson* decisions, the relevant backdrop to these cases, and their real-world consequences supported by significant empirical data and research. Part III proposes an analytical framework through which the lower courts can reject, either by overruling or "narrowing," *Whren* and *Batson*. This proposed approach includes Justice Kavanaugh's three considerations of *stare decisis* and its applicability, an analysis of "perceived" versus "actual" harms, and the need to make the Supreme Court more proficient in its rulings. The article concludes by calling upon the lower courts to implement this framework and get into

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[44] Jess Bravin, *Breaking With Tradition, Some Judges Speak Out on Racial Injustices,* WALL ST. J., (June 13, 2020), https://www.wsj.com/articles/breaking-with-tradition-some-judges-speak-out-on-racial-injustices-11592060400

[45] *Id.* Notably, New York is conducting "an independent review of the 'court system's response to issues of institutional racism.'" In addition, other state courts or justices have made similar statements note included in the article. *See State Court Statements on Racial Justice*, NEWSROOM, NAT'L CTR. FOR STATE COURTS (2020), https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice

[46] Bravin, *supra* note 44.

[47] *Id.* Cheri Beasley is now the former chief justice and has announced her candidacy for the North Carolina Senate. Alex Rogers, *First Black woman to be North Carolina Supreme Court chief justice announces Senate bid*, (April 27, 2021), https://www.cnn.com/2021/04/27/politics/cheri-beasley-democrat-north-carolina-senate-campaign-launch/index.html

[48] The Washington State Supreme Court promulgated GR 37 to help address the problems with *Batson*'s test. *See* State v. Jefferson, 429 P.3d 467, 477 (2018). At the same time, in interpreting its own past precedents, the Washington State Supreme Court developed an alternative to *Batson*'s step three analysis in *Jefferson*. *See id.* at 480.

"good trouble, necessary trouble" by dismantling *Whren* and *Batson*.

II. TWO PILLARS OF RACIAL INJUSTICE: THE OVER-INCLUSION OF AFRICAN AMERICANS AS TARGETS (*WHREN V. UNITED STATES*) AND THEIR OVER-EXCLUSION AS DECISION-MAKERS (*BATSON V. KENTUCKY*)

In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind.

- *Michelle Alexander*[49]

To get in "good trouble, necessary trouble," our courts must reckon with two pillars that sanction racial injustice in our criminal procedure jurisprudence. African Americans are over-included as targets (defendants) in our criminal justice system and its processes when it is at the convenience of law enforcement, but over-excluded as decision-makers (jurors) when it is no longer convenient to the prosecution. Contact with the criminal justice system substantially begins at the time of a police stop; in one state alone there were over twenty million traffic stops over a fourteen-year-period.[50] The criminal justice system is most inclusive of the citizenry during the jury selection process; this is where citizens have the opportunity to uphold their civic duties and become decision-makers in a system that is otherwise largely exclusive of the community. When considering where African Americans are systemically over-included as targets and over-excluded as decision-makers in our system, our courts should reckon first with *Whren* and *Batson*.

A. *Whren v. United States—License to Conduct Racially Motivated Police Stops*

On the evening of June 10, 1993, Mr. Brown, a Black man, along with his Black passenger, Mr. Whren, were riding in a dark Pathfinder truck in Washington, D.C., when police noticed them.[51] Vice-squad officers who were patrolling a "high drug area" became suspicious of Mr. Brown and Mr. Whren when they passed the Pathfinder.[52] The officers' objective was to

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[49] ALEXANDER, *supra* note 9, at 2.

[50] *See generally* BAUMGARTNER ET AL., *supra* note 16.

[51] Whren v. United States, 517 U.S. 806, 808 (1996).

[52] *Id.*

"find narcotics activity going on."[53] Their "suspicions were aroused" when they passed the Pathfinder, which had temporary license plates and was stopped, with its "youthful occupants" inside, at a stop sign for "an unusually long time—more than [twenty] seconds."[54] Apparently, the driver looked into the lap of the passenger and this was suspicious enough that the officers decided to make a U-turn to get behind the Pathfinder.[55] That U-turn, particularly the officers' decision to execute it when they did, cannot be glossed over. At that moment, the officers were convinced enough that the Pathfinder, which stayed at a stop sign for a longer period than the officers deemed normal, with its "youthful" driver having looked into the lap of his "youthful" passenger needed to be investigated further. Behavior that would be considered innocuous in most people led these officers to target two young Black men. After the police officers were behind the Pathfinder, it then, without its signal, suddenly turned right and sped off at an "unreasonable" speed.[56]

Those were the facts from which the constitutional pretextual, racially motivated police stop was borne. As Michelle Alexander noted, a "classic pretext stop" is a police stop intended to search for drugs, but without any evidence of such illegal activity; thus, the police use minimal traffic violations as an excuse for the stop and proceed from there.[57] "Pretext stops, like consent searches, have received the Supreme Court's unequivocal blessing."[58]

This was a unanimous decision by the Supreme Court without a single dissent or simple concurrence expressing any sort of reservations by the Justices of how this rule of law may result in racial disparities.[59] Instead, the "cruel irony" was that the Court referred Mr. Brown and Mr. Whren back to the Equal Protection Clause of the Fourteenth Amendment to redress any racial discrimination on the part of officers in effecting police stops, exclaiming "[s]ubjective intentions play no role in ordinary, probable-cause

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[53] Brief for Petitioner at 4, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 75758, at *4.

[54] *Whren*, 517 U.S. at 808.

[55] *Id.*

[56] *Id.*

[57] ALEXANDER, *supra* note 9, at 67.

[58] *Id.*

[59] In addition to expected silence from several justices in the Rehnquist Court (including the Chief Justice Rehnquist himself, Justice Scalia—who wrote the majority—, and Justice Thomas), silent, too, were Justices Ginsburg, Breyer, Souter, Stevens, Kennedy, and O'Connor. Noteworthy is that five years later in *Atwater v. City of Lago Vista*, Justice O'Connor was extremely vocal about a white woman's misdemeanor arrest where the Court granted virtually unfettered discretion to police officers in exercising their arrest power. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 360–73 (2001) (O'Connor, J., dissenting).

Fourth Amendment analysis."[60] The irony of this referral is that the Fourteenth Amendment, under *Washington v. Davis*, requires evidence of discriminatory intent, not disparate impact alone; this is an incredibly high, if not impossible burden to satisfy. Thus, unless Mr. Brown and Mr. Whren could provide evidence of "purposeful discrimination" on the part of the officers, that they were victims of systemic racism and implicit bias would not matter to any court under any amendment.[61]

The *Whren* court cited approvingly to the notion that an officer's observations, which supply individualized suspicion for the stop, adequately constrain police discretion.[62] In *Whren*, the Supreme Court effectively closed the courthouse doors to any attempts to litigate racial discrimination under the Fourth Amendment by holding that the subjective motivations of police were irrelevant—the amendment that, as Justice Stevens wrote five years before the *Whren* decision, was to be "a restraint on Executive power. The Amendment [that] constitute[d] the Framers' direct constitutional response to unreasonable law enforcement practices employed by agents of the British Crown."[63]

In the end, the Court held that because the officers had probable cause to stop the Pathfinder for a traffic code violation, the stop was reasonable under the Fourth Amendment.[64] In relying on its precedents, the Supreme Court rejected the argument that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."[65] In other words, an officer can be actually motivated to

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[60] *Whren*, 517 U.S. at 806; *see also* ALEXANDER, *supra* note 9, at 109 (describing the *Whren* court's reference to the Fourteenth Amendment as amounting to "cruel irony" based on previously decided equal protection cases requiring discriminatory intent to establish racial discrimination captured by the Fourteenth Amendment).

[61] *See* Washington v. Davis, 426 U.S. 229, 239–42 (1976) (holding discriminatory intent is required for an equal protection violation and disparate impact standing alone is insufficient to sustain such violation).

[62] *See Whren*, 517 U.S. at 817–18 (citing Delaware v. Prouse, 440 U.S. 648, 654–55 (1979) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1975))).

[63] California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (citing Weeks v. United States, 232 U.S. 383, 389–91 (1914); Boyd v. United States, 116 U.S. 616, 624-25 (1886); 1 W. LaFave, SEARCH AND SEIZURE 3–5 (2d ed. 1987).

[64] *Whren*, 517 U.S. at 819. State courts have since adopted "reasonable suspicion" as the standard required for traffic code violation stops. *See e.g.*, Loveless v. State, 789 S.E.2d 244 (Ga. Ct. App. 2016); Marshall v. State, 117 N.E.3d 1254, 1259 (Ind. 2019); City of E. Grand Rapids v. Vanderhart, 2017 WL 1347646, No. 329259, at *6 (Mich. Ct. App. April 11, 2017); State v. McBreairty, 142 N.H. 12, 697 A.2d 495, 497 (N.H. 1997); Comm'n v. Chase, 599 Pa. 80, 960 A.2d 108, 120 (2008); State v. Casas, 900 A.2d 1120 (R.I. 2006); State v. Donaldson, 380 S.W.3d 86 (Tenn. 2012); State v. Richardson, 2002 WL 34423170, No. 2001-064, at *1 (Vt. June Term 2002) (unpublished); Warner v. Comm'n, 2019 WL 6314821, Record No. 0871-18-4, at *4 (Va. Ct. App. November 26, 2019); State v. Snapp, 174 Wn.2d 177, 275 P.3d 289, 299 (Wash. 2012) (does not address *Whren*, rather adopts reasonable suspicion standard for traffic stops).

[65] *Whren*, 517 U.S. at 813.

investigate a crime wholly unrelated to any of his observations or, much worse, be motivated (either in part or whole) by the race of the person he decides to seize under the guise of minimal traffic violations.[66] As researchers have noted, "*Whren* was a watershed moment."[67]

1. *Batson v. Kentucky—The failure to recognize that the prosecution will discriminate based on race in selecting (or de-selecting) the decision-makers*

In 1986, *Batson v. Kentucky* was considered landmark; today, *Batson*'s acceptance of any race-neutral reason proffered by the prosecution for striking a racial minority from the jury along with its colorblind "purposeful discrimination" requirement has become impervious to implicit racial bias. The *Batson* court recognized, "Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others.'"[68] If our courts permit the systemic exclusion of racial minorities from participation in the judicial process, what lines then would we expect to be drawn outside the courthouse walls that would hold firm to equal protection? Although *Batson* may have been "a nod to the newly minted public consensus that explicit race discrimination [was] an affront to American values," its continued application is now repressive.[69]

Mr. Batson, a Black man, was tried on charges of second-degree burglary and receipt of stolen property in Kentucky.[70] During jury selection, the prosecutor used his peremptory challenges to strike the only four Black jurors on the venire; Mr. Batson's trial proceeded with an all-white jury.[71] Ruling on the defense objection to this, the trial judge pointedly stated that the parties were allowed to use their peremptory challenges to "strike anybody they want to."[72]

In *Batson*, the Supreme Court crafted a three-part test triggered when the defendant contends that the prosecution's use of its peremptory challenge to strike a racial minority from the jury was race-based. First, the

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[66] "To be clear, *Whren* would indeed authorize an officer to observe a car or driver, develop a suspicion or an inkling that something may be of interest, and then wait for the driver to violate one of hundreds of different traffic laws, including driving too fast (speeding), driving too slow (impeding traffic), touching a lane marker, or any of a number of equipment or regulatory violations." BAUMGARTNER ET AL., *supra* note 16, at 11.

[67] *Id.* at 11.

[68] Batson v. Kentucky, 476 U.S. 79, 87–88 (1986) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).

[69] ALEXANDER, *supra* note 9, at 119.

[70] *Batson*, 476 U.S. at 82.

[71] *Id.* at 83.

[72] *Id.*

petitioner must satisfy a prima facie burden of purposeful discrimination; this is intended to be a low bar, one that can be met by establishing a reasonable inference of discrimination.[73] The *Batson* court reasoned that one way this threshold could be met is by pointing out a "pattern" of peremptory strikes against Black jurors in the instant venire.[74] Second, the Government must then offer any race-neutral explanation for its peremptory strike against a racial minority.[75] Third, the trial court must then deploy a totality of the circumstances test where the ultimate question is whether or not the petitioner demonstrated purposeful discrimination.[76]

The sad reality is that *Batson*, especially after *Purkett v. Elem* (in 1995), is nothing more than feel-good rhetoric. *Purkett* sanctions that the prosecution may offer any reason at all, even a ridiculous one, to explain away any overt or implicit bias in exercising the peremptory challenge against a racial minority.[77] In *Purkett*, the prosecutor explained his striking of Black jurors as follows:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact . . . Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.[78]

The Eighth Circuit held that this reason was factually irrelevant to whether or not the juror was qualified to serve in the case; however, the Supreme Court reversed, holding that the explanation given by the prosecutor need not be persuasive or even plausible.[79] "Once the reason is offered, a trial judge may choose to believe (or disbelieve) any 'silly or superstitious' reason offered by prosecutors to explain a pattern of strikes that appear to be based on race."[80]

Indeed, in modern-day practice, the absurdity in step two, though perhaps more subtle, continues. For example, in Wyoming's *Roberts v. State*, after striking a minority juror, the prosecution offered a laundry list of

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[73] *Batson*, 476 U.S. at 96–97; *see also* Johnson v. California, 545 U.S. 162, 166 (2005).

[74] *Batson*, 476 U.S. at 97.

[75] *Id.* at 96.

[76] *Id.* at 96; *see also* Roberts v. State, 2018 WY 23, ¶ 17, 411 P.3d 431, 438 (Wyo. 2018).

[77] *See* Purkett v. Elem, 514 U.S. 765, 775 (1995) (Stevens, J., dissenting).

[78] *Id.* at n.4 (quoting the prosecutor's explanation).

[79] *Id.* at 768.

[80] ALEXANDER, *supra* note 9, at 123.

why he struck the juror in response to the *Batson* challenge, including that Juror 364 was "'crumpling' her face, wearing a hat in the courtroom, stating that she 'want[ed] more proof' of a [DUI] thus indicating that '[s]he might be uncomfortable with the bright line of a .08 as the state law in Wyoming,' crossing her arms, 'shifting,' being 'really silent,' and expressing 'distrust of law enforcement.'"[81] This explanation was accepted and the trial court denied the *Batson* challenge; however, on appeal, the trial record revealed that Juror 364 never actually spoke during jury selection.[82] Based on the inaccuracy of the prosecutor's explanation as compared to the record and, significantly, because the Wyoming Supreme Court could not decipher whether the trial court would have, in spite of this error, still accepted the prosecutor's descriptions of Juror 364's alleged demeanor as sufficiently race-neutral, the Court issued a limited remand in the case.[83] But for the prosecutor's explanation being contrary to the trial record, it is significantly likely the case would not have been remanded.

The excuse of demeanor is particularly problematic. It can serve as a "catch-all" for any prosecutor looking to survive a *Batson* challenge. And courts have put much trust in the prosecutor, including when the trial court did not observe the behaviors or demeanor alleged by the prosecutor. For example, in *Thayler v. Haynes* (2010), the Supreme Court stated that a demeanor-based peremptory challenge does not need to be corroborated by the trial court's own observations.[84] In turn, relying on *Thayler*, the *Roberts* court in Wyoming has declared that while "purely subjective impressions" without objective support do not satisfy *Batson*'s step two, it believed that the prosecutor's descriptions in *Roberts* were not impermissibly subjective.[85] The Wyoming Supreme Court was apparently satisfied that the lower court could have found the prosecutor to be credible (even if the trial court did not make its own independent observations) when describing Juror 364's alleged behaviors as facial expressions that included "nodding, and grimacing, 'crumpl[ing]' her face, crossing her arms, and 'shifting.'"[86]

That the prosecutor can offer any plausible reason at *Batson*'s step two only adds to the impossibility that is step three's requirement of "purposeful

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[81] *Roberts*, 411 P.3d at 438.

[82] *Id.* at 439.

[83] *Id.* at 439–40. On the limited remand, the case was dismissed by the Laramie County District Court following an evidentiary hearing. State of Wyoming v. Brandon Roberts, In the District for the First Judicial District, State of Wyoming, County of Laramie, Docket No. 32-855, Order Vacating Conviction and Dismissing Case With Prejudice, May 29, 2018, Judge Catherine R. Rogers (on file with author and Wyoming Supreme Court) (Order on file with Journal).

[84] Thayler v. Haynes, 559 U.S. 43, 49 (2010) ("[I]n the absence of a personal recollection of the juror's demeanor, the judge [may accept] the prosecutor's explanation.").

[85] *Roberts*, 411 P.3d at 439.

[86] *Roberts*, 411 P.3d at 438.

discrimination."[87] In addition, even if there is solid evidence of discriminatory purpose, it takes tremendous effort to succeed on appeal (when the challenge is lost at trial) due to the deference given to the trial court. The Washington State Supreme Court encountered this problem in *State v. Jefferson* and, ultimately, decided to provide an alternative (to purposeful discrimination) in *Batson*'s step three. In *Jefferson*, the trial court accepted the prosecutor's "race-neutral" explanations and found no purposeful discrimination had occurred.[88]

> There are legitimate non-discriminatory reasons, that are not race based, why Mr. Curtis wants to strike No. 10, notwithstanding the fact that they are both African American men; the fact that he didn't bond with him; he didn't feel comfortable with him in terms of his earlier responses; the issue about *12 Angry Men* and his familiarity with the movie .... And I don't, in essence, I don't believe that the state has—that the defense has shown that that, in some—in any way is pretext or a cover for race-based strike, so I'm going to deny the motion.[89]

The Washington State Supreme Court held that under *Batson's* step three, the trial court's finding that there was no purposeful discrimination on the part of the state was not clearly erroneous.[90] The *Jefferson* court went on to apply *Batson*'s step three to demonstrate how even questionable actions and reasoning on the part of the prosecutor failed to reach the high bar of purposeful discrimination. First, the court noted that Juror 10's answers to questions were not that different from those jurors who were empaneled on the jury.[91] In addition, the court found that the prosecutor's belief that Juror 10 would "bring outside evidence into the jury room" lacked support in the trial record.[92] Lastly, the court highlighted that Juror 10 faced disparate questioning from that of other jurors.[93]

Significantly, however, the *Jefferson* court held that under the current *Batson* step-three framework, the challenge failed.[94] The court found that

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[87] Batson v. Kentucky, 476 U.S. 79, 93–96 (1986) (citing Washington v. Davis, 426 U.S. 229, 239–42 (1976) (holding that petitioners must demonstrate discriminatory intent, not disparate alone, to prove an equal protection violation)).

[88] State v. Jefferson, 429 P.3d 467, 472 (2018).

[89] *Id.* at 472 (quoting 3 VRP (May 5, 2015) at 246–47).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 473.

[93] *Id.* at 474.

[94] *Id.*

although the prosecutor's reasons may have well been pretextual in nature, the record did not support that the trial court's denial of the *Batson* challenge (based on the failure to demonstrate purposeful discrimination) was clearly erroneous.[95] "Based on this record, it is impossible to say with certainty that the prosecution's reasons for its peremptory strike of Juror 10 were based on purposeful race discrimination."[96]

The Washington State Supreme Court then, based on its own precedents, proceeded to offer an alternative route in analyzing *Batson* challenges that considers unconscious, implicit, and unintentional racial bias.[97] The court framed this as an "alteration" to *Batson*.[98] After a comprehensive discussion of the history and evolution of *Batson* and its progeny at both the state and federal levels, the *Jefferson* court crafted a new step three to *Batson* analysis, holding that the central inquiry was "[w]hether 'an objective observer could view race as a factor in the use of the peremptory challenge.'"[99] The court noted that this was "an objective inquiry based on the average reasonable person—defined as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated ways."[100] Perhaps the Washington State Supreme Court gave too much credit to the "average reasonable person," but, nevertheless, it took a bold step in dismantling the oppressive burden of establishing purposeful discrimination under *Batson*.

C. *The Relevant Backdrop to the Whren and Batson Decisions*

The *Whren* and *Batson* decisions were fueled by a colorblind view that, at the time, defied reality. Both cases were decided during the era of the "War on Drugs" and mass incarceration. There was turbulence centered on race relations across the country. In no way were the 1980s and 1990s reflective of a utopian, colorblind, "we are all created equal" society.

Specifically, in the 1980s and 1990s, although the nation might not have been ready to admit it, President Ronald Reagan's "War on Drugs" was overwhelmingly and disproportionately putting Black men in prison.[101] "In

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[95] *Id.* at 472.

[96] *Id.* at 474.

[97] *Id.* at 476–77. In addition, the Washington State Supreme Court has also enacted General Rule 37, which provides a framework for evaluating peremptory strikes and addressing the shortcomings of *Batson*. Here, the *Jefferson* court found that the rule did not apply retroactively. *See id.* at 477.

[98] *Id.* at 480.

[99] *Id.*

[100] *Id*.

[101] It must be noted that while many individuals believe that the "War on Drugs" was a war that actually responded to a drug crisis, President Reagan "officially announced the current drug war in 1982, before crack became an issue in the media or a crisis in poor black neighborhoods." ALEXANDER, *supra*

less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase."[102] As Michelle Alexander wrote:

> Drug offenses alone account[ed] two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000. Approximately a half-million people [were] in prison or jail for a drug offense in [2010-2011], compared to an estimated 41,100 in 1980—an increase of 1,100[%]."[103]

Black men were disproportionately represented in these numbers with the "War on Drugs" fully in effect in the mid-1980s; specifically, "prison admissions for African Americans skyrocketed, nearly quadrupling in three years, and then increasing steadily until it reached in 2000 a level *more than twenty-six times* the level in 1983."[104]

In 1991, just two years before Mr. Brown and Mr. Whren were stopped by police, "the Sentencing Project reported that the number of people behind bars in the United States was unprecedented in world history, and that one fourth of young African American men were now under the control of the criminal justice system."[105] In April 1992, a Ventura County jury (based in "a community that is close to Los Angeles in distance but a world away in lifestyle and racial composition")[106] returned a verdict of not guilty for four white police officers who were captured on video brutally beating a Black

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note 9, at 5. As Alexander highlighted, "The *New York Times* made the national media's first specific reference to crack in a story published in late 1985. Crack became known in a few impoverished neighborhoods in Los Angeles, New York, and Miami in early 1986." ALEXANDER, *supra* note 9, at Introduction, n.2, (citing Craig Rienarman & Harry Levine, *The Crack Attack: America's Latest Drug Scare, 1986-1992*, in IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 152 (New York: Aldine De Gruyter, 1995)).

[102] *Id.* (citing MARC MAUER, RACE TO INCARCERATE 33 (New York: The New Press, rev. ed., 2006)).

[103] *Id. at* 60.

[104] *Id.* at 98 (citing JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER RE-ENTRY 28 (Washington, DC: Urban Institute Press, 2002)) (emphasis in original). The problem still persists. In a 2016 report, the Sentencing Project found that African Americans were incarcerated in state prisons "more than five times the rate of whites, and at least ten times the rate in five states." Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT, 3–8 (June 14, 2016), file:///Users/Morgen/Downloads/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.

[105] ALEXANDER, *supra* note 9, at 56.

[106] Lou Cannon, *Trial in Videotaped Beating of Motorist Opens Today*, WASH. POST (Feb. 3, 1992), at A3, available at https://www.washingtonpost.com/archive/politics/1992/02/03/trial-in-videotaped-beating-of-motorist-opens-today/f5b6cd00-d4eb-4438-83f1-e253f43eae08/

man, Rodney King, on a traffic stop in Los Angeles.[107] This was the impetus for the Los Angeles riots, which occurred primarily in the Black South Central neighborhood, leaving a trail of carnage and wreckage.[108]

The Supreme Court could have drawn from multiple sources of information to consider the impact of systemic racism on policing and the operation of our criminal justice system when it decided *Whren* and *Batson*. The 1980s and 1990s were turbulent times for race relations in America, but our Supreme Court turned a blind eye and a deaf ear to it all.

D. *The Real-World Impact of Whren—Over-Inclusion of African Americans as Targets (Defendants) in the Criminal Justice System*

Since *Whren*, statistics have demonstrated that African Americans are disproportionately pulled over by police; however, this is perfectly acceptable under *Whren*.[109] The real-world consequences of *Whren* have led to a "free-for-all" policing approach where officers conduct stops based on their unlimited discretion and in spite of their conscious (racism) or unconscious motivations (implicit racial bias).

To be sure, that evening in 1993, the vice-squad officers did locate illegal drugs in Mr. Whren's hands. This is ultimately how we get to address these issues; contraband is seized or alleged illegal activity occurs, the case is adjudicated below, and, upon conviction, sometimes an appeal is generated that may, such as in the case of *Whren*, result in a seminal decision. The cases where individuals are arbitrarily stopped, searched, and then released by police when nothing turns up do not make it into Westlaw and LexisNexis.

Lest one be tempted to baldly conclude that African Americans commit more crime and, hence, are overrepresented in prison; the data demonstrates otherwise. For example, as it pertains to drug crime, "[p]eople of all races use and sell illegal drugs at remarkably similar rates. If there are significant differences in the surveys to be found, they frequently suggest that whites,

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[107] Michael A. Santivasci, *Change of Venue in Criminal Trials: Should Trial Courts Be Required to Consider Demographic Factors When Choosing a New Location For a Criminal Trial?,* 98 DICK. L. REV. 107, 112–13 (1993) (indicating the case of Rodney King had "racial overtones" as the officers were white and Mr. King was African American and discussing the granted motion for venue change for the defendant officers to Ventura County) (citing Lou Cannon, *Trial in Videotaped Beating of Motorist Opens Today*, WASH. POST, at A3 (Feb. 3, 1992) ("[T]he highly publicized videotape has inflamed racial feelings in Los Angeles, where members of the black and Hispanic communities said the incident reflects deep-seated attitudes of prejudice in the Los Angeles Police Department."))); *see also*, *Black History Milestones: Timeline*, History.com (June 6, 2020), https://www.history.com/topics/black-history/black-history-milestones (last visited July 25, 2020).

[108] *See* Santivasci, *supra* note 107, at 113 (citing Tom Mathews et al., *The Siege of L.A.*, NEWSWEEK, at 30 (May 11, 1992) ("Denied the justice they demanded for Rodney King, protesters and looters unleashed the deadliest riot in 25 years—and issued a wake-up call to the rest of America"); *see also* History.com, *supra* note 107.

[109] *See*, *e.g.*, BAUMGARTNER et al., *supra* note 16; *see also* Rushin & Edwards, *supra* note 16.

particularly white youth, are more likely to engage in illegal drug dealing than people of color."[110] In 1995, when asked during a survey to envision a person believed to be a drug user and describe that person, "[n]inety-five percent of the respondents pictured a Black drug user, while only [five] percent imagined other racial groups."[111] However, in 1995, African Americans represented only fifteen percent of drug users.[112] Further, in 2002, researchers at the University of Washington found that "contrary to the prevailing 'common sense,' the high arrest rates of African Americans in drug-law enforcement could not be explained by rates of offending; nor could they be explained by other standard excuses, such as the ease and efficiency of policing open-air drug markets, citizen complaints, crimes rates, or drug-related violence."[113] The racial disparities in police stops and searches cannot be washed away by oversimplifying the issue and citing to crime rates or arguing "no harm, no foul." The overall unproductivity of racial profiling is glaring when reviewing the data on police stops and the output thereof.

Even when *Whren* was decided, there was some evidence of racial

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[110] ALEXANDER, *supra* note 9, at 99 (citing U.S. Dep't of Health and Hum. Serv.'s, Substance Abuse and Mental Health Serv.'s Admin., *Summary of Findings from the 2000 National Household Survey on Drug Abuse*, NHSDA series H-13, DHHS pub. No. SMA 01-3549 (Rockville, MD: 2001) (indicating that 6.4% of whites, 6.4% of African Americans, and 5.3% of Hispanics were current illicit drug users in 2000); *Results from the 2002 National Survey on Drug Use and Health: National Findings*; NSDUH series H-22, DHHS pub. No. SMA 03-3836 (2003) (finding nearly identical rates of illicit drugs users among whites and Blacks with only a single percentage point between the two); *Results from the 2007 National Survey on Drug Use and Health: Nationals Findings*, NSDUH series H-34, DHHS pub. No. SMA 08-4343 (2007) (indicating similar findings); Marc Mauer & Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* 19 (Washington, DC: Sentencing Project, Sept. 2007) (citing a study suggesting that African Americans have slightly higher rates of illegal drug users than whites); Howard N. Snyder & Melissa Sickman, *Juvenile Offenders and Victims: 2006 National Report*, U.S. Dep't of Just., Officer of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (Washington, DC: 2006) (indicating that white youth are more likely than Black youth to sell illicit drugs); Lloyd D. Johnson et al., *Monitoring the Future, National Survey Results on Drug Use*, 1975-2006, *vol. 1, Secondary School Students*, U.S. Dep't of Health and Hum. Serv.'s, National Institute on Drug Abuse, NIH pub. No. 07-6205, 32 (Bethesda, MD: 2007) ("African American 12th graders have consistently shown lower usage rates than White 12th graders for most drugs, both licit and illicit"); Lloyd Johnston, Patrick M. O'Malley, and Jerald G. Bachman, *Monitoring the Future: National Results on Adolescent Drug Use: Overview of Key Findings 2002*, U.S. Dep't of Health and Hum. Serv.'s, National Institute on Drug Abuse, NIH pub. No. 03-5374 (Bethesda, MD: 2003) (data shows "African American adolescents have slightly lower rates of illicit drug use than their white counterparts")).

[111] ALEXANDER, *supra* note 9, at 106 (citing Betty Watson Burston, Dionne Jones, and Pat Robertson-Saunders, *Drug Use and African Americans: Myth Versus Reality*, J. ALCOHOL & DRUG ABUSE 40, 19 (Winter 1995)).

[112] ALEXANDER, *supra* note 9, at 106.

[113] *Id.* at 126. *See also* Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 no. 3 SOC. PROBS. 419–41 (2005); Katherine Beckett, Kris Nyop, & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44(1) CRIMINOLOGY 105 (2006).

profiling in traffic stops. In the 1990s, in New Jersey and Maryland, "[a]llegations of racial profiling in federally funded drug interdiction operations resulted in numerous investigations and comprehensive data demonstrating a dramatic pattern of racial bias in highway patrol stops and searches."[114] For example, in New Jersey, the data demonstrated "that only [fifteen] percent of all drivers on the New Jersey Turnpike were racial minorities, yet [forty-two] percent of all stops and [seventy-three] percent of all arrests were of black motorists—despite the fact that blacks and whites violated traffic laws at almost exactly the same rate."[115] In the Maryland studies, "African Americans comprised only seventeen percent of drivers along a stretch of I-95 outside of Baltimore, yet they were [seventy] percent of those who were stopped and searched."[116]

Critically, since *Whren*, substantial research and investigation into police stops occurring from 2002 to 2016 in the state of North Carolina was conducted by Frank R. Baumgartner, Derek A. Epp, and Kesley Shoub and produced in their 2018 book *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race*.[117] These researchers analyzed, in remarkable detail, over twenty million traffic stops effected by the various police agencies in North Carolina over the course of fourteen years.[118] They found that African Americans were consistently over-policed as compared to whites.[119] In just one year's worth of data, African Americans were sixty-three percent more likely than whites to be stopped by police.[120] From the complete data set (over twenty million traffic stops), it was demonstrated that African Americans are more likely to be stopped for investigatory purposes where, frequently, pretextual stops occur to engage the driver for some investigatory reason unrelated to the reason for the traffic stop.[121]

To discern what the data collected by Baumgartner et al. shows, "the proper baseline for comparison" must be realized.[122] Importantly, not everyone has a car or drives (or drives often).[123] In addition, "[s]ome people drive more than others. Some people drive safely while others speed, change lanes erratically and without signaling, or drive while impaired."[124]

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[114] ALEXANDER, *supra* note 9, at 133.

[115] *Id. at* 133 (citing State v. Soto, 324 N.J. Super. 66, 69–77, 83–85 (N.J. Super. Ct. Law Div. 1996)).

[116] *Id.* at 133 (citing Harris, *supra* note 16, at 80).

[117] *See generally* BAUMGARTNER et al., *supra* note 16.

[118] *See id*. at 2, 29, 31–34.

[119] *Id.* at 65.

[120] *Id.* at 68–69 tbl.3.1.

[121] *Id.* at 53–54 tbl.2.1.

[122] *Id.*

[123] *Id.*

[124] *Id.*

Baumgartner et al. proceeded with a "population comparison" because, "on average, whites drive more than blacks and Hispanics."[125] Baumgartner et al. found "that regardless of how one calculates [the baseline population], black drivers in North Carolina are consistently over-policed, compared to whites."[126] Significantly, "disparities found in comparisons to the community population are *low* estimates of disparate treatment rather than high ones, since whites can on average be expected to be more likely to own a car and drive more miles compared to blacks and Hispanics."[127]

Using 2010 to demonstrate whether drivers of different racial groups are stopped at the same rates, Baumgartner et al.'s collected data demonstrated that while Blacks made up 22.46% of the state of North Carolina's population in 2010, 32.02% of the traffic stops that occurred in the state that year were of Black drivers.[128] On the other hand, that year the white population for North Carolina was 68.77% while white drivers comprised 60.12% of the 2010 traffic stops.[129] "This means that the black proportion of those stopped is almost 10 points higher than in the population—a 42.59[%] increased risk. Conversely, the population is 68.77[%] white, while only 60.12[%] of those stopped are white. This is a gap of 8.65 points—a 12.58[%] decreased risk."[130]

In calculating the "stop rate ratio" from this 2010 data, by comparison of the number of traffic stops to the state population, the data showed that Blacks were [sixty-three] percent more likely to be pulled over than whites.[131] "With 843,060 traffic stops in 2010, and 6.3 million whites in the population, the odds of a given white person to be pulled over were 13.4%.[132] Blacks, with 449,012 stops and a population just over two million, had much higher odds of being stopped: 21.9%."[133] Further, based on two different national surveys that helps determine who in the population drives, this data is a "vast underestimate."[134]

In looking more broadly at the whole data set collected over the course of fourteen years from the over twenty million traffic stops, Baumgartner et al.'s data indicated that 46.27% of the stops were "investigatory" in nature; in other words, were stops due to police observations related to violations labeled as "vehicle equipment," "vehicle regulatory," "investigation" (e.g.,

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id*. at 68–69 tbl.3.1.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.* at 75–76.

where officers are searching for a specific individual via "attempt to locate," "be on the lookout for," or other investigations), seat belt, and other vehicle violations.[135] Black drivers represented 51.85% of these stops (whereas white drivers made up 46.98%).[136] According to Baumgartner et al., the stops for "investigatory purposes are more likely to relate to minor offenses that may serve as a pretext for pulling a driver over."[137]

Notably, in assessing both the search rates as well as outcomes of traffic stops, Baumgartner et al. demonstrate how racial profiling, including implicit bias, impacts police discretion negatively in terms of crime control; this data significantly calls into question the deferential treatment given to police by the *Whren* court. The data collected from the more than twenty million traffic stops indicated that 700,000 resulted in a search.[138] From this data, it is shown that "white drivers are searched 2.35% of the time [and] black drivers 5.05[%]. . . ."[139] Critically, "blacks are 2.15[%] as likely as whites to be searched, or 115[%]."[140] Recalling the data on "investigatory stops" above, "black drivers face a 170[%] increased chance of search, compared to whites" following a stop for investigatory purposes.[141]

Can it, however, be stated: "no harm, no foul?" Do officers find more contraband on Black drivers rather than white ones? In the 700,000 searches that were conducted, if one reviews "all searches" (without separating out the searches by type, i.e., consent, probable cause, incident to arrest, *Terry* frisk, and warrant), "police are equally likely to find contraband on blacks as compared to whites."[142] Nevertheless, when differentiated among types of searches, this is where stark deviations occur; Baumgartner et al. note these deviations are most pronounced when evaluating the data between discretionary and procedural searches.[143] "Officers are [twenty-two] percent less likely to find contraband on black drivers following consent searches and [twelve] percent less likely after probable cause searches."[144] However, searches incident to arrest and those resulting from warrants are "essentially race neutral and blacks are more likely to be found with contraband after protective frisks."[145] The researchers state:

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[135] *Id*. at 53–54 tbl.2.1.

[136] *Id.*

[137] *Id.* at 53.

[138] *Id.* at 59 tbl.2.7, 85 tbl.4.1.

[139] *Id.* at 85.

[140] *Id.*

[141] *Id.* at 86.

[142] *Id*. at 112–13.

[143] *Id*. at 113.

[144] *Id.*

[145] *Id.*

> [t]his indicates that officers are either worse at making probable cause assessments as to whether black motorists have contraband or have a lower threshold for what qualifies as cause when interacting with a black driver. Either possibility suggests that black and white drivers are treated in a disparate manner not justified by any difference in criminal behavior.[146]

Next, Baumgartner et al. separated potential outcomes of a traffic stop into three categories—light, expected, and severe.[147] A light outcome was defined as nothing happened to the driver, a verbal warning was given, or a written warning was issued.[148] Meanwhile, an expected outcome was defined as the issuance of a ticket or citation, and a severe outcome, was an arrest.[149] "A stop resulting in light action indicates one of two things: the driver is perceived as a negligible threat; or the driver was pulled over because of a suspicion which is immediately relieved once the officer speaks with the driver, perhaps giving an apology for the inconvenience. A warning may also be appropriate for a young driver not fully stopping at a stop sign or in other cases where the officer rightfully uses his or her discretion."[150]

In the more than twenty million traffic stops, "Black drivers are [ten] percent more likely to get a 'light outcome,' [seven] percent less likely to get a ticket, and [sixty-eight] percent more likely to be arrested, compared to white drivers."[151] Baumgartner at al. asked what the disparities in outcome might indicate and noted, "[l]ight action taken against a driver might indicate either that the officer made a mistake in pulling the driver over or that they were barely breaking the law (e.g., going one mph over the speed limit). Our data indicates that blacks are disproportionately likely to experience a light outcome."[152] The researchers discuss that one concern of lawmakers in North Carolina was that officers were pulling over Black drivers for no reason at all, and that there was some evidence that this was indeed the case.[153] Interestingly, Baumgartner et al. also note that Black drivers were less likely to be ticketed than white drivers, suggesting that "the racial disparities that we do find are perhaps driven less by outright racial animus on the part of police officers (because, in that case, why not ticket blacks at higher rates) than by implicit biases that lead officers to be more suspicious

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[146] *Id.*

[147] *Id.* at 86–87 tbl.4.3.

[148] *Id*. at 86–87.

[149] *Id.* at 87.

[150] *Id*.

[151] *Id.* at 57 tbl.2.5, 87 tbl.4.3.

[152] *Id.* at 87–88.

[153] *Id.* at 88.

of black drivers."[154] The researchers offer that "most officers are not necessarily out to punish black drivers but they, perhaps unconsciously, have a lower threshold for stopping and searching African Americans."[155] All the more evidence that the Supreme Court's demand for "purposeful discrimination" is severely misguided.[156]

Finally, Baumgartner et al.'s data illustrates that the targeting of Black drivers is on the rise. From the data collected up until 2016, it is shown that while white traffic stops are consistently falling, minority stops are not.[157] Black drivers are "among an increasing share of those stopped over time. If at the same time the racial disparities in search rates are also growing, this suggests a ratchet effect: increasing targeting of blacks over time."[158]

At what point do we decide that the costs of *Whren* outweigh its benefits? While the *Whren* court weighed heavily in favor of police discretion, actual data in one state alone is illustrating the costs of the *Whren* mandate. As distrust in police continues to deepen not just in communities of color, but now, also in white people who have been marching over the past few months in our Nation for Black lives, *Whren* is starting to look more and more like a Nineteenth century opinion that was built on a false premise, colorblindness. Although beyond the scope of this article, briefly, in place of *Whren*, our courts should consider a totality of the circumstances approach as viewed through eyes of an objective, detached, neutral, and race-conscious judge where, *inter alia*, the reason for the stop, the credibility of the officer (along with any evidence of his subjective intent), and the progression of the stop (e.g., whether a simple traffic stop leads to a consent or probable cause search) should be considered.

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[154] *Id.*

[155] *Id.*

[156] Significantly, in addition to the Baumgartner et al.'s work in this area, there is a comprehensive study (based on data from traffic stops 2008–2015) in the state of Washington that assesses the impacts of the state's modified *Whren* approach and demonstrating overwhelming statistics of police disproportionately stopping racial minorities. *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling,* 73 STAN. L. REV. 637 (2021). In addition, the ACLU released a report in 1999 consisting of statistics gained from litigation in eight states challenging *Whren*. *See* Harris, *supra* note 16. There is another broader noteworthy analysis supporting similar findings that was published in July 2020. Emma Pierson, Camelia Simoiu, Jan Overgoor, et al., *A Large-scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (2020), available at https://5harad.com/papers/100M-stops.pdf.

[157] BAUMGARTNER et al., *supra* note 16, at 67 fig.3.2.

[158] *Id.* at 97.

E. *The Real-World Impact of Batson—Over-Exclusion of African Americans as Jurors Evidenced by "Whitewashing the Jury Box" Report*

After *Batson*, it was readily apparent that the opinion was, perhaps, rhetorically powerful, but had little-to-no influence on ferreting out racial discrimination via peremptory challenges exercised by the prosecution. As Michelle Alexander noted, "one comprehensive study reviewed all published decisions involving *Batson* challenges from 1986 to 1992 and concluded that prosecutors almost never fail to successfully craft acceptable race-neutral explanations to justify striking black jurors."[159]

Much like the case with *Whren*, the data demonstrates that *Batson* is not a workable rule of law today; in fact, as Michelle Alexander has noted, and the Washington State Supreme Court reminds us, it never really was. Recent empirical evidence collected and analyzed in the state of California further supports it is time to rethink and reframe *Batson*.

In June 2020, the Berkeley Law Death Penalty Clinic released a substantial report that corroborates the abuse and manipulation of *Batson* by the prosecution in exercising peremptory challenges against racial minorities.[160] The Clinic evaluated 683 cases decided by the California Courts of Appeal from 2006 through 2018 that involved *Batson* challenges against prosecution peremptory challenges in the state's lower courts.[161] The data overwhelmingly showed that Black jurors were subject to peremptory strikes by the prosecution far more than any other racial group.[162] "In nearly [seventy-two percent] of these cases, district attorneys used their strikes to remove Black jurors. They struck Latinx jurors in about 28% of the cases, Asian-American jurors in less than 3.5% of the cases, and White jurors in only 0.5% of the cases."[163]

Not surprisingly, the "race-neutral" explanation at the forefront was demeanor-based reasons; this justification was used in 40.6% of the cases reviewed.[164] In "the 480 cases in which prosecutors struck Black jurors, they offered a demeanor-based reason in 37.5% (180 cases) of these cases."[165] Second to demeanor was "a prospective juror's relationship with someone

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[159] ALEXANDER, *supra* note 9, at 121 (citing Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 UNIV. MICH. J. L. REFORM 229, 236 (1993)).

[160] *See generally* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38.

[161] *Id.* at vi, 13.

[162] *Id.*

[163] *Id.* at vi; *see also id*. at 13.

[164] *Id.* at vi, 15.

[165] *Id.* at 16.

who had been involved in the criminal legal system."[166] Thereafter, frequently, it was "a prospective juror expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially-and/or class-biased."[167] Such reasons are racialized as African Americans do have a "greater distrust—compared to Whites'—of law enforcement and the criminal legal system based on the history of anti-Black racism in the United States and their lived experiences."[168]

Other justifications that might be typified as the "silly" or "ridiculous" reasons authorized by *Purkett*, included challenges against Black jurors "because they had dreadlocks, were slouching, wore a short skirt and 'blinged out' sandals, visited family members who were incarcerated, had negative experiences with law enforcement (often many years before they were called for duty), or lived in East Oakland, Los Angeles County's Compton, or San Francisco's Tenderloin."[169]

The Report highlighted that in the last thirty years, the California Supreme Court had "reviewed 142 cases involving *Batson* claims and found a *Batson* violation only [3] times (2.1%)."[170] In addition, the California Courts of Appeal, from 2006 through 2018, found error in the trial court's denial of a defense *Batson* challenge "in just 18 out of 683 decisions (2.6%)."[171] Further, "[i]t has been more than [thirty] years since the California Supreme Court found a *Batson* violation involving the peremptory challenge of an African American prospective juror."[172] As recently as May 2020, in a dissenting opinion, Justice Liu of the state supreme court stated that the "*Batson* framework, as applied by this court, must be rethought in order to fulfill the constitutional mandate of eliminating racial discrimination in jury selection."[173]

Batson looks more and more like the product of perhaps a well-intentioned court, but its effect is counter-productive because it is based on the fiction of colorblindness.[174] Although in 1879, in *Strauder v. West Virginia*, the Supreme Court struck down state statutes that excluded Black

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[166] *Id.* at vi; *see also id.* at 15.

[167] *Id.* at vi; *see also id.* at 15.

[168] *Id.* at 17, 36–43.

[169] *Id.* at vi.

[170] *Id.* at vii.

[171] *Id*. at viii.

[172] *Id.* at vii.

[173] *Id.* at viii.

[174] Another study based on empirical data collected from Mississippi found that African American jurors are far more likely to be removed from the venire. *See* Whitney DeCamp & Elise DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. RSCH. CRIME & DELINQ. 3, 3–30 (2020).

jurors from jury service, "institutional opposition to Black enfranchisement and political participation had taken hold in the South, ushering in 'the Jim Crow era of white supremacy, state terrorism, and apartheid . . . .' Although laws no longer explicitly barred African Americans from jury service, in many states, "'local officials achieved the same result by . . . implementing ruses to exclude black citizens.'"[175] The ruses to exclude African Americans from fundamental process remain in full effect today and can be seen in the prosecution's disproportionate exercise of peremptory challenges against Black jurors.

It is time for our courts to scrutinize *Batson* through a well-informed, race-conscious Twenty-First-Century lens, and reject its precedential position in our criminal procedure jurisprudence. While it is beyond the scope of this article, when considering the methodology that must replace *Batson*, the courts should view peremptory challenges through the perspective of an objective, detached, neutral, and race-conscious judge. Further, the courts should consider those recommendations made by the Berkeley Law Death Penalty Clinic in replacing the *Batson* test.[176]

III. COURTS SHOULD USE THE LAW, USE THE LAW, USE THE CONSTITUTION TO REJECT *WHREN* AND *BATSON*

"[S]tare decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true."

- Justice Neil Gorsuch, Ramos v. Louisiana[177]

Nearly all fifty states have accepted *Whren* in their jurisdictions.[178]

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[175] BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38, at 2 (quoting Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 9–10 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf); *see also* Strauder v. West Virginia, 100 U.S. 303, 304 (1879).

[176] *See* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38, at ix–xi.

[177] Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020).

[178] *See*, *e.g.*, cases cited *supra* note 64; State v. Williams, 249 So.3d 527 (Ala. Crim. App. 2017); Jones v. Sterling, 110 P.3d 1271 (Ariz. 2005); State v. Harmon, 113 S.W.3d 75 (Ark. 2003) (noting that it has the capacity to diverge from *Whren* under the state constitution, but upholding pretext stops); People v. Lomax, 234 P.3d 377 (Cal. 2010); People v. Cherry, 119 P.3d 1081 (Colo. 2005); State v. McClean, No. N23NCR170176771, 2019 WL 6736793 (Conn. Super. Ct. November 15, 2019) (unpublished); State v. Rickards, 2 A.3d 147 (Del. Super. Ct. 2010) (addressing *Whren* under state constitution and apparently applying it); Hilton v. State, 961 So.2d 284 (Fla. 2007); State v. Taylor, 144 P.3d 22 (Haw. 2006) (unpublished); Flieger v. State, No. 40690, 2015 WL 1406316 (Idaho Ct. App. March 25, 2015); People v. McDonough, 940 N.E.2d 1100 (Ill. 2010); State v. Brown, 930 N.W.2d 840 (Iowa 2019) (adopting *Whren* under the state constitution); State v. Greever, 183 P.3d 788 (Kan. 2008); Stigall v. Com., No. 2007-CA-001880-MR, 2008 WL 4182363 (Ky. Ct. App. 2008); State v. Sherman, 931 So.2d 286 (La. 2006); State v. Sasso, 143 A.3d 124 (Me. 2016) (largely applying *Whren* with mention

Similarly, *Batson* has also been accepted in most jurisdictions.[179] The multiple state supreme courts and justices who have made statements condemning racial injustice have accepted and applied *Whren* and *Batson*.[180] As Part II illustrated, there is solid evidence that these precedents have substantial, disparate impact on racial minorities (African Americans in particular). Now it is time for our courts to get into that "good trouble,

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it may apply a secondary test to consider subjective motivations); Thornton v. State, 214 A.3d 34 (Md. 2019); Com. V. Buckley, 90 N.E.3d 767 (Mass. 2018) (adopting *Whren* under the state constitution); State v. George, 557 N.W.2d 575 (Minn. 1997); Goff v. State, 14 So.3d 625 (Miss. 2009); State v. Brink, 218 S.W.3d 440 (Mo. Ct. App. 2006); State v. Farabee, 22 P.3d 175 (Mont. 2000); State v. Bartholomew, 602 N.W.2d 510 (Neb. 1999); State v. Dickey, 706 A.2d 180 (N.J. 1998); People v. Robinson, 767 N.E.2d 638 (N.Y. 2001); State v. McClendon, 517 S.E.2d 128 (N.C. 1999); State v. Bartelson, 704 N.W.2d 824 (N.D. 2005); Bowling Green v. Godwin, 850 N.E.2d 698 (Ohio 2006); Dufries v. State, 133 P.3d 887 (Okla. Crim. App. 2006); State v. Sleep, 590 N.W.2d 235 (S.D. 1999); Walter v. State, 28 S.W.3d 538 (Tex. Crim. App. 2000); State v. Miller, 438 P.3d 1011 (Utah Ct. App. 2019); Miller v. Chenoweth, 727 S.E.2d 658 (W. Va. 2012); State v. Iverson, 871 N.W.2d 661 (Wis. 2015); Fertig v. State, 146 P.3d 492 (Wyo. 2006). *But cf.* Moran v. State, 162 P.3d 636, 638 (Alaska Ct. App. 2007) (neither accepting nor rejecting *Whren*); *cf.* State v. Ochoa, 206 P.3d 143 (N.M. Ct. App. 2008) (rejecting *Whren* and holding pretext stops as unconstitutional under state constitution); State v. Arreola, 290 P.3d 983 (Wash. 2012) (holding that "mixed-motive" stops are constitutional).

[179] *See*, *e.g.*, Ex Parte Phillips, 287 So.3d 1179, 1215–16 (Ala. 2018); Mooney v. State, 105 P.3d 149 (Alaska 2005); State v. Urrea, 421 P.3d 153 (Ariz. 2018); Lewis v. State, 139 S.W.3d 810 (Ark. Ct. App. 2004); People v. Chism, 324 P.3d 183 (Cal. 2014); People v. Rodriguez, 351 P.3d 423 (Colo. 2015); State v. King, 735 A.2d 267, 279, n.19 (Conn. 1999) (eliminating step one); Sells v. State, 109 A.3d 568 (Del. 2015); Spencer v. State, 238 So.3d 708, 712, 717 (Fla. 2018) (although the court had applied a modification to *Batson*, it appears the court has backed away from that standard); Johnson v. State, 809 S.E.2d 769 (Ga. 2018); State v. Daniels, 122 P.3d 796, 799, n.6, 800 (Haw. 2005) (largely following the *Batson* framework, but applying a de novo standard of review to challenges and providing for more protected categories); State v. Ish, 461 P.3d 774 (Idaho 2020); People v. Houston, 874 N.E.2d 23 (Ill. 2007); Jeter v. State, 888 N.E.2d 1257 (Ind. 2008); State v. Veal, 930 N.W.2d 319 (Iowa 2019); State v. Gonzalez, 460 P.3d 348 (Kan. 2020); Roe v. Commonwealth, 493 S.W.3d 814 (Ky. 2015); State v. Draughn, 950 So.2d 583 (La. 2007); State v. Hollis, 189 A.3d 244 (Me. 2018); Spencer v. State, 149 A.3d 610, 621–22 (Md. 2016) (applying *Batson* to defense counsel); Commonwealth v. Robertson, 105 N.E.3d 253 (Mass. 2018); People v. Knight, 701 N.W.2d 715 (Mich. 2005); State v. Adams, 936 N.W.2d 326 (Minn. 2019); Hardison v. State, 94 So.3d 1092 (Miss. 2012); State v. Meeks, 495 S.W.3d 168, 173 (Mo. 2016) (applying *Batson*, but the first step requiring only that the struck juror is of a "cognizable racial group"); State v. Warren, 2019 MT 49, 439 P.3d 357 (Mont. 2019); State v. Wofford, 904 N.W.2d 649 (Neb. 2017); Mathews v. State, 466 P.3d 1255 (Nev. 2020); State v. Ouahman, 58 A.3d 638 (N.H. 2012); State v. Thompson, 132 A.3d 1229 (N.J. 2016); State v. Salas, 236 P.3d 32 (N.M. 2010); People v. Bridgeforth, 69 N.E.3d 611, 613 (N.Y. 2016) (applying *Batson* but covers more protected categories); State v. Bennett, 843 S.E.2d 222 (N.C. 2020); State v. Galvez, 858 N.W.2d 619 (N.D. 2015); State v. Were, 890 N.E.2d 263 (Ohio 2008); Smith v. State, 157 P.3d 1155 (Okla. Crim. App. 2007); State v. Curry, 447 P.3d 7 (Or. Ct. App. 2019); Commonwealth v. Cook, 952 A.2d 594 (Pa. 2008); State v. Porter, 179 A.3d 1222 (R.I. 2018); State v. Inman, 760 S.E.2d 105 (S.C. 2014); State v. Scott, 829 N.W.2d 458 (S.D. 2013); State v. Kiser, 284 S.W.3d 227 (Tenn. 2009); Davis v. Fisk Elec. Co., 268 S.W.3d 508 (Tex. 2008); State v. Colwell, 994 P.2d 177 (Utah 2000); State v. Yai Bol, 29 A.3d 1249 (Vt. 2011); Bethea v. Commonwealth, 831 S.E.2d 670 (Va. 2019); State v. Boyd, 796 S.E.2d 207 (W. Va. 2017); State v. Lamon, 664 N.W.2d 607 (Wis. 2003); Pickering v. State, 464 P.3d 236 (Wyo. 2020). *But cf.* State v. Jefferson, 429 P.3d 467 (Wash. 2018) discussed *supra* note 48.

[180] *See* cases cited *supra* notes 176–77.

necessary trouble."[181]

While independent analysis of a court's own state constitution and the promulgation of court rules to dismantle *Whren* and *Batson* are all honorable quests, a far more explicit and powerful message from our courts would be the overt act of dismantling and rejecting these two racially oppressive precedents. This is, of course, like all things in life, much easier said than done. We lawyers are taught right out of the gate the supremacy of *stare decisis*, precedent, and the Supreme Court. This is a call to the lower courts to be the administrators of justice they have taken oaths to be.[182]

To that end, this Part provides lower courts with an analytical framework for rejecting *Whren* and *Batson*. This framework draws upon principles of *stare decisis*, namely Justice Kavanaugh's methodology for *stare decisis*; the concept of "perceived versus actual harms" of precedent; and "narrowing from below" as articulated by legal scholar Richard M. Re.[183] While the application of Justice Kavanaugh's approach would suffice for lower courts in overturning their own precedent (i.e., horizontal *stare decisis*) and the Supreme Court should it ever again have the occasion of revisiting *Whren* and *Batson* (though one cannot be too optimistic given the Court just applied *Batson* in 2019 in *Flowers v. Mississippi*), steps two and three of the proposed framework are for the lower courts to take action on *Whren* and *Batson* in spite of "vertical stare decisis."[184]

Specifically, the proposed framework is as follows. Step one requires lower courts to weigh Justice Kavanaugh's three considerations in his *stare decisis* approach; if those considerations weigh in favor of rejecting the precedent, then courts move to step two. Step two of the analysis asks courts to evaluate whether inaction on the precedent will result in continued actual, rather than perceived or theoretical, harms. If this query is answered affirmatively then courts move to the final step. Step three obligates the court to deliberate whether rejecting the precedent will make the Supreme Court more proficient in its rulings. This step draws upon one of four models or views—"the Proficiency Model"—of vertical *stare decisis* discussed by legal scholar Richard M. Re.[185] In the end, if evaluation of all three steps leads the lower court to reject the precedent, then the court can either narrow or overrule the precedent. Under this framework, the lower courts most certainly should narrow or overrule *Whren* and *Batson*.

A. *An Analytical Framework for Dismantling Whren and Batson, Step*

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[181] Am. Const. Soc'y Convention, *supra* note 2.

[182] *See*, *e.g.*, 28 U.S.C.A. § 453 (West); WIS. STAT. ANN. § 757.2 (West 2020).

[183] *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

[184] Flowers v. Mississippi, 139 S. Ct. 2228, 2234–38 (2019).

[185] Re, *supra* note 183, at 939–40.

One: The Use of Justice Kavanaugh's Stare Decisis Methodology[186]

Particularly in moments of social change and progress, the Supreme Court has untethered itself from burdensome, outdated precedent.[187] If courts stubbornly cling to prior case law that is no longer principled or just, the legitimacy of the judiciary becomes apocryphal. Indeed, "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[188]

On the other hand, *stare decisis* carries with it a predictability and, arguably, a sense of certainty that can positively impact our society and its relationship to the courts and law. As Chief Justice Roberts recently noted, *stare decisis* "brings pragmatic benefits. Respect for precedent 'promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"[189]

What then tips the scales one way or the other, for or against the application of *stare decisis* by our courts? Although the answer supposedly lies in a discussion of a multitude of factors that the Supreme Court has applied on an ad hoc basis, *stare decisis* has been in somewhat of a disarray until very recently (in April 2020) when *Ramos v. Louisiana* was decided.[190]

1. *The Casey factors and the vortex that is stare decisis*

Stare decisis might be best understood as inapposite to the frequently cited mantra: "Don't let your past define your future." *Stare decisis*, definitionally, is that the past controls the future. There are two recognized types of *stare decisis*—horizontal and vertical *stare decisis*. Horizontal *stare decisis* is when a court is bound by its own precedents unless it finds, in consideration of the principles of *stare decisis*, that it should not be so bound.[191] Vertical *stare decisis*, however, is when a court is bound by a

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[186] We all watch and wonder whether Justice Kavanaugh (and any of his other colleagues) will seek to dismantle *Roe v. Wade* one day. After *Ramos v. Louisiana*, there will certainly be more scholarship in this area. Although such research and comment are beyond this article, it is worth noting here that given the framework he set out in his concurrence in *Ramos*, Justice Kavanaugh may have great difficulty in taking on *Roe*. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1410–20 (2020).

[187] *See*, *e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); Lawrence v. Texas, 539 U.S. 558 (2003); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[188] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 866 (1992) (plurality).

[189] June Med. Serv., L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (C.J. Roberts, dissenting) (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

[190] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1404 (2020).

[191] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF. L. REV. 1441, 1467 (2004).

higher court's (such as the Supreme Court's) precedents.[192] Complicating things for the lower courts, some commentators have remarked that is it is "settled law" that lower courts should abide by "vertical precedent."[193] Justice Stevens went as far as accusing a lower court of "'engag[ing] in an indefensible brand of judicial activism' when it 'refused to follow' a 'controlling precedent' of the Supreme Court."[194]

The Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* offers one of the most comprehensive discussions of horizontal *stare decisis* (where the Supreme Court was analyzing its own precedent) prior to *Ramos*. At issue in *Casey* were five provisions of Pennsylvania's Abortion Control Act of 1982 (as amended in 1988 and 1989), placing limitations on abortion in spite of the precedent of *Roe v. Wade*.[195] It has been noted that *Casey* is where *stare decisis* is "most comprehensively formulated and defended."[196] Indeed, "one searches the first 500 volumes of the U.S. Reports in vain for a full-blown theory or doctrine of precedent. Think about it: after over 200 years in operation, *Casey*, 1992, is the Court's first grand theology of precedent[.]"[197]

In reaffirming *Roe*, the *Casey* court applied factors in assessing the continued utility of *Roe* along with "an additional set of prudential, policy, and (seemingly) political judgments to lay on top of the more-legal factors."[198] The court analyzed factors and notions of workability (and/or judicial efficiency), reliance, abandonment, "changed facts," societal views (i.e., changed perceptions), and judicial integrity.[199] No factor "is treated as dispositive; none is identified as essential; the relative weight of each is unclear."[200]

As to the "workability" factor, the inquiry is whether a prior rule previously announced "has proven to be intolerable simply in defying

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[192] *Id.*

[193] *Id.* at 1466–67.

[194] *Id.* at 1466 (quoting Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 486 (1989) (Stevens, J., dissenting). "This statement [was] unanimous because the four dissenters explicitly agreed with the majority's statement on this point," though the majority did not use the term "judicial activism." Kmiec, *supra* note 191, at 1466 n.155 (citing *Rodriguez de Quijas,* 490 U.S. at 484).

[195] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 844 (1992); *see also* Roe v. Wade, 410 U.S. 113 (1973).

[196] Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1166 (2008).

[197] *Id.* at 1169.

[198] *Id.* at 1172.

[199] *See generally id.* at 1172–75, 1177–85, 1192–94, 1198–99; *see also Casey*, 505 U.S. at 845, 854–56, 863–64, 869.

[200] Paulsen, *supra* note 196, at 1172.

practical workability."[201] The *Casey* court held that *Roe* was not "unworkable," and, rather, represented "a simple limitation beyond which a state law is unenforceable."[202] The Court noted that the judicial assessments of state laws affecting abortion rights that occurred in the wake of *Roe* have fallen "within judicial competence."[203] A commentator attempting to unpack this analysis of workability/unworkability has noted:

> [A] precedent or line of precedents . . . tends to be thought "unworkable" where there exists no readily discoverable, judicially manageable standards to guide judicial discretion or where the purported "rule" supplied by precedent seems to require judicial policy determinations of a kind not appropriate for courts to be making.[204]

Perhaps closely aligned with "workability" is the concept of judicial efficiency. "The Court's discussion of stare decisis in *Casey*, before plowing through specific factors one at a time, began with the idea of efficiency, noting that the idea of following precedent 'begins with necessity, and a contrary necessity marks its outer limit.'"[205] The Court, wary of coming to every single issue anew, highlighted the importance of precedent, but also indicated the outer limit where the necessity to discard precedent would arise "if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."[206]

Another factor in *Casey* was the assessment of reliance interests in the perpetuation of the existing rule. That is, "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."[207] The Court's goal here is to comprehend what the reliance costs would be to those who have steadily leaned on the precedential value of the rule under scrutiny.[208] Arguably, part of that calculus, per the *Casey* court, is the societal interests in continuing on with the old rule, or "social reliance."[209] It has been highlighted that "*Casey* appears to broaden the inquiry, framing the question of reliance as whether changing a legal interpretation to correct a perceived

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[201] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992); *see also* Paulsen, *supra* note 196, at 1173.

[202] *Casey*, 505 U.S. at 855.

[203] *Id.*

[204] Paulsen, *supra* note 196, at 1173; *see also Casey*, 505 U.S. at 855.

[205] Paulsen, *supra* note 196, at 1174 (quoting *Casey*, 505 U.S. at 854).

[206] *Casey*, 505 U.S. at 854; *see also* Paulsen, *supra* note 196, at 1175.

[207] *Casey*, 505 U.S. at 854.

[208] *Id.* at 855; *see also* Paulsen, *supra* note 196, at 1177–78.

[209] Paulsen, *supra* note 196, at 1180.

error would cause 'significant damage to the stability of the society governed by' the rule in question."[210]

On the other end of the spectrum of reliance costs, however, is where societal interests in continued application of precedent carry much less weight than reliance interests related to individual rights. For example,

> "The holding in *Bowers [v. Hardwick]*," wrote Justice Kennedy for the Court, "has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual *or societal* reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so."[211]

The balance of individual or societal reliance costs seems to be in the "eye of the beholder," in that the "Court sometimes accords social reliance significant weight and sometimes it does not. (The cynic might be inclined to say that the choice depends on the Court's social policy preferences.)."[212]

The next *Casey* factor, and perhaps the simplest, is "whether a precedent decision's premises, analysis, or holding have been significantly (or significantly *enough*) undermined by a subsequent case or by subsequent cases that the precedent" has essentially been abandoned.[213]

The *Casey* court also asked, "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," i.e., the "changed facts" factor.[214] It has been argued, however, that:

> [I]f changes in factual circumstances mean precedent no longer *applies* to very many real-world situations—its relevance has been overtaken by historical changes—that scarcely seems a reason to change the governing legal interpretation and abandon the precedent. Presumably, the precedent might still be right; it simply does not matter

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[210] *Id.* (quoting *Casey*, 505 U.S. at 855).

[211] Paulsen, *supra* note 196, at 1182 (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003) (emphasis added)).

[212] Paulsen, *supra* note 196, at 1182. Significantly, Paulsen, in demonstrating the problems with the "reliance" factor, maintains that, for example, "*Plessy* [*v. Ferguson*] was as wrong as wrong precedent can be," but that "[i]f 'reliance' and stability interests ever should counsel against overruling a precedent, under the reasoning of *Casey*, *Plessy* would have been such a case. But that cannot possibly be right, can it?" *Id.* at 1184.

[213] *Id.* at 1184–85; *see also Casey*, 505 U.S. at 855.

[214] *Casey*, 505 U.S. at 855.

much anymore.[215]

The *Casey* court's "changed facts" (or "changed perceptions") analysis centered primarily on *Plessy v. Ferguson* (1896) to *Brown v. Board of Education* (1954).[216] "Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was . . . fundamentally different from the basis claimed for the decision in 1896."[217] It has been noted that while *Plessy* clearly needed to be rejected:

> [T]he ["changed facts"] factor, as used in *Casey* to explain the propriety of the Court's repudiation . . . entails a subtle and disturbing implication—almost impossible to reconcile with the other factors comprising the Court's stare decisis doctrine—*that the meaning of the Constitution properly depends on how society views social facts at different times*.[218]

This has the potential to swallow the entirety of *stare decisis* analysis based on the current temperament of the judiciary as informed by a majoritarian society's beliefs and interests. This poses a whole other line of inquiry as to whether the judiciary is tasked with, *inter alia*, promoting social norms or what is "morally" right versus wrong.

Finally, the *Casey* court was concerned with judicial integrity. In a nutshell, this factor queries:

> [W]hether, even if a precedent is thought erroneous, it would seem arbitrary, capricious, or fickle for the Court to be changing its mind too often or too readily (especially if its decisions change along with personnel changes) or to be changing its interpretation in response to public, or political, or even scholarly criticism or pressure.[219]

As the *Casey* court acknowledged:

> There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to

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[215] Paulsen, *supra* note 196, at 1192.

[216] *Casey*, 505 U.S. at 863.

[217] *Id.*

[218] Paulsen, *supra* note 196, at 1194; *see also id.* at 1192–93.

[219] *Id.* at 1198.

> drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.[220]

On the other hand, with the evolution of societal thought and tolerance or, perhaps better put, acceptance, should the Nation's highest court not also so evolve?

One could efficiently wrap up the *Casey* factors as follows: "[t]he end result of this inquiry is that the current doctrine of stare decisis does not require adherence to the current doctrine of stare decisis."[221] Perhaps for good reason, the doctrine has been called "embarrassingly unworkable."[222] Most problematic with the *Casey* factors is that the factors are tethered to an extremely broad inquiry—should *stare decisis* apply or not? Instead, a far better approach, one that is crafted by Justice Kavanaugh, is that the *Casey* factors and related questions ought to be tethered to several inquiries that serve as a compass in answering the overarching probe of whether *stare decisis* should be followed or not.

2. *The Ramos Court's focus on race and Justice Kavanaugh's foothold for disparate impact to become legally significant*

In April 2020, we saw the Court's willingness to engage in critical analysis of race as a factor in our criminal procedure jurisprudence. *Ramos v. Louisiana* dealt with the utility of continuing (in the states of Louisiana and Oregon) *Apodaca v. Oregon* (1972), where the Supreme Court held that unanimous verdicts were not constitutionally required in criminal trials under the Sixth and Fourteenth Amendments.[223] It is critical, and extremely poignant when considering the future existence (or demise) of *Whren* and *Batson*, that the Supreme Court so candidly and openly discussed the history of racism and its role in the *Apodaca* decision. The *Ramos* opinion gives us hope that the current Supreme Court is ready and willing to reckon with both the historical and continued presence of racial injustice in its criminal procedure jurisprudence.

At the outset of *Ramos*, the Supreme Court demonstrates its willingness to engage in intellectual honesty about the racial backdrop of some of its criminal procedure jurisprudence. It is all about race from the beginning of *Ramos*; encouragingly, the opinion recognizes the injustice of rules and laws that are "facially race-neutral," but are, nevertheless, tethered to the

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[220] *Casey*, 505 U.S. at 866.

[221] Paulsen, *supra* note 196, at 1167.

[222] *Id.*

[223] *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020); *see also* Apodaca v. Oregon, 406 U.S. 404 (1972).

promotion of racism.[224] The Supreme Court also appears to acknowledge the injustice of racial disparities in its discourse on race and its historical position in both Louisiana and Oregon as it pertains to non-unanimous verdicts.

First, Justice Gorsuch went back to the nineteenth century by describing a Louisiana state constitutional convention in 1898. At this convention, there was an endorsement for non-unanimous verdicts for serious crimes seeking to "'establish the supremacy of the white race,' and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements."[225] Justice Gorsuch noted that, in a successful attempt to circumvent both "unwanted national attention" (that would result from the recent U.S. Senate's call for an investigation into Louisiana's exclusion of African Americans from juries) and the Fourteenth Amendment, Louisiana delegates at the convention crafted an alleged "race-neutral" mechanism to render African American juror contributions moot.[226] "With a careful eye on racial demographics, the convention delegates sculpted a 'facially race-neutral' rule permitting ten-to-two verdicts in order to 'ensure that African American juror service would be meaningless.'"[227] Justice Gorsuch also addressed the state of Oregon's history of racism, tracing non-unanimous verdicts in that state back "to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"[228]

Next, in her concurrence, Justice Sotomayor stated that, in part, she wrote separately because "the racially biased origins of the Louisiana and Oregon laws uniquely matter here."[229] In particular, Justice Sotomayor took issue with the Louisiana and Oregon state legislatures' failure to reckon with the discriminatory purpose and effect of the laws they issued. She wrote, "Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here."[230]

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[224] *Id*. at 1394.

[225] *Id.* (first citing OFF. J. OF THE PROC. OF THE CONST. CONVENTION OF THE STATE OF LA. 374 (H. J. Hearsey ed. 1898); then citing Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 HARV. L. REV. 279, 286–87 (1899); and then citing Louisiana v. United States, 380 U.S. 145, 151–53 (1965)).

[226] *Id*.

[227] *Id.* (quoting State v. Maxie, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018), App. 56–57) (citing Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018)).

[228] *Id.* (quoting State v. Williams, No. 15-CR-58698 (C.C. Ore., Dec. 15, 2016), App. 104).

[229] *Id.* at 1408 (Sotomayor, J., concurring in part).

[230] *Id.* at 1410.

Justices Gorsuch and Sotomayor were troubled by the overt racism that led to the institution and continuation of alleged race-neutral laws in Louisiana and Oregon; however, Justice Kavanaugh took it a step further when he, albeit nominally, expressed that disparate impact without per se overt racism matters. Justice Kavanaugh joined Justice Gorsuch in a historical discussion of race in Louisiana, referring to the 1898 state convention and its approval of "non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African Americans, especially in voting and jury service."[231] Justice Kavanaugh diverged from the other two justices in his discussion on race when he claimed an intolerance for racially discriminatory effects. Justice Kavanaugh queries, *inter alia*, "[w]hy stick by an erroneous precedent . . . that tolerates and reinforces a practice that is thoroughly racist in its origins *and has continuing racially discriminatory effects*?"[232]

In perhaps a narrow, but still noteworthy manner, Justice Kavanaugh acknowledged a foothold for disparate impact to matter through the lens of *stare decisis* analysis. While Justice Kavanaugh, much like Justices Gorsuch and Sotomayor, was clearly troubled by the racist origins of non-unanimous verdicts, he also indicated that its continued racially discriminatory effects are problematic. Justice Kavanaugh homes in on the discriminatory effects of non-unanimous verdicts when he wrote:

> Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The [ten] jurors "can simply ignore the views of their fellow panel members of a different race or class." That reality—and the resulting perception of unfairness and racial bias—can undermine the confidence in and respect for the criminal justice system. The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors. In effect, the non-unanimous jury allows backdoor and unreviewable

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[231] *Id.* at 1417 (Kavanaugh, J., concurring in part) (first citing THOMAS AIELLO, JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA 16–26 (2015); and then citing Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1620 (2018)).

[232] *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring in part) (emphasis added). Noteworthy is that Justice Sotomayor mentioned both "discriminatory taint" and "discriminatory effect" in her concurrence, but was not as explicit about this as Justice Kavanaugh. *See id.* at 1410 (Sotomayor, J., concurring in part). In her analysis of Louisiana's reenactment of the law at issue, she noted that "Louisiana's perhaps only effort to contend with the law's discriminatory purpose and *effects* came recently, when the law was repealed altogether." *Id.*

> peremptory strikes against up to [two] of the [twelve] jurors.[233]

Lower courts should be discussing race and its interaction with *Whren* and *Batson* like the Supreme Court did in *Ramos*. Though perhaps not as overtly racist, the origins of *Whren* and *Batson* are arguably very similar to *Ramos's* roots. While there was no constitutional convention that involved explicit proclamations of the supremacy of the white race, both *Whren* and *Batson* were decided in questionable periods of our nation's history. Both cases were decided during a time where Black men were rapidly and disproportionately sent to prison.[234] At the time of *Whren*, racial animus in parts of our country was extremely high following the cruel, senseless beating of Rodney King.[235] In the face of all of this, the *Whren* court mustered the confidence to tell us that race did not matter in police contacts.

Further, the *Batson* court crafted a test that embraced colorblindness in an effort to dissuade overt racism in the exercise of peremptory challenges by the government, even though, at the time of *Batson*, there were very few published cases demonstrating overt, explicit racism during jury selection by the government.[236] Indeed, *Batson* created a race-neutral test to deal with a race-neutral problem.

Non-unanimous jury verdicts and the law established in *Whren* and *Batson* share common origins— the perpetuation of a criminal justice system centered on social control, not crime control.[237] As the non-unanimous verdict suppresses the voices of minority jurors and serves as a mechanism to keep those jurors in check, *Whren* authorizes the over-policing and targeting of racial minorities and over-includes African Americans in one of the most powerless chairs of the courtroom, that of the defendant. In addition, *Batson* ensures the continued exclusion of racial minorities as decision-makers in a process that looks more and more like it

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[233] *Id.* at 1418 (Kavanaugh, J., concurring in part).

[234] *See supra* notes 101–107.

[235] *See supra* notes 105–107.

[236] *See* Batson v. Kentucky, 476 U.S. 79, 10 (Marshall, J., dissenting) ("Although the means used to exclude blacks have changed, the same pernicious consequence has continued.") (first citing Strauder v. West Virginia, 100 U.S. 303 (1880); then citing Swain v. Alabama, 380 U.S. 202, 231–58 (1965) (Goldberg, J., dissenting); then citing Roger S. Kuhn, *Jury Discrimination: The Next Phase,* 41 S. CAL. L. REV. 235 (1968); and then citing JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 155–57 (1977)). Notably, in *State v. Washington*, a prosecutor "admitted that he had 'utilized a large percentage of his peremptory challenges in the exclusion of blacks,' but he stated he did not do so 'on the basis of color' rather 'on the nature of the case, the intelligence of the juror, and on whether or not the juror could related, not only to me as a person, but to the theory of my case." State v. Washington, 375 So. 2d 1162, 1163 (La. 1979).

[237] ALEXANDER, *supra* note 9, at 21 (describing how following the collapse of one system of control, such as slavery and Jim Crow, there is a transition period where "backlash intensifies and a new form of racialized social control begins to take hold"); *id*. at 21–22.

was designed for the control of certain people, not for "blind justice."

3. *Justice Kavanaugh's stare decisis methodology*

Justice Kavanaugh's concurrence in *Ramos* provided courts with a step-by-step "how-to" in reckoning with the past and tearing down these "monuments" of racial injustice that remain in our criminal procedure jurisprudence. As noted previously, *stare decisis* is not a model that exemplifies clarity; given its complete disarray, it is open to criticism of simply being results-oriented or a gateway for judicial activism.[238] *Stare decisis* desperately needed synthesis and organization; enter Justice Kavanaugh's approach in *Ramos*.

a. *Justice Kavanaugh's three considerations for the applicability of stare decisis*

In *Ramos*, Justice Kavanaugh addressed a central problem of *stare decisis*—the doctrine seems to have endless factors floating about that attempt to answer whether it should be applied. As Justice Kavanaugh noted, "the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together."[239] Justice Kavanaugh then provided us with that roadmap by proposing three considerations for whether the doctrine of *stare decisis* should be applied in cases going forward.

The first consideration was whether "the prior decision is not just wrong, but grievously or egregiously wrong?"[240] Justice Kavanaugh described this inquiry as more than a "garden-variety error or disagreement."[241] Factors that courts may consider in this inquiry are "the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors."[242] Justice Kavanaugh cites to *Korematsu v. United States* and *Plessy v. Ferguson* as cases that were egregiously wrong when they were decided.[243] He also provides an example, *Nevada v. Hall*, of where a case "may be unmasked as egregiously wrong or based on later legal or factual

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[238] *See* Kmiec, *supra* note 191, at 1466–67.

[239] Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

[240] *Id.*

[241] *Id.*

[242] *Id.* at 1414–15.

[243] *Id.* at 1415; *see also* Korematsu v. United States, 323 U.S. 214 (1944); Plessy v. Ferguson, 163 U.S. 537 (1896).

understandings or developments."[244]

The second inquiry proffered by Justice Kavanaugh is whether "the prior decision caused significant negative jurisprudential or real-world consequences?"[245] Justice Kavanaugh indicated that courts may consider factors such as "workability" and "consistency and coherence with other decisions" again.[246] Justice Kavanaugh further stated that courts "may also scrutinize the precedent's real-word effects on the citizenry, not just its effects on the law and the legal system."[247] Here, Justice Kavanaugh cited *Brown v. Board of Education* as one such example.[248]

The third and final consideration developed by Justice Kavanaugh is whether "overruling the prior decision [would] unduly upset reliance interests?"[249] Much like the *Casey* court utilized this factor, "[t]his consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent."[250] Factors considered by the court here include, *inter alia*, "a variety of reliance interests and the age of the precedent."[251] Notably, the "variety of reliance interests" here appeared to embrace *Casey's* inclusion of "society's interests," as does Justice Gorsuch's majority opinion in *Ramos* where he stated, "[i]n its valiant search for reliance interests, the dissent somehow misses maybe the most important one: the reliance interests of the American people."[252]

Justice Kavanaugh is quite candid that, although this "structure methodology and roadmap" in deciding whether or not to adhere to stare decisis is better organized, its application "is not a purely mechanical exercise . . . ."[253] Nonetheless, Justice Kavanaugh writes that "[t]he three considerations correspond to the Court's historical practice and encompass various individual factors that the Court has applied over the years as part of the stare decisis calculus."[254] He also notes that they are consistent with the founding principle that "overruling is warranted when (and only when) a

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[244] *Ramos*, 140 S. Ct. at 1415; *see also* Nevada v. Hall, 440 U.S. 410 (1979), *overruled by* Franchise Tax Bd. of California v. Hyatt, 139 S. Ct. 1485, 1492 (2019) (overruling *Hall* under *stare decisis* finding that the states "retain their sovereign immunity from private suits brought in the courts of other [s]tates.").

[245] *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

[246] *Id.*

[247] *Id.*

[248] *Id.*; *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[249] *Ramos*, 140 S. Ct. at 1415.

[250] *Id.*; *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854–55 (1992).

[251] *Casey*, 505 U.S. at 854–55.

[252] *Ramos*, 140 S. Ct. at 1408 (majority opinion); *see also* Paulsen, *supra* note 196, at 1180, 1182 (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

[253] *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

[254] *Id.*

precedent is 'manifestly absurd or unjust.'"[255]

b. *Application of Justice Kavanaugh's analytical framework to Whren and Batson*

Justice Kavanaugh's *stare decisis* analysis is instructive in evaluating the continuing viability of *Whren* and *Batson*, with particular focus on his application of considerations two and three in *Ramos*. When extrapolating Justice Kavanaugh's *Ramos* analysis to *Whren* and *Batson*, it is evident that these two cases no longer deserve the protection of *stare decisis*—vertical or horizontal.

In *Ramos*, Justice Kavanaugh began his examination of the utility of *stare decisis* and its application with his first consideration—whether *Apodaca* is egregiously wrong. Although his application of this first consideration is not entirely on point, as *Whren* and *Batson* were not "outliers" of their time, the understanding of the importance of factual developments under this consideration cannot be overstated.[256] One of the factors to examine in this inquiry, per Justice Kavanaugh, is "changed facts."[257] The substantial research conducted in North Carolina on traffic stops may not necessarily show "changed facts," as there is evidence racial profiling was prevalent before (and at the time) of *Whren*, but the *Casey* court, in analyzing this factor, noted that when facts "come to be seen so differently, as to have robbed the old rule of significant application or justification," such as in *Brown v. Board of Education*, then that is reason to reject the precedent.[258] The research and data demonstrating factually what is happening on traffic stops and how African Americans are disproportionately harmed is striking. It is not too far afield to say that how we view traffic stops has "come to be seen so differently" as to make *Whren* look like the modern-day *Plessy v. Ferguson* in need of a *Brown*.

Similarly, the research on *Batson*, as produced in the Berkeley Death Penalty Clinic June 2020 report, shows what Justice Marshall already knew, but *Purkett* was blind to; that is, race-neutral explanations would circumvent any, perhaps rhetorically stated, goal of addressing the systemic exclusion of African Americans from juries by the Supreme Court.[259] *Batson* no longer has significant application (nor did it ever) as it is so easily thwarted by the

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[255] *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 70).

[256] Justice Kavanaugh found that *Apodaca* was egregiously wrong, noting that *Apodaca* was an outlier in the Supreme Court's jurisprudence even when it was decided. He also noted that the original meaning and the Court's prior cases illustrate that the Sixth Amendment required unanimous verdicts. *Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring in part).

[257] *Id.* at 1414.

[258] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855, 863 (1992); *see also* ALEXANDER, *supra* note 9, at 133 (detailing 1990's data on racial profiling).

[259] *See* Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring); *see also* Purkett v. Elem, 514 U.S. 765, 768 (1995).

litany of alleged race-neutral explanations offered by the prosecution.

It is true that it was earlier noted that "changed facts" analysis has the potential to swallow the entirety of *stare decisis* analysis based on the temperament of the bench affected by a majoritarian society's beliefs and interests. In addition, as noted previously, this begs the question of whether the courts are tasked with promoting social norms or what is "morally" right versus wrong. It is therefore necessary for all of Justice Kavanaugh's considerations to be viewed together and balanced by the courts.

The second inquiry proffered by Justice Kavanaugh is whether "the prior decision caused significant negative jurisprudential or real-world consequences?"[260] In *Ramos*, Justice Kavanaugh found that although *Apodaca* was "workable," it caused "significant negative consequences."[261] This is where Justice Kavanaugh discusses race, both the history of racism related to *Apodaca's* rule as well as its "continued racially discriminatory effects."[262] In addition to what is detailed *supra* in section B, Justice Kavanaugh stated that "the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling, in my respectful view."[263] He goes on to cite to *Pena-Rodriguez v. Colorado* for the proposition that the Supreme Court "has emphasized time and time again the 'imperative to purge racial prejudice from the administration of justice' generally and from the jury system in particular."[264]

For *Whren,* the primary negative real-life consequence is that African Americans are stopped by police at an astronomically higher rate than whites, but for little reason other than (quite likely) their race. These consequences can be demonstrated in statistical form. For example, per Baumgartner et al.'s findings, in the year 2010 alone, Black motorists were sixty-three percent more likely to be pulled over than whites.[265] Black drivers made up 51.85% of "investigatory" stops (as defined by Baumgartner et al.), where the stop is more likely to serve as a pretext. Black drivers stopped are 115% as likely as whites to be searched.[266] Police are twenty-two percent less likely to find evidence on Black drivers following consent searches and twelve percent less likely to find evidence subsequent to searches allegedly based on probable cause, demonstrating "that officers are either worse at making probable cause assessments as to whether black motorists have contraband or have a lower threshold for what qualifies as

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[260] Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

[261] *Id.* at 1417.

[262] *Id.* at 1418–19.

[263] *Id.* at 1418.

[264] *Id.* (quoting Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017)).

[265] *See supra* Part II(D).

[266] *See supra* Part II(D).

cause when interacting with a black driver."[267] The truth is that African Americans are over-included in our criminal justice system as targets.

While there is apparently plenty of room for African Americans at the defense counsel table, there is a corresponding paucity of room in the jury box. For *Batson*, the principal negative real-life consequence is that African Americans are being over-excluded as the decision-makers in our courtrooms. As Part II demonstrated, out of 683 cases (where *Batson* challenges were at issue) decided by the California Courts of Appeal over the span of twelve years, in approximately seventy-two percent of those cases, the prosecution used peremptory challenges against African American jurors.[268] In addition, this research shows *Batson's* utter lack of utility and how easy it is to circumvent a purposeful discrimination finding by making up any "silly" or "ridiculous" reason for the peremptory strike against a racial minority.[269] It also demonstrates how "race-neutral" justifications can be linked to systematic racism through the over-inclusion of racial minorities in the criminal justice system. For example, frequent "race-neutral" reasons for striking a racial minority were "a prospective juror's relationship with someone who had been involved in the criminal legal system," or "a prospective juror expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially-and/or class-biased.[270]

These real-world consequences of *Whren* and *Batson* are not only negative, but also (literally, not theoretically) harmful. Therefore, *Whren* and *Batson* "fail" the second consideration of Justice Kavanaugh's *stare decisis* approach.[271]

Finally, under Justice Kavanaugh's third consideration the reliance interests are considered. That analysis primarily focuses on what the resultant costs will be to those who have relied upon the precedent if overturned. It has also been construed as an accounting of society's interests.[272] Justice Kavanaugh found that the reliance costs of overturning *Apodaca* were minimal, highlighting that other than "the effects on that limited class of directed review cases, it will be relatively easy going forward for Louisiana and Oregon to transition to the unanimous jury rule that the

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[267] *See supra* Part II(D).

[268] *See supra* notes 101–107 and accompanying text; *see also supra* notes 120–123.

[269] *See supra* notes 101–107 and accompanying text; *see also supra* note 126.

[270] *See supra* notes 101–107 and accompanying text; *see also supra* notes 126–128.

[271] Justice Kavanaugh recognizes that courts will disagree on how to balance the considerations as well. *See* Ramos, 140 S. Ct. at 1416 (Kavanaugh, J., concurring in part). The word "failure" is used here to indicate that *Whren* and *Batson* do not impress on whether they should be adhered to considering their negative, harmful consequences in the real world.

[272] *See supra* Part III(C)(2).

other [forty-eight] states and the federal courts use."[273]

To be sure, the reliance costs on law enforcement in overturning *Whren* will be significant, but not unduly burdensome. No longer will police be permitted to stop citizens to investigate situations for which they have no cause under the guise of a minimal traffic code violation. Nevertheless, it does not necessitate a leap in logic to say that police officers will, in fact, continue to stop drivers for traffic code violations and will still ask for consent or use their understanding of probable cause to investigate beyond such violations. However, without *Whren*, they would be required to articulate that the traffic code violation was the actual reason for the stop and that the stop would not progress further without the appropriate cause. In addition, police officers would be heavily scrutinized on how the stop progresses to limit pretextual stops. This is not that different from what police officers are already required to do under other precedent, such as *Terry v. Ohio*.[274] Further, it ought to be axiomatic by now what the reliance interests of the American people are in seeing that *Whren*, be overturned.[275]

As to the rejection of *Batson*, the reliance costs to the prosecution will be minimal, particularly considering suggested reforms. If the prosecution has a legitimate reason to exclude a minority juror from the panel, it should not be difficult to tether this exclusion to a strategic trial decision or theory. The elimination of *Batson* will bring with it reform efforts, such as what the *Jefferson* court did in Washington; it will not result in the total loss of peremptory challenges, but, rather, only the racially biased ones. Society's interest in including African Americans (and other racial minorities) on juries heavily outweighs the prosecution's implicit biases and assumptions made during the exercise of its peremptory challenges. This third and final consideration weighs heavily in favor of overturning *Whren* and *Batson*.

In sum, the scales tip heavily toward justice under Justice Kavanaugh's analytical framework and towards uprooting *Whren* and *Batson* from our criminal procedure jurisprudence. These two pillars of racial injustice are "manifestly unjust."[276]

If that was the only change necessary to address *stare decisis*, then the analysis could end here. However, the truth is, the Supreme Court only accepts review and takes on a comparatively insubstantial number of cases

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[273] Ramos v. Louisiana, 140 S. Ct. 1390, 1419 (2020) (Kavanaugh, J., concurring in part).

[274] *See* Terry v. Ohio, 392 U.S. 1 (1968). In seizing individuals short of de facto arrest or formal arrest, officers are required to articulate reasonable suspicion for such seizure; in addition, the scope or progression of that seizure is scrutinized for its relationship to what inspired the initial inception of the seizure. *See id.* at 19–21.

[275] *See Ramos*, 140 S. Ct. at 1408.

[276] *Id.* at 1415 (Kavanaugh, J., concurring in part) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 70).

a year.[277] Our lower courts are therefore best positioned to take on the injustices of *Whren* and *Batson*; however, the Supreme Court has simply stated that its precedent is its own "prerogative," and that the lower courts should accept it and move on.[278] What, then, can be done by the lower courts due to the supremacy of the Supreme Court and the principles of vertical *stare decisis*?

B. *The Persistence of the Framework for Dismantling Whren and Batson Despite Vertical Stare Decisis, Step Two: "Perceived Harms Versus Actual Harms" Analysis*

After strong admonitions from the Supreme Court, such as its 2016 reiteration that "[i]t is this Court's prerogative alone to overrule one of its precedents," lower courts will be hesitant to directly overturn "vertical precedent" out of fear of being labeled judicial activists.[279] However, the Supreme Court's inertia in overturning *Whren* and *Batson* (and the lower courts' perpetuation of these cases) in light of the real-world consequences and impacts for racial minorities is oppressive.[280]

Many lower courts will feel constricted in what they can do about *Whren* and *Batson* because of their internalization of the principles of vertical *stare decisis*.[281] In short, vertical *stare decisis* is the Supreme Court telling the lower courts "respect our authority." It broadcasts to the lower courts that errors or problems with Supreme Court precedent is best left to the High Court to correct, accentuating "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[282] Although state courts—thanks to federalism—may have more leeway in interpreting Supreme Court precedent, it can be equally argued that state courts are more restricted in their interpretation of

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[277] The Supreme Court accepts approximately 100 to 150 of the more than 7,000 cases where the Court's review is sought each year. *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Aug. 8, 2020). This last term, the Court granted review in seventy-one cases.

[278] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); *see also* Hutto v. Davis, 454 U.S. 370, 375 (1982).

[279] Bosse v. Oklahoma, 137 S. Ct. 1 (2016) (quoting United States v. Hatter, 532 U.S. 557, 567 (2001) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (internal quotation marks omitted))); *see* Kmiec, *supra* note 191, at 1466; *see also Ramos*, 140 S. Ct. at 1416, n.5 (Kavanaugh, J., concurring in part) (citing *Rodriguez de Quijas*, 490 U.S. at 484); *see also Hutto*, 454 U.S. at 375.

[280] *See supra* notes 109–156.

[281] *See* Re, *supra* note 183, at 949, 949 n.125 (citing RICHARD A. POSNER, HOW JUDGES THINK 45 (2008) ("Lower court judges follow Supreme Court precedent less out of fear of reversal if they do not than because (in my terms) adhering to precedents created by a higher court is one of the rules of the judicial 'game' that judges internalize.").

[282] *Hutto*, 454 U.S. at 375.

such precedent.[283]

Lower courts would do well to recall that courts are not forever bound by prior decisions; rather, the rule (or perhaps better put, the judicial policy) of *stare decisis* is not static, and is not an "inexorable command."[284] Significantly, "the doctrine of stare decisis is not constitutionally required, in any sense, and has never been so understood."[285] As opposed to a black letter law or an inherent power of the judiciary, "the doctrine of stare decisis is one of policy and practice only . . . ."[286] Thus, although the Supreme Court has thrown around its weight and announced that its precedent is its own "prerogative," lower courts should remain undeterred by this policy or practice, remembering that a Supreme Court ruling is not black letter law nor an "inexorable command" according to the Supreme Court itself.[287]

The second step of the proposed framework for the lower courts to reckon with *Whren* and *Batson* is related to Justice Kavanaugh's second consideration, namely, whether "the prior decision caused significant negative jurisprudential or real-world consequences?"[288] However, rather than looking solely at the real-world consequences, lower courts should also interrogate the results of continued inaction. More specifically, will the lower courts' own inertia result in perceived (merely theoretical) harms or actual harms? One commentator has discussed the concept of "perceived harms" within the context of *stare decisis* analysis, concluding that "perceived harms" are not appropriate in examining whether a precedent should be overruled.[289] Similarly, if the evidence of real-world consequences demonstrates that the harms were isolated or will not continue with inaction, then lower courts could feel free to allow the precedent to stand.

As shown in Part II, the real-world consequences of *Whren* and *Batson* are not isolated to any particular time; rather, there is substantial evidence

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[283] "Federalism considerations may counsel in favor of affording state courts more leeway to narrow from below. For instance, even though the Supreme Court can review state court rulings on federal law, state courts are not referenced as 'inferior courts' in Article III [section 1 of the Constitution] and may not be subject to the Court's 'supervisory power.'" Re, *supra* note 183, at 937 n.79 (citing Amy Coney Barrett, *The Supervisory Power of the Supreme Court,* 106 COLUM. L. REV. 324, 342 nn.77–78 (2006)). Nevertheless, it can also be effectively argued that state courts are constrained in their attempt at independent state constitutional analysis. *See* Katharine Goodloe, *A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations,* 35 N.Y.U. REV. L. & SOC. CHANGE 749, 758–65 (2011).

[284] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992).

[285] Paulsen, *supra* note 196, at 1169.

[286] *Id.* at 1170.

[287] *See Casey*, 505 U.S. at 854.

[288] Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

[289] *See* Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 827 (2018) (asserting that "[o]ne potential takeaway [from Chief Justice Roberts' concurrence in *Citizens United v. F.E.C.*] is that precedents are in greater need of overruling when they are not only wrong in their reasoning, but detrimental in their results."). The author further proposes that "[o]n balance, then, a precedent's perceived harms generally should be excluded from the stare decisis calculus."); *id.* at 828.

that the harm these decisions inflict has worsened. These harms are not merely theoretical in nature; they are actual in fact. The over-policing of African Americans and, thus, their over-inclusion in the criminal justice system, is well-supported by the data provided herein. One hopes that no one on the modern-day judiciary would contend it is not an actual harm to over-include African Americans as targets of the criminal justice system. Similarly, the over-exclusion of African Americans as decision-makers in the process constitutes an actual, continuing harm. Justice Gorsuch, Sotomayor, and Kavanaugh recognized as much in *Ramos*.[290]

This step calls upon statisticians and researchers to continue to produce empirical data that shines a light on the actual harms of jurisprudence across our nation, such as the vast research conducted by Baumgartner et al. and the Berkeley Law Death Penalty Clinic. There is truth in the numbers and the data, and lower courts will need that work to successfully contend with the Supreme Court's harmful precedents.

If the answer is that actual harms will persist unless there is action, then step three is designed for lower courts to do the work that needs doing. Lower courts should next evaluate whether some action against the precedent will make the Supreme Court's jurisprudence in the relevant area more proficient (i.e., assist the Court in maintaining necessary proficiency as the supreme court of the land).

C. *The Persistence of the Framework for Dismantling Whren and Batson Despite Vertical Stare Decisis, Step Three: Rejecting Precedent to Support the Supreme Court's Proficiency*

This final step in the proposed framework requires the lower courts to decide whether some action on its part is necessary to uphold the image of the Supreme Court. The Supreme Court is the highest court of our nation. Of course, the cynic would argue that the Court is the sum of its members' dueling or complimentary political leanings and ideologies, but one can also hope that our Supreme Court is the most adept court of the land.

Lower courts should ask whether acting counter to vertical *stare decisis* will refine the Court's expected proficiency; it is contemplated that the Supreme Court will be the most accurate and competent court in our nation given its position of supremacy. Necessarily, the lower courts should engage in "narrowing" or overruling of precedent when they determine it is the correct action to take.[291]

Finally, even though the lower court may be ready to overrule or

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[290] *See supra* Part III(A)(2).

[291] Although both *Whren* and *Batson* could, arguably, be distinguished by the lower courts as they encounter similar situations, this article focuses on the more complex or, perhaps, heady actions of "narrowing" or overruling precedents. Of course, distinguishing cases, when veritably available, also remains an option.

"narrow" a precedent, it must be guided by the inquiry of whether so doing will make the Supreme Court more proficient in its rulings.

1. *"Narrowing from below"*

"Narrowing," a concept coined by scholar Richard M. Re, is an alternative to distinguishing or outright rejecting precedent for lower courts.[292] It may also be a more palatable route for lower courts as they consider abandoning Supreme Court precedent and dwell on their inferiority to the Supreme Court.[293] "Narrowing" is defined by Re as "interpreting a precedent not to apply where it is best read to apply" or, put more succinctly, it "is interpreting a precedent more narrowly than it is best read."[294] The appropriateness of "narrowing down" depends largely on the reasonableness of the lower court's reading of the precedent and the theory of vertical *stare decisis* at play.[295] Re asserts that "it is in the nature of ambiguity that the reasonable interpreters may disagree about which reading is best, in part because they use different interpretive tools."[296] Re further notes that, although interpreters can occasionally conclude that multiple readings could be deemed the best or that no reading whatsoever could be considered the best, "courts are often able to rank precedential interpretations, such that options are deemed best, reasonable, or unreasonable."[297]

"Narrowing" should be differentiated from "distinguishing" and "overruling" (in part or in full). First, "distinguishing means interpreting a precedent not to apply where it is best read not to apply."[298] Therefore, if a court can distinguish precedent from the situation before it, then the precedent is found not to apply, and the court decides the case outside the bounds of the precedent. On the other hand, if the best reading of the precedent applies to the situation before it, then the court is left with either "narrowing" or overruling the precedent. Meanwhile, "'[o]verruling' occurs when a new precedent trumps an older one. By contrast, 'partial overruling' occurs when a new precedent trumps only part of an older precedent."[299]

A helpful example that Re provides of "narrowing down" is what ultimately led to the Supreme Court's decision in *Arizona v. Gant*.[300] Before *Gant*, the Arizona Supreme Court had guidance in two precedents dealing

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[292] *See* Re, *supra* note 183 at 932–35.

[293] U.S. CONST. art. III, § 1.

[294] *Id.* at 927–28, 932.

[295] *Id.* at 925.

[296] *Id.* at 928.

[297] *Id.*

[298] *Id.* at 928; *see also id.* at 929 tbl.1.

[299] *Id.* at 929.

[300] Arizona v. Gant, 556 U.S. 332 (2009).

with the issue before it, either *New York v. Belton* or *Thornton v. United States*.[301] In *Belton*, the Supreme Court crafted "a bright-line rule: when police arrest the driver of a car, they may search the vehicle's passenger compartment."[302] Lower courts followed that precedent for years when they encountered similar circumstances.[303] Approximately twenty-three years later, in *Thornton*, "three [justices] in concurrences and two in dissent . . . expressly signaled serious concerns with how the lower courts were approaching *Belton*."[304] Three years later, the Arizona Supreme Court "narrowed from below" in its interpretation of *Belton*, and aligned itself with the dissent in *Thornton*.

> Although finding it "possible" to construe *Belton*'s "bright-line" holding broadly, the Arizona court concluded that that the interpretation was in tension with some language in *Belton* would require "abandoning" other Fourth Amendment precedents. The Arizona court therefore limited *Belton* to the "precise" factual situation it addressed: cases where police were attempting to maintain control over multiple unsecured individuals.[305]

In other words, the Arizona court held that *Belton* did not apply to Mr. Gant's situation because he was secured in the back of a police car prior to the officers searching his car. "This certainly was not the best reading of *Belton*, which had been read much more broadly by almost every court to encounter it, including the Supreme Court itself."[306] Nevertheless, in *Gant*, the Supreme Court agreed with the Arizona court's "narrowed" approach.[307]

A careful reading of both *Whren* and *Batson* shows that these two cases can validly be "narrowed from below" by the lower courts.

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[301] New York v. Belton, 453 U.S. 454 (1981); Thornton v. United States, 541 U.S. 615 (2004).

[302] Re, *supra* note 183, at 957 (citing *Belton*, 453 U.S. at 460).

[303] Re, *supra* note 183, at 957 (citing *Gant*, 556 U.S. at 342) (noting that this view had "predominated"); *see also* Davis v. United States, 131 S. Ct. 2419, 2424 n.3 (2011) (listing prior cases adhering to *Belton*).

[304] Re, *supra* note 183, at 957.

[305] *Id.*

[306] *Id.* at 957–58.

[307] *Id.* at 958. Re refers to *Arizona v. Gant* as an example of "signal narrowing," a form of "provocative narrowing"; according to Re, "signaled provocation occurs when lower courts narrow from below in response to a Supreme Court signal and thereby provoke the Court to reconsider its own precedent." *Id.* at 956.

a. *Narrowing Whren*

"Narrowing" a case simply means interpreting a precedent more narrowly than its best reading.[308] There are at least two reasonable, though not the best, readings available in *Whren* for "narrowing down."

On at least two occasions, the *Whren* court cited to precedents that embraced the well-recognized "totality of the circumstances" analysis. First, when discussing *United States v. Robinson* for support that the subjective intent of officers matters not, the Court noted that *Robinson* stood for the proposition that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken *as long as the circumstances, viewed objectively, justify that action*."[309] Then when criticizing the petitioners for arguing for an objective test to uncover the subjective intent of police, the Court cites to *Robinson* again, stating that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken *in certain circumstances*, [whatever] the subjective intent."[310] The *Whren* court did not discard a "totality of the circumstances" approach to Fourth Amendment analysis, nor could it given its prevalence in evaluating cases that arise under the amendment.[311]

A lower court could legitimately "narrow" *Whren* by heavily scrutinizing the specific set of circumstances in the situations before it. The *Whren* court also pointed out that the petitioners' proposed test was "designed to combat nothing other than the perceived 'danger' of the pretextual stop, albeit only indirectly and over the run of cases."[312] Here, there is an opportunity for lower courts, based on the data, to find that there is no longer merely a "perceived danger" of pretextual stops, but a demonstrated danger in the circumstances now before it.[313] In addition, in its frustration with the petitioners and their proposed objective test, the *Whren* court could not understand why such a test would be fashioned where "the court cannot take into account *actual and admitted pretext* . . . ."[314] Here, too, there is room for lower courts to assess the totality of the

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[308] *Id.* at 932.

[309] Whren v. United States, 517 U.S. 806, 813 (1996) (quoting Scott v. United States, 436 U.S. 128, 136, 138 (1978)) (emphasis added); *see also* United States v. Robinson, 414 U.S. 218 (1973).

[310] *Whren*, 517 U.S. at 814 (citing *Robinson*, 414 U.S. at 236) (emphasis added).

[311] *See*, *e.g.*, Illinois v. Gates, 462 U.S. 213 (1983) (establishing a totality of the circumstances standard for assessing probable cause); *see also* Alabama v. White, 496 U.S. 325 (1990) (applying a totality of the circumstances approach to reasonable suspicion).

[312] *Whren*, 517 U.S. at 814.

[313] *See supra* notes 109–158 and accompanying text.

[314] *Whren*, 517 U.S. at 814. Of course, why would a police officer ever admit to let alone an investigatory pretextual stop (unless of course it was licensed by the Supreme Court), much less a stop based on racial profiling.

circumstances before it and hold that the "actual" (though, perhaps not admitted) reason for stopping a motorist was race.[315] The Supreme Court has already struck down "roving patrols" and found that race (alone) is not sufficient cause to seize an individual; if the totality of the circumstances showed that the stop was primarily focused on race, the lower court could take action against such egregious behavior on the part of the police.[316]

Next, a lower court could decide that even though the officer had probable cause to stop a motorist for a traffic violation that the Fourth Amendment still requires balancing. The balancing would be of the citizenry's privacy interests versus law enforcement interests; such balancing would weigh heavily in favor of the privacy interests because pretextual stops have become unusually harmful to the privacy of African Americans. Specifically, the *Whren* court declined to engage in such balancing because of the existence of probable cause in the case, highlighting that this balancing in prior cases "was necessary because they involved seizures without probable cause."[317] The Court, however, noted that where probable cause was present, the only cases where it found that the balancing of interests needed to occur "involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests. . ."[318] The Court cited *Tennessee v. Garner* and *Wilson v. Arkansas* as examples.[319] Although it is not the best reading (which is acceptable under "narrowing") of *Whren* to assert that pretextual stops are "unusually harmful" to the privacy interests of African Americans, a lower court could conclude that the disproportionate impacts on African Americans in police stops has become unusually harmful to their privacy using the available empirical data from North Carolina described earlier in this piece.[320] In addition, because many of the recent police killings of African Americans have occurred during traffic stops, this reasoning

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[315] This necessarily involves reading the "and" in "actual and admitted pretext" as an "or," but it not entirely out of the realm of possibility under a totality of the circumstances approach. And, again, "narrowing" is not dedicated to the best reading, only a narrower reasonable reading of the precedent.

[316] *See id.* at 818 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 882–84 (1975)). Critically, as *Brignoni-Ponce* also presents its own problems where, at the very end of the opinion, the Court comments "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." *Brignoni-Ponce*, 422 U.S. at 886–87. As Michelle Alexander asserted, "[t]he likelihood that a person of Mexican ancestry is an 'alien' could not be significantly higher than the likelihood that any random black person is a drug criminal." ALEXANDER, *supra* note 9, at 131.

[317] *Whren*, 517 U.S. at 818.

[318] *Id.*

[319] *Id.*; *see also* Tennessee v. Garner, 471 U.S. 1 (1985) (involving a fifteen-year-old Black teen who was "seized" by deadly force); Wilson v. Arkansas, 514 U.S. 927 (1995) (involving a no knock-and-announce entry into a home).

[320] *See supra* notes 109–160 and accompanying text.

could also extend to the physical interests of African Americans.[321]

b. *Narrowing Batson*

Any direct "narrowing" of *Batson* may be far more difficult; indeed, the lower courts may have to take the bolder step—therefore getting into that "good trouble, necessary trouble"[322]—by directly rejecting or overruling *Batson* or "narrowing" it indirectly.

At the start of *Batson*, the Court goes through great detail to express its goal in furthering its jurisprudence to combat the exclusion of African Americans in jury selection.[323] For example, the Court starts its analysis by recalling that "[m]ore than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."[324] The Court stated "that [*Strauder*] laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which the individual jurors are drawn."[325] It further noted that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."[326] The Court also asserted some guarantees of the Fourteenth Amendment, including that the accused be tried by a jury selected "pursuant to nondiscriminatory criteria," that the State will not be permitted to exclude members of the accused's race from the venire on account of race, and that those on the jury must be "indifferently chosen" in order to "secure the defendant's right . . . to 'protection of life and liberty against race or color prejudice.'"[327] The Court also discussed the harms of racial discrimination in jury selection; that it harms not only the accused, but also the targeted juror as well as the community at large.[328]

In his concurrence in *Batson*, Justice White commented that, although *Swain v. Alabama* should have sufficed in warning prosecutors that "using peremptories . . . on the assumption that no black juror could fairly judge a black defendant would violate" equal protection, there was a need to further

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[321] Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Ttops*, WASH. POST, (Dec. 24, 2015), https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html; *see also Washington Post Police Shootings Database*, *supra* note 41.

[322] Am. Const. Soc'y Convention, *supra* note 2.

[323] *See* Batson v. Kentucky, 476 U.S. 79, 85–87 (1986).

[324] *Id.* at 85 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

[325] *Id.*

[326] *Id.*

[327] *See id.* at 86–87 (citing Martin v. Texas, 200 U.S. 316, 321 (1906); *Strauder*, 100 U.S. at 305, 309).

[328] *Batson*, 476 U.S. at 87.

the Court's jurisprudence in the area.[329] Justice White stated, "[i]t appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs."[330] Furthermore, as Justice Marshall highlighted in his concurrence, the statistics on jury selection from 1970's supporting this widespread practice were striking.[331] There was explicit willingness on the part of at least two of the *Batson* Justices to refine the Court's strategy in contending with systemic exclusion of African American jurors.[332] As Part II indicates, there is strong data of the perpetuation of such harmful exclusion and for all intents and purposes, *Batson* has contributed nominally to the effort.[333]

In large part, *Batson*'s insubstantial impact is due not only to its purposeful discrimination requirement, but also its acceptance of any "race-neutral" explanation dreamed up by the prosecution. In his concurrence, Justice Marshall predicted as much, proclaiming:

> How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore, "did not possess the sensitivities necessary to realistically look at the issues and decides the facts of the case"?[334]

Justice Marshall then protested, "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory."[335] Based on current data, it appears Justice Marshall was correct.

Lower courts could "narrow" *Batson* by asserting that it never effectively served its own purposes. Data, such as those collected by the Berkeley Law Death Penalty, demonstrating the systemic exclusion of African Americans (and other racial minorities) from juries under the guise of "race-neutral" reasons on the part of the prosecution supports the widespread continuation of this harmful practice today.[336] Indeed, it shows a need, not unlike the need demonstrated in the 1970s, for the Court to weigh in once more. One potential method of using *Batson* for "narrowing" would

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[329] *Id.* at 101 (White, J., concurring).

[330] *Id.* at 101.

[331] *See Batson*, 476 U.S. at 104.

[332] *Id*. at 100–08.

[333] *See supra* notes 161–177 and accompanying text.

[334] *Batson*, 476 U.S. at 106 (internal citations omitted).

[335] *Id.*

[336] *See generally* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38.

be for lower courts to laboriously scrutinize race-neutral explanations and where, for example, the prosecution's justification is historically or implicitly intertwined with racism, reject it, and deny removal of the challenged juror.[337]

In addition, the exclusion of African Americans from juries is still so pervasive even after the Court's attempts to address it, it may well be considered "invidious discrimination" at this point. To this end, lower courts could, rather than directly "narrow" *Batson*, indirectly narrow through *Washington v. Davis*, which *Batson* cites to in adopting its purposeful discrimination requirement for step three.[338] Specifically, if "narrowing" *Batson* proves too difficult for the lower courts, they could narrow *Davis* and its rule that disparate impact is insufficient in reaching an equal protection violation.[339] Significantly, the *Davis* court, in rejecting disparate impact alone as evidence that an otherwise facially valid and neutral law was racially discriminatory, made some striking comments about jury selection.[340] The *Davis* court stated that, "[i]t is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[341] This pointed description of the invidious discriminatory nature of systemic exclusion of African Americans from juries supports lower court endeavors to use *Davis* to "narrow" *Batson*.

Further, the current Supreme Court has arguably signaled in *Ramos* its willingness to consider the continued discriminatory effects of a law or practice that has discriminatory origins.[342] As noted previously, Justices Gorsuch, Sotomayor, and Kavanaugh were troubled with the origins of Louisiana and Oregon's non-unanimous laws.[343] Justices Sotomayor and Kavanaugh were also, quite explicitly, troubled by the laws' continued "discriminatory effects" or "taint."[344] Justice Kavanaugh specifically asked, "Why stick by an erroneous precedent . . . that tolerates and reinforces a practice that is thoroughly racist in its origins *and has continuing racially*

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[337] *See id.*, *supra* note 38, at x–xi.

[338] *Batson*, 476 U.S. at 93 (citing Washington v. Davis, 426 U.S. 229, 240 (1976)).

[339] *See id.* at 93.

[340] Notably, the *Davis* decision, in 1976, was issued ten years prior to the *Batson* opinion. *See Davis*, 426 U.S. at 229.

[341] *Davis*, 426 U.S. at 242. This could be an example of "signaling" from the Supreme Court to the lower courts with regard to its holding in *Swain* prior to its decision in *Batson*.

[342] *See supra* Part III(A)(2); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring in part).

[343] *See supra* Part III(A)(2).

[344] *Ramos*, 140 S. Ct. at 1410, 1418.

discriminatory effects?"[345] Although the exercise of peremptory challenges may be facially race-neutral, the *Davis* court left open the possibility that a petitioner could demonstrate such invidious discrimination that disproportionately in and of itself would be enough. The lower courts could use *Davis* to "narrow" *Batson* and find that the continued widespread exclusion (supported by statistical data) of African Americans from juries through peremptory challenges by the prosecution is "invidious discrimination" and, thus, an equal protection violation.

2. *Determining whether the lower court action would make the Supreme Court more proficient in its rulings*

The building blocks of this overarching inquiry of step three of the proposed framework consists of ideas drawn from legal scholar Michael M. Re's categorized models of viewing vertical *stare decisis*, namely the "Proficiency Model."[346] In his article that formally introduces a concept he refers to as "narrowing" (discussed *infra* at subsection 2), Re discusses four different models related to vertical *stare decisis*.[347] In the third step of the proposed framework, this article specifically draws upon the Proficiency Model (or view) as it is truest to assuring the accuracy and competency of the highest court in the land. Nevertheless, it is informative to review all the models discussed by Re, including the Authority Model as particularly lower courts may be initially drawn to it.

a. *The Authority View of vertical stare decisis*

Under this view or model, the Supreme Court's supremacy is fully embraced; the *Hutto*, *Rodriguez de Quijas*, and *Bosse* cases aptly wrap up this view in their professing that the Supreme Court's precedents are its own prerogative.[348] "The [A]uthority [M]odel thus calls for lower courts to treat the Court's majority holdings as law in much the way that a statute is law."[349] In a nutshell, "[u]nder the authority model, the holdings of Supreme Court majority opinions are not just relevant to legal correctness, but constitutive

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[345] *Id*. at 1419 (emphasis added). Of course, it should not go unsaid that Justice Kavanaugh compared non-unanimous juries to what the practice of peremptory challenges *used* to be in describing how non-unanimous verdicts can "silence the voices and negate the votes of black jurors . . . ." This seems to indicate that Justice Kavanaugh may not be ready to accept the "discriminatory effects" argument under *Batson* analysis; though, it is hard to know given that his recent opinion in *Flowers v. Mississippi*, where the Supreme Court last applied *Batson*, was propelled by such appalling facts. *See Flowers*, 139 S. Ct. at 2234–38.

[346] *See* Re, *supra* note 183, at 936–45.

[347] *See id.*

[348] *See supra* note 281; *see id.* at 949, 949 n.125, 939–40.

[349] Re, *supra* note 183. at 936.

of it."[350]

The Authority View (or model) of vertical *stare decisis* does not necessarily mean that Supreme Court precedent is impenetrable. As Re asserts (and we lawyers know to be true), precedent is frequently ambiguous, leading to two or more reasonable readings of it.[351] There is room for lower courts to "narrow" Supreme Court precedent when there is an alternative reasonable reading to that of the precedent's best reading.[352] "When a precedent is open to alternative meanings, there is competition for the mantle of constitutive correctness. The winner of that competition largely turns on an important issue: the lower court's degree of confidence that what seems like the best reading of higher court precedent actually is."[353]

"Narrowing," as described above, can still occur despite operating within the Authority View; nevertheless, lower courts should boldly rely upon the Proficiency View as that assures accuracy and competency of the Supreme Court remains intact.

b. *The Prediction View of vertical stare decisis*

The Prediction View (or model) of vertical *stare decisis* instructs that the lower courts should do what they believe the Supreme Court would do when reviewing the precedent under similar circumstances.[354] Under this view, it is understood that rejecting precedent will be infrequent; rather, it will only be "an unusual subset of cases [where] a lower court might predict that the higher court will overrule or otherwise set aside its own case law."[355]

Rather than anticipate what the Supreme Court may do, lower courts should be dedicated to upholding the Supreme Court's accuracy and competency through the Proficiency View.

c. *The Signals View of vertical stare decisis*

The Signals View of vertical *stare decisis* is the notion that the Justices may "signal" or "indicate some aspect of how lower courts should decide cases." It is distinguished from the Prediction View's "forward-looking orientation and openness" by considering extrajudicial statements that are made by the Justices in gauging its predictions. The *Gant* case discussed *supra* is an example of signals from the Supreme Court.[356]

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[350] *Id.*

[351] *See id.* at 937.

[352] *See id.*

[353] *Id.*

[354] *Id.* at 940.

[355] *Id*. (citing Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 324 (1943) (as an example of this unusual situation)).

[356] *See supra* notes 342–354 and accompanying text.

Rather than wait on signals from the Supreme Court, the time is ripe for lower courts to act now, and they can do so under the Proficiency View of vertical *stare decisis*.

d. *The Proficiency View of vertical stare decisis and its dedication to assuring the accuracy and competency of the Supreme Court*

The Proficiency View (or model) of vertical *stare decisis* is the most persuasive model given the role of supremacy the Supreme Court plays in our nation.[357] Under this view, "as a nine-member body at the apex of the United States judicial system, the Supreme Court has unusual and perhaps unmatched skill at answering legal questions."[358] It is the "special features" of the Supreme Court that "may render it more likely to be correct than virtually any lower court, but those features plainly do not preclude the possibility of faulty results and reasoning."[359] In addition, "there may be reasons in particular cases to think that the Court's general decision-making superiority has failed."[360] Among others, one indicator of the unreliability of precedent is that the Court's ruling was "dependent on out-of-date premises."[361]

The business of the lower courts in applying the Proficiency View of vertical *stare decisis* is essentially one of caretaking; caring for the Supreme Court's supremacy and proficiency in its holdings. Under step three of the framework, this model is responsible for the question: does the lower court action make the Supreme Court more proficient?

That *Whren* and *Batson* are based on outdated premises has been demonstrated. To make our Supreme Court's jurisprudence more race-conscious and, thus, more accurate and competent, lower courts should take action against *Whren* and *Batson* under this model.

D. *Application of Step Three to Whren and Batson—the Supreme Court Will Become More Proficient if These Two Pillars of Racial Injustice are Acted Upon by the Lower Courts*

It should be evident, by now, whether some lower court action—by "narrowing" or overruling—against *Whren* and *Batson* would make the Supreme Court more proficient in its rulings. Even in the 1980s and 1990s, the information was there for the Court to gain competence about systemic

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[357] *See* U.S. CONST. art. III § 1. "The judicial Power of the United States, shall be vested in one supreme Court . . ..."; *see also* Re, *supra* note 183, at 939–40.

[358] Re, *supra* note 183, at 939.

[359] *Id.*

[360] *Id.*

[361] *Id.* at 940.

racism and its prevalence in our criminal justice system.[362] Justice Scalia's comment about the "perceived" danger of the pretextual stop in *Whren* was misplaced even in 1996, but certainly more so today in light of the statistics and data demonstrating the disparate impact on African Americans in police traffic stops.[363] In addition, the Court's summary rejection of the Fourth Amendment as the correct amendment to seek recourse for racial profiling in policing is ludicrous given that the Fourth Amendment's design can be traced to the Founders' worries about unfettered discretion in the hands of the British Crown.[364]

Further, *Batson* has failed miserably. Indeed, we are right where it all began in *Batson*, right where Justice Marshall said we were in 1986.[365] In *Batson*, the Court fashioned a test that only permitted more, albeit subtle, racial discrimination.[366] This test promulgated a "race-neutral" approach to deal with a, primarily, race-neutral, though still racially discriminatory, problem.[367] Other than the outlying cases with extreme facts, *Batson* does very little in the way to address its original goal—stop the systemic exclusion of African Americans from the democratic process of serving on a jury.[368]

Our Supreme Court's rulings would become far more adept and, thus, credible, if the lower courts would cease "methodically ignoring what everyone knows to be true."[369] *Whren* and *Batson* are two pillars of racial injustice that, if not already, will become stains on the Supreme Court's legacy, much like *Plessy v. Ferguson*.

Under the entire proposed framework, balancing Justice Kavanaugh's three considerations of *stare decisis*, recognizing that there will be actual (not merely perceived) harms if their precedential value remains, and determining that action against the precedents will make the Supreme Court more proficient, the lower courts should act dauntlessly to overturn or "narrow" *Whren* and *Batson*.

IV. CONCLUSION

Some courts have avoided getting into trouble (honorably so) by conducting independent state constitutional analysis or by promulgating a

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[362] *See supra* notes 101–107 and accompanying text.

[363] *See supra* notes 109–158 and accompanying text.

[364] *See* ALEXANDER, *supra* note 9, at 67.

[365] Batson v. Kentucky, 476 U.S. 69, 103–04 (1986) (Marshall, J., concurring).

[366] *See id.* at 97–98 (majority opinion).

[367] *Id.* at 106 (Marshall, J., concurring).

[368] *See supra* notes 158–17 and accompanying text.

[369] Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020).

court rule to address the inequities of *Whren* and *Batson*.[370] Nevertheless, that is not as effective, not as powerful as sending a very direct, explicit message to the Supreme Court (as well as other lower courts) that it is time to become a twenty-first century bench in this fast-emerging race-conscious nation. More importantly, to the American people, the lower courts should send a message that the courts are places of equity, not disparity. It is time to stop pretending that Lady Justice never looks out from under her blindfold to ascertain the race of those in her courts. It is time for our courts to see, talk about, and take on race and all the concepts that come along with it—colorblindness, implicit bias, etc.

Let the legacy of Rayshard Brooks, George Floyd, Breonna Taylor, Ahmaud Arbery, and Sandra Bland, in part, be that our courts "get in good trouble, necessary trouble,"[371] and decline to uphold *Whren* and *Batson*. Lower courts should boldly take action applying this article's proposed framework. Piece-by-piece, step-by-step, *Whren* and *Batson* should be dismantled through application of Justice Kavanaugh's *stare decisis* considerations, an analysis of actual versus perceived harms, and finally, by asking whether destructing these pillars of racial injustice will make our Supreme Court more proficient. The analysis under these three steps instructs that *Whren* and *Batson* must be "narrowed" or overruled by the lower courts.

This moment, as Americans march and protest in our streets for Black Lives, is ripe for our courts to not just issue statements, but to send a message that racial injustice no longer has a place in the courts' criminal procedure jurisprudence. It is time, as Representative John Lewis stated, "to use the law, to use the law and the Constitution to bring about a non-violent revolution" in our criminal courtrooms.[372] If our criminal justice system really is a system dedicated to crime control, not social control, then no longer can courts acquiesce to strict notions of *stare decisis* when faced with precedent that sustains racial injustice. No longer can our courts "methodically ignor[e] what everyone knows to be true."[373]

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[370] In addition, as a 2011 law review article detailed, constraints on state courts when interpreting their own state constitutions exist and impact progress for criminal justice reform. *See generally* Goodloe, *supra* note 283.

[371] Am. Const. Soc'y Convention, *supra* note 2.

[372] *Id*.

[373] *Ramos*, 140 S. Ct. at 1405.

Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys

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ABSTRACT

The federal law that guarantees an appropriate and inclusive education for children with disabilities relies on private enforcement; parents concerned about the inadequacy of their children's education can take advantage of an administrative hearing to seek resolution of disputes with the child's school district. While conceived in the Individuals with Disabilities Education Act (IDEA) as a prompt and informal tool, evidence suggests that special education due process hearings have become overly complex, prohibitively expensive, and excessively lengthy, thus limiting their accessibility and usefulness as an enforcement mechanism.

Despite numerous studies highlighting the flaws of special education due process, few have taken advantage of a particularly important resource for crafting reform proposals: the attorneys who practice special education law. Tapping into practitioners' lived experiences of special education due process provides us with a clearer sense of how the due process system plays out in practice and, importantly, how differing perceptions of the system's flaws may facilitate or impede attempts to build support for particular reforms.

In addition to cataloging various features of the due process system that differ from state to state, this article reports data from a nationwide survey of practicing special education lawyers that elicited their views about the effectiveness of the due process system. The most salient observation obtained from the survey is that the attorney's client—be it the parents or the school district—strongly shapes the attorney's perceptions of the system's flaws and targets for change. Yet the results also suggest a number of reforms that could improve and streamline the system while garnering support from both parents and school districts. Recommendations include

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(1) more rigorous training of hearing officers, both in terms of case management and substantive special education law; (2) publication at the state level of more comprehensive and uniform standards for procedure, discovery, and admission of evidence; (3) development of additional funding sources for parent attorneys and expert witnesses; and (4) state review of rules with an eye toward greater procedural simplicity.

INTRODUCTION

Since the passage of the Individuals with Disabilities Education Act (IDEA) in 1975, parents of children with disabilities have had the ability to request due process hearings to resolve disputes between parents and school districts regarding the special educational programming provided to their children.[1] While the basic idea of an administrative hearing before a hearing officer has been a consistent pillar of the IDEA over the past forty-five years, the effectiveness of the due process hearing to resolve disputes between parents and school districts is a perennial concern.

The leading complaints concerning the due process system are its complexity and expense.[2] While parents and child advocates have expressed dismay that the due process system is financially out of reach for most families,[3] school administrators have suggested that the due process system is burdensome and costly for school districts as well.[4] Observations about the increasing "judicialization" of due process procedures have been the subject of many studies,[5] as have many diverse recommendations for

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[1] The Education for All Handicapped Children Act of 1975, often referred to as PL 94-142, was the original title of the law now entitled the Individuals with Disabilities Education Act. When passed, the law required states to provide parents the opportunity for an impartial due process hearing conducted by the State educational agency or the local educational agency or intermediate educational unit. Parties to the hearing were given the right to be accompanied by counsel, compel the attendance of witnesses, present evidence, cross examine opposing witnesses, obtain a written decision with findings of fact, and obtain a transcript of the hearing. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, §§ 615(b)(2), 615(d), 89 Stat. 773, 788–89 (1975).

[2] See, e.g., Tracy Gershwin Mueller, Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts, 26(3) J. DISABILITY POL'Y STUD. 135, 137 (2015) (referencing numerous concerns about due process in published commentaries).

[3] *See, e.g.*, Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement,* 86 NOTRE DAME L. REV. 1413 (2011); Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U.J. GENDER SOC. POL'Y & L. 107 (2011).

[4] *See* Sasha Pudelski, *Rethinking Special Education Due Process*, AM. ASS'N OF SCH. ADMIN. (April 2016), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf

[5] *See, e.g.*, Perry A. Zirkel, Zorka Karanxha & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007).

change.[6]

Notably, despite numerous studies highlighting the flaws of special education due process, few have explored the experiences and perceptions of the attorneys who practice special education law in order to gain insight into the flaws of due process and to lead policymakers to potential solutions. Those that have sought input and observations from practicing attorneys focused on a particular state (Pennsylvania) or, although national in scope, limited the discussion to attorney attitudes toward a narrow set of topics (resolution sessions, IEP facilitation, binding arbitration, and the two-tier system).[7] As a contribution to the effort to analyze more fully the efficacy of due process as a mechanism for dispute resolution, we undertook a national survey of practicing special education lawyers that tapped into attorneys' attitudes regarding the overall complexity, accessibility, and effectiveness of the due process system in their state. In addition, we asked respondents to share their thoughts about the use of formal discovery and expert witnesses in special education due process. We also provided respondents with an opportunity to share their recommendations for how best to improve the due process system.

As described more fully in this article, the survey results bore out the continued concern of many that the due process system is problematic. In answer to survey questions, lawyers found fault with the knowledge and objectivity of hearing officers, the length of hearings, the pressure put on the system by attorney and expert witness fees, and the overall complexity of due process hearings. Most notable, however, were the very distinct differences in the perceptions of the attorneys who represent school districts and the attorneys who represent parents. While attorneys on both sides of special education disputes expressed some level of dissatisfaction with the process, each group perceived the flaws in fundamentally different ways. School district attorneys tended to see the high cost of plaintiff's attorney fees (which school districts must bear if parents prevail, due to the fee-shifting provisions of the IDEA) as an intractable problem limiting the efficient resolution of cases. In contrast, parent attorneys focused more on the cost of expert witnesses (the cost of which is not shifted to districts, even if parents prevail) as a barrier to parents trying to access the due process system and find resolution to their disputes. Both groups of attorneys identified issues with hearing officers as interfering with the effectiveness of due process, with school lawyers more likely to raise concerns about their lack of skills and knowledge and parent lawyers more concerned about perceived bias.

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[6] See, e.g., Elizabeth A. Shaver, Every Day Counts: Proposals to Reform IDEA's Due Process Structure, 66 CASE W. RES. L. REV. 143 (2015); S. James Rosenfeld, It's Time for an Alternative Dispute Resolution Procedure, 32 J. NAT'L ASS'N L. JUDICIARY 544 (2012).

[7] Zirkel, *supra* note 5 at 28, 30 n.14, 50 n.85.

Despite these differing perceptions, however, the attorney responses suggested that a number of reforms could garner general support.[8] First, reforms targeting the quality and objectivity of hearing officers would invite greater faith in the system. State education agencies could begin by looking seriously at how they choose, pay, and train hearing officers, with an eye toward assuring that hearing officers are well versed in both hearing management and substantive special education law, and are not biased toward one side or the other. Second, states should revisit their rules to ensure that they have developed and published clear standards for procedure, discovery, and admission of evidence. This would leave less to the discretion of hearing officers and would create a more uniform and predictable experience for all parties. Third, federal, state, and local educational authorities should explore funding sources to support legal organizations that provide free or low-cost representation to parents and to fund needed experts. This would ease the financial pressures that often prevent all but the wealthiest of parents from pursuing due process and reduce the high cost of due process for all parties. Finally, states should examine their choices about due process to eliminate as much procedural complexity as possible by considering such changes as putting time limits on hearings and limiting discovery.

The article is organized in five parts. Part I provides relevant background information on special education due process hearings, which are required by the Individuals with Disabilities Education Act for dispute resolution between parents and school districts. Part II reviews previous work done on this topic, focusing specifically on the few studies that have surveyed special education practitioners with due process experience. Part III reports the results from an original national survey of special education lawyers conducted in late 2019 and early 2020. Part IV provides an analysis of the results and makes recommendations. Part V concludes by acknowledging how intractable the problems with due process have been and focusing on the recommendations that might have the best chance of success.

I. DUE PROCESS UNDER THE IDEA

The IDEA is the primary federal law governing the education of children with disabilities. In return for federal funding, states commit to implementing a special education program that accords with the Act's

[8] While a variety of reform proposals might generate considerable support from *either* parent attorneys or school attorneys, we have focused on proposals that might find broad consensus and thus have a better chance of implementation.

mandates.[9] Eligible students aged three through twenty-one are guaranteed a "free appropriate public education"[10] (FAPE) in the least restrictive environment (LRE). Once a child has been identified as eligible, the school district must respond appropriately to the child's unique needs by developing an Individualized Education Program (IEP). An IEP is a written plan that sets forth the child's present levels of performance; the child's strengths and weaknesses; the measurable annual goals the child is expected to attain; the programs and services the child will receive to address their learning needs; and classroom and testing accommodations and modifications.[11]

Due to the inherent vagueness in the terms "free appropriate public education" and "least restrictive environment," parents and school districts sometimes disagree on what special education services and placement a child should receive under the law. Recognizing this, the IDEA provides several dispute resolution tools to help resolve differences of opinion, one of which is a due process hearing.[12] The law requires states to establish a hearing process that allows any party to present a complaint related to the identification, evaluation, or educational placement of a child, or the provision of FAPE.[13] A hearing to address the complaint must be held by an impartial hearing officer; parties have the right to be represented by counsel, present evidence and witnesses, cross-examine opposing witnesses, and compel the attendance of witnesses.[14] The hearing officer is obliged to make findings of fact and conclusions of law, issue a written decision that determines whether a violation of the IDEA has occurred and, if a violation has occurred, award appropriate relief. The law also guarantees the right of a party disagreeing with the hearing officer's decision to bring a civil action in state or federal court.[15] If the parent prevails, the law allows the court to require the school district to pay the parent's costs and attorney fees (but not the costs of any expert witnesses).[16]

Although all states must adhere to those core provisions of the IDEA, as

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[9] While the term "states" is used throughout, it is meant to include other jurisdictions that receive funding for special education through the IDEA, including the District of Columbia and the Bureau of Indian Affairs.

[10] 20 U.S.C. § 1401(9) (2018) ("A free appropriate public education" is defined as special education and related services provided in conformity with an individualized education program for a child with a disability); Bd. of Educ. v. Rowley, 458 U.S. 176, 188–89 (1982) (requiring states to provide only a minimum floor of educational opportunity to students, not the best education possible).

[11] 20 U.S.C. § 1414(d) (2018).

[12] The full list of formal dispute resolution tools includes facilitated IEP meetings, mediation, state complaints, and due process petitions. 20 U.S.C. § 1415(f) (2018).

[13] 20 U.S.C. § 1415(b)(6)(A) (2018).

[14] 20 U.S.C. § 1415(h) (2018).

[15] 20 U.S.C. § 1415(i)(2) (2018).

[16] 20 U.S.C. § 1415(i)(2)–(3) (2018).

well as timelines by which certain events must take place,[17] they have considerable room for customizing the due process framework to suit the state's particular needs.[18] Some of the areas open to customization include the statute of limitations period,[19] the use of a one-tier or two-tier administrative review system,[20] the allocation of the burden of proof,[21] the use of discovery rules, the use of evidence rules,[22] qualifications and employment of hearing officers,[23] regulations concerning permissible representation,[24] and timelines for filing in federal court.[25]

In some of these areas, the states have largely converged on the same practice. For instance, forty-four states have set the statute of limitations period at two years. Thus, a due process hearing must be requested within two years of the date the parent or district knew or should have known about the alleged violation of the IDEA. Five states (Alaska, Louisiana, North Carolina, Texas, and Wisconsin) have restricted the statute of limitations period to one year, while only Kentucky has extended it to three years.[26]

Similarly, forty-three states have chosen to implement a one-tier administrative review system as opposed to a two-tier system. In one-tier systems, the state department of education conducts the hearing and the losing party can then appeal to state or federal court. In two-tier systems, the hearing is conducted by the local educational agency, and the losing party can then appeal to the state department of education, which will appoint a

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[17] For instance, school districts must schedule a resolution meeting between the parents and school district within fifteen calendar days of receiving a due process complaint, unless both the parent(s) and school district agree in writing not to have a resolution meeting or to use mediation instead. The State Education Agency (SEA) or the public agency directly responsible for the child's education must also ensure that, no later than forty-five days after the thirty-day resolution period expires, a final decision is reached in the hearing and a copy of the decision is mailed to each party.

[18] This approach has been described as "cooperative federalism." *See* Schaffer v. Weast, 546 U.S. 49, 52 (2005) (citing Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (8th Cir. 1999)).

[19] 20 U.S.C. § 1415(f)(3)(C) (2018).

[20] 20 U.S.C. §§ 1415(g)(1), (i)(2)(A) (2018).

[21] The IDEA is silent on which party bears the burden of proof at a due process hearing, though the U.S. Supreme Court in *Schaffer* interpreted the IDEA as placing the burden of proof on the party seeking relief, which is nearly always the parent. Nevertheless, some states have assigned the burden to the school district.

[22] The IDEA does not specify whether the rules of civil procedure or the rule of evidence must be used in a due process hearing.

[23] 20 U.S.C. §§ 1415(f)(3)(A)(i)–(iv) (2018).

[24] The IDEA provides parents with the right to be accompanied and advised by counsel and individuals with special knowledge or training with respect to the problems of children with disabilities. 20 U.S.C. § 1415(h)(1) (2018).

[25] 20 U.S.C. § 1415(i)(2)(B) (2018).

[26] Alaska has a one-year statute of limitations for parents and a sixty-day statute of limitations for school districts. ALASKA STAT. § 14.30.193(a) (2008); ALASKA ADMIN. CODE tit. 4, § 52.550(a) (2007); LA. ADMIN. CODE tit. 28, § 1511(F) (2020); N.C. GEN. STAT. § 115C-109.6(b) (2006); 19 TEX. ADMIN. CODE § 89.1151(c) (2018); WIS. STAT. § 115.80(1)(a)(1) (2020); KY. REV. STAT. § 157.224(6) (2004).

review officer or review panel.[27] Only after the review officer or panel issues a decision can the losing party appeal to state or federal court. Those states with a two-tier system are Kansas, Kentucky, North Carolina, Nevada, New York, Ohio, and South Carolina.[28]

Another area in which the majority of states have converged on the same practice is the allocation of the burden of proof. In 2005, the Supreme Court ruled that the party requesting a due process hearing bears the burden of proof under the IDEA unless a state enacts legislation to the contrary.[29] The majority of states have declined (despite pressure from parents and advocates) to pass such legislation. Because the vast majority of due process cases are initiated by parents,[30] they typically bear the burden in the states that have not specifically shifted it to school districts.[31] Only six states—Connecticut, Delaware, Florida, New Jersey, Nevada, and New York—place the burden of proof on the school district.[32]

More variation exists among the states when it comes to rules about representation, hearing officer qualification, use of formal discovery, rules of civil procedure, and rules of evidence. For example, the IDEA provides that parties have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities[.]"[33] Whether or not this right extends to allow parents to be represented by special education advocates, rather than only by licensed attorneys, has not been addressed by Congress or the Supreme Court. The regulation of the practice of law, which includes unauthorized practice rules, is determined at the state level. Thus, states can

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[27] 20 U.S.C. § 1415(f)–(g) (2018).

[28] Since 1991, the trend has moved toward one-tier systems. *See* Connolly et al., *State Due Process Hearing Systems Under the IDEA: An Update*, 30 J. DISABILITY POL'Y STUD. 156, 157 (2019) (summarizing trend and reporting that in 1991, twenty-six states were using a two-tier system; by 2010, nine states were using two tiers; in 2020, just seven states use two tiers). *See* E.L. ex rel. Lorsson v. Chapel Hill-Carrboro Bd. Of Educ., 773 F.3d 509, 515 (4th Cir. 2014) (upholding North Carolina's two-tier system).

[29] Schaffer v. Weast, 546 U.S. 49, 61–62 (2005).

[30] A school district might file a complaint to defend the appropriateness of its evaluation when the parent is seeking an independent educational evaluation or to challenge a parent's refusal to consent to special education services. Nevertheless, such complaints are rare.

[31] *See* Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act?*, 13 CONN. PUB. INT. L. J. 1 (2013) (discussing the burden of proof in due process cases); Thomas A. Mayes et al., *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27 (2005).

[32] CONN. AGENCIES REGS. § 10-76h-14 (2000); DEL. CODE ANN. tit. 14, § 3140 (1983); FLA. STAT. ANN. § 1008.212 (2013) (placing burden on school district only with respect to expedited hearings); N.J. STAT. ANN. § 18A:46-1.1 (2008); NEV. REV. STAT. 388.467 (2015); N.Y. EDUC. LAW § 4404(c) (McKinney 2007) (placing the burden of production and persuasion on the district except in cases involving tuition reimbursement when the parent unilaterally places their child in private school).

[33] 20 U.S.C. § 1415(h)(1) (2018).

determine the role of a non-attorney in due process hearings. Eleven states allow non-attorney advocates to represent parents in a due process hearing.[34]

The process for hiring and qualifying hearing officers is mostly controlled at the state level. The federal law requires that hearing officers possess knowledge of and have an ability to understand the law, regulations, and court decisions; possess the ability to conduct hearings; and possess the ability to render and write decisions consistent with the law.[35] The officers may not be an employee of the state or local educational agency (LEA) involved in the child's education or care and may not have a personal or professional conflict of interest.[36] This leaves states with the option to have hearings heard by panels or individuals, by lawyers or by non-lawyers, and by people with particular expertise in special education or lacking in such knowledge.[37] Hearing officers can be full or part-time and may or may not be part of a state system for administrative hearings.[38]

Presently, administrative law judges (ALJs) preside over special education due process hearings in seventeen states.[39] Among the thirty-three states that do not use ALJs, many have simply adopted the IDEA's requirements for hearing officers and left it at that. But other states have

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[34] With the sole exception of Texas (89 TEX. ADMIN. CODE §1175 (2018)), state statutes and codes uniformly fail to explicitly state whether or not attorney advocates are permitted to represent parents in a due process hearing. We reached out to the relevant state education departments by phone and email to determine whether or not advocate representation was allowed. All email responses are on file with the authors. In states where the rules are not specific about the right to be represented by a non-attorney in a due process hearing, the non-attorney advocates risk prosecution for the unauthorized practice of law. *See* In re Arons, 756 A.2d 867, 874 (Del. 2000) (finding neither the IDEA nor the due process clause of the U.S. Constitution gives parents the right to be represented by lay advocates in special education administrative hearings and affirming the decision of the Delaware Board on Unauthorized Practice of Law that the lay advocate in a due process case was engaged in the unauthorized practice of law).

[35] 20 U.S.C. § 1415(f)(3)(A)(ii)–(iv) (2018).

[36] 20 U.S.C. § 1415(f)(3)(A)(i) (2018).

[37] And although the IDEA does not say anything about staying up to date on special education law and developments, some states require hearing officers to undergo periodic refresher training to maintain their credentials (e.g., Tennessee (TENN. CODE. ANN. § 49-10-606 (2019)) and Wisconsin (WIS. ADMIN. CODE PI § 11.12 (2021)).

[38] *See* Connolly, Zirkel & Mayes, *supra* note 29, at 158–60 (cataloging the various choices states have made with regard to employment status, organizational home, background, and assignment method of due process hearing officers. The authors highlight the trend toward the use of full-time hearing officers and the use of attorneys rather than special educational professionals as hearing officers).

[39] Arizona (ARIZ. ADMIN. CODE §7-2-405 (2021)), California (CAL. EDUC. CODE §56501(b)(4)(1992)), Colorado (1 C.C.R. 301-8:2220-R-6.02 (2013)), Florida (FLA. ADMIN. CODE r. 6A-6.03311(2014)), Georgia (GA COMP. R. & REGS. 160-4-7-.12(2010)), Hawaii (HAW. CODE R. § 8-60-65(2009)), Iowa (IOWA ADMIN. CODE r. 281-41.511(256B,34CFR300) (2021)), Louisiana (LA. ADMIN CODE. tit. 28, Pt XLIII, §511(2012)), Maryland (MD CODE. ANN., EDUC., §8-413)(2016)), Michigan (MICH. ADMIN. CODE r. 340.1724f)(2020), Minnesota (MINN. R., 3525.3900 (2014)), North Carolina (N.C. GEN. STAT. ANN. § 115C-109.6 (2006)), North Dakota (N.D. ADMIN. CODE 67-23-05-02 (2008)), New Jersey (N.J. ADMIN. CODE § 6A:14-2.7 (2020)), Oregon (OR. ADMIN. R. 581-015-2365 (2007)), Tennessee (TENN. CODE. ANN. § 49-10-606 (2019)), and Washington (WASH. ADMIN. CODE 392-172A-05085 (2007).

added additional requirements. For example, Louisiana, Virginia, Wisconsin, West Virginia, and Texas require hearing officers to have a law degree; Oklahoma requires hearing officers to have *either* a law degree or a master's degree in education, special education, psychology, or another related field.[40] Delaware has taken a particularly creative approach by requiring that due process hearings be overseen by a hearing panel consisting of three members appointed on a rotating basis. The panel must include a Delaware attorney, an educator knowledgeable in the field of special education, and a lay person with a demonstrated interest in the education of children with disabilities and approved by the Governor's Advisory Council for Exceptional Children.[41]

Finally, the IDEA states that any party to a due process hearing has the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,[42] as well as prohibit the introduction of any evidence at the hearing that was not disclosed to that party at least five business days before the hearing.[43] The IDEA is silent, however, as to whether formal discovery should be available to parties, or whether the hearing will be conducted according to the court rules of civil procedure and evidence. Although due process hearings under the IDEA are not meant to be overly formal and were originally expected to be "commenced and disposed of as quickly as practicable,"[44] there is evidence that due process hearings are quite like complex civil trials in many places.[45] Presently, twelve states use formal discovery in due process hearings, while eight states use the rules of civil procedure and eight states use the rules of evidence.[46]

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[40] LA. ADMIN CODE. tit. 28, Pt XLIII, § 511 (2012); 8 VA. ADMIN. CODE 20-81-210 (2010); WIS. ADMIN. CODE PI § 11.12 (1998); OKLA. ADMIN. CODE 210:15-13-5 (2008); W. VA. CODE R. § 126-16-1 (2017) (details concerning hearing officers detailed in 126-16 Attachment); 19 TEX. ADMIN. CODE § 89.1170. In contrast, South Carolina seems to set the bar rather low, requiring that a hearing officer be at least twenty-one years of age and a high school graduate. Office of Special Educ. Servs, South Carolina State Dep't of Educ., SPECIAL EDUCATION PROCESS GUIDE FOR SOUTH CAROLINA (2013), https://ed.sc.gov/districts-schools/special-education-services/state-regulations/special-ed-process-guide-sepg-2013/

[41] 14 DEL. ADMIN. CODE §§ 926.11.2, 11.4 (2017); DEL. CODE ANN. tit. 14 § 3137(d) (2012).

[42] 20 U.S.C. § 1415(f)–(h) (2018).

[43] 34 C.F.R. § 300.512 (2017).

[44] *See* 121 CONG. REC. 37,416 (1975).

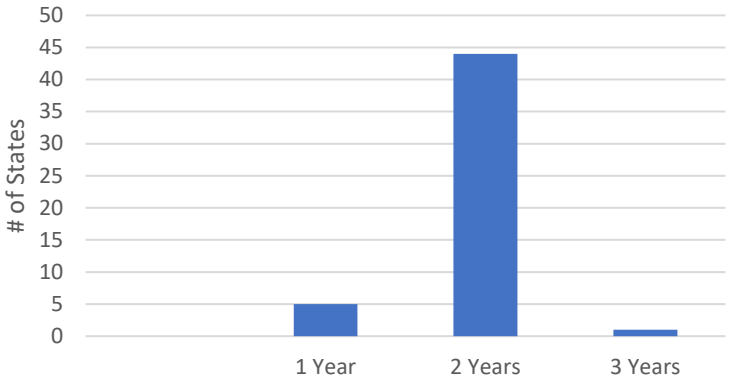
[45] *See, e.g.*, Zirkel et. al, *supra* note 5.

[46] Of the states that allow for discovery, the rules of civil procedure, and/or evidence, only a few explicitly state as such in their state administrative codes. For those states' whose statutes and regulations are silent, we relied upon phone calls to the appropriate state divisions (either the state education department or the office of administrative hearings) and also the attorney responses to our surveys. The twelve states that permit formal discovery are: Colorado (1 COLO. CODE REGS § 104-1(2014)), Florida, Iowa ((IOWA ADMIN. CODE 281-41.1010(5) (17A,256B)), Indiana (511 IND. ADMIN. CODE 7-45-7), Kentucky (KY. REV. STAT. § 13B.080), Massachusetts, Missouri, Montana (MONT. ADMIN. R. 10.16.3513), North Carolina, North Dakota, South Dakota, and Wyoming. The eight states in which the

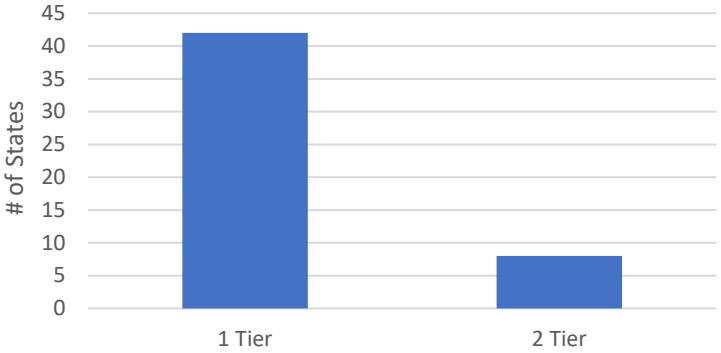
Three states (Indiana, North Carolina, and South Dakota) use formal discovery, the rules of civil procedure and the rules of evidence.[47]

The following graphs reflect the practices in the states:

Statute of Limitations



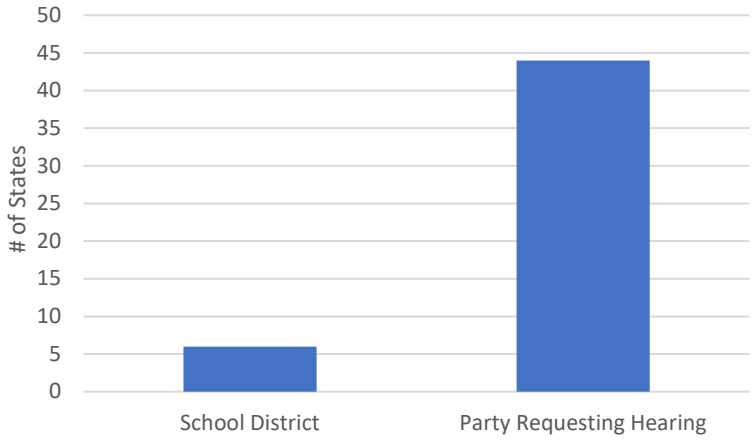
Two Tier v. One Tier Appeal



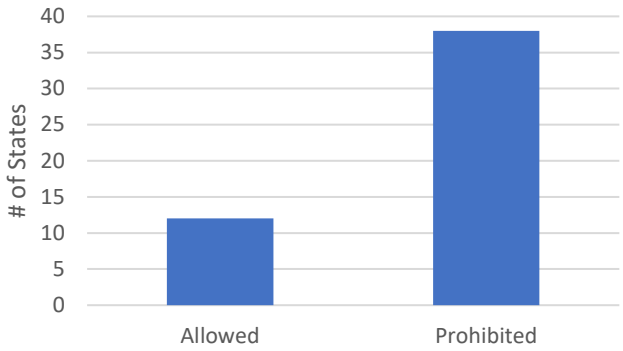
rules of civil procedure are used are: Alabama, Colorado, Florida, Indiana, North Carolina, South Dakota, Texas (19 TEX. ADMIN. CODE § 89.1185), Tennessee, and Wyoming.

[47] It is worth highlighting here the difficulty which the authors experienced when trying to establish whether a state uses discovery, the rules of procedure, and/or the rules of evidence. Some attorney respondents to our survey indicated that their state uses the formal rules of discovery and or the rules of civil procedure and evidence, even though the state codes were silent on this matter. This suggests that even when a state does not explicitly require the use of formal discovery or the rules of civil procedure and evidence, individual hearing officers may have discretion to allow discovery and to employ the formal rules on their own initiative.

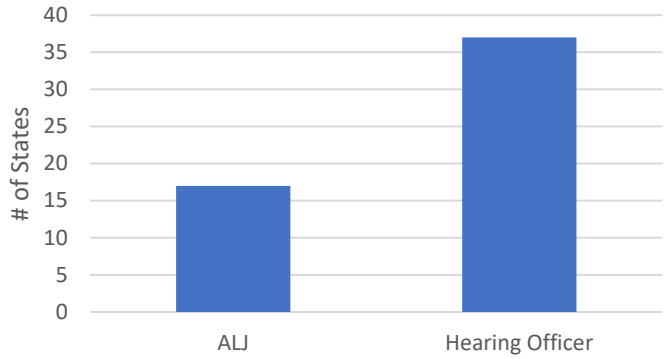
Allocation of Burden of Proof



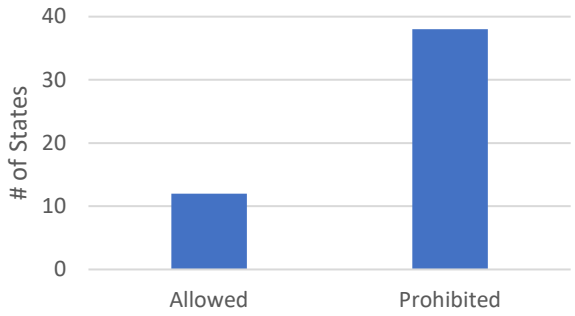
Non-Attorney Representation



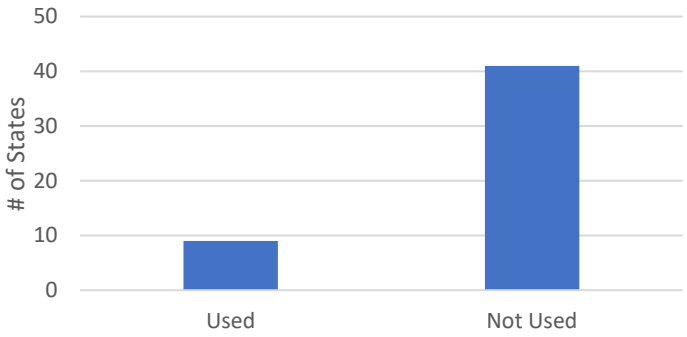
ALJs v. Hearing Officers



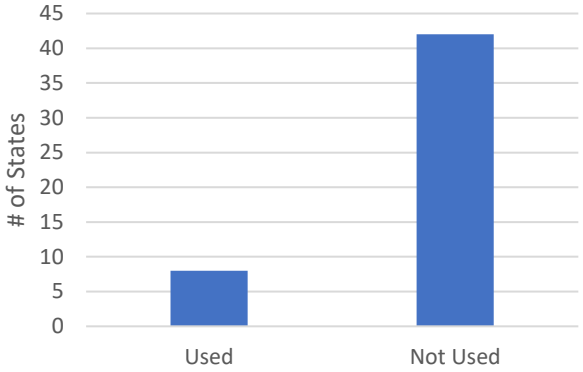
Formal Discovery



Rules of Civil Procedure



Rules of Evidence



II. LISTENING TO SPECIAL EDUCATION ATTORNEYS

As the preceding section demonstrates, the flexibility accorded to states under the IDEA means that the experience of parties engaged in a due process hearing can vary significantly depending on the state in which they are located. Yet despite such differences, the literature on due process hearings speaks to a common theme that transcends state boundaries: the due process system is not living up to expectations. Indeed, over the past twenty-five years, there has been a steady stream of studies highlighting various flaws of the due process system.[48] The general take away is that the

[48] *See, e.g.*, Rosenfeld, *supra* note 6 (proposing that IDEA include a process for voluntary, binding arbitration); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403, 409–13 (1994) (proposing a five-step reform that would enhance the authority and revise the approach of the due process hearing).

system is inefficient, prohibitively expensive, and time-consuming.[49]

Despite what is now a sizable literature critiquing special education due process, there are still very few studies that explore the experiences and perceptions of the attorneys practicing special education "on the ground." A review of the literature found only two such studies: one by Kevin Hoagland-Hanson and one by Elizabeth Shaver.[50] Hoagland-Hanson's study focused on due process hearings in Pennsylvania and consisted of interviews with four members of the Pennsylvania special education bar, all of whom represented parents, as well as an empirical analysis of due process hearing outcomes in the state. In contrast, Shaver fielded a nationwide survey of special education attorneys that focused on practitioners' views concerning the effectiveness of the resolution session prior to a due process hearing, the desirability of IEP facilitation, the possibility of amending the IDEA to allow for voluntary, binding arbitration for special education disputes, and the costs and benefits of a two-tier system versus a one-tier system.

Interestingly, the results of Shaver's nationwide survey reflected the same phenomenon revealed in the survey reported here: attorney attitudes towards certain aspects of special education due process appear to depend heavily upon whether the attorney represents parents or school districts. For instance, Shaver found that school district attorneys were considerably more positive in evaluating the use of IEP facilitation as a means to resolve disputes and avoid the filing of a due process complaint than were parent attorneys. Sixty percent of school district attorneys felt that IEP facilitation was a "valuable vehicle to resolve disagreements quickly," but only thirty-three percent of parent attorneys agreed.[51] School district attorneys were also more positive about the use of the resolution session as a means to resolve disputes; forty-one percent of school district attorneys reported that the resolution session was a "valuable vehicle" but only eighteen percent of parent attorneys felt the same.[52]

Notably, however, Shaver's study suggested that areas of commonality do exist between attorneys on both sides. Both school district and parent attorneys agreed that IEP facilitation was a good idea in the abstract, but that its potential was often lost in the implementation. Attorneys on both sides

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[49] Hyman et al., *supra* note 3; Pasachoff, *supra* note 3; Pudelski, *supra* note 4.

[50] Hoagland-Hanson, *supra* note 7; Shaver, *supra* note 6. Other studies have interviewed or surveyed school parents, school administrators, and state special education directors. *See, e.g*., J. Michael Havey, *School Psychologists' Involvement in Special Education Due Process Hearings*, 36(2) PSYCHOL. IN THE SCHS. 117 (1999) (interviewing school psychologists involved in due process hearings); Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57(6) EXCEPTIONAL CHILD 546 (1991) (interviewing parents and school officials in Pennsylvania); Ann C. Candler & Eddie W. Henderson, *Procedural Due Process in Special Education: A Survey of Directors of Special Education*, 14 AM. SECONDARY EDUC. 20 (1984) (surveying special education directors).

[51] Shaver, *supra* note 6, at 181.

[52] *See id*. at 1845.

indicated that the success of IEP facilitation was highly dependent on the facilitator's skills and training; a good facilitator could make all the difference and possibly help the parties avoid the filing of a due process complaint. Based on her findings, Shaver recommended that Congress develop guidelines for training IEP facilitators so that they have conflict resolution skills as well as substantive understanding of special education teaching methodologies and best practices for writing IEPs.[53]

For those seeking improvements to the special education due process system, the experience and perceptions of attorneys represent an important resource. By tapping into practitioner's lived experiences of special education due process, we can gain a better sense of how the due process system plays out in practice and, importantly, how differing perceptions of the system's flaws may facilitate or impede attempts to build support for particular reforms. Parents and school districts face different challenges and concerns; these differences undoubtedly affect how they— and their attorneys— experience and evaluate due process. Finding commonly-held perceptions, values, and goals among the attorneys on both sides, however, could lead toward reforms that can be embraced more readily across the board.

III. SURVEYING SPECIAL EDUCATION ATTORNEYS

The survey reported here builds on prior studies by examining attorney attitudes towards the overall complexity, accessibility, and effectiveness of due process. Conducted in late 2019 and early 2020, the survey questioned attorneys throughout the country in order to identify certain aspects of due process that might be important factors contributing toward the perception that due process is too complex.[54] Specifically, the survey asked lawyers about their experiences with formal discovery, the rules of procedure, the rules of evidence, and the use of expert witnesses. In addition, it sought their perceptions and attitudes towards the aspects of due process that could be affecting the accessibility of special education due process. It provided multiple opportunities for the participating attorneys to provide narrative comments and recommendations, potentially leading toward more targeted and effective reforms.

All respondents were contacted through email; several national organizations agreed to send the survey invitation to their respective email

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[53] *Id*. at 193–94.

[54] Complexity is used in this context to refer to a process that is difficult to navigate because of numerous legal rules and procedures, lengthy hearings, the need for sophisticated evidence, and the like. Excessive complexity can delay resolution of the issue, often leaving a child's educational needs unmet for an extended period of time.

lists.[55] Those lists were supplemented with Google searches to find email addresses of attorneys who practice special education law.[56] The survey specifically solicited responses from lawyers with experience in special education due process hearings; those without such experience would likely have declined to respond.[57]

The survey contained thirty-six questions,[58] four of which were open-ended questions inviting comments on particular aspects of due process hearings. The first section of the survey gathered basic information on each respondent, including where and for how long the attorney had been practicing, whether the attorney typically represented school districts or parents in special education matters, and how many due process cases the attorney had handled. Respondents were then asked about their use of discovery and expert witnesses, and about whether certain procedures were used in the state (i.e., rules of evidence, rules of civil procedure, representation by non-attorneys). Finally, a series of questions sought observations about the accessibility of due process to parents seeking to resolve special education disputes. At multiple points in the survey, respondents were invited to include narrative comments. In particular, respondents were given the option of providing comments on the use of expert witnesses, the use of discovery, the effectiveness of *pro se* representation for parents, and the effectiveness of attorney representation for parents.[59] At the end of the survey, respondents were given the opportunity to provide ideas for improving due process in special education.[60]

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[55] Three organizations graciously agreed to send the survey to members: 1) The National Disability Rights Network; 2) Council of Parent Attorneys and Advocates; and 3) National School Boards Association. Two additional lists in North Carolina were used, one of school board lawyers and one of parent lawyers.

[56] Recipients who did not respond within a week of receiving the survey were provided one reminder.

[57] Likely for this reason, our sample size is slightly less than half of Elizabeth Shaver's 2015 study. Indeed, while the number of lawyers practicing special education law in the U.S. is small, the number with experience in special education due process is likely even smaller. In North Carolina, for example, in 2018, just nine lawyers represented the parents in all of the due process hearings held in the state (except the *pro se* cases) and just fourteen lawyers represented the school districts. Analysis done by the authors based on state reports of the 16 due process cases that resulted in final hearing decisions. *See Due Process Hearings*, PUB. SCHS. OF N. CAROLINA: STATE BD. OF EDUC., DEP'T OF PUB. INSTRUCTION, https://ec.ncpublicschools.gov/parent-resources/dispute-resolution/due-process-hearings (last visited Feb. 25, 2021).

[58] The survey was designed to be completed within five to fifteen minutes depending upon how much time the attorney wished to spend answering the open-ended questions.

[59] These comments remain on file with the authors.

[60] Respondents were also given the option to provide their contact information if they were interested and available for a one-on-one interview. For confidentiality reasons, these names will not be shared.

A. Respondent Demographics

A total of 175 attorneys from forty-three states and two additional jurisdictions completed the survey.[61] Table 1 provides the breakdown of respondents across states; slightly more than half of the states had one to three respondents, and only seven states had seven or more respondents.[62] Ninety-eight attorneys representing parents, seventy-four representing school districts, and three attorneys representing both parents and school districts participated in the survey.[63]

As Figure 1 demonstrates, the respondents came with varied levels of experience. Nearly half of the respondents had practiced special education law for more than fifteen years. Sixteen percent reported having practiced special education law for eleven to fifteen years; nearly twenty percent for six to ten years, and about twenty percent for zero to five years. When it came to experience specifically with due process cases (Figure 2), about half had handled more than twenty cases, while twelve percent reported having handled eleven to twenty cases, sixteen percent reported six to ten cases, and just over twenty percent reported zero to five cases. Those attorneys with the greatest experience in due process cases practiced in a wide range of states.[64] The states with the most attorneys who have handled more than twenty due process cases were Arizona (5), California (5), District of Columbia (4), Maryland (5), North Carolina (5), New Jersey (7), Ohio (4), and Texas (8). Not surprisingly, most of these attorneys practice in states with high numbers of due process cases (California, District of Columbia, Maryland, New Jersey, and Texas). [65]

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[61] Not every respondent answered every question; therefore, some questions record fewer than 177 responses.

[62] Those attorneys who reported practicing in multiple states (n=19) were asked to indicate which state they would be referring to when completing the survey.

[63] Three attorneys indicated they represented both types of clients.

[64] AL, AR, AZ, CA, CO, CT, DC, FL, GA, HI, IL, IN, KY, LA, MA, MD, MI, MN, MO, MT, NC, NH, NJ, NM, NV, NY, OH, OR, PA, RI, TN, TX, VA, WA.

[65] *IDEA Data Brief: Due Process Complaints/Hearings,* CTR. FOR APPROPRIATE DISPUTE RESOL.. IN SPECIAL EDUC. (May 2017), https://www.cadreworks.org/sites/default/files/resources/CADRE%20DPC%20Brief_WebFinal_6.2017.pdf

Figure 1: Years of Experience in Special Education Law

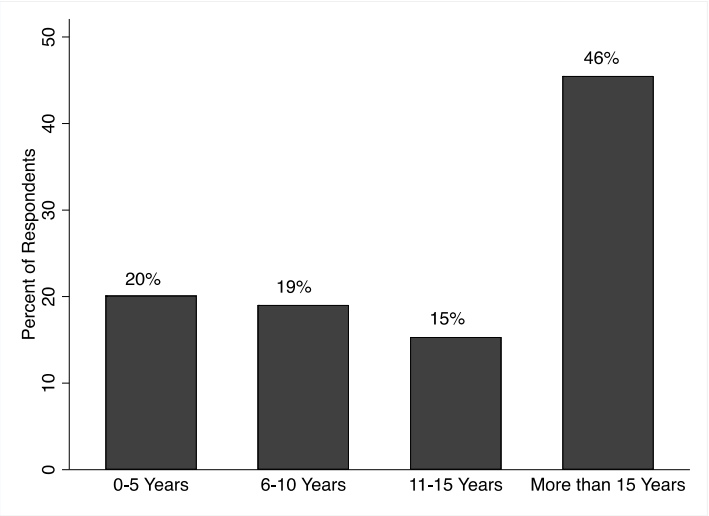


Figure 2: Number of Due Process Cases Handled

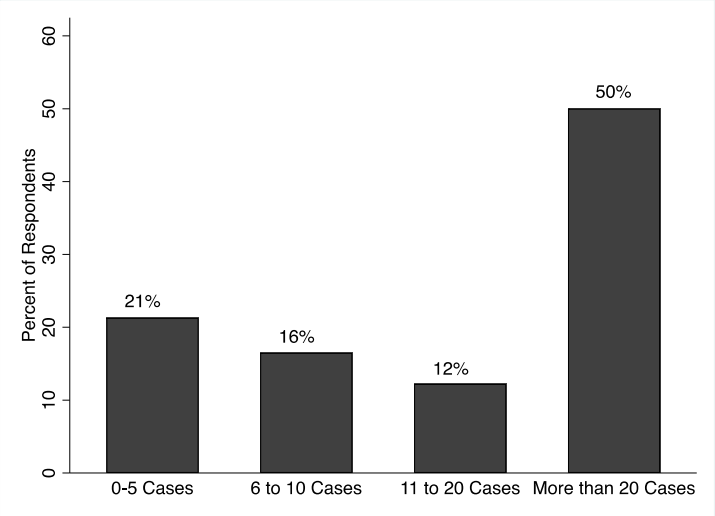


Table 1: Number of Respondents by State

0	1-3	4-6	7-9	10+
Delaware	Alaska	Alabama	District of Columbia	North Carolina
Idaho	Connecticut	Arkansas	Florida	Texas
Kansas	Hawaii	Arizona	Georgia	
North Dakota	Iowa	California	Illinois	
South Dakota	Indiana	Colorado	New Jersey	
Vermont	Bureau of Indian Affairs	Massachusetts		
West Virginia	Kentucky	Maryland		
	Louisiana	Michigan		
	Missouri	Minnesota		
	Mississippi	New York		
	Montana	Ohio		
	Nebraska	Oregon		
	New Hampshire	South Carolina		
	New Mexico	Tennessee		
	Nevada	Virginia		
	Oklahoma			
	Pennsylvania			
	Rhode Island			
	Utah			
	Washington			
	Wisconsin			
	Wyoming			

B. Attorney Perceptions of Overall Complexity, Accessibility, & Effectiveness of Due Process Hearings

The first substantive portion of the survey focused on attorneys' perceptions of the overall complexity, accessibility, and effectiveness of due process. Although due process was originally meant to provide parents with a prompt and informal tool for dispute resolution,[66] previous studies— as

[66] *See* 121 CONG. REC. 37,416 (1975) (The remarks of Senator Harrison Williams Jr. included the following statement, "I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. Thus, in view of the *urgent need* for *prompt resolution* of questions involving the education of handicapped children it is expected that *all hearings and reviews* conducted pursuant to these

well as vocal complaints by parents and their advocates— suggest that special education due process may not be meeting the mark.

a. Complexity

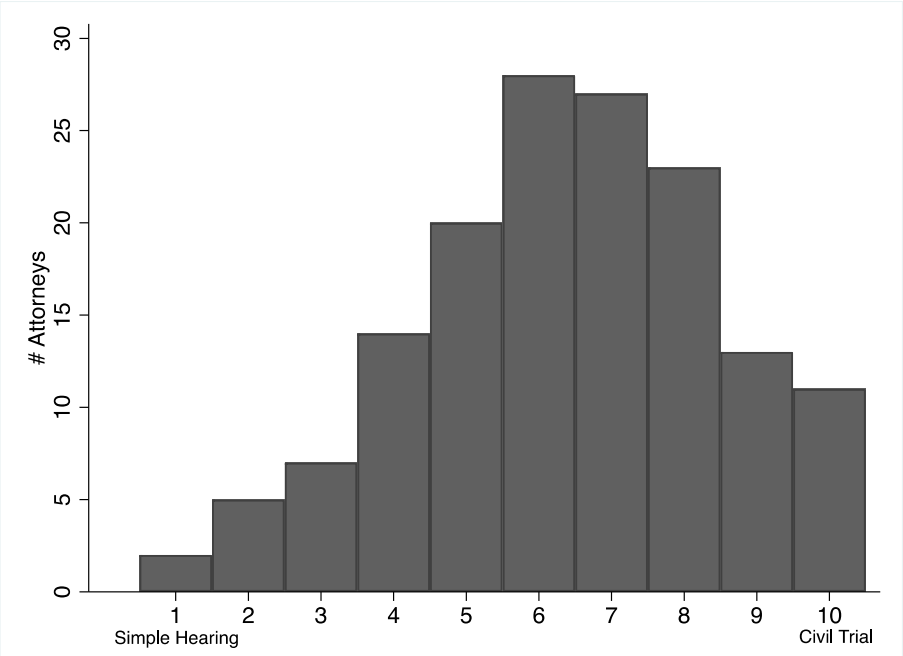
Respondents were asked to rate their state's due process hearing system on a scale of one to ten, with one being a simple administrative hearing and ten a complex civil trial. Figure 3 presents the results, aggregated across attorney type. Of the 149 respondents who answered this question, less than ten percent (28) reported a score of four or lower.[67] About half of the respondents (51% or 76) reported a score between five and seven. Nearly a third of the respondents (30% or 45) reported a score of eight or higher. The average score of all respondents was 6.33, with a median score of 6. These responses are consistent with previous research that has documented the increased "judicialization" of due process hearings.[68]

provisions will be *commenced and disposed of as quickly as practicable* consistent with a fair consideration of the issues involved."); C.M. ex rel. J.M. v. Bd. of Educ. of Henderson Cty., 241 F.3d 374, 381 (4th Cir. 2001) ("[T]hese rights [to a due process hearing and judicial review] were created to supply a simple and efficient method to encourage parental participation and facilitate parental enforcement of the IDEA.").

[67] Again, not all respondents answered all questions. Thus, our percentages are based on the number of attorneys responding to a given question, not the overall number of attorneys who participated in the survey.

[68] Zirkel et. al, *supra* note 5, at 46, n. 60.

Figure 3: Attorneys Ratings of Their State's Due Process System

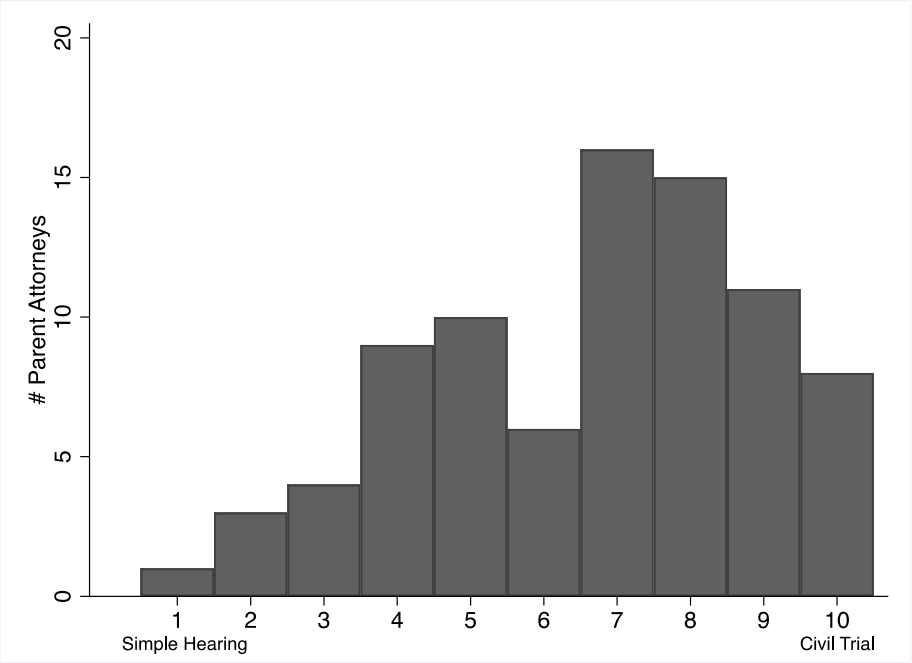


When broken down according to attorney type, the responses show that school district attorneys and parent attorneys have, on average, very different perceptions of the complexity of the due process system. Parent attorneys, as a group, perceived the system as more complex than school district attorneys. As shown in Figures 4 and 5, which report system ratings among parent attorneys and school district attorneys respectively, the distribution of responses among parent attorneys is clearly skewed towards the right (i.e., more perceived complexity) while the distribution among school district attorneys is much more normally distributed. The majority of parent attorneys (68%) rated the due process system in their state at a six or higher; the majority of school district attorneys (61%) rated the due process system in their state at a six or *lower*. A third of school district attorneys rated their state's due process framework at a five, right in the middle of an informal hearing and complex trial. The average score of parent attorneys was 6.57, with a median score of 7; the average score of school district attorneys was 6.20, with a median score of 6.

This survey question did not contain an option for comments, so the reasons for the perceptions about complexity were not provided by respondents. Judging from the comments on other parts of the survey, however, the difference in perception could be attributable to the requirement that, in most states, parents shoulder the burden of proof but are not in possession of the evidence. This makes it far more difficult for parents to put together their case. School districts (in most cases) are typically in a

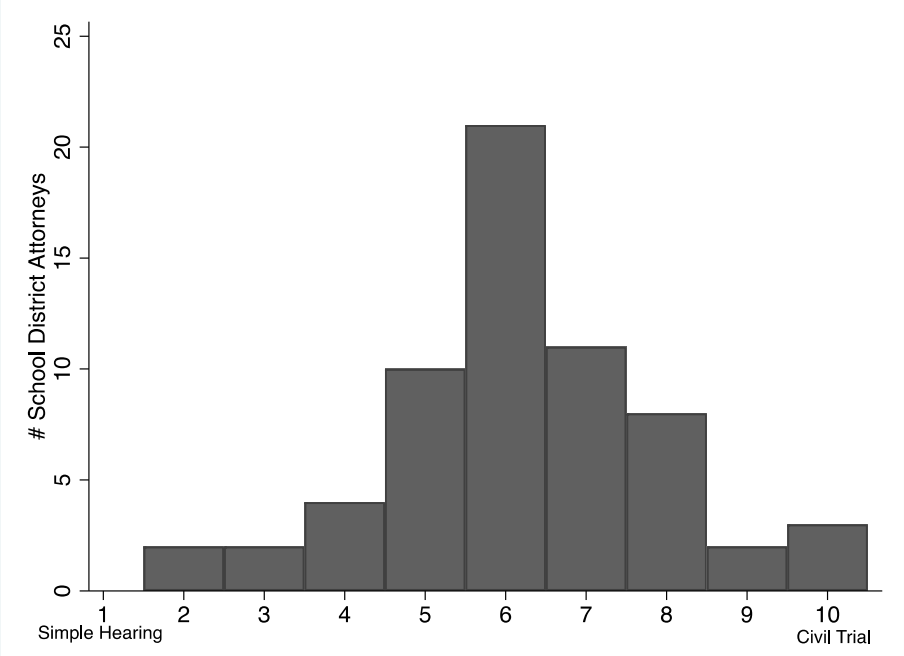
defensive position and have easy access to virtually all the evidence, such as teacher observations, student work samples, and a full range of professional opinions. The challenge for parent attorneys—of having to pull together enough evidence to meet a preponderance standard while being limited in access to evidence— could well make the case feel more complex for them than it does for school attorneys.[69]

Figure 4: Parent Attorneys' Rating of Their State's Due Process System



[69] In general, we might also expect that school district attorneys would view the system as less complex because, given they represent entire school districts and not individual families, they may see many more due process cases than parent attorneys. However, even among school and parent attorneys who have each handled more than twenty due process cases, we still see this difference in perception. The mean complexity rating among school attorneys who have handled more than twenty due process cases is a six; among parent attorneys it is a seven.

Figure 5: School District Attorneys' Rating of Their State's Due Process System



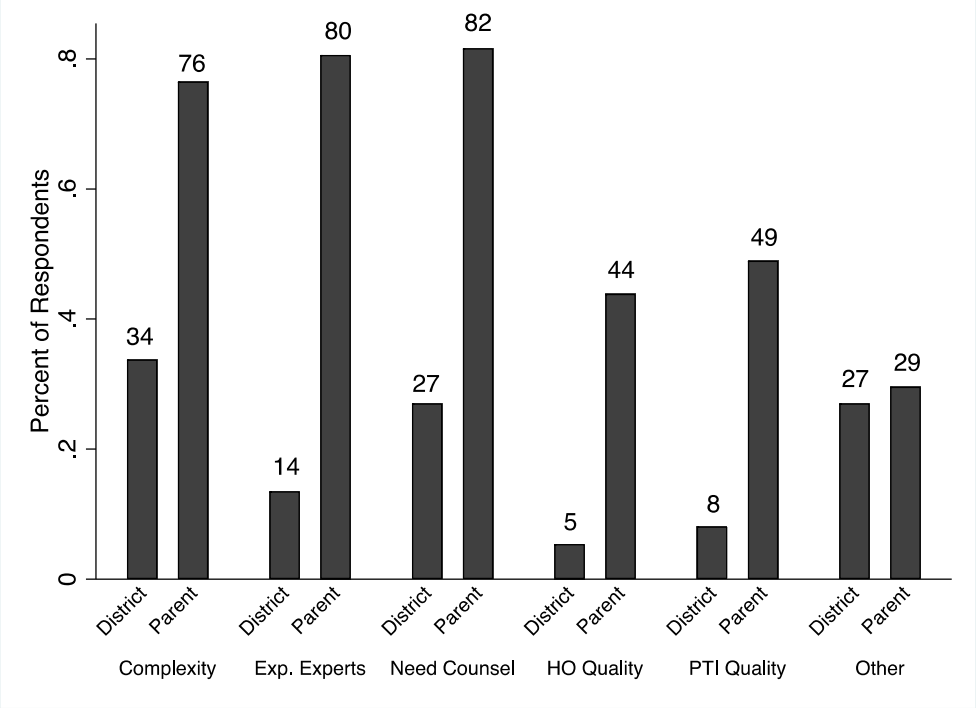
b. Accessibility

Respondents were also presented with a list of potential barriers that might make it difficult for parents to navigate the due process hearing system in their state and were asked to indicate which, if any, of those barriers characterized their state's system.[70] Figure 6 presents the results, broken down across attorney type. First, parent attorneys were much more likely to indicate that barriers were present in their state. While seventy-six percent of parent attorneys indicated that their state's due process hearing system was too complex for parents to navigate, only thirty-four percent of school district attorneys did so. While eighty percent of parent attorneys agreed that good results require expensive experts, which most of their parent clients cannot afford, only fourteen percent of school district attorneys endorsed that view. Similarly, while eighty-two percent of parent attorneys indicated

[70] The specific barriers listed were: "Overall hearing system is too complex for most parents to navigate; Good results require expensive experts, which most parents can't afford; Good results require representation by attorneys, which most parents can't afford; Hearing officers do not assist parents in the process; Support for parents, from our state's Parent Training and Information (PTI) Center or other organization, is not readily available." Note that this question is slightly different in format from others in the survey. Only those respondents who agreed that one of the listed barriers was in fact a barrier responded; those who did not agree were instructed not to respond at all. Thus, the results show the number of attorneys who responded, not the percentage.

that good results require representation by attorneys, which most parents can't afford, only twenty-seven percent of school district attorneys identified that as a barrier. Finally, when it comes to the assistance of hearing officers, forty-four percent of parent attorneys reported that hearing officers do not assist parents in the process; only five percent of district attorneys did so. [71]

Figure 6: Identifying Barriers to Special Education Due Process



c. Effectiveness

Participants were next asked whether they thought the due process system was an effective way for parents to get special education disputes resolved, when represented by an attorney and when not represented by an attorney. As noted in Section II, some states allow parents to be represented by non-attorney advocates, while other states require that parents either proceed *pro se* or hire legal representation.

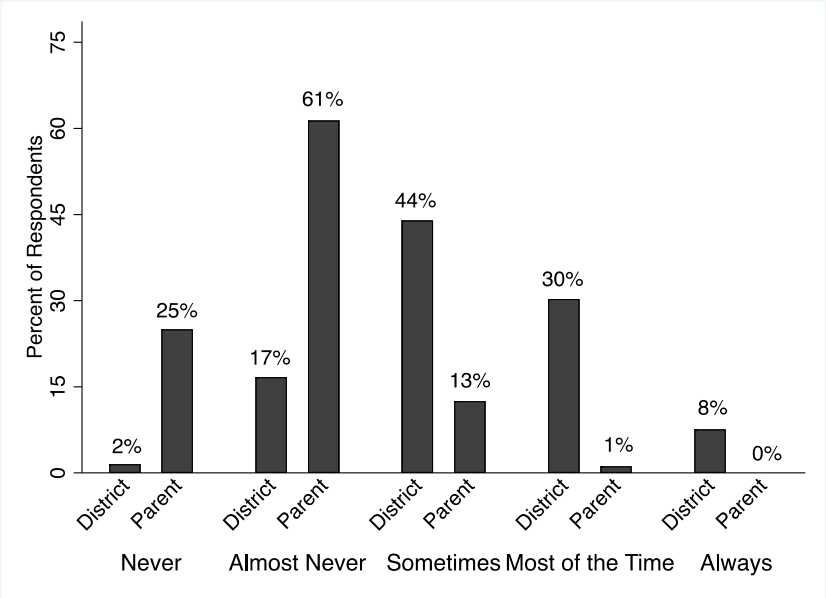
[71] The law does not specifically mandate that hearing officers assist parents; they have discretion over what level of assistance is provided. Surely, most inexperienced, *pro se* parents will have difficulty with an administrative hearing and will find the process more accessible with assistance from the hearing officer regarding adherence to rules, meaning of terminology, and even presentation of evidence. A hearing officer's obligation to neutrality will limit the extent of assistance that is appropriate, however.

Pro Se Parents

With regard to *pro se* parents, the majority of respondents reported that due process is not an effective system to resolve special education disputes. More than half (57%) believe that due process is either never or almost never effective. Less than twenty percent think it is effective always (3%) or most of the time (13%). The remainder said it was sometimes effective (26%). However, as with the questions concerning complexity and accessibility, there are large differences between parent attorneys' evaluations of the effectiveness of due process and those of school district attorneys.

Attorneys who represent parents, on the whole, do not believe that due process can produce favorable results for unrepresented parents. As demonstrated in Figure 7, more than eighty-five percent said that due process was never or almost never effective (25% chose never effective; 61% chose almost never effective) while only twelve percent indicated that due process was sometimes effective and only one percent said it was effective most of the time. Indeed, one parent attorney commented, "A *pro se* parent has a better chance of winning the Power Ball than winning a due process hearing."

Figure 7: Effectiveness of the State's Due Process System for Pro Se Parents



Parent lawyers attributed that absence of success to the parents' general lack of understanding about what is needed to meet their burden of

proof, how to present evidence and witnesses, how to respond to motions, and how to craft a persuasive argument. Some parent attorneys suggested that, because school districts are always represented by lawyers, even when the parent is *pro se,* the playing field is far from even. Other parent lawyers reported that hearing officers are far more likely to defer to the school's witnesses when the parent does not have a lawyer to push against that deference and are more likely to push a parent toward a less favorable settlement. Others commented on the uphill battle parents face because the process is rarely concluded within the forty-five-day time limit prescribed in the IDEA and *pro se* parents cannot sustain their case month after month.

In contrast, school district attorneys were considerably more positive regarding *pro se* parents' chances of prevailing in due process. In the view of more than eighty percent of the school district lawyers in the sample, due process is at least sometimes effective for *pro se* parents (sometimes: 44%; most of the time: 30%; and always: 7%).[72] Several school district lawyers commented that they thought parents could sometimes do better unrepresented than represented. They suggested that the hearing officers "bend over backwards" to explain the process to the parents and that they themselves try to get to a resolution early in the process before a hearing occurs. Without the impact of attorney fee negotiations, they said, the discussions can focus more directly on the student's needs. In their view, a settlement is more often reached through mediation or at the resolution session when the parents are not represented. Nevertheless, a number of school district lawyers did note that unrepresented parents are typically ill-equipped to handle the complexities of a due process hearing or present effective arguments. One school district lawyer shared that over a long career, she had never lost a case to an unrepresented parent but had settled several.

One notable area of agreement between the two groups of lawyers is on alternatives to due process: attorneys on both sides suggested that *pro se* parents were more likely to be successful using the state complaint process or mediation. They noted that the state complaint process is much more accessible to parents and that parents are more likely to get the relief they seek.[73] At least one parent lawyer said, however, that even that process was not always accessible. This is because school districts had begun using due process to appeal state complaint decisions favorable to parents, thus

[72] The comments suggested that a few lawyers read the question as comparing representation by attorneys with representation by non-attorney advocates, as opposed to asking about parents with no representation at all.

[73] This position is understandable, as the burden on the parents is considerably lower in the state complaint process. In that process, the parent need only present a complaint to the state educational agency; the state agency then gathers the evidence, investigates the complaint, and makes a decision. Once the parent has presented the complaint, there is no ongoing role for the parent, other than to answer questions of the state investigator should the investigator have any.

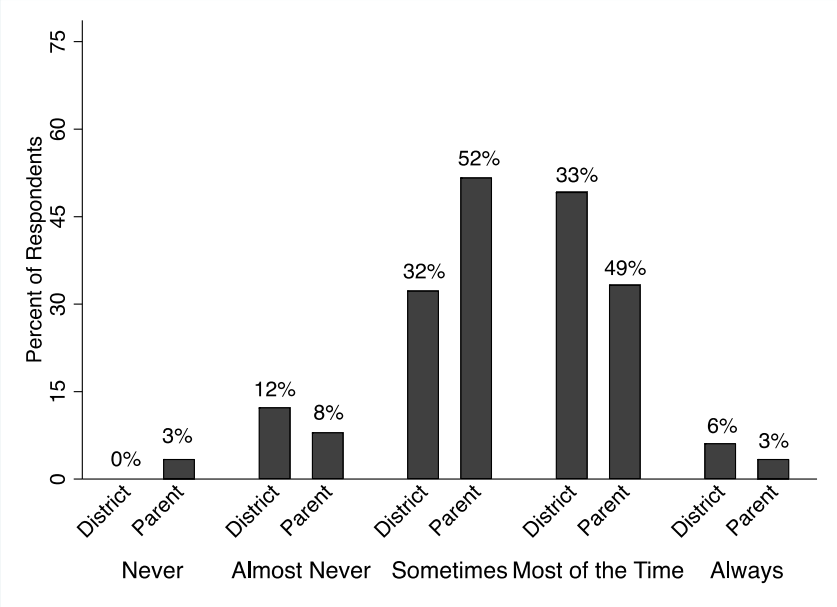
requiring parents to navigate due process anyway.

Represented Parents

On the question of whether due process is effective at resolving special education disputes when the parent *is* represented by an attorney, the differences of opinion between school district lawyers and parent lawyers were not as pronounced as on other questions. School district lawyers were more likely to say that the process was effective "most of the time" than were parent lawyers (49% of school district lawyers vs. 33% of parent lawyers); parent lawyers were more likely to say that the process was just "sometimes" effective for parents (51% of parent lawyers vs. 32% of school district lawyers). While the differences in opinion were less marked than with respect to *pro se* parents, the differences are still quite significant. The specific breakdowns across attorney type are presented in Figure 8.

Parent attorneys generally reported that having an attorney improves the chances of a parent getting the dispute resolved. Some commented that representation helps level the playing field because school districts are always represented; it also helps families enter good settlements. Another said that in his experience, the majority of cases are settled before a hearing when there are attorneys on both sides.

Figure 8: Effectiveness of the State's Due Process System for Represented Parents



A prevalent viewpoint of school district lawyers, however, is that the issue of parent attorney fees impairs the effectiveness of due process. "Attorneys' fees drive the train," commented one school board lawyer. Another said, "Some parent attorneys are VERY unreasonable when it comes to fees, which holds up the whole system of trying to resolve disputes in the best interest of the student and his/her FAPE." Yet another shared this experience: "The [parent's attorney's] strategy seems to be to run up the time and bills for the school districts…Our small-sized districts are forced to settle and pay $15,000 or more to the attorney in order to get the settlement because they would literally go broke paying for the due process hearing." With somewhat more recognition of the need for parent attorneys to get paid for their work, another remarked, "Winning at due process is the only way that a parent's attorney can access the IDEA's fee-shifting provision, so parents who are represented by counsel almost always end up going through due process."

Perhaps not surprisingly, parent attorneys also mention the issues of fees, but with a different emphasis. Many parent attorneys bemoan the expense of prosecuting a due process case for a parent, noting how few parents can afford counsel. One remarked, "The original purpose of a timely, cost-effective hearing has been turned on its ear. At present, getting a case through a hearing costs approximately $50,000 to $100,000 of qualified attorney time. This is due to the legal complexities districts' counsel create and financially benefit from." Another said, "It is too expensive to be useful for anything other than private placement cases." Several parent lawyers see the school districts as the power players. One described it this way: "Special education attorneys come from small offices and represent clients that typically cannot afford attorneys. The school districts have big, big resources and teams of attorneys and paralegals, so it is a David and Goliath situation."

Both school district attorneys and parent attorneys acknowledged that the effectiveness of due process is highly dependent on the lawyers. School district lawyers frequently noted that the process can be ineffective when the parent's lawyer is not experienced or knowledgeable about special education law, while parent lawyers commented that the chance of resolution depended on whether or not school district's law firm was overly litigious. Others noted that the skills that attorneys bring to the table facilitate resolution of the case. One school district attorney noted that attorneys tend to work toward resolving matters in most cases, regardless of which side they are representing. That attorney remarked, "Attorneys are trained to present evidence and make arguments in a concise and orderly manner that usually saves time and expenses. Attorneys rarely incite their clients' emotions and can be useful in calming difficult personalities. That is true for both parent attorneys and school division attorneys."

C. Attorney Attitudes Towards Specific Aspects of Due Process

In addition to asking respondents about their general perceptions of the complexity, accessibility, and effectiveness of due process, the survey also asked respondents to report more specifically on the use of formal discovery and expert witnesses. These topics were chosen on the theory that they were the most likely to add complexity to the process, especially for parents.

Discovery

States differ on whether formal discovery is allowed as part of due process procedures.[74] Respondents were asked to indicate the formal discovery tools, if any, that they usually use in due process cases. A little more than half the attorneys indicated they used discovery; the rest did not. Among the attorneys who use discovery, as shown in Figure 9, requests for the production of documents were the most common form of discovery, with requests for admissions, written interrogatories, and depositions used far less frequently. Slightly more than half reported using requests for production of documents when preparing for a due process case, while less than twenty percent reported using written interrogatories, depositions, or requests for admission. These patterns were repeated, with slight variation, when the data were grouped by parent attorneys and school district attorneys. Among school district attorneys, fifty percent use requests for documents, twenty-two percent use written interrogatories, sixteen percent use depositions, and twelve percent use requests for admission. Among parent attorneys, fifty-six percent use requests for production of documents, seventeen percent use written interrogatories, twelve percent use depositions, and sixteen percent use requests for admission.

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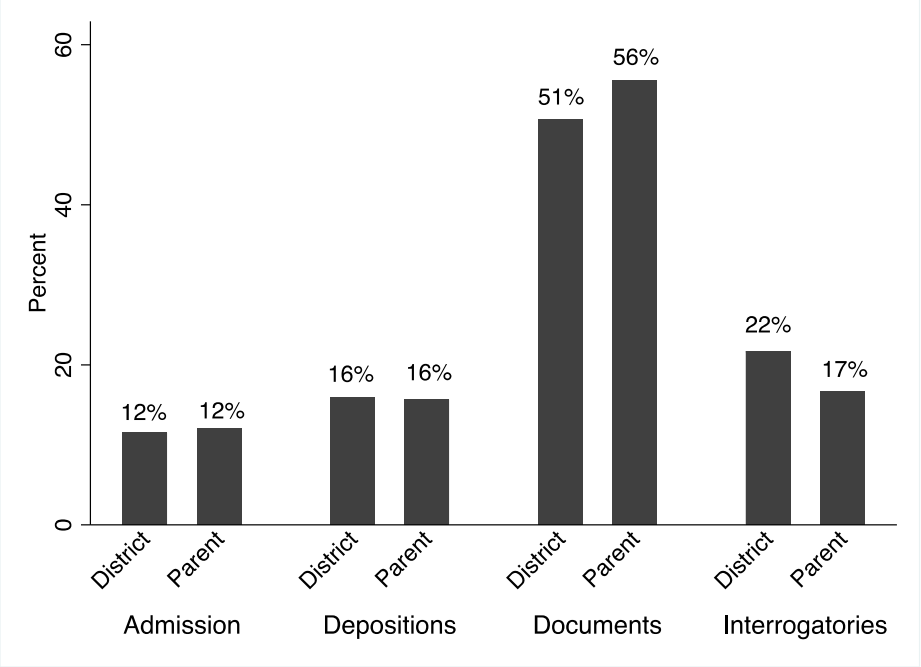
[74] The IDEA is silent on the use of discovery in due process. A 1996 letter from the federal Office of Special Education Programs within the U.S. Department of Education contained the following response to a question asking whether it was permissible under the IDEA for a school district to request that a parent answer interrogatories or produce documents prior to the hearing: "Part B does not contain discovery rules, and there is nothing in Part B that would prohibit or require use of discovery proceedings such as those described in your inquiry. Whether discovery is used in a Part B due process hearing and the nature and extent of discovery methods used are matters left to the discretion of the hearing officer and could be subject to any relevant State or local rules or procedures." Letter from OSEP, to Stadler (Jul. 5, 1996). On file with authors.

Figure 9: Use of Discovery Tools



Eighty-six attorneys provided comments on the use of formal discovery in due process hearings; both school district attorneys and parent attorneys had a considerable amount to say. Most of the comments fell into one of four major categories: pro-discovery comments, anti-discovery comments, comments focused on the costs of discovery, and comments focused on the improper use of discovery by the opposing side. Comments in favor or against formal discovery begin the following discussion, followed by those suggesting that discovery is either too costly or used improperly.

Should Formal Discovery Be Allowed?

Of the thirty-four school district attorneys who provided comments on the use of formal discovery, more were opposed to its use than were in favor of it. While eleven attorneys detailed why they felt formal discovery is an impediment to the due process system, only five attorneys advocated for greater discovery. Of those five, only two provided a detailed explanation as to why formal discovery would be useful. One attorney noted that "access to private medical/psychological/education providers is often critical to due process claims, but without the ability to get it, the school district doesn't have what it needs to assess settlement options or prepare for a hearing." An attorney who does not have access to discovery remarked, "discovery and motion practice would allow hearing officers to focus the issues that should be addressed during due process hearings. Often, hearings turn into multi-

day and multi-week free-for-alls. Adequate discovery and motion practice could assist in this regard."

Those school district lawyers who opposed the use of formal discovery cited a number of reasons for their opposition. One repeated justification for restricting discovery was time, or the lack thereof. It was noted that the tight deadlines for each step of the due process framework "don't lend themselves well to the timelines for written discovery." Others said allowing formal discovery would "slow down the case" and take "time away" from more important aspects of the case. Numerous school district attorneys also suggested that allowing for formal discovery would lead to a more arduous due process system. Adding formal discovery would be "too broad [and] burdensome," one said. Multiple attorneys noted that, due to the size of student files, document production could "end up being thousands of pages."

Parent attorney views were more divided about whether formal discovery aids or impedes the due process system. Of those offering comments on discovery, eleven indicated opposition to allowing the use of formal discovery, while ten suggested that formal discovery should be allowed.[75] Those respondents who felt formal discovery should be allowed said that formal discovery is "essential…for the side that bears the burden of proof," and that it "help[s] level the playing field for parents." Parent attorneys who opposed the use of formal discovery, like their school district counterparts, frequently mentioned the time constraints of due process. These respondents said formal discovery would "complicate and slow down the otherwise fairly efficient process and shortened timeline," and would "delay[] a decision beyond the applicable time frame." Formal discovery was also viewed as making what should be an informal process too formal and complicated. One attorney noted that "[o]n the whole, I think it's preferable for the hearing process to be more informal in order to level the playing field between parents and districts." Another noted that "formal discovery is intimidating to *pro se* parents and makes the process more formal and more akin to typical litigation."

The Costs of Discovery & Improper Use

Both school district lawyers (6) and parent lawyers (11) expressed concerns about the costs that formal discovery imposes. While school district attorneys' comments were characterized by a simple recognition that discovery adds costs, however, the comments provided by parent attorneys also reflected a concern that increased costs would have particular impact on lower-income families. Formal discovery, it was feared, would "price parents out of getting their hearing," and "have the effect of hindering, if not

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[75] The remaining comments by parent attorneys were best categorized as neutral, neither advocating for nor opposing the use of formal discovery in due process.

barring, parents (especially low-income parents) from utilizing the due process system."

As might be expected in this adversarial setting, attorneys on both sides suggested that the *other* sides' attorneys used discovery as a weapon. One school district attorney suggested that "[p]arents' attorneys…will file formal discovery very early, even when it's clear the case will settle quickly, in an effort to drive up costs and pressure the school." Other school district lawyers suggested that discovery was used by parent attorneys for "nuisance/harassment purposes" and to "mire school districts down in responding to requests rather than preparing for a hearing."

Parent attorneys showed a similar frustration and sense of discovery "weaponization." One lawyer representing parents noted that the school districts "use discovery to significantly increase the legal expenses for families in the hope they will run out of money and give up." Another parent attorney suggested that the school districts "throw[] in the kitchen sink, thus making it impossible to prepare." Like the school district attorneys, parent attorneys indicated frustration with what were viewed as purposely burdensome discovery practices: "Here, school district attorneys employ the practice of sending multiple copies of the same documents in discovery such that you might end up with 35 copies of the same exact document. This results in productions that range from 5,000 to 15,000 pages of produced documents that must be slogged through which waste the family's time and resources."

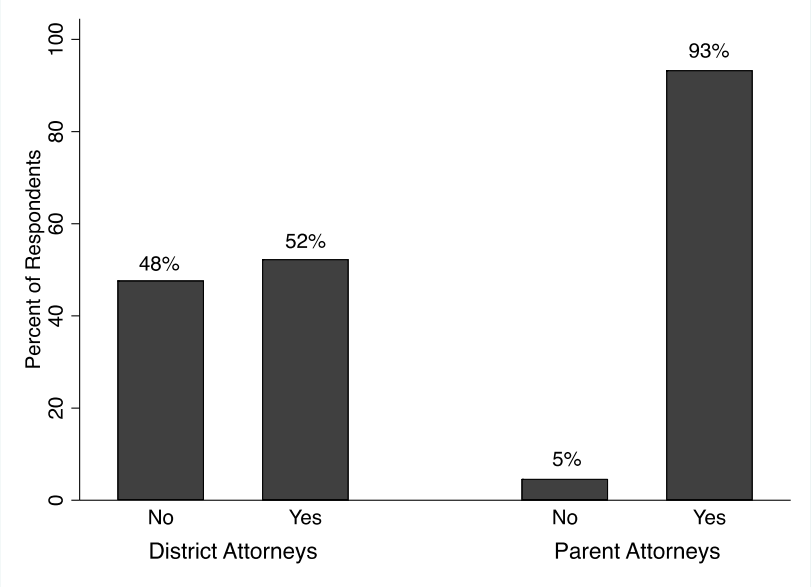
The considerable variation in attitudes toward discovery reveal that its usefulness in due process hearings continues to be a matter of significant debate. While discovery can enhance the parties' opportunity to obtain information not contained in the student's official records, it can also add cost and complexity to the proceeding. Not surprisingly, many attorneys view their own discovery practices as necessary and reasonable, but the opposing side's use to be unnecessary and unreasonable. Consensus on the issue is illusive.

Expert Witnesses

Respondents were asked to indicate whether, in their experience, evidence from an expert witness is typically necessary to obtain a favorable ruling on a substantive issue in a due process case. One hundred and fifty-nine lawyers responded to this question, with three-quarters agreeing that evidence from an expert witness is necessary to secure a favorable ruling. When the data are broken down across attorney type, views diverge. As shown in Figure 9, parent attorneys are considerably more likely than school district attorneys to report that an expert witness is necessary to obtain a favorable ruling. While ninety-three percent of the parent attorneys indicated that an expert witness is necessary, school district attorneys were much more

divided on the issue: forty-eight percent reported that an expert witness was *not* necessary to obtain a favorable ruling, while fifty-two percent agreed it was.

Figure 10: Need for Expert Witnesses



Eighty-one attorneys offered comments on the use of expert witnesses in special education due process hearings, and both school district attorneys (30) and parent attorneys (51) had strong opinions on the subject. The comments were sorted into four groups: comments focused on parents' inability to meet their burden of proof without an expert witness, comments concerning the high cost of expert witnesses, comments highlighting school districts' ability to use staff as "built-in" experts, and comments regarding the use of unqualified experts. Comments of those who see expert witnesses as necessary but prohibitively costly for parents begin the discussion, followed by those suggesting that school districts gain advantage by having built-in experts or presenting unqualified experts.

Expert Witnesses Necessary for Parents but also Costly

Nearly half (24) of the parent attorneys who provided comments on the use of expert witnesses focused on the inability of parents to succeed without providing expert testimony. For parents to "have any chance in prevailing," these attorneys suggested, it is critical for parents to retain an expert witness. Indeed, one attorney reported that "[e]xpert witnesses are essential to winning even the simplest cases," while another noted that "one cannot even think of prevailing without an expert witness [and as such] I will not take a

case if the parents are unwilling to pay an expert to testify and appear."

A number of parent attorneys pointed out that school districts come with "built-in" experts, i.e., their school staff, and so it is necessary for parents to bring their own experts to "combat" school officials. Others noted that expert witnesses are critical in "educating" the judge or hearing officer as to the child's special education needs. Many parent attorneys suggested that school staff are often given deference by the judge or hearing officer, and thus it is "necessary [for parents] to have witnesses who can speak with authority and experience…about various aspects of students' diagnoses and resulting needs."

At the same time parent attorneys highlighted the necessity of retaining an expert witness, they also expressed considerable frustration regarding the high costs of doing so. The costs of retaining expert witnesses were consistently seen as a powerful barrier to indigent and low-income families. Because these costs cannot be shifted to the school district, parents must pay for their experts even when they ultimately prevail in the case. As one parent attorney commented, "The problem with experts is the cost. Not being able to recoup the cost of an expert— even when the prevailing party— is a huge impediment to parents' ability to afford going to due process."

Although school district attorneys also focused on the costs of expert witnesses in their comments, their focus centered less on the particular burdens of expert witnesses and more on the overall expense of the hearing. One school district attorney noted that "many cases become 'battles of the experts' and run up insane costs." Another seemed to doubt the motivations of parents' witnesses, suggesting that parents' expert witnesses "often seem to be pushing an agenda, including advocating that the LEA should be paying for their services."

Built-In Experts & Unqualified Experts

Both school district attorneys' and parent attorneys' comments reflected an awareness that school district staff can, and often do, serve as expert witnesses in due process hearings. Seven school district attorneys who mentioned this occurrence acknowledged it in a matter-of-fact way, exemplified by this remark: "I find that school the school district's internal staff serve as expert witnesses very effectively for my clients; I usually don't need an "outside" expert. My client's employees are experts in their areas." On the other hand, parent attorneys view school districts' ability to put forth "built-in" experts as placing parents at a distinct disadvantage. One attorney noted that while parents have access to their child's independent evaluations, they still "have to pay for experts to testify…or find ones that are willing to testify for free." Indeed, one attorney asserted that "[t]he only party that is not harmed by the requirement of expert testimony is the school district, because it has educational experts on hand it can call on with ease."

Additionally, several parent attorneys suggested that school "experts" are often given greater deference by hearing officers. It was noted that "[c]linician input is always vital to the presentation of our cases" because "[s]chool districts are given the benefit of the doubt most often by hearing officers— they are seen as the educational experts. It's often necessary to have witnesses who can speak with authority and experience, often more so than the district's witnesses…" Others suggested that hearing officers often give school district experts the "benefit of the doubt" or "deference over the parents' retained expert" because the school's witnesses "can pretty much observe the student at school whenever they want, while that takes more coordination and possibly expense on the parent/student side."

A few school district attorneys' comments, however, suggested that they felt that it was *parents'* experts that are given greater (and undue) deference. One suggested that "too much weight is often given to [outside experts] because they are in private practice and thought to be more skilled than public school experts." Others suggested that "hearing officers often defer to [parents'] expert witnesses even when they know little about education" and that parents' experts are "[g]iven too much deference when they have relatively limited exposure to the student and their areas of expertise are often tangential to educators." Indeed, one school district attorney suggested that expert witnesses almost always help parents, "even when the expert has limited practical knowledge and is obviously biased due to relationships with the parent or student."

Attorneys on both sides expressed doubt and suspicion as to the qualifications of the opposing sides' experts, but in very distinct ways. Among school district lawyers, it was noted that parents' experts often have "no direct knowledge of the particular student at issue," and "are rarely experienced in education law or the requirements of special education" and come from areas of expertise that "are often tangential to education." Parent attorneys, however, did not seem to view experience in an educational setting as necessarily dispositive of quality. In particular, parent attorneys expressed frustration with school districts routinely using their staff as experts, when under usual expert rules, they would not qualify. One attorney noted that even first-year teachers are often considered experts.

On the whole, the majority of those attorneys who chose to comment on the use of expert witness, both parent attorneys and school district attorneys, expressed frustration with the use of expert witnesses. The reasons for such frustration, however, differed depending on which side an attorney represented.

IV. ATTORNEY RECOMMENDATIONS FOR CHANGE

At the end of the survey, participants were asked an open-ended question: If you were to suggest changes to the due process hearing system in your state, what might those be? Nearly one-hundred respondents left comments, (thirty-nine school district lawyers and fifty-seven parent lawyers, which accounts for a bit more than half of each group of respondents) revealing the high interest in reforming due process. The range of the comments reflected not only many differing views, but also the variety of characteristics of the due process system throughout the country. For example, where there is no discovery allowed, some lawyers want it and others are glad it is not available; where discovery is allowed, some want to get rid of it and some prefer to keep it. Similarly, where the rules of evidence and civil procedure are used, a number of lawyers want to eliminate or loosen them, yet where they are not in place, lawyers wish for them.

Nevertheless, a few strong themes percolated throughout the comments. For example, both school district and parent lawyers expressed the need for better trained hearing officers. Indeed, there was more agreement on this point than any other. Quite a few comments referred to hearing officers' lack of understanding of special education law; others mentioned a lack of skill in applying the law to the facts or in basic procedures. One lawyer thought that hearing officers should have to pass a competency test before hearing due process cases; others preferred hearing officers who only handle special education cases, which would give them sufficient opportunity to develop expertise.

The lack of a sufficient number of hearing officers to handle the caseload was raised by lawyers from a number of different states (Illinois, New Jersey, Kentucky, New York). Mirroring the comments made about the effectiveness of due process in resolving parent disputes, parent attorneys frequently noted that hearing officers are not impartial and have a strong bias toward school districts. Some attributed this to the appointment process or the payment system.

Finding ways to reduce the complexity of hearings was another very common theme among the comments, and again one shared by attorneys representing both sides. Some comments were quite general, such as, "simplify the procedures" or "make any reasonable change that reduces the cost." Others were more specific, such as, "allow for subpoenas for records of third parties without need for hearing officer signature." One school board lawyer suggested that the process should be essentially on paper, with cases being resolved by a summary judgment type process in which both parties would submit documentary evidence, affidavits, and written arguments,

supplemented by an hour for each side to make an oral argument.[76]

Simplifying discovery would also be a welcome change according to several respondents. One respondent suggested that discovery be limited to requests for production of documents; another thought there should be rules for mandatory disclosures instead of discovery. Another proposal was for more clarity about the applicable rules. One attorney commented, "Too much is left to the discretion of hearing officers, even with regard to how they will accept communication and documents,…timing of prehearing calls, and how and when they will sign subpoenas." The need for clarity and certainty of rules was also expressed this way: "Procedures need to be adopted and formalized so that each hearing isn't like the wild, wild west."

Quite a number of respondents focused on the length of hearings, with the majority suggesting that hearings be limited to either two, three, or five days. Several described hearings of ten to twenty days, remarking that hearing officers do not do enough to require the parties to streamline their evidence and engage in efficient time management. Allowing hearings to be scheduled over multiple months on non-consecutive days was viewed as problematic, as the judges cannot remember the testimony taken months before and the child's needs change over the course of an extended hearing. More timely decisions are needed, according to several respondents; they noted that the forty-five-day requirement in IDEA is routinely ignored. Two respondents, however, one who represents schools and another parents, suggested that the timelines are too short, predicting that resolution would be easier to reach with more time.

A number of respondents mentioned preventing the need for due process hearings. Mandatory mediation was a frequent suggestion, particularly from school district lawyers, as a preferable way to reach an early resolution. A parent lawyer who approves of mediation thought it was preferable to due process because of the retaliation experienced by parents who choose to use the due process system. Another parent attorney thought mandatory mediation could be helpful as long as the mediator was not thereafter the hearing officer on the case.

Many parent attorneys, but no school board attorneys, said that to improve the whole process, parents must be able to recover the cost of expert witnesses. In line with their answers to the more specific question about expert witnesses, parent attorneys see a clear need for either reimbursement for the cost of experts or the development of a funding source to pay for experts. A few respondents thought the appointment of independent experts by the hearing officer would improve the fairness of the system. One school board lawyer proposed prohibiting the use of expert witnesses.

Related to the cost of experts is the cost of attorneys themselves. Many

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[76] This suggestion would require a change to the IDEA itself, which gives to parties the right in due process to present and cross-examine witnesses. *See* 20 U.S.C. § 1415(h) (2018).

participants suggested that reforms are needed to address the high cost of attorneys and the inability of most parents to meet that cost. Three school board lawyers and nearly twenty parent lawyers suggested that parents need more options for obtaining affordable representation. Recommendations included an increase in training for pro bono lawyers, an appointment system, more law school clinics specializing in education cases, greater priority for these cases at legal aid offices, and a state fund for payment of lawyers for parents. Three respondents, one school board lawyer and two parent lawyers, suggested that a certification process for non-attorney advocates could produce adequately trained people to represent parents at a lower fee.

Several school district attorneys, perhaps not unpredictably, favor a change that would alter the IDEA's fee-shifting provisions that require school districts to pay fees of prevailing parents. One school lawyer described the problem this way: "Some parent attorneys are VERY (emphasis in original) unreasonable when it comes to fees which holds up the whole system of trying to resolve disputes in the best interest of the student and his/her FAPE." Another view expressed was that the threat of paying exorbitant fees "is what drives 95% of settlements" causing school districts to "give in." Apparently because some districts will not pay attorney fees unless due process is pending, a school district lawyer lamented as follows: "It is not uncommon for parents to reach a practical resolution outside of a hearing, through an IEP meeting or other means, but then be forced to go to hearing so that the parent attorneys can seek fees from the district." A parent attorney proposed capping fees and costs for both parties, which would create an incentive to resolve cases "without all-out war."

A view expressed frequently by parent attorneys was that school districts should have the burden of proof. One elaborated on that idea, saying, "School districts should have the burden of proof until or unless 85% of the students with disabilities are graduating with a standard diploma with their original cohorts." A school district lawyer from New York, where the district has the burden of proof under state law, thought the burden should be on the parents instead. Having the burden on the school district, said the lawyer, "encourages frivolous litigation by parents and unnecessarily increases costs for school districts."

A broad suggestion made equally by parent and school board lawyers was to revamp the system entirely, though no one had a blueprint for doing so. "There has to be a way to accomplish the goals of IDEA that is more efficient and cost effective for the district and the parent," remarked one school board lawyer. Another questioned whether the current system reflects the true intent of the regulations. Similarly, a parent lawyer said, "A stronger and faster alternative to due process hearings would be the better solution." In a realistic vein, a parent lawyer observed, "There are no short-term or quick fixes for an adjudicative system that has been in place since 1977."

A. Analysis and Recommendations

Finding the sweet spot for due process hearings is a Goldilocks problem: they should not be so complex and expensive that parents cannot access them but cannot be so stripped down that they do not give parents a realistic opportunity to challenge a school district's decision regarding their child's education.[77] At the same time, because school districts must serve many children, and with limited resources, the due process system should be structured so as to quickly weed out frivolous complaints and keep it manageable for the districts as well. Creating a due process hearing system that is "just right" has been a significant challenge.

Any reform proposals must confront the reality that much of the unwelcome complexity and expense comes with the territory. The subject matter of due process hearings is inherently complicated. Sophisticated expertise is needed to understand the nature of the child's disabilities, how those conditions impair learning, what rate and level of educational progress is reasonable, and what interventions are needed to address the impact of the child's challenges. Even very knowledgeable professionals struggle to precisely diagnose and understand the unique combination of impairments affecting any particular child and to accurately assess the impact of potential programming and placement choices.

At the same time, the legal standards are strikingly vague. Concepts such as an "appropriate education,"[78] "reasonably calculated,"[79] and "in light of the child's circumstances"[80] leave considerable room for disagreement. While the vagueness is perhaps necessary in light of the uniqueness of each individual child, it nevertheless opens the door to differing viewpoints. Even parents who accept the limitations on IEPs— i.e., that they need not be designed to maximize their child's potential[81]—may still perceive that their child's progress is insufficient while the child's teacher sees it as reasonable.

The procedures required by the IDEA likewise contribute to complexity. To assure meaningful procedural protections, the IDEA requires a detailed written complaint and an evidentiary hearing before a hearing officer with

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[77] For example, rules that prohibit experts, require evidence to be presented in a very limited amount of time, or limit the role of attorneys could make for an efficient hearing, but one in which the parents would be quite unlikely to be able to meet their burden of proof.

[78] The basic promise of the IDEA is that each child is entitled to a "free appropriate public education." 20 U.S.C. § 1412(a)(1)(A) (2016).

[79] Bd. of Educ. v. Rowley, 458 U.S. 176, 203-04 (1982) (holding that the IEP must be reasonably calculated to enable the child to receive an education benefit).

[80] Endrew v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017) (ruling that the appropriateness of a child's IEP should be judged in light of the child's circumstances).

[81] *See Rowley*, 458 U.S. at 176 (1982) (rejecting the argument that a child with a disability is entitled to an education that will maximize the child's potential).

cross-examination.[82] Such features alone require a high level of literacy and understanding of the law, which puts the process beyond the capacity of most parents and school district personnel. As a result, both sides need legal representation. So long as attorneys must be involved—especially attorneys with the requisite expertise, and for parent lawyers, the willingness to take on the risks of a contingency agreement —they must be appropriately compensated. At the same time, with the complexity of the subject matter of most special education disputes, the testimony of expert witnesses is nearly always needed. Experts, too, need to be compensated for their participation. Thus, significant expense is inevitable.

Finally, reform proposals have a higher likelihood of success if there is buy-in from both parents and schools. But as was borne out in the responses to this survey, the targets for reform are highly influenced by one's viewpoint. The special education lawyers who answered our nationwide survey clearly identified with their clients' positions; their perceptions of the flaws in the system seemingly followed directly from their allegiances.[83] For example, lawyers who represent school districts view the process as less complex than do parent lawyers, although both are participating in the very same process.[84] Likewise, lawyers who represent school districts are much more likely to view the current due process hearing as an effective tool for resolution of disputes than are parent lawyers, though they too find much fault with the system as it is. The comments made by the two groups not only revealed their differing opinions, but in some cases, very negative feelings about the opposing attorneys, calling them "very unreasonable," or accusing them of "weaponizing" discovery tools. While certainly not universal, this negativity toward the other side may be a factor in the lack of consensus on how to repair what many consider a broken system of dispute resolution.

Even within groups, there were many differing views. For example, on the question asking attorneys to rate the complexity of the hearings in their state on a scale of one to ten, with ten being the most complex, attorneys on the same side, in the same state, provided starkly divergent responses. For example, the ratings of complexity by the nine parent attorneys from New Jersey ranged from two through ten. It is difficult to know whether these contradictory ratings reveal true differences (perhaps related to different practices among hearing officers within the same state) or something else

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[82] 20 U.S.C. § 1415 (2018).

[83] Differing perceptions of the two groups of lawyers is not entirely unexpected. Parent and school district lawyers are, after all, adversaries in the process, with opposing positions in every case. Most cases that reach the stage of due process have already been through multiple efforts at dispute resolution: discussions at IEP meetings, mediation, a resolution session, and settlement talks. By the time the case is at due process, the parties have dug in their heels and may well view the opposing side as being unreasonably recalcitrant.

[84] *See supra* note 63.

affecting perceptions. In the New Jersey case, the two attorneys at the extremes were both highly experienced attorneys, so each had a good vantage point from which to judge. Again, with such conflicting observations about what is happening, agreement about how to address due process may continue to prove elusive.

Despite the variety of views, certain ideas surfaced frequently enough to suggest areas for potential reform in the due process system. Each of these appears to have some support from both groups of practicing lawyers, suggesting their clients would favor them as well. They are largely neutral, offering benefits to all involved. They are within the authority of the state educational agencies, thus not requiring Congressional action. The strongest themes are as discussed below.

1. Well-Trained, Objective Hearing Officers

From the point of view of special education lawyers across the board, hearing officers with both case management skills and substantive knowledge of special education is vitally important. Everyone benefits when the hearing is well-run, and the hearing officer fairly and correctly applies the law to the facts, without an initial predisposition toward either side. States should examine their qualifications for hearing officers, their hiring processes, their initial and ongoing training requirements, and their payment system (together with the potential for unintended biases related to the payment system) to assure that they are employing hearing officers with the requisite skills and commitment to manage and decide the cases effectively.

The trend toward using administrative law judges (ALJs) in a state's administrative court[85] has the advantage of allowing the state education department to rely on the processes already in place for the resolution of administrative disputes. Administrative law judges tend to be lawyers[86] who are familiar with civil procedure and evidentiary standards and are likely to be better equipped than non-lawyers to manage the case in a professional manner. Administrative courts have a body of rules that can be adapted for use in due process, relieving the state educational agencies of having to develop their own rules. Judging from some of the comments regarding the process where the hearing officers are not ALJs, the lack of standard rules and enormous discretion given to the hearing officers is destabilizing to the entire process.[87] Nevertheless, to the extent that state administrative courts

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[85] Connolly, Zirkel & Mayes, *supra* note 29, at 158 (2019).

[86] *Id.* at 159.

[87] Consider these comments from respondents: "Hearing Officers in DC have a lot of discretion to allow/order something, however there is no right to formal discovery." "In Utah we do not have a formal set of rules which offer guidance to hearing officers on how to conduct their role. At times I have been

are themselves highly "judicialized," using these courts for special education hearings may cut against the goal of increased procedural simplicity.

Another potential disadvantage of using the ALJs in the state administrative court is lack of specialized knowledge in special education. If the ALJs are randomly assigned and hear only a few special education cases, they have little opportunity to develop the expertise needed to understand the intricacies of the special education system as well as the nature of children's disabilities and their impact on education. When ALJs are less well-versed in the subject matter, there is more need for experts and extended testimony, adding to the overall expense and length of hearings. This disadvantage can be mitigated by identifying certain ALJs who will be regularly assigned special education cases.

Regardless of whether states use ALJs or independent hearing officers, they need a system to monitor the hearing officers for quality control. One survey respondent commented that when a hearing officer's decision is reversed by a reviewing court, there is no mechanism for the hearing officer to learn of the reversal so as to learn from the review. Hearing officers whose decisions are consistently reversed should likely lose their contract for the role. Mandatory training for all hearing officers should be in place in every state.

2. Clarity and Comprehensiveness of Rules

All parties to due process welcome clarity regarding the rules that will govern the hearing, from the pre-hearing stage through the appeal stage. Currently, the level of detail in the rules regarding due process hearings varies considerably from state to state. When the rules are sparse, hearing officers have discretion to fill in the gaps. This leaves parties not knowing what to expect, which can be especially problematic for less experienced lawyers or advocates and unrepresented parents.

As broad support exists for clear and comprehensive rules, all states should review their rules and determine if they sufficiently give parties the information they need to know about procedures as they approach due process. States should make sure the rules are easily accessible on the state's website and written in a straightforward way. Timelines, the right to discovery, evidentiary rules, expert qualification, subpoena procedures, and the like should not be left to the discretion of hearing officers. These matters should be explicitly covered in the rules, allowing for uniformity across the state.

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told that we would follow the federal rules of evidence and at others that we would use an undetermined "relaxed version of the rules of evidence." "We have had a highly trained independent hearing officer for the past 15-20 years who does a fabulous job and knows the laws and rules very well. If he retires, I don't know that we will maintain the same quality and fairness."

3. Reduction of Costs

Lawyers on both sides of due process cases are concerned about the increasing cost of the cases. High costs prevent many parents with legitimate claims from pursuing them and put a burden on school districts that could be spending that money on educating children. The two largest contributors to high cost are attorney fees and expert witness fees. Potential approaches to reducing the high cost of due process are presented below.

a. Attorney Fees

Assuming the parent is represented, both sides in a case must cover attorney fees. The mechanisms by which the fees are paid differ, however. School districts will always have to cover the fees of their lawyers. This might be done through in-house counsel, which would typically be more cost effective, or with outside attorneys. Insurance may assist with outside counsel in some cases.[88]

Parents may or may not have to cover their attorney's fees, depending on the agreement with their attorney and the success of the case. IDEA contains a fee-shifting provision, requiring that the school district pay the parent's attorney fees if the parent is the prevailing party in the due process case.[89] Thus, many parent attorneys in private practice take cases on contingency, expecting to get their fees paid by the school district either in a favorable settlement or after a favorable hearing decision.[90] Parents typically pay a retainer fee, which is usually not returned if the case is unsuccessful. Some non-profit organizations and law school clinics provide free counsel to parents, either with or without income-eligibility guidelines.[91] Even when parents are not required to pay their lawyers

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[88] For a general discussion of school district insurance coverage, see Marcos Antonio Mendoza, The Limits of Insurance as Governance: Professional Liability Coverage for Civil Rights Claims Against Public School Districts, 38 QUIN. L. R. 375 (2020).

[89] 20 U.S.C. § 1415(i)(3)(B)(i) (2004).

[90] Parent attorneys must either obtain the fees through settlement, or by seeking them in federal district court following the due process hearing. 20 U.S.C. § 1415(i)(3)(B) (2004). The court has discretion to award reasonable fees as part of the costs when the prevailing part is the parent of a child with a disability, but is required to reduce the fees requested upon a finding that they are unreasonable or excessive, the parent or attorney unreasonably protracted the resolution of the controversy or failed to give the school district proper notice. 20 U.S.C. § 1415(i)(3)(F) (2004). The fee reduction does not apply, however, if the school district unreasonably protracted the final resolution. 20 U.S.C. § 1415(i)(3)(G) (2004). For an example of a fee reduction for the parent's attorney, *see* J.L. v. Harrison Township Bd. of Educ., No. 14-2666, 2016 WL 4430929, at *17-18 (D.N.J. Aug. 9, 2016).

[91] Legal aid organizations nationwide funded in part by the Legal Services Corporation limit eligibility to those families with an income of less than 125% of the federal poverty guidelines. 45 C.F.R. §1611.3(b) (1977). State protection and advocacy organizations, on the other hand, do not have income guidelines. 42 U.S.C. § 10805(a)(1)(C) (2006). Policies with regard to income eligibility at law school clinics vary according to local policy and state student practice acts. For example, in North Carolina, law

directly, they may be asked to allow the legal organization to pursue attorney fees as a way to support the organization. Thus, the school district may still be responsible for parent fees in a settlement or in cases in which the parent prevails even when the attorney is with a non-profit.

More availability of free counsel for parents would go a long way toward reducing the overall expense of due process. It is easier for non-profit attorneys to waive their fees, especially during settlement; this can bring down the total costs of due process and ease the burden on the districts of having to pay for both sides' fees.[92] Furthermore, non-profit attorneys representing parents often work to resolve disputes at the IEP level or through pre-due process settlement without the pressure of needing to recover fees, significantly reducing the overall expense of a dispute. Nevertheless, reducing the risk to districts of having to pay parents' attorney fees could simultaneously reduce the pressure that risk places on the districts to assiduously adhere to the IDEA's prescriptions. Thus, while more access to free or low-cost counsel to parents in need could improve accessibility and potentially bring overall costs down, the fee-shifting provision remains an important enforcement feature of the law that should remain.

If "free counsel" were implemented as a measure to address the high cost of due process, then sources of support for non-profit legal organizations would need to expand. More government funding, at either the federal or state level, would be the most reliable source, if policy makers were convinced of the value of appropriating it.[93] In today's climate however, with so many unmet needs in public education and limited legislative commitment to meet those needs through sufficient public funding, the idea of government support for additional special education lawyers is not likely on the immediate horizon. Philanthropic and law school funding are other potential sources of support.

Limiting the participation of attorneys in due process proceedings would reduce the cost of due process, but this is not an attractive option. As noted earlier, enforcement of the special education law is complicated and beyond the capacity of most parents. The design of the IDEA incorporates parental enforcement as a tool to ensure that schools are offering a free, appropriate public education to each child with a disability. Without attorneys to assist them, many parents would be unable to bring complaints that help enforce the law. Further, nearly all of the parent lawyers, and many of the school district lawyers, see the prospect of parents pursuing due process without an

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school clinics may only represent persons who are unable financially to pay for legal advice or services. 27 N.C. ADMIN. CODE § 1C.0201 (2020).

[92] For example, the Children's Law Clinic at Duke Law School, with which the authors are associated, often significantly reduces or waives its claim for fees if the case settles early.

[93] This would be similar to government funding for attorneys in other types of cases, such as juveniles, indigent criminal defendants, or parents facing termination of parental rights.

attorney as ineffective.[94] The widespread use of non-attorney advocates, especially without a credentialing system, or a full prohibition on any representation, would not seem to serve parents well either, given the skills needed to effectively present evidence to meet the burden of proof. Even if school districts were not permitted to be represented by attorneys in *pro se* due process cases, those districts would undoubtedly be consulting their attorneys behind the scenes, leaving unrepresented parents at a distinct disadvantage. Capping attorney fees or eliminating the fee-shifting provisions of the IDEA are likewise unappealing, as both approaches would discourage private lawyers from developing a special education practice and make due process even less accessible than it is already to lower-income parents.

b. Expert Witness Fees

The second contributor to high costs in due process is the cost of expert witnesses. Parent attorneys are nearly unanimous that parents cannot win cases without expert witnesses, and half the school board lawyers agree.[95] Experts are required to enable parents to meet their burden of proof (in the majority of states that have not shifted that burden to school districts), as parents must overcome school district evidence from its staff, whose testimony nearly always is given complete credence unless countered by that of someone with equivalent expertise. Without fee-shifting provisions for expert witness fees,[96] these costs must be borne by parents, making these fees a significant barrier for parents who wish to pursue due process.

Congress could address the problem by adding expert-witness fee-shifting provisions similar to the attorney provisions. This would require school districts to reimburse parents for the expert witness fees if the parents prevail. The IDEA Fairness Restoration Act,[97] which would amend Section 615(i)(3) of the IDEA to add expert witness fees to the attorney fee-shifting provision, has been introduced in Congress on multiple occasions, but never passed. Because such an approach is staunchly opposed by school districts,[98] a consensus on such a strategy is not on the horizon.

Another solution, which could occur at the state level, would be the creation of a funding source to pay experts. States could, for example,

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[94] *See supra* p. 26.

[95] *See supra* p. 36-37.

[96] *See* Bd. of Educ. v. Murphy*,* 548 U.S. 291 (2006).

[97] S. 2790, 113th Cong. (2014); S. 613, 112th Cong. (2011); H.R. 4188, 110th Cong. (2007).

[98] The National School Boards Association and the American Association of School Administrators filed an *Amici Curiae* brief in the case of *Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), expressing strong disagreement with the idea of shifting expert witness fees to school districts when parents prevail in due process. Brief for National School Boards Association et al. as Amici Curiae Supporting Petitioner, Bd. of Educ. v. Murphy, 548 U.S. 291 (2006).

establish a fund upon which hearing officers could draw to pay one or more independent experts to aid in the resolution of a due process case. Parents who wish to use this mechanism rather than privately hire an expert could be required to show why an expert is needed and propose the expert of their choice, with an opportunity by the school district to show that the proposed expert is biased or without the requisite expertise. The hearing officer would have the authority to vet the proposed expert for objectivity and authorize a reasonable fee. An alternative, but similar approach, could involve a pool of pre-certified experts from which either party could draw. These approaches might garner common support because they would address the concerns of school district lawyers that the parents' experts are insufficiently knowledgeable while still making experts available to the parents. Further, if all parties and the hearing officer agreed on the objectivity and expertise of the expert, the expert's opinion would hold great sway; were the expert to produce a report prior to the hearing, it could well expedite settlement of the case, obviating the need for an extensive, contentious hearing and multiple appeals. That result would reduce attorney fees and overall hearing costs as well.

While the creation of new funding streams to pay for lawyers and experts for families may be initially disfavored due to the perceived cost, policy makers would be well-advised to study how the upfront provision of such funds could ultimately decrease the overall cost of special education dispute resolution. If that could be shown, it would be money well-spent.

4. Procedural Simplicity

A large number of suggestions have been made, both by the attorneys responding to this survey and in other forums,[99] aimed at reducing the procedural complexity of due process. Some propose reforms that would alleviate the need to use the due process hearing at all; the most common among those proposals is mandatory mediation. Data from the Center for Appropriate Dispute Resolution in Special Education (CADRE) show that agreements are produced in about two thirds of the cases in which mediation is attempted.[100] CADRE likewise contends that mediation, along with other early dispute resolution mechanisms such as facilitated IEP meetings, are more cost-effective and efficient than due process hearings.[101] For parties who do not reach resolution through mediation, however, a mediation requirement would have added time, money, and complexity. In any event,

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[99] *See* Mueller, *supra* note 2.

[100] *See Trends in Dispute Resolution Under the Individuals with Disabilities Education Act (IDEA),* CTR. FOR APPROPRIATE DISP. RESOL. IN SPECIAL EDUC. (Oct. 2019), https://www.cadreworks.org/sites/default/files/resources/TrendsDisputeResolutionOCT2019FINAL.pdf.

[101] *Id.*

however, this change would require an amendment to the statute; the IDEA requires that participation in mediation must be voluntary.[102]

Another suggestion to reduce procedural complexity was made by a few respondents in states in which there is a two-tiered administrative review process: eliminate the state review process. As noted earlier, all but seven states use a one-tier review system. Given that most first-tier hearings are extensive evidentiary hearings, the value of the second tier is difficult to determine. It adds a time-consuming additional step before either party can appeal to court. States with two tiers should consider eliminating the second tier; they can do this within their current statutory authority.

Otherwise, despite a seemingly universal wish for more procedural simplicity, only limited consensus around workable strategies emerged from the survey. This is perhaps because for every procedure that is simplified, the parties lose a mechanism for potential advantage. If discovery is limited, for example, a route for gaining information is foreclosed. If evidentiary rules are relaxed, the possibility of the admission of unreliable testimony and the exclusion of necessary testimony increases. Two potential reforms to address procedural complexity are imposition of time limits on presentation of evidence and a limit to discovery.

a. Time Limits

In response to concerns that hearings can be upwards of twenty days, the idea of time limits has emerged. New Hampshire, for example, limits due process hearings to two days, except for good cause.[103] Time limits on the presentation of evidence force the parties to focus on the most important issues and use their time efficiently. Attorney fees are reduced by shorter hearings, so there is a cost reduction as well as increased simplicity. So long as the default period is reasonable and an escape valve exists for either party to move for additional time in extraordinary circumstances, time limits create a strong incentive to the attorneys to crystallize the evidence and avoid overly detailed presentations. A limit in the range of three to five days would likely be adequate for most due process cases.[104]

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[102] *See* 20 U.S.C. § 1415(e)(2)(A)(i) (2018).

[103] N.H. Code Admin. R. Educ. 1123.02(f) (2021).

[104] The U.S. Department of Education has acknowledged that states can set limits on the time a party may spend presenting evidence or questioning witnesses at due process hearings. *See* B.S. v. Anoka Hennepin Pub. Sch., 799 F.3d 1217 (2015) (finding that the ALJ's limitation of nine hours for each side's evidentiary presentation was not an abuse of discretion and was consistent with Minnesota's statute); Letter from Melody Musgrove, Director, Office of Special Education Programs, to Margaret O'Sullivan Kane, Kane Education Law (Jan. 7, 2015) (on file with author) (finding that a three-day limit on hearings was permitted by the IDEA, which does not address the length of hearings).

b. Discovery

No consensus exists around formal discovery. Our survey results showed that in states allowing discovery, the attorneys perceived hearings to be more somewhat more complex than in states without discovery. The number of attorneys from each state was so small, however, that the results cannot be considered statistically valid.[105] Nevertheless, the perception that discovery adds complexity is intuitively true. The addition of interrogatories, depositions, and entry onto property for inspection make due process hearing essentially like civil trials. Those processes not only take time, but accomplishment of them takes training and skill as well. Each process must be planned and executed prior to the hearing; frequently the use by one party encourages use by the other party. Multiple survey respondents complained that discovery is frequently abused, with attorneys perceiving their opponents as intentionally using discovery for the sole purpose of dragging out the process and driving up the costs.

On the other hand, discovery provides a valuable tool, particularly to parents, to obtain vital information. In the typical case, for example, the parent is attempting to prove that the services provided are not appropriate or the child's setting is not the least restrictive environment. Neither the parent nor the parent's expert has had the daily vantage point that the teachers and other school district employees have had. Discovery tools give the parent the pre-hearing chance to question potential school witnesses, obtain documentary information that is not included in the child's official school records, and observe (or have an expert observe) the child in the classroom setting. Without these tools, the parent and the parent's attorney could find themselves heading into the hearing ill-prepared to respond to the school district's case. That lack of advanced knowledge can result in a longer hearing, as the parents scramble to react to the evidence presented by the school district.[106]

Another advantage of discovery is that it can encourage settlement. If used appropriately and not abused, discovery allows both sides to fully assess the expected evidence and predict the likely outcome of the hearing. That knowledge can lead to productive settlement talks, thus alleviating the need for a full hearing. Discovery can also lead to stipulations of facts, thereby streamlining the presentation of evidence when settlement does not occur.

The majority of states do not allow formal discovery, though some

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[105] Respondents from states allowing the use of formal discovery in due process hearings reported a mean complexity rating of 6.52 out of 10 and a median score of 7 out of 10. In states that do not use formal discovery, the mean complexity score was 6.27 and the median was 6.

[106] A rule against discovery can be slightly mitigated by the option to conduct discovery if the case is appealed to federal court following the hearing. Parties can request that the record be supplemented with information gained from discovery at the court level.

give hearing officers discretion to allow it when the need for it is shown.[107] The competing considerations make it difficult to find the right balance. While allowing discovery increases the complexity, the information void for parents without access to it can significantly limit their opportunity to show that their children with disabilities are not being appropriately served. State education agencies should at least reconsider their choices on discovery, with input from parents, school districts, and special education attorneys, to ensure that the hearing process is fair and provides parents an effective opportunity to resolve disagreements with the school district.

V. CONCLUSION

It seems indisputable that the due process hearing system in place is a flawed mechanism for resolving disputes between parents and school districts. The many studies and analyses of due process show it to be viewed as frustratingly complex, expensive, and time-consuming. Its effectiveness at actually resolving the disputes presented is far from clear. Despite varying features in participating jurisdictions, the process appears unpopular throughout the country. Nevertheless, it has changed little since 1975 when it first became part of the system for providing special education to disabled students in the United States, despite many calls for amendments over the years.[108] Our study adds to the voices seeking change, but also adds an insight into why change has been so elusive: the opposing sides in the dispute, as represented by their lawyers, perceive the flaws very differently. Consensus around change is difficult to achieve when the participants disagree on the features to be amended, and, as reflected in our study, display limited mutual trust.

Continued push for change is merited regardless of its challenge. Here, we have focused on a few efforts that, based on the views expressed in the survey, could garner agreement on both sides. First, we encourage state education agencies to revisit their policies with regard to hiring, training, and paying hearing officers. Across the board, attorneys felt that better qualified and trained hearing officers would foster more efficient and effective hearings. Second, we encourage the agencies to review their procedural rules to make them clearer, more comprehensive, and more accessible. Complete and more explicit rules, leaving fewer procedures to the discretion of hearing officers, can make the hearing process more uniform and predictable for parents and school districts alike. Finally, we believe serious efforts should be pursued to find sources for the payment of necessary expert witnesses and to expand free or low-cost legal

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[107] See earlier discussion, *supra* note 49.

[108] *See, e.g.*, Shaver, *supra* note 6; Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender So. Pol'y & L. 107 (2011).

representation for parents. Availability of both has the potential to bring down the overall cost of due process and increase parental accessibility to dispute resolution, which is one of the cornerstones of the IDEA. While more needs to be done to improve the due process experience for both parents and school districts, we believe these efforts could enhance IDEA dispute resolution for all.

Restraint and Seclusion in Schools and the IDEA Struggle

VIVIAN CHO†

I. INTRODUCTION

Restraint and seclusion are behavioral control measures that are used in both public and private schools across the United States.[1] Restraint and seclusion are often used on children with disabilities, and these techniques are dangerous and traumatizing. Mechanical restraints, even when applied correctly, have been associated with grave outcomes, including asphyxiation, broken bones, oxygen deprivation to the brain and internal organs, and death.[2]

Restraint and seclusion have been used disproportionately on students with disabilities.[3] Empirical data shows that restraint and seclusion are routinely used as methods of discipline instead of emergency techniques.[4] The United States Government Accountability Office ("GAO") reported that there were 61,440 students in public schools subjected to physical restraints, and 33,578 students subjected to seclusion in school year 2013–2014.[5] Boys and students with disabilities are consistently restrained or secluded at

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† Vivian W. Cho, J.D. 2021, University of San Francisco School of Law. I would like to thank Professor Luke Boso for his guidance and insight. I give utmost gratitude to my family for their patience and understanding. This piece is dedicated to my children, M.C. and J.C. I would like to thank the editors of the Connecticut Public Interest Law Journal for the opportunity to publish and for their excellent editorial work.

[1] *See* U.S. DEP'T OF EDUC. OFF. FOR C.R. DATA COLLECTION DATA SNAPSHOT: SCH. DISCIPLINE 11 (Issue Brief No. 1, 2014), https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf; *See generally* U.S. GOV'T ACCOUNTABILITY OFF., SECLUSIONS & RESTRAINTS: SELECTED CASES OF DEATH & ABUSE AT PUBLIC & PRIVATE SCH.'S & TREATMENT CTR. (May 19, 2009), https://www.gao.gov/assets/130/122526.pdf.

[2] LESLIE MORRISON ET AL., RESTRAINT & SECLUSION IN CAL.: A FAILING GRADE, DISABILITY RIGHTS CALIFORNIA 3 (2008), https://www.disabilityrightsca.org/system/files?file=file-attachments/702301.pdf.; *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1.

[3] *See* U.S. DEP'T OF EDUC. OFF. FOR C.R. *supra* note 1.

[4] *See* Morrison, *supra* note 2, at 4.

[5] U.S. GOV'T ACCOUNTABILITY OFF., K-12 EDUC. FED. DATA & RES. ON RESTRAINT & SECLUSION 4 (Feb. 27, 2019), https://www.gao.gov/assets/700/697114.pdf.

higher rates than girls and students without disabilities.[6]

In an earlier investigation, the GAO also reported hundreds of allegations of death and abuse in public and private schools across the United States between the years 1990 and 2009. The GAO identified that almost all of the allegations involved students with disabilities.[7] Despite the U.S. Department of Education's ongoing effort to collect and review data on the inappropriate use of behavioral interventions,[8] the practice of dangerous restraint continues. In 2018, a thirteen-year-old Sacramento student with autism died after he was restrained face-down by school staff for one hour and forty-five minutes.[9] In 2019, a class action lawsuit was filed against a California public school for the improper use of dangerous restraint and seclusion techniques on a group of students with disabilities, causing significant physical and psychological harms.[10] Both cases are illustrative of the fact that restraint and seclusion are routinely used to punish students who exhibit disability-related behaviors perceived to be disruptive or aggressive.

Although the Individuals with Disabilities Education Act (IDEA)[11], section 504 of the Rehabilitation Act (section 504)[12], and the Americans with Disabilities Act (ADA)[13] all directly and indirectly strengthen the civil rights of students with disabilities in the education setting, case law suggests that these federal laws provide inadequate protection against the harm of restraint and seclusion and offer limited remedial measures. Litigation efforts by disability rights advocacy groups across the country focused primarily on the allegations of IDEA and section 504/ADA violations to address the improper use of restrain and seclusion. This paper discusses the fundamental limitations of IDEA and section 504 claims/ADA in protecting children from the harmful misuse of restraint and seclusion. This paper also analyzes the recent federal court interpretations of these statutes and their implications in restraint and seclusion litigation.

In Part I, this paper discusses what restraint and seclusion procedures

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[6] *Id.* at 4–5.

[7] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1.

[8] Press Release, U.S. Dept. of Educ., U.S. Dept. of Educ. Announces Initiative to Address the Inappropriate Use of Restraint & Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Law https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws (last visited Apr. 17, 2020).

[9] Press Release, Disability Rights California, Disability Rights California Responds to Student Death at Guiding Hands School (Apr. 16, 2020 at 11:48pm), https://www.disabilityrightsca.org/press-release/disability-rights-california-responds-to-student-death-at-guiding-hands-school.; *See also* Langley et al. v. Guiding Hands Sch. et al., No. 2:19-cv-02265 (E.D. Cal. Nov. 8, 2019).

[10] *See generally* Kerri K. v. State of Cal., No. CIVMSC19-00972 (Cal. Super. Ct., May 13, 2019).

[11] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2000 & Supp. IV 2004).

[12] Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794, *et seq.* (2000).

[13] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2008).

are and why are they used in schools. This is necessary to understand how dangerous and inappropriate these interventions are when used among students with disabilities. This section also draws on facts from recent court cases to illustrate the detrimental effects of these interventions. Part II gives a description of existing federal disability statutes and seeks to analyze how the construction of these statutes interplay. This section explains how the current judicial interpretation of these provisions creates a significant hurdle which plaintiffs must overcome in order to allege a successful cause of action under the IDEA or section 504. This section also examines case law to illustrate the ineffectiveness of these federal laws in providing remedies to students who are harmed by the improper use of restraints and seclusion. Finally, Part III provides recommendations on possible legal reforms to protect students from improper use of restraint and seclusion.

II. USE OF RESTRAINTS, SECLUSION, AND CORPORAL PUNISHMENT IN THE SCHOOL CONTEXT

Historically, the use of physical restraint and seclusion was rooted in psychiatric medicine.[14] Although controversial, these techniques were used to help patients manage their physical or emotional outbursts.[15] The National Disability Advocacy Network's (NDRN) 2009 report defines "restraint" as "[a]ny manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of an individual to move his or her arms, legs, body, or head freely," and "seclusion" as "the involuntary confinement of an individual alone in a room or area from which the individual is physically prevented from leaving."[16] Today, restraint and seclusion are methods that may be routinely deployed by school personnel as a way of intervening with students' behavioral challenges.[17] Moreover, the use of restraint and seclusion could be repeated for an individual child and administered by the same individual.[18] However, there are well documented adverse physical and psychological effects related to the use of restraint and seclusion when used amongst children and adolescents.[19]

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[14] Janet Colaizzi, *Seclusion & Restraint: A Historical Perspective*., 43 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERV. 31 (2005).

[15] *Id.* at 33.

[16] NAT'L DISABILITY RTS. NETWORK, SCH. IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINTS & SECLUSION IN SCH. (Jan.2009), https://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf.

[17] *See* Morrison, *supra* note 2.

[18] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 26. A 7-year-old girl enrolled in a special classroom at a public school in Californian was repeatedly restrained and secluded as a punishment for non-aggressive behaviors by the same teacher. The adverse interventions continued despite formal complaint to the school principal and the teacher.

[19] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1.

A. Case Illustration: Kerri K. et al. vs. State of California

In May 2019, a disability rights advocacy group and its co-counsels filed a class action on behalf of five elementary school children with disabilities against the California Department of Education (CDE), county school officials, and staff at Floyd I. Marchus School, in order to challenge the improper use of restraints and seclusion in non-emergency situations.[20] In this case, one of the plaintiffs, Kerri K., was diagnosed with Emotional Disturbance and Attention Deficit Hyperactivity Disorder (ADHD). Kerri K. was subjected to forty-five documented instances of restraint during a period of nine months.[21] Kerri K. alleged that she was retrained as many as seven times a day.[22] During one instance, Kerri K. became frustrated with her math assignment, which was a specifically identified behavioral "trigger" based on her previous assessments. Kerri K. reacted to this trigger by tearing her math book and kicking a classroom trash can. Instead of using any positive behavioral intervention or alternative strategies, school staff put Kerri K. into a "child control" restraint position.[23]

During another instance, after Kerri K. "cowered in the corner of one of the support rooms crying," two school staff members lifted Kerri K. and pinned her against the wall cabinets, with one staff on one side, and another on the other side of Kerri K. While Kerri K.'s feet were dangling off the ground, the school staff forcibly spread her legs apart using their own legs and bent her head between her legs, effectively putting her into a "team control position."[24] While Kerri K. was restrained, she repeatedly exclaimed that she was in pain. Eventually, the two staff members released her after she faintly cried, "I can't breathe."[25]

Other plaintiffs in this California case were similarly subjected to restraint and seclusion despite the fact that the children never demonstrated any violent or aggressive behavior.[26] The facts from *Kerri K. et al* illustrate that restraint and seclusion are often used during non-emergency situations on children with disabilities in special education. In addition, these

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[20] *Kerri K.*, *supra* note 10, at 19.

[21] *Id.* at 32.

[22] *Id.*

[23] *Id.* (A "child control" position "involves one or more adults holding [a] child's crossed arms' across his or her torso in a standing, seated or lying down position.").

[24] *Kerri K.*, *supra* note 10, at 32. The team control position involves "[t]wo staff members hold[ing] the individual as the auxiliary team members continually assess the safety of all involved and assisted, if needed." The adults using the technique must face the same direction as the Acting Out Person while adjusting, as necessary, to maintain close body contact with the individual"; "[k]eep their inside legs in front of the individual"; "[b]ring the individual's arms across their bodies, securing them to their hip areas"; "and "[p]lace the hands closest to the individual's shoulders in 'C-shape' position to direct the shoulders forward." *Kerri K.*, *supra* note 10, at 25.

[25] *Id.* at 34.

[26] *Id.*

interventions are repeatedly deployed against an individual by the same school staff. The repetitive administrations strongly suggest that the interventions were indeed ineffective in managing or altering the underlying behavior the school staff attempted to address. Ironically, Kerri K's Individual Education Plan (IEP) and Behavioral Intervention Plan (BIP) both documented that physical restraints would be counterproductive to her behavioral management.[27] The actions taken by the school staff blatantly disregarded the directive authority of the plaintiff's IEP and BIP.

Another plaintiff in *Kerri K.*, Sara S. was similarly restrained improperly and repeatedly in dangerous positions such as the "high-level hold" and the "transport position."[28] In addition, the school staff secluded Sara S. in a small "support room."[29] Following the restraint and seclusion instances, Sara S. developed anxiety and depression and was unable to receive further academic instruction for the remainder of the school year. She was also admitted to a psychiatric hospital immediately following one of the episodes of physical restraint.[30] Ultimately, Sara S. was no longer able to attend Marchus, and was compelled to enroll in a more restrictive program in a residential placement setting instead. This detrimental outcome essentially denied her a meaningful educational placement.

Students plaintiffs in *Kerri K.* filed a class action against Floyd I. Marchus School to challenge the illegal and abusive use of restraints and seclusion in non-emergency situations.[31] The causes of action included violations of the California Education Code for depriving students of a free and appropriate public education in the least restrictive environment, as well as violations under the California Constitution for violating the plaintiffs' rights to receive basic education services and be free from unreasonable seizure and excessive force.[32] In addition, plaintiffs also filed various state tort claims against the defendant school officials.[33]

B. More Detrimental Cases

Certainly, restraint and seclusion misuse causes various degrees of harm. The Government Accountability Office (GAO) published a summary of case studies examining death and abuses at public and private schools and

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[27] *Id.* at 9.

[28] *Id.* at 42.

[29] *Id.*

[30] *Id.* at 43.

[31] *Class Action Seeks to End Illegal and Abusive Restraints and Seclusion Practices Used Against Children with Disabilities in California*, DISABILITY RTS. EDUC. & DEF. FUND (May 15, 2019), https://dredf.org/2019/05/15/class-action-seeks-to-end-illegal-and-abusive-restraints-and-seclusion-practices-used-against-children-with-disabilities-in-california/.

[32] *Id.* at 69.

[33] *Id.* at 70–80.

treatment centers across the United States.[34] The details in these cases highlighted the extent of physical and psychological harms, as well as educational deprivation that the involved children with disabilities suffered.

The harsh facts in the GAO report suggests the risk of harm in using restraint and seclusion far outweighs any arguable benefits for controlling behaviors in classrooms. For example, in Texas, a fourteen-year old boy died after he was placed face down on the floor by a 230-pound teacher, who laid on top of him because the student did not stay seated in class.[35] Another sixth-grade special education student reportedly had his leg broken by the public school teacher who was trying to restrain him.[36] An eight-year old Illinois student, diagnosed with attention deficit hyperactivity disorder, was restrained to a chair by a teacher with masking tape and also had his mouth taped shut because the student would not remain seated.[37]

While the GAO's report casts light on the most extreme detriments of restraint and seclusion misuse, it also urges for regulations that would address this abusive issue at a national and systemic level. Ideally, there should be a legal framework to provide student plaintiffs with means of seeking redress for their physical, psychological and educational grievances. More importantly, this legal framework should also deter future abuses caused by routine restraint and seclusion in the education setting. The legal framework should also hold education policymakers accountable for any failure to create, implement, and monitor safe and effective policies and procedures for students requiring behavioral interventions.

III. THE LAW

A. Current Federal Laws and National Standards Governing Restraint and Seclusion

Within health care settings, the risks associated with the use of behavioral restraint and seclusion appear to be well recognized at the federal level. Federal authorities impose significant restrictions on when and how these measures can be used in a variety of contexts. For example, Title 42 of the Code of Federal Regulations imposes regulations on the care of patients who participate in the Medicare and Medicaid programs. The statute provides that restraint or seclusion may only be used to prevent imminent risk of physical harm when less restrictive interventions have been

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[34] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1.

[35] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 10.

[36] *Id.* at 6.

[37] *Id.* at 12.

determined to be ineffective to protect the individual, staff, or others.[38] In addition, the use of behavioral restraints and seclusion generally requires a physician's written order, [39] and there are specific time limitations applicable based on the age of the individual patients as follows:

> i) Each order for restraint or seclusion used for the management of violent or self-destructive behavior that jeopardizes the immediate physical safety of the patient, a staff member, or others may only be renewed in accordance with the following limits for up to a total of 24 hours:
>
> (A) 4 hours for adults 18 years of age or older;
>
> (B) 2 hours for children and adolescents 9 to 17 years of age; or
>
> (C) 1 hour for children under 9 years of age.[40]

Although special education programs similarly receive direct federal funding like Medicare and Medicaid programs, there are no federal statutes or promulgated regulations that specifically address the use of restraint and seclusion in public or private schools.[41] The Children's Health Act of 2000 offered hope to some scholars and advocates when it amended Title V of the Public Health Service Act to target the practice of restraint and seclusion in medical and federally-funded residential facilities.[42] The Act declared that children in federally-funded, non-medical and community-based facilities have "the right to be free from physical or mental abuse, corporal punishment, and any restraints or involuntary seclusions imposed for purposes of discipline or convenience."[43] Unfortunately, the Act did not extend its protection to children in schools, frustrating many education advocates in the field.[44]

B. The Individuals with Disabilities Education Act (IDEA)

The IDEA is one of the key federal laws that provides major legal protections for students with disabilities in the education context. This law

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[38] 42 C.F.R. §§ 482.13(e)(2)–(3) (LEXIS current through the April 15, 2020 issue of the Federal Register).

[39] 42 C.F.R. § 482.13(e)(5) (LEXIS current through the April 15, 2020 issue of the Federal Register).

[40] 42 C.F.R. § 482.13(e)(8)(i) (LEXIS current through the April 15, 2020 issue of the Federal Register).

[41] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 3.

[42] Keeping All Students Safe Act (KASSA), H.R. 4247, 111th Cong. § 2(1) (2010).

[43] 42 U.S.C. § 290jj(a)(2) (2006).

[44] Alyssa Kaplan, Note, *Harm Without Recourse: The Need for a Private Right of Action in Federal Restraint and Seclusion Legislation*, 32 CARDOZO L. REV. 581, 586 (2010).

was first adopted in 1975 as the Education for All Handicapped Child Act (EHA), and the statute is designed to ensure that students with disabilities can access equal education opportunities as compared to students without disabilities.[45] Prior to the 1970s, many children requiring special education were categorically denied access to education opportunities. At the time, public schools in the United States only accommodated one-out-of-five children with disabilities.[46] Congress responded to these dire education needs by enacting a federal statute that would address the educational inequality among students with disabilities.[47] The statute was introduced shortly after Congress enacted the first disability civil rights law—section 504 of the 1973 Rehabilitation Act. As some scholars have noted, the EHA was Congress's response to the burden created by litigation pursuant to section 504 demanding equal education opportunities for students with disabilities.[48] While section 504 was the first national civil rights legislation that protected children from the denial of public education participation because of their disabilities, the law does not provide substantive requirements to address the unique educational needs of children with disabilities. In *Smith v. Robinson*, the United States Supreme Court described the EHA as a "comprehensive scheme set up by Congress to aid the States in complying with their obligations to provide public education for handicapped children."[49] In addition, the Court explained that the EHA "was an attempt to relieve the fiscal burden placed on State and localities by their responsibility to provide education for all handicapped children."[50] In particular, the EHA required all public schools accepting federal funds to provide equal access to education and free meals for children with physical and mental disabilities. The EHA also contained provisions requiring public school to provide evaluations and to create individualized educational plans for children with disabilities.

The EHA was later renamed and improved as the Individuals with Disability Education Act (IDEA) in 1990. After further amendments in 1997 and 2004, the IDEA continues to be the mainstay legal framework protecting the educational needs of students with disabilities. The IDEA aims to provide every student with a disability the access to a "free appropriate public education" (FAPE) that will meet the student's unique needs; the

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[45] DEREK W. BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 470 (2nd ed. 2016).

[46] U.S. DEP'T OF EDUC. OFF. OF SPECIAL EDUC. AND REHAB. SERV., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (Apr. 17, 2020 at 1:10PM), https://www2.ed.gov/policy/speced/leg/idea/history.pdf.

[47] *Id.*

[48] *Id.*

[49] Smith v. Robinson, 468 U.S. 992, 1009 (1984).

[50] *Id.* at 1010.

education must be provided in the "least restrictive environment" possible.[51] In providing FAPE, the statute requires states to make specific educational plans called Individual Educational Programs (IEP) for every eligible student. The IEPs contain written statements of learning targets for students to meet.[52]

While IDEA is largely a federal funding statute for special education, the explicit procedural safeguards provide a private cause of action in a federal or state civil court[53] whenever state and local education agencies violate the IDEA. Failure to comply with IDEA provisions could bring federal sanctions to recipients, such as the loss of funding.[54] In private litigation, the IDEA allows plaintiffs to seek remedies in the form of injunctive and equitable relief against the state or local educational agencies.[55] Courts may grant equitable relief to ensure school programs or services are delivered according to the statutory framework of the IDEA. Specially, a plaintiff may seek relief if the state violates the core guarantee of the provision of FAPE, which should comprise of individually-tailored educational services for children with at least one of the thirteen qualifying disabilities.[56] In addition to the student's own right to a private cause of action, the United States Supreme Court, in a recent IDEA case, confirmed that parents may also exercise rights to bring an IDEA claim. In *Winkelman v. Parma City School District.*, the Court considered the statutory provision of §1415(a) of the IDEA, which expressly states that the IDEA "mandates that educational agencies establish procedures 'to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education'" and concluded that parents too, have their own right to bring an IDEA claim when their child is denied FAPE.[57] Therefore, the IDEA clearly imposes procedural obligations to engage parents in the planning of the student's education, and the statute provides parents with a private right of action to

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[51] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400(d)(1), 1412(a)(5)(A) (2018).

[52] 20 U.S.C. § 1414(d)(1)(A)(i) (2018).

[53] 20 U.S.C. § 1415(i)(2) (2018).

[54] *See* Tom E. Smith, *IDEA 2004: Another Round in the Reauthorization Process*, 26 REMEDIAL AND SPECIAL EDUC. 314, 316 (2005). The 2004 reauthorization of IDEA provides a path for full funding in special education programs over a period of years through 2011. *See also* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 520 (2007).

[55] *See* 20 U.S.C. § 1403(b) (2018) ("In a suit against a State for violation of this title, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State."). *See also* 20 U.S.C. § 1403(a) (2018) ("A State shall not be immune under the 11th amendment of the Constitution of the United States from suit in Federal court for a violation of this title [IDEA].").

[56] Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 747 (2017).

[57] *Winkelman*, 550 U.S. at 528.

enforce the procedural provisions when such safeguards are violated.

1. Free and Appropriate Public Education Standard under Rowley

The term "appropriate" within the IDEA statutory obligation to provide a "free appropriate public education" is probably the most litigated, and arises in many contexts. This is certainly true in the context of improper use of restraint and seclusion in special education. The Supreme Court laid down the standard for what is considered "appropriate education" in the landmark decision *Board of Education of the Hendrick Hudson Central School District v. Rowley* in 1982.[58] In *Rowley*, the Court held that schools are not required to maximize the potential of each disabled child, but instead, schools only need to follow the procedures set out in the IDEA and create an Individual Educational Program "reasonably calculated to provide some educational benefit to students with disabilities."[59] The plaintiff, Anne Rowley, was a deaf student enrolled in a public school in New York. The Rowley's felt that Anne should be provided a qualified sign-language interpreter because, without one, Anne could comprehend less than half of what is said during classroom instructions.[60] The Rowley's felt that the denial of a sign-language interpreter would deprive Anne of FAPE because Anne could only "achieve her full potential commensurate with the opportunity provided to other children" with the assistance of an interpreter.[61] The Court ultimately rejected the Rowley's argument that FAPE requires schools to provide maximum benefits to students with a disability. Instead, the Court accepted a much more limited standard, defining the substantive obligation of FAPE only as providing "some benefit" in students' education.[62]

Although *Rowley* remains good law today, some circuits recognized that the 1997 Amendment to the IDEA appeared to abrogate *Rowley* "some benefit" standard. The amendment aimed to "place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education."[63] For example, since 1997, the Sixth Circuit has interpreted the standard that governs FAPE as requiring a "meaningful educational benefit."[64] The IDEA was subsequently amended in 2004 after the passing of the No Child Left Behind Act in 2002, which

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[58] Rowley, 458 U.S. 176 (1982).

[59] *Id.* at 207.

[60] *Id.* at 215.

[61] *Id.* at 186.

[62] *Id.* at 200.

[63] Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 (2009).

[64] Deal v. Hamilton City Bd. of Educ., 393 F.3d 840, 862 (6th Cir. 2004); *See also* Oakstone Cmty. Sch. v. Williams, 2013 U.S. Dist. LEXIS 197022 (2013).

promised a high-quality education to all students, including those with disabilities.[65]

While some scholars have argued that this later amendment to the IDEA might have once again heightened the *Rowley* FAPE standard, courts continued to apply the "some educational benefit standard."[66]

C. The FAPE Challenge and Restraint and Seclusion Cases

Intuitively, the FAPE mandate seems to be an appealing starting point to address the inappropriateness of restraint and seclusion in special education settings. However, using the FAPE obligation as an enforcement tool has proven to be challenging for litigants. Caselaw suggests that the argument that restraint and seclusion interventions violate the IDEA provisions or denies FAPE has limited legal merit, both substantively and procedurally.

Various courts have adjudicated restraint and seclusion cases as a failure to provide FAPE and interpreted the *Rowley* standard differently. The case *CJN v. Minneapolis Pubic Schools* illustrates how the Eight Circuit used academic progress as a benchmark to measure whether an education program indeed met the standard of "some educational benefit" articulated in *Rowley*.[67] The student in *CJN* suffered from brain lesions and a long history of psychiatric illness.[68] The school placed him in a "special program for elementary needs" classroom, where he nevertheless misbehaved by kicking others and hitting staff members with a pencil.[69] The teachers placed him in "time-out" sessions and physically restrained him on a number of occasions. In spite of these interventions, he maintained academic progress, a fact that led the state hearing officer to dismiss his FAPE claim.[70]

Plaintiff argued that the use of restraint and seclusion violated the very nature of FAPE. He asserted that academic progress was not a sufficient benchmark of FAPE.[71] The Eighth Circuit nevertheless upheld the state hearing officer's decision, rejecting CJN's FAPE claim. Finding no FAPE violation, the court stressed that, even though academic progress itself is not proof of FAPE, it provides evidence that the student's behavioral problems were sufficiently addressed under the interventions such that he could

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[65] 20 U.S.C. § 1412(a)(16) (2018); 20 U.S.C. § 1412(a)(15) (2018); 34 C.F.R. § 300.39(b)(3)(ii) (2006).

[66] Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 747 (2017); *See generally* K.C. v. Mansfield Indep. Sch. Dist., 618 F. Supp. 2d 568, 575–76 (N.D. Tex. 2009).

[67] CJN v. Minneapolis Pub. Sch., 323 F.3d 630 (8th Cir 2003).

[68] *Id.* at 634.

[69] *Id.* at 634–35.

[70] *Id.* at 634.

[71] *Id.* at 637.

learn.[72] The Eighth Circuit concluded that making academic progress is highly relevant to the education benefit inquiry when analyzing whether a student has been denied FAPE.[73] The court further explained that the fact that plaintiff was subjected to an increased amount of restraint does not make his education inappropriate within the meaning of the IDEA.[74] Therefore, under the Eighth Circuit's analysis, whether the use of restraint and seclusion substantively fails the educational benefit standard does not depend on the amount or degree of restraint used on the student, but how effective or ineffective the interventions were in attributing to academic outcome.

As the dissent in *CJN* pointed out, the Eighth Circuit's reasoning is problematic because the mere demonstration of academic progress will allow school defendants to defeat any FAPE claims. This standard is based on a strong presumption in favor of the use of restraint and seclusion because in most cases, the students subjected to these interventions still manage to show some academic progress. The majority also justified its approval of the use of restraint by noting that it reduced the likelihood that CJN's behavior would escalate and require suspension. The dissent criticized this logic as troubling because, arguably, resorting to restraint and seclusion is a worse outcome for the student than school suspension. Substantively, the Eighth Circuit's use of academic progress as a standard to measure educational benefit begs the question of whether it is consistent with *Rowley*, or the 1997 Amendment standard of "meaningful educational benefit." While the *CJN* court did not address this question directly, the opinion implies that the demonstration of academic progress satisfies both the "some educational benefit" standard articulated in *Rowley* and the "meaningful educational benefit" standard that some courts read into the 1997 Amendment.

On the issue of whether the misuse of restraint and seclusion is a deviation from the FAPE standard, not all courts adopt the *CJN* academic progress benchmark. In *Alleyne v. N.Y. State Education Department*, the Northern District of New York expressly rejected the *CJN* logic that aversive interventions such as mechanical restraints should be used as long as the student is making academic progress[75]. In *Alleyne*, the court was presented with the issue of whether school officials have arbitrarily denied the student plaintiff FAPE in violation of IDEA when they passed emergency regulations that would authorize the use of aversive treatment, including the use of mechanical restraints in situations where the student exhibits self-

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[72] *Id.* at 638. (The 8th Circuit Court of Appeal stated that CJN's academic progress was indeed highly relevant to the educational benefit inquiry, "because it demonstrates that his IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well.").

[73] *Id.* at 638.

[74] *Id.* at 639.

[75] Alleyne v. N.Y. State Educ. Dep't, 691 F. Supp. 2d 322, 330 (N.D.N.Y. 2010).

injurious or aggressive behaviors.[76] The court rejected the defendant's argument that academic progress is a justification to uphold regulations permitting use of mechanical restraints. In addition, the court reasoned that academic progress cannot be the sole measure on whether the students received FAPE.[77]

Other courts, such as the Third Circuit Court of Appeals, adopt yet a different approach to address the threshold for IDEA violations, relying on an earlier U.S. Supreme Court opinion: *Honig v. Doe*.[78] *Honig* was not a restraint and seclusion case, but rather was a case regarding the indefinite suspension of two students with disabilities as a violation of the EHA.[79] Specifically, the Court was faced with the legal question of whether state or local school authorities may "unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities."[80] Ultimately, the Court held that school procedures such as "study carrels, timeouts, detention, or the restriction of privileges" are permissible under the statutory provisions of EHA, so long as there is no unilateral change of the placement by the school district.[81] The Third Circuit Court of Appeals adopted the same reasoning in *Melissa S. v. School District*.[82] In that case, the plaintiff alleged that the use of physical restraints and isolation to control Melissa S's behavioral outbreaks violated her right under the IDEA and FAPE because these interventions frequently left the student without an education aide and "the learning environment caused her to regress educationally."[83] The Third Circuit rejected the plaintiff's FAPE claim and held that the use of restraint and seclusion did not violate the IDEA so long as there is no placement change and the restraint and seclusion constitutes "normal procedures for dealing with children who are endangering themselves or others."[84]

Melissa S. relied on the "no placement change" standard set out in *Honig* to adjudicate a complaint of educational regression due to the frequent use of physical restraints and isolation, notwithstanding that the central issue in *Honig* was indefinite school suspension, not restraint and seclusion misuse. Since the appropriateness of restraint and seclusion was never evaluated in *Honig*, the Third Circuit's adoption of the "no placement change" standard seems misplaced. The *Honig* decision was a statutory interpretation of the

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[76] *Id.*at 327.

[77] *Id.* at 334.

[78] *See* Honig v. Doe, 84 U.S. 305 (1988).

[79] *Id.* at 308.

[80] *Id.*

[81] *Id.* at 325.

[82] Melissa S. v. Sch. Dist. of Pittsburgh, 183 F. Appx. 184, 186 (3rd Cir. 2006).

[83] *Id*.

[84] *Id.* at 188, citing *Honig*, 84 U.S. at 325–26.

"stay-put" provision within the EHA which "prohibits state or local school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities during the pendency of review proceedings."[85] Conversely in *Melissa S.*, the Third Circuit faced the question of the possible deprivation of FAPE in violation of IDEA because the student was subjected to physical restraints and isolation. In other words, the central issue in *Melissa S.* was whether the administration of restraints and seclusion by the defendants substantively violated the FAPE guarantee. Although restraint and seclusion interventions effectively exclude students from their education program, the nature of this exclusion is much more transient compared to school suspensions. The standard used in *Honig* to evaluate the lawfulness of school suspensions seems inapposite when applied to the analysis of appropriateness of restraint and seclusion interventions. The Third Circuit likely adopted this standard because it conceptualized restraint and seclusion interventions as a form of disciplinary action similar to school suspension. This characterization is fundamentally flawed because it fails to consider how physical restraints, unlike school suspensions, are often used by school staff without much deliberation. Secondly, restraints are almost always physically offensive to a student, while school suspensions are much more benign in nature and do not implicate a student's bodily autonomy. Certainly, this standard used by the Third Circuit is concerning for plaintiffs because it is rare that inappropriate use of restraint and seclusion directly cause a change in educational placement.

1. FAPE under Endrew F.

The IDEA conditions federal funding on the compliance with statutory requirements for schools to deliver education through IEPs.[86] The IEP is a central piece to the delivery of FAPE. The adequacy of an IEP under IDEA was articulated in *Rowley* as "reasonably calculated to enable the child to receive educational benefit."[87] In the context of behavior management, IEP may include the "use of positive behavioral interventions and supports, and other strategies, to address that behavior" when the learning is impeded by the unique behavioral issues related to children's disabilities.[88] The IEP is the means by which special education and related services are "tailored to the unique needs" of a particular child.[89]

In *Endrew F. v. Douglas County School District RE-1*, the Supreme

[85] *See Honig*, 84 U.S. at 306.

[86] 20 U.S.C. § 1400 *et seq*. (2018).

[87] *Rowley*, 458 U.S. 176 at 207.

[88] 34 C.F.R. § 300.324(a)(2)(i) (2017).

[89] *Rowley*, 458 U.S. 176 at 181.

Court stepped in once again, thirty-five years after *Rowley*, to consider parameters that define the substantive obligation under the IDEA.[90] In *Endrew*, the Court unanimously ruled that, under the IDEA, public school students with disabilities are actually entitled to more than "some benefits" or "merely more than de minimis" progress as interpreted by the Tenth Circuit Court of Appeal.[91] The Court indicated that IDEA must surely require more than just "some benefit," and the task in *Endrew* was to provide substantive guidance on student progress.[92]

In *Endrew*, an autistic high-school student's parents brought suit against the Douglas County School District for the denial of FAPE required by IDEA because he was failing to make meaningful progress towards his educational goals.[93] Endrew's parents believed that the IEP proposed by the school was inadequate to address his behavioral problems. Subsequently, Endrew's parent transferred him to a private school where the new school was able to identify Endrew's most problematic behaviors, and the new strategies used enabled Endrew to make a degree of academic progress.[94]

The plaintiffs appeared first before the administrative law judge, and then later before the Tenth Circuit Court of Appeal, and both held that the student had not been denied FAPE.[95] The Court recognized that a "merely more than minimis" progress standard is not consistent with the central purpose of IDEA and landed on the holding that the IDEA requires that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[96] Like *Rowley*, the Court in *Endrew* explicitly declined to provide a "bright-line rule" or "to elaborate on what 'appropriate' progress will look like from case to case."[97] Instead, the Court explained that deference should be given to the "expertise and exercise of judgment by school authorities."[98]

At first glance, the *Endrew* standard seemed to have raised the "floor" established in *Rowley*, and would be advantageous for restraint and seclusion plaintiffs. However, like *Rowley*, *Endrew* never articulated a definitive test for the adequacy of educational benefit nor did the Court elaborate on "what 'appropriate' progress will look like from case to case."[99] The lack of clarity provides little guarantee as to how any particular IDEA challenge might turn

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[90] *See* Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017).

[91] *Id.* at 992.

[92] *Id.* at 999.

[93] *Id.* at 996–97.

[94] *Id*.

[95] *Id.* at 997.

[96] *Id.* at 991.

[97] *Id.* at 1001.

[98] *Id*.

[99] *Id*.

out. The implication of the *Endrew* holding on restraint and seclusion cases could mean that school authorities will be given deference whenever there is a dispute on the appropriateness of restraint and seclusion interventions. It is pertinent to note that the *Endrew* standard retained the factor of "reasonableness" in the language of its holding. Limited restraint and seclusion case law applying the *Endrew* standard[100] casts uncertainty as to whether evidence such as empirical data or expert testimony on the adverse effects of restraint and seclusion may tip the scale in plaintiff's favor in terms of reasonableness. The degree of deference to be given to school authorities on the question of appropriateness remains to be the biggest hurdle for plaintiffs if they want to challenge the FAPE requirements. A foreseeable argument by school authorities could very well be that in light of the student's propensity of aggressive behavioral outbursts, the school has no choice but to use physical restraints to maintain classroom order.[101] Since restraint and seclusion misuses do not always result in a complete lack of educational progress, the school would conclude that the amount of progress nevertheless was indeed "appropriate" in light of the child's circumstances.

D. Failed Implementation of Individual Education Plan (IEP)

As reflected in the caselaw, many circuits have concluded that the substantive right described in *Rowley* was not so robust after all.[102] This is because *Rowley* expressly declined to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[103] As illustrated by the cases previously discussed, litigants have been largely unsuccessful in overcoming the substantive threshold to allege a viable FAPE violation claim in their restraint and seclusion cases. Over the years, various circuits attempted to define the parameters of a standard within the meaning of *Rowley's* decision, but this result in major inconsistencies amongst the various jurisdictions.

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[100] *See* McCarthy v. Scottsdale Unified Sch. Dist. No. 48, 409 F. Supp. 3d 789, 801 (D. Ariz. 2019). The District of Arizona cited once to *Endrew* in its discussion of the background law, but did not adjudicate plaintiff's denial of FAPE claim by applying the *Endrew* standard because the plaintiff failed to exhaust administrative remedies. *See* Emma C. v. Torlakson, 2018 U.S. Dist. LEXIS 141094 (N.D. Cal. 2018). The Court cited to *Endrew* in its discussion about the requirements of individualized education programs ("IEPs") under the meaning of IDEA, "the plan must be 'tailored to the unique needs' of each child and crafted in manner consistent with the procedural requirements described in the government statute and regulators." *Id.* at 25. However, the central legal inquiry was whether the state collects enough data to evaluate whether school districts are the IEPs. Once again, the *Endrew* standard was not directly applied to evaluate the substantive requirement of FAPE.

[101] *See generally* Parrish v. Bentonville Sch. Dist., No. 5:15-CV-05083, 2017 U.S. Dist. LEXIS 41149 (W.D. Ark. 2017) (This case is an example where the court accepted the school's argument that it had no choice but to use physical restraints to control the student's behavior).

[102] L.J. v. Sch. Bd., 927 F.3d 1023, 1210 (11th Cir. 2019).

[103] *Rowley*, 458 U.S. 176 at 202.

As an alternative to the substantive FAPE denial or inadequacy argument, some litigants tested an alternative approach, framing their arguments against the use of specific restraint and seclusion techniques as a failure to implement IEPs.[104] Restraint and seclusion techniques are sometimes expressly included in a student's IEP as the "last-resort," emergency behavioral management tactics.[105] In circumstances in which the administration of restraint and seclusion techniques falls outside of the parameters set out in the student's IEP, litigants may construct their allegations as an IEP implementation failure. An examination of the IEP implementation jurisprudence could be instructive for the restraint and seclusion application.

As some scholars point out, IEP implementation could be considered the "third dimension" that emerged after the procedural and substantive dimensions of FAPE established in *Rowley*.[106] This third dimension of FAPE is thought to have "largely escaped analysis in the legal literature" and was not addressed in *Rowley*, but has become increasingly prominent in recent years.[107]

1. The Benefit-Based Approach

On the issue of when courts may conclude that a school has failed to properly implement the IEP, the Fifth Circuit articulated a two-step benefit-based approach in *Houston Independent School District v. Bobby R.*[108] The *Bobby R*. court held that, first, "a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."[109] Second, the party must show that the student had received more than a trivial benefit from the IEP.[110]

The Fifth Circuit in a subsequent decision, *Houston Independent School District v. V.P. ex rel. Juan P.*, applied this two-step test and reached the conclusion that the school in that case failed both the implement prong and the benefit prong of the analysis.[111] In the *V.P. ex rel. Juan P.* analysis,

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[104] *See generally* A.T. v. Baldo, No. 18-16366, 2019 U.S. App. LEXIS 38325 (9th Cir. 2019). *See also* Payne v. Peninsula Sch. Dist., 653 F.3d 863 (9th Cir. 2010).

[105] See generally CJN v. Minneapolis Pub. Sch., 323 F.3d 630 (8th Cir 2003).

[106] Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. OF THE NAT'L ASS'N OF ADMIN. L. JUD. 409, 411 (2016).

[107] *Id.* at 412.

[108] *See* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000).

[109] *Id.* at 348–49 (citing Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989)).

[110] *Id.* 349–350.

[111] Houston Indep. Sch. Dist.v. V.P. ex rel. Juan P., 582 F.3d 576, 587–88 (5th Cir. 2009).

however, the Fifth Circuit stressed the relevance of an inquiry to "educational benefit" in its analysis of the implementation prong of the test.[112] In particular, the court explained that, in determining if a school has failed to implement "substantial or significant" provisions of the IEP, the question to consider is whether the student derived an education benefit from the services set out in the IEP.[113]

Subsequent to these Fifth Circuit decisions, the Third Circuit and the Fourth Circuit also adopted this two-part approach in other failure-to-implement cases, finding the overall educational benefit as determinative of this test from *Bobbi R.*[114] Specifically, the Third Circuit has cited to *Bobbi R.* to explain that, for a plaintiff to prevail on a failure-to-implement IEP claim, the plaintiff must show "that the school failed to implement substantial or significant provisions of the IEP, as opposed to a mere *de minimis* failure, such that the disabled child was denied a meaningful educational benefit."[115]

This intertwined two-part implementation test is problematic in its interpretation and application. Though textually the implementation prong of this test appears to be a procedural or quantitative inquiry into the implementation of the IEP, the Fifth Circuit effectively reduced the test to a one-step, substantive *Rowley* inquiry into educational benefit. Certainly, in the context of restraint and seclusion cases, this test will be detrimental to the argument of improper use of restraint and seclusion as an IEP implementation failure. The construct of this test will squash this argument because behavioral intervention is usually one of many components of a student's IEP and the restraint and seclusion provision rarely takes up a substantial portion in the contents of a particular student's IEP. If ultimately the *Rowley* standard would apply in an implementation inquiry, a plaintiff's implementation argument will likely fail because one will find some educational benefit in a student's comprehensive IEP, despite a variance in the implementation of the behavioral component of the student's IEP. Therefore, restraint and seclusion litigants likely cannot rely on this Fifth Circuit two-part test for their IEP implementation argument.

2. The Material Failure Approach

In *Van Duyn ex rel. Van Duyn v. Baker School District*, the Ninth Circuit considered the "substantial or significant" standard of *Bobby R.*, but articulated a one-step test where proofing a denial of educational benefit is

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[112] *Id.* at 587.

[113] *Id*.

[114] *Melissa S*., 183 F. Appx. at 187; O.S. v. Fairfax City. Sch. Bd., 804 F.3d 354, 360–61 (4th Cir. 2015); Sumter City. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484–86 (4th Cir. 2011).

[115] *Melissa S*., 183 F. Appx. at 187 (citing Bobby R., 200 F.3d at 349).

not required.[116] The plaintiff in *Van Duyn* alleged that the school district failed to implement a key portion of his IEP and thereby deprived him of FAPE by the IDEA.[117] The factual records indicated variances in the school's implementation of the specificity of the IEP. For example, Van Duyn's IEP included a behavior management plan that was to be implemented full-time, yet the school failed to set up his daily schedule before starting each school day and his behavior was not consistently recorded on a behavior card, as outlined in his IEP.[118] While most IDEA cases challenge the formulation of an IEP, this Ninth Circuit case considered the failure to implement IEP as a violation of the IDEA.[119] Ultimately, the *Van Duyn* court held that "a *material failure* to implement an IEP violates the IDEA" and it further explained that "a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."[120]

The Ninth Circuit conducted a heavily factual inquiry in its materiality analysis.[121] Plaintiff's implementation failure allegation ultimately failed in part because the court deemed the IEP as lacking clarity in its construct.[122] The court's logic was that an allegation of material failure of implementation could not prevail if the IEP itself contains ambiguity such that the school is not clearly instructed on how the IEP should be implemented. It is important to note that under the *Van Duyn*'s standard, the material failure in implementation relates largely to the extent of discrepancy in services, whereas under *Bobby R.*, the test for implementation failure hinges largely on which of the "substantial or significant provisions" of the IEP has the school failed to implement.

The *Van Duyn* materiality standard in implementation cases could be a promising approach in some restraint and seclusion cases, provided that the student's IEP was drafted with adequate specificities. In order to allege a material failure of IEP implementation, the court under *Van Duyn* would look for clear instructional definitions on behavioral management technique that the IEP outlines. The IDEA appears to offer procedural mechanism to protect students from the improper use of restraint and seclusion when the IEP explicitly prohibits such use. While courts typically do not interpret the

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[116] Van Duyn ex rel. Van Duyn v. Baker Sch. Dist., 502 F.3d 811 (9th Cir. 2007).

[117] *Id.* at 814.

[118] *Id.* at 816.

[119] *Id.* at 819.

[120] *Id.* at 822.

[121] *Id.* at 824.

[122] *Id.* (The court identified that the IEP was unclear in describing how certain behavioral interventions such as the daily behavior card, social stories and quiet room should be used in the elementary school. The court also pointed out some ambiguity on whether plaintiff's IEP requires schoolwork to be presented at his level.)

IEP as a contract, the *Van Duyn* decision confirms that the IDEA offers procedural protection against the material discrepancy of IEP implementation.[123] It is important to note that the case law applying the *Van Duyn* standard has largely been limited to unpublished court opinions that focus on failure to implement IEP generally. Failure to implement IEP in the context of restraint and seclusion would be somewhat of a pioneer argument and would be highly jurisdiction dependent.

E. Mootness in IDEA Claims

One important feature of IDEA is its administrative safeguards. The IDEA requires an aggrieved party to invoke a state's administrative procedures before seeking judicial remedies at a federal or state court.[124] To begin, a dissatisfied parent may file a complaint with the local or state educational agency.[125] The intention of this procedural requirement is to ensure that any dispute of a student with disabilities is first analyzed by an administrator with expertise who may promptly resolve the technical educational issues.[126] The purpose of this mechanism is to afford state and local agencies the first opportunity to conduct full exploration of the issues and to promote judicial efficiency. Hence, the doctrine of administrative exhaustion is a key procedural element for those seeking remedies under the IDEA.

While the administrative exhaustion requirement serves as a mechanism for efficient dispute resolution in the formation of an IEP, this doctrine at times creates a procedural hurdle for restraint and seclusion litigants. Like any other type of IDEA challenges, plaintiffs in restraint and seclusion cases must file their complaint administratively and exhaust all available remedies to resolve their concerns before they can access judicial remedies. The administrative exhaustion requirement could be a practical barrier for aggrieved restraint and seclusion plaintiffs, especially in the most outrageous cases where significant harm to the student ensued.

The Eighth Circuit case *C.N. v. Willmar Public School* illustrates how the administrative exhaustion doctrine creates a practical barrier in bringing a viable IDEA challenge.[127] C.N. was a third-grade student who was tested for Autism Spectrum Disorder, but diagnosed with communications disorder and attentional and hyperactivity problems.[128] She attended Willmar Public School and had an IEP created through the collaborative efforts of the IEP

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[123] *Id.* at 826.

[124] 20 U.S.C. § 1415(i)(2) (2018).

[125] 20 U.S.C. § 1415(b)(6) (2018).

[126] J.S. v. Attica Cent. Sch., 386 F.3d 107, 112 (2nd Cir. 2004).

[127] C.N. v. Wilmar Pub. Sch., 591 F.3d 624 (8th Cir. 2010).

[128] *Id.* at 627.

team. C.N.'s IEP included a behavioral intervention plan which authorized the use of restraint holds and seclusion "when C.N. exhibited various target behaviors" despite C.N.'s mother's objections.[129] The plaintiff alleged a violation of FAPE under the IDEA due to improper and overzealous use of seclusion and restraint techniques on C.N. The plaintiff also alleged mistreatments by school personnel, including the pulling C.N.'s hair, yelling and shouting to demean and belittle her, forcing C.N. to hold certain posture at a desk, and once denying her the use of a restroom, thereby causing an accident. The report also indicated that the special education teacher "choke[d] her and that the restraints hurt her very much."[130]

Given the despicable facts, C.N.'s parents felt that an immediate transfer was necessary for her physical and psychological safety. C.N. was subsequently transferred out of the District in Willmar and attended a different school within the District in Atwater, Minnesota.[131] C.N.'s parents did not request a due process hearing until after C.N. was transferred to her new school in Atwater. When they later filed the IDEA challenge against the school district in Willmar, the district court held, and the Eighth Circuit affirmed, that C.N. failed to exhaust available administrative remedies and hence C.N.'s IDEA claim was dismissed.[132]

The administrative remedies and the exhaustion doctrine in C.N. failed to account for situations where the aggrieved student and family may have a compelling reason to remove the student from their original school in order to avoid further exposure to gravely dangerous interventions. C.N.'s case was considered moot because the original school district was no longer responsible for complying with the IDEA's mandate on C.N.'s education. Instead, the new school district would assume such obligations. The Eighth Circuit relied on an earlier case within the jurisdiction, concluding that "[i]f a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved."[133] In the absence of any judicial exceptions to the administrative exhaustion doctrine, restraint and seclusion litigants facing unsafe and ineffective behavioral interventions are precluded from seeking judicial remedies unless they file for an administrative hearing prior to the school transfer. As much of a safeguard as it is for facilitating direct and efficient educational disputes, this procedural feature of the IDEA appears to leave restraint and seclusion litigants a practical bind. Litigants must effectively choose between staying at the defendant school to preserve their right to access judicial remedies, or move to a potentially safer school environment and lose their chance to

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[129] *Id.* at 628.

[130] *Id.* at 627.

[131] *Id.* at 629.

[132] *Id.*

[133] Thompson v. Bd. of Spec. Sch. Dist., 144 F.3d 574, 579 (8th Cir. 1998).

further judicial access.

F. The Interplay between the IDEA and the Americans with Disability Acts (ADA) and Section 504 of the Rehabilitation Act

Restraint and seclusion litigants may opt for companion claims under the ADA or section 504 of the Rehabilitation Act.[134] The ADA and section 504 are anti-discrimination statutes that prohibit discrimination against children with disabilities.[135] In education, both the ADA and section 504 prohibit discrimination against an otherwise qualified disabled individual in public accommodations and any federally assisted programs, including all public schools and private schools receiving funding under the IDEA for educating children with disabilities.[136] The protection afforded by the ADA and section 504 in higher education is rather easy to understand because of its application to promote inclusive admissions. In the context of K-12 education, the ADA and section 504 ensure that children with disabilities are not excluded from access to appropriate education. Often, ADA and section 504 cases involve disputes between school districts and parents on the issue of permitting accommodation to enable participation in educational activities. Specifically, courts have interpreted section 504 as "demanding certain 'reasonable' modifications to existing practices in order to 'accommodate' persons with disabilities."[137]

Among students with disability-associated behaviors that substantially impedes their learning, the provision of appropriate behavioral interventions, such as Positive Behavioral Interventions and Supports (PBIS), is a form of accommodation under section 504.[138] Therefore, the failure to provide effective behavioral interventions to students with disability, by means of using harmful restraint and seclusion, is a violation of section 504.

In a sense, the negative prohibition against discrimination under section 504 and ADA seems to impose narrower obligations on schools than the IDEA which requires more affirmative crafting of an IEP according to its substantive requirements. Nevertheless, the protection for children with disabilities in education offered through the section 504/ADA and the IDEA overlap. The Supreme Court recently clarified that the ADA or section 504 are "separate vehicles," "no less integral than the IDEA for ensuring the rights of handicapped children."[139] The Court reiterated that the IDEA "does

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[134] *See* Fry v. Napolean Cmty. Sch., 137 S. Ct. 743, 752 (2017).

[135] 42 U.S.C. § 12101 et seq. (2009); 29 U.S.C. § 794 (2016).

[136] *See* 29 U.S.C. § 794(2)(A) (2016).

[137] *Fry*, 137 S. Ct. at 749 (citing Alexander v. Choate, 469 U.S. 287, 299-300 (1985)).

[138] 34 C.F.R. § 104.3(j)(2)(ii) (2017).

[139] *Id.* at 750.

not prevent a plaintiff from asserting claims under such laws even if . . . those claims allege the denial of an appropriate public education."[140]

In *Fry v. Napoleon Community Schools, et al.*, the Supreme Court confirmed that litigants are free to bring both an IDEA claim and a section 504/ADA claim together. However, one procedural caveat is that these section 504/ADA companion claims may also be subjected to the administrative exhaustion requirement like an ordinary IDEA[141] claim. In *Fry*, the plaintiff parents alleged that the school district refused to "reasonably accommodate" their daughter's use of a service animal, and therefore discriminated against their daughter as a person with disabilities in violation of both the ADA and section 504. The lower court dismissed the Fry's' ADA and section 504 claims, stating that they have failed to exhaust the IDEA's administrative procedures. The lower court's logic was that exhaustion must be satisfied whenever "the genesis and the manifestations" of the complained-of harms were "educational" in nature.[142] The Supreme Court in *Fry* explicitly rejected the lower court's interpretation of the exhaustion requirement for ADA and section 504 claims. Instead, the Court held that the requirement to exhaust IDEA remedies before seeking relief under the ADA or section 504 depends on whether the "gravamen of a complaint against a school concerns the denial of a FAPE."[143]

Denial of the "reasonable accommodation" to use a service animal was the crux of the *Fry* case. In *Fry*, the gravamen of the plaintiff's complaint did not concern the appropriateness of an educational program. Interestingly, the Court stressed that the "the 'substance' of, rather than the labels used in, the plaintiff's complaint" would be the guidepost to determine whether IDEA exhausting is necessary for ADA and section 504 claims.[144]

Applying the *Fry* holding to restraint and seclusion cases, the relevant question is whether plaintiffs' ADA and section 504 may inevitably be dismissed on the basis of failure to exhaust administrative remedies under IDEA. Typically, a plaintiff may frame their ADA and section 504 allegation for misuse of restraint and seclusion as acts and omissions of the conduct of the defendant which denied the plaintiff the benefits of a public education on the basis of plaintiff's disability. Since physical restraint and seclusion techniques withdraw and exclude a student from participating in their education and the techniques would otherwise not be deployed but for the student's disabilities, plaintiff may argue that this is a form of discrimination. Under *Fry's* holding, plaintiffs may be exempt from the IDEA exhausting requirement if their ADA and section 504 claim centers

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[140] *Id.*

[141] 20 U.S.C. § 1415(l) (2018); 34 C.F.R. § 104.3(j)(2)(ii) (2017).

[142] *Fry*, 137 S. Ct. at 752.

[143] *Id.* at 756.

[144] *Id.* at 755.

on the idea that restraint and seclusion misuse is a disability-based discrimination.

In *Fry*, the Court explicitly acknowledged that litigants could make a disability-based discrimination claim separate and distinct from issues that relate to FAPE obligation under the IDEA. The Court also recognized that a litigant may come to a "late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely," and that this is considered "strategic calculations about how to maximize the prospects of such a remedy."[145] Therefore, the *Fry* opinion articulated that, when the ADA and section 504 claim is separate and distinct from an IDEA claim, plaintiffs are not bound by the IDEA exhaustion requirement nor are defective in pursuing the IDEA remedial process.

IV. RECOMMENDATIONS

Although FAPE denial is one of the most common allegation made by plaintiffs in restraint and seclusion cases, neither the *Rowley* standard and the subsequent *Endrew* decision provides a bright-line rule that addresses when an educational agency might have violated the substantial obligations under the IDEA when the misuse of restraint and seclusion causes an educational deprivation and injurious impact. Despite *Endrew's* clarification on the "appropriateness" standard, perhaps elevating the baseline requirements that many lower courts have chosen to adopt since *Rowley*, the assessment of adequacy of a student's IEP with respect to the choice of behavioral interventions remains highly deferential to school authorities. The Court in *Endrew* explicitly cautioned lower courts against taking the "absence of a bright-line rule" as "an invitation . . . to substitute their own notions of sound educational policy for those of the school authorities which they review."[146] The deference to school authorities advocated in *Endrew* is based on a heavy presumption that school authorities possess expertise and sound judgment in every aspect of education for students with a disability. Arguably, the inappropriate use of restraint and seclusion interventions is an indication of poor understanding and incompetency in student behavioral management. A high degree of deference to school authorities in this context would be inappropriate. If courts would ultimately defer to school authorities on the issue of "appropriate" educational progress or adequacy of IEP, this interpretation of IDEA would significantly constrain the substantive regulatory function of the IDEA.

On the contrary, the IDEA contains a robust procedural framework to facilitate educational program development and draws on a highly collaborative approach among educators, parents, and other related services

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[145] *Id.* at 757.

[146] *Endrew*, 137 S. Ct. at 1001.

professionals. This procedural framework may offer a more viable cause of action allowing restraint and seclusion plaintiffs to craft a "failure to implement IEP" allegation when the school fails to execute the parameters of behavioral interventions specified in the student's IEP. Certainly, this highlights the necessity of drafting an IEP with specificities, and the burden is on the parents. Some advocates recommend parents to include a "No Consent" Letter in the student's IEP as a way to heighten protection against the use of aversive techniques by school teachers and staff.[147] While jurisdictions are split in their evaluation of what constitutes material failure of IEP implementations, restraint and seclusion litigants may rely on this approach by making showings of material discrepancy in the student's IEP in those jurisdictions that adopt the Ninth Circuit's material approach.

In most cases, IDEA is not the only possible cause of action in restraint and constraint litigation. The ADA and section 504 of the Rehabilitation Act protect qualified individuals from discrimination by a public entity. To maintain a disability discrimination claim under these statutes, the plaintiff must show that the defendant school is deliberately indifferent to a harm to the plaintiff's protected right to equal access of public education and that the school failed to act upon the knowledge of this harm.[148] In other words, the plaintiff must show that the school knows that the inappropriate use of restraint and seclusion is a form of discrimination for reasons related to a student's disabilities, and nevertheless fails to employ effective measures to accommodate the student to participate in education. A true section 504 and ADA claim is doctrinally distinct from an IDEA claim which focuses on the IEP. In *Fry*, the Court discussed this distinction and clearly cautioned litigants that, if their underlying claim is an allegation of substantive violation of FAPE yet lacks the discriminatory intent required under section 504 and the ADA, they are subject to the administrative exhaustion requirement under the IDEA procedural provisions before judicial consideration of their section 504 and ADA claim.[149] Hence, litigants must be mindful that, although section 504 could be an alternative cause of action, the IDEA poses direct procedural implications if a plaintiff inevitably fails to prove that restraint and seclusion is a discriminatory conduct.

V. CONCLUSION

The misuse of restraint and seclusion of students with disabilities is an issue that demands a robust and systemic scheme of regulations. Aggrieved plaintiffs have turned to the IDEA for redress, but caselaw indicates that the

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[147] Courtney Hansen, *Why Your Child Needs a "No Consent" Letter for Restraint and Seclusion, Inclusion Evolution: Parents, Students, and Teachers' Guide to Inclusion* (Feb. 27, 2019), https://www.inclusionevolution.com/child-needs-no-consent-letter-restraint-seclusion/

[148] Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001).

[149] *Fry*, 137 S. Ct. at 752.

IDEA has largely failed to function as a tool to sanction schools that deploy restraint and seclusion inappropriately. The substantive obligation required by the IDEA has been up for judicial interpretation and application since *Rowley*. The recent *Endrew* opinion provides some additional clarification on what might constitute an appropriate educational program within the meaning of FAPE, but the Court left major uncertainties as to how a school might nevertheless violate the guarantee of FAPE when the education program falls under the line of adequacy. In the context of restraint and seclusion misuse, the IDEA could theoretically be used as a sanction if plaintiffs could prove that using restraint and seclusion as a choice of behavioral intervention substantively deprives the student of a FAPE. The way many appellate courts have adjudicated FAPE claims in restraint and seclusion cases nevertheless suggests that the IDEA is ineffective to prosecute systemic flaws in educational practices. The purpose of IDEA has always been to focus on an individualized educational program, yet the abuse involved in restraint and seclusion cases calls for a level of reform far beyond individual students. While it is common for plaintiffs to file parallel claims under state torts and other codified state statutes regulating restraint and seclusion either directly or indirectly,[150] these causes of action at most redress plaintiffs after the fact, in the forms of compensatory damages and monetary settlements. Despite the challenges that litigants face, IDEA cases will likely continue to reach lower courts because parents of IDEA eligible students are motivated to file FAPE denial claims for tuition reimbursement if the student is ultimately transferred from a public school to a private school.

Children with disabilities in the United States are perpetually at risk of abusive restraint and seclusion. The physical and emotional trauma as a result of restraint and seclusion should never be part of a student's education experience. In light of the inadequate protection that existing disability and education legal frameworks provide, future effort should focus on policy advocacy to aim at a nation-wide abolishment of restraint and seclusions.

[150] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 33–58; *see generally Kerri K.*, *supra* note 10.

A Constitutional Framework for Enforcing Statewide Quarantine Orders: Banning Out-of-State Residents from In-Person Transactions

JASON GALLANT[†]

In March 2020, when news of the first case of COVID-19 to reach Austin, Texas, hit, I was living 1,600 miles away from home. My family, residing in Connecticut, was located just twenty miles east of the first coronavirus "cluster," a pocket of infections so bad that New York Governor Andrew Cuomo established a perimeter around the city of New Rochelle. Two months later, I made the decision to return home to my family by way of a three-day road trip, an experience that would underscore the cultural divide of the pandemic. A stop at the Buc-ee's convenience store in rural Royce City revealed Texans jokingly sneezing on poor employees, as if to mock the virus. I woke up in Arkansas to a local car dealership's commercial praising the month of May as "freedom month" and boasting how many people they could fit in their building at once. A Tennessee family walked into a rest stop bathroom wearing masks as necklaces. It took me until Virginia to see someone wearing a face mask correctly and consistently.

It was in New York where I first saw a face shield.

In contemporary usage, "quarantine" differs from "isolation" in that the former involves "the separation of individuals . . . who are not ill but are thought to be at risk of becoming infectious," while the latter refers to the separation of those who are already sick.[1] My home state of Connecticut is no stranger to these types of quarantines.[2] But much of the recent literature on quarantining potentially infectious citizens revolves around claims of procedural and substantive due process.[3] In such a widespread pandemic as the one this country currently faces, the question of individualized quarantine becomes moot as millions of Americans face a risk of infection

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[1] Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & POL'Y 1, 7 (2018).

[2] For the details surrounding some of these cases, including Connecticut residents Louise Mensah-Sieh and Laura Skrip, see *id.* at 2–3.

[3] *E.g.*, Parmet, *supra* note 1, at 1; Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391 (2018); Polly J. Price, *Do State Lines Make Public Health Emergencies Worse? Federal Versus State Control of Quarantine*, 67 EMORY L.J. 491 (2018); Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53 (2007).

so great that quarantine is no longer thought of as an individual or group measure, but rather a *statewide* measure. The responsibility of containing the virus has thus shifted from the federal level to the state and local level. The stark differences in these approaches is best illustrated by comparing the responses of Northeastern states and the rest of the country.

Once the epicenter of the COVID-19 pandemic, the Northeastern United States has shown immense progress on its way to becoming one of the safest places in America to live during the pandemic. The road has not been easy. After the first wave of COVID-19 had waned in May 2020, infections in the region were lower than when the pandemic had begun earlier that year. Through strict compliance with mandatory mask orders, discipline with social distancing, and cultural shifts toward collectivism, the Northeast experienced one of the lowest regional infection rates in the country, all with the prospect of safe and effective vaccines seemingly months, if not years, away.[4] This was due to the collective leadership of state governors recognizing the immediate need to prioritize public health over reopening economies. The combined statewide efforts, led by Governor Andrew Cuomo of New York, and joined most visibly by Governors Ned Lamont of Connecticut and Phil Murphy of New Jersey, paid dividends, with New York experiencing lower levels of coronavirus-related hospitalizations in July 2020 than it had when the pandemic had started.

Of course, as the rest of the country prematurely dropped mask mandates and capacity restrictions, a "second wave" of COVID-19 would spread across the country. While three safe and effective vaccines were approved on an emergency basis, new, more transmissible variants of the coronavirus infected hundreds of thousands of Americans every day. While no part of the country was spared from the spike in cases, the Northeast fared better than nearly everywhere else. Eventually, as more Americans gained access to the vaccines, the Northeast consistently led the country in the proportions of their populations receiving the vaccine; as of this writing, every state in New England has vaccinated at least 60% of its population, with New York not far behind.[5]

However, it is entirely possible that the state will once again see rising infection rates by the time this Note reaches an audience. If it does, a primary cause will undoubtedly be increased interstate movement. In July 2020, a prescient Governor Cuomo made clear his fear of a "second wave" of cases

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[4] This Note does not seek to offer an evaluation of how effective other states' responses to the pandemic have been. I wholly expect that by the time an audience reads this Note, such differences will have been thoroughly documented, debated, and evaluated by far more qualified entities than I.

[5] Centers for Disease Control, *Covid-19 Vaccinations in the United States*, https://covid.cdc.gov/covid-data-tracker/#vaccinations (last visited June 10, 2021).

emerging from people coming to New York from out-of-state locations.[6] He would be proven right. Evidence emerging over summer 2020 indicated that affluent yet sparsely populated areas in the Northeast, and Connecticut in particular, became refuges for those wealthy enough to afford real estate or lengthy vacations there,[7] or to escape from those neighboring states seeing spikes in infection rates.[8]

When states took proactive steps to reduce movement in and out of their borders, both interstate and intrastate transmission of the virus declined.[9] It would follow that if compliant states could somehow seal themselves off from the non-compliant ones, and strict mitigation measures were enacted upon doing so, the virus could be mitigated, or even contained, within those borders.

Of course, it is unconstitutional to restrict the freedom of movement from state to state.[10] It follows that, under current case law, it is an impermissible restraint on movement to block non-residents from entering other states.[11] But this has so far not prevented governors from taking proactive steps to try and reduce interstate transmission as much as possible. When the pandemic first began, a number of states imposed mandatory quarantines on arriving travelers from the New York City area in an attempt to reduce transmission. Over the summer of 2020, when infection rates shifted and New York saw falling infection rates, the state imposed reciprocal quarantine orders on over thirty-four states. Soon after, New York, New Jersey, and Connecticut began collecting forms from inbound travelers subject to quarantine, receiving local addresses and other information which would allow for easier contact tracing. But this is about the extent to which individual states enforced these orders, in part because

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[6] Luis Ferré-Sadurní & Nate Schweber, *New York Confronts Second-Wave Risk: Visitors From Florida and Texas*, N.Y. TIMES (July 20, 2020), https://www.nytimes.com/2020/07/14/nyregion/coronavirus-ny-travel-cuomo.html

[7] Kurtis Lee, Richard Read, & Jaweed Kaleem, *$8,000 rentals. Private jets. How the super-rich escape the coronavirus pandemic*, L.A. TIMES (Apr. 23, 2020), https://www.latimes.com/world-nation/story/2020-04-23/how-rich-people-escape-coronavirus-epidemic

[8] *Id.*

[9] Quarantine orders, discussed *infra*, are the best example of this. To observe how publicly funded institutions might take similar steps, see *UConn Will Not Allow Out-of-State Students Taking Online Classes to Live on Campus*, NBC CONN. (Aug. 11, 2020), https://www.nbcconnecticut.com/news/coronavirus/uconn-will-not-allow-out-of-state-students-taking-online-classes-to-live-on-campus/2317145/.
But see Self-Quarantine for Travelers FAQ, N.J. DEP'T OF HEALTH (Oct. 20, 2020), https://nj.gov/health/cd/documents/topics/NCOV/Travel_advisoryFAQs_6-25-2020.pdf (exempting from quarantine individual travelers coming to New Jersey for business travel).

[10] *See* Saenz v. Roe, 526 U.S. 489, 500 (1999) (describing the constitutional right to leave one state and enter another state freely).

[11] This may include the imposition of a *cordon sanitaire* or a state sealing itself from the inside. For a broader discussion on this, see *infra* Part II.

this is the extent to which they *could*.[12] Only for a limited time had states set up checkpoints to ensure that out-of-state travelers quarantined; however, once travelers began this quarantine, the enforcement of the order became far more difficult.[13] As long as quarantine orders are unenforceable, they serve no protective effect. I argue that state governors are within their power to enforce these quarantine orders beyond simply asking travelers to fill out forms at airports. Governors are able to take greater measures to dissuade out-of-state residents from high-risk areas not to come to states that have controlled the coronavirus.[14]

In this Note, I propose the legality of a ban on in-person business from out-of-state consumers who are subject to mandatory quarantines based on their residency. Such a ban would effectively force those parties subject to quarantine to actually remain quarantined. Their interactions with in-state residents and low-risk out-of-state residents would be minimized. In doing so, the risk of infecting an already low-risk population decreases. In considering such a proposal, I look to the Constitutional arguments that are likely to come up as a result, but ultimately reach the conclusion that there are legal ways to achieve the implementation of this proposal. Furthermore, the value proposition in doing so is great enough to warrant its consideration. In Part I, I introduce my proposal and the value in its enaction. In Part II, I defend the legality of a ban on transactions from out-of-state residents through the lens of the Privileges and Immunities Clause. In Part III, I analyze this legality through the lens of the Commerce Clause. In Part IV, I conclude.

I. THE PROPOSAL: A BAN ON IN-PERSON TRANSACTIONS FROM OUT-OF-STATE RESIDENTS

It is important to first discuss what is and is not encompassed in my proposal. "Quarantine" refers to the separation, involuntary or otherwise, of individuals believed to pose a risk of infection to the outside community.[15] As the term became more widespread (and colloquial) during the early days of the pandemic, the accepted definition shifted to refer to any period of time

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[12] *See e.g.* Quarantine and Travel: Strict Penalties, Rare Enforcement, N.Y. TIMES (Aug. 21, 2020) https://www.nytimes.com/2020/08/21/travel/quarantine-enforcement.html (discussing the dilemma of "soft enforcement").

[13] The problem is not unique to the Northeast, and is particularly unfortunate for those areas that ought to have geographic advantages in restricting entry to quarantined individuals. *See id.* (discussing enforcement issues in Hawaii and Puerto Rico).

[14] Realistically, some state borders cannot be sealed off, even if such a restriction were constitutional. For example, it would be difficult to block all traffic coming from New Jersey into New York due to their unique and varied borders; the George Washington Bridge, Lincoln and Holland Tunnels, Outerbridge Crossing, and PATH train tunnels would all need to be effectively sealed, measures Governor Cuomo would likely not approve.

[15] *See* Parmet, *supra* note 1, at 7–8.

spent in isolation and therefore without risk of infection from the outside world. This is the inverse of the legal definition; rather than protecting an individual threat from the outside community, "quarantine" has become a defensive term of protectionism. A "quarantine order," on the other hand, has become a temporary or expiring restriction on movement on an out-of-state resident, which terminates either upon isolating for a requisite period of time, or upon departure from the jurisdiction in question. It is not a restriction on movement because the citizens subject to the quarantine order are free to enter and leave the imposing jurisdiction as they choose. They may even select the location of their isolation, and so change it as often as they choose, provided that they comply with the terms of the quarantine order.

Quarantine orders by themselves demonstrate a state's commitment to containing COVID-19 at great social expense. More often than not, however, the orders are facially weak. A boilerplate order generally advises that incoming travelers "self-quarantine" for fourteen days upon entering the jurisdiction in question.[16] Many of these orders fail to define what "self-quarantine" means, and those commonly held definitions likely vary from state to state. Furthermore, if they fail to enumerate the types of activities citizens subject to the quarantine order may participate in, the citizens themselves may self-define, leading to underenforcement and constitutional challenges. Some orders even provide for exemptions to the quarantine order if the traveler can show a negative coronavirus test within seventy-two hours of entering the jurisdiction,[17] an arbitrary exemption at odds with science.[18]

The clash here is that soon after the country's founding, it was within the states' purview to enact laws regulating the quarantine of infected individuals.[19] Ironically, it was initially the expectation of *state* governments that the federal government would assist in efforts largely dictated by the state, rather than the other way around.[20] As a result, "[s]tates have traditional authority over all issues of public health within their borders,"[21] although this function has largely remained undefined, likely due in part to

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[16] *E.g.*, *Self-Quarantine for Travelers FAQ*, *supra* note 9; Conn. Exec. Order No. 7III (July 21, 2020).

[17] *See, e.g.*, Conn. Exec. Order No. 7III (July 21, 2020). This type of exemption is distinct from that which exempts essential workers from quarantining.

[18] *See* CTRS. FOR DISEASE CONTROL, *Testing for COVID-19*, CDC (Mar. 17, 2021), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html ("The [negative COVID-19] test result only means that you did not have COVID-19 at the time of testing. You might test negative [for COVID-19] if the sample was collected early in your infection and test positive later during your illness. You could also be exposed to COVID-19 after the test and get infected then.").

[19] Batlan, *supra* note 3, at 63.

[20] *See id.* at 63–64 (describing how states had quarantine powers superior to that of the federal government).

[21] Price, *supra* note 3, at 499.

the fact that there has not been a need to define this role since the last major national pandemic. This, in turn, led to a national confusion over how the pandemic would be handled, and which levels of government would take command over key functions in mitigating the pandemic, including the administration of tests. What the disparate actions taken by various states show, however, is that "[t]he United States is dangerously handicapped and unprepared to effectively control transmission from state to state, especially when individual states take actions that benefit it but harm their neighbors."[22] Whether this is a result of federal or state unpreparedness is a question of policy. It is ambiguous because modern courts have yet to reach the question of a pandemic on such a wide-reaching scale.[23] When they do reach such questions, courts are hesitant to precisely define the bounds of state powers.[24] Nevertheless, there is a difference between a state-imposed *quarantine* that restricts an individual's freedom of movement, and a *quarantine order* that expires either after a predetermined period of time, or upon exiting the state in question.

In a perfect world, states would seek to impose a *cordon sanitaire*, or "a prohibition against persons entering or leaving a defined boundary,"[25] on their own borders to prevent the virus from entering (or in some cases, escaping) their jurisdictions. This would be presumably unconstitutional on the state level due to its inherent restriction on the freedom to travel between the states. Starting with *Kent v. Dulles*[26] and continuing into *Saenz*, the Court has upheld the "right to travel." This "right to travel" includes "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and . . . the right to be treated like other citizens of that State" if the alien decides to become a permanent resident.[27]

If the state cannot block out-of-state residents from entering its borders, there may still be other ways to *discourage* entry into the state that the Court would find constitutional. Broadly, the states have police powers to "protect themselves from disease . . . so long as no better less restrictive alternative exists."[28] There is, for example, precedent holding that a state may *regulate*

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[22] *Id.* at 494.

[23] Parmet, *supra* note 1, at 11.

[24] *Id.* at 21 (citing a lone Maine state court decision, Hickox v. Mayhew, No. CV-2014-36, 2014 Me. Trial Order LEXIS 1 (D. Me. Oct. 31, 2014), for such a rare occasion).

[25] *Id.* at 49.

[26] 357 U.S. 116 (1958).

[27] Saenz v. Roe, 526 U.S. 489, 500 (1999).

[28] Emily Palmer, *The Open Road Calls, but Authorities Say 'Stop*,*'* N.Y. TIMES (Aug. 7, 2020), https://www.nytimes.com/article/coronavirus-driving-restrictions.html.

the means of entry.[29] Others may argue that the mere existence of a quarantine order is sufficient to deter out-of-state residents. I find this argument unpersuasive as more evidence emerges that communities of affluent city-dwellers are starting to make their way into the suburbs, trading densely populated areas for bucolic vistas and greater compliance with mask orders. For example, while many seek to escape New York City, sales of single-family homes in the New York City suburbs increased 73% in Fairfield County, CT, 112% in Westchester County, NY, and 121% in the Hamptons on the east coast of Long Island.[30] There was clearly a *desire* during the early stages of the pandemic to live in states experiencing low levels of the coronavirus, and even within these low-risk areas came a desire to escape to areas with more space, and by extension, less risk of infection. This motivation also came with a constitutional right to move to those states. The question thus becomes whether a state can narrowly tailor a ban to connect with a legitimate monitoring interest: the need to control the spread of COVID-19. In doing so, I acknowledge that a broad ban is necessary to achieve the desired goal of preventing interstate transmission of the coronavirus, while acknowledging that only the least restrictive means of doing so is likely to be affirmed by the courts.

I propose that in response to increased spread of the coronavirus, state governors should dissuade out-of-state residents from at-risk areas from entering states which have sufficiently controlled the spread of coronavirus through a temporary ban on *in-person* business transactions within the state. This ban would apply to nonresidents arriving from states experiencing high levels of infection, and would last for a period of fourteen days from the first date of entry into the state. Failure to present an in-state driver's license or other state-issued identification card would serve as *prima facie* evidence that the bearer is an out-of-state resident that has not quarantined in the state. An out-of-state resident can overcome the presumption that he has not quarantined for the requisite amount of time by showing either (a) documents which would otherwise be sufficient to prove residency in the state in question, or (b) presenting a form generated within the state's borders certifying the date of entry into the state, and only after the requisite amount of quarantine time has passed since entry. In practice, this would impact any transactions requiring the out-of-state resident to interact with an in-state merchant. For example, an out-of-state resident under mandatory quarantine could not physically order takeout food from a restaurant but could place an order on an online delivery platform (GrubHub, UberEats, etc.) to be delivered to the quarantine location. A car travelling through the

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[29] *See generally* Hendrick v. Maryland, 235 U.S. 610 (1915) (holding that a Maryland regulation of the mode of transportation used to enter the state was not a regulation of interstate commerce).

[30] Anna Bahney, *Manhattan apartment sales plunge while the suburbs boom*, CNN (Aug. 6, 2020), https://www.cnn.com/2020/08/06/success/manhattan-pending-home-sales-suburbs/index.html

state would be able to pump gas but must be prepared to do so with a credit card instead of paying cash. In other words, if a non-resident wanted to seek refuge in the state, they would be free to do so, but would be effectively cornered – through these commercial transaction restrictions - into quarantining for the requisite amount of time as directed by the State.

One might argue that this is an imperfect proposal for a couple of reasons. First, and most obvious, is the question of enforcement: will the state be able to enforce such an entry quarantine on such a wide scale? Hawaii provides an excellent case study on how such a system might work, and a cautionary tale for those who let down their guard. Starting when the pandemic spread throughout the country, Hawaii introduced a mandatory fourteen-day quarantine order on all travelers entering the state.[31] This order required that all travelers must remain in place for the requisite period of time by registering their addresses with the local authorities, and immediately going to that location for the fourteen-day period.[32] State police would conduct periodic checks on those travelers and arrest and fine all who violated the order.[33] What is most notable about this order is the aggressive enforcement tactics the Hawaii State Police utilized to catch all offenders.[34] The state temporarily lifted the order with respect to inter-island travel,[35] but it was reflexively reinstated[36] with the nationwide uptick in cases looming in the background. Similarly situated states should be able to engage in similar enforcement protocols to see similar results, especially considering that to date, there have been no constitutional challenges to Hawaii's enforcement protocol.

Accusations of domestic xenophobia may arise, and some audiences will

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[31] Haw. Second Supp. Emergency Proclamation (Mar. 21, 2020), https://dod.hawaii.gov/hiema/second-supplementary-proclamation-covid-19/.

[32] *Id.*

[33] Christina O'Connor, *Nearly 200 people arrested for violating Hawaii's 14-day mandatory quarantine*, PAC. BUS. NEWS (July 17, 2020) https://www.bizjournals.com/pacific/news/2020/07/17/hawaii-200-quarantine-violation-arrests.html.

[34] *See id.* (detailing face-to-face compliance checks with tourists residing in hotels, and the arrest of hundreds of tourists violating the quarantine order). *See also Social Media Posts Lead to Another Visitor Arrest*, STATE OF HAWAII (May 15, 2020), https://governor.hawaii.gov/newsroom/latest-news/hawaii-covid-19-joint-information-center-news-release-social-media-posts-lead-to-another-visitor-arrest-may-15-2020/ (showing authorities' tracking of social media and reliance on tips from local residents to enforce the quarantine order). *Cf. Breaking Quarantine in Hawaii? A Citizens Group Is Watching*, HONOLULU CIVIL BEAT, (May 31, 2020), https://www.civilbeat.org/2020/05/breaking-quarantine-in-hawaii-a-citizens-group-is-watching/ (for the extent to which private citizens' groups would assist local authorities in enforcing these orders).

[35] Haw. Ninth Supp. Emergency Proclamation for COVID-19 (June 10, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/06/2006097A-ATG_Ninth-Supplementary-Proclamation-COVID-19-distribution-signed.pdf

[36] Haw. Eleventh Supp. Emergency Proclamation for COVID-19 (Aug. 6, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/08/2008022-ATG_Eleventh-Proclamation-for-COVID-19-distribution-signed.pdf.

view my proposal as an example of "coastal elitism." To be fair, this reaction is not without precedent.[37] There may, however, come a time when daily infections rise again. They may be regionally isolated, but unless our current vaccines can adequately address rapidly spreading variants, the country may see a resurgence of the coronavirus. One might do well to recall initial quarantine orders by governors across the country in response to the explosion of COVID-19 cases in the New York City metropolitan area.[38] This is not to suggest hypocrisy, but necessity; in support of true federalism, the Supreme Court has affirmed the power of the states to address evils as it sees fit, whether to protect the country as a whole or merely its own citizens.[39] The Court recognizes extenuating circumstances, and, even when it comes to something as small as hunting wildlife, is rather lenient in how it grants its hall passes.[40]

Critics may also argue that statewide isolationism could lead to detrimental results nationwide.[41] Analogous to the loss of public trust if a faulty vaccine were to be released before substantial data were made available, a failure to uphold such a regulation in court might poison the well for all future attempts to protect a state's population in this manner. This criticism seems dubious on its face because the courts would be burdened with multiple state statutes to sort through, each of which may be tailored slightly differently, and thus requiring an entirely different decision, risking inconsistent application of judicial principles.[42] If one state's policy were to fail constitutional muster, it is far from certain that an identical statute from another state would have the same fate, which makes state-by-state experimentation and implementation crucial to the successful passage of such a regulation.

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[37] *See* Batlan, *supra* note 3, at 69 ("Furthermore, elite and middle-class New Yorkers urged an extraordinarily strong state response to the threatened epidemics [of 1892], believing that such state power would be exerted to control the bodies of immigrants. When the elite and middle class became the subject of such power, however, the state came under intense criticism.").

[38] *See, e.g.*, Ga. Exec. Order GA-11 (Mar. 26, 2020) (requiring travelers originating in Connecticut, New York, or New Jersey and arriving in Texas to quarantine for fourteen days); Fla. Exec. Order No. 20-80 (Mar. 23, 2020) (requiring the same for inbound travelers to Florida).

[39] The right to address public health "evils" has already been addressed by the Court. *See, e.g.* Compagnie Francaise & Co. v. Board of Health, 186 U.S. 380 (1902) (holding a state-enforced quarantine of Americans returning from overseas in the name of public health to be constitutional); see also Zemel v. Rusk, 381 U.S. 1, 24 ("The right to travel within the United States is of course also constitutionally protected . . . [b]ut that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole.").

[40] E.g. Baldwin v. Fish and Game Commission, 436 U.S. 371 (1978).

[41] *See* Price, *supra* note 3, at 495 (exploring "the dangers of protectionism when state and local governments attempt to exclude outside threats from local communities").

[42] *See* Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 18 URB. LAW 567, 571 (1986) (describing how identical state regulations may nevertheless be subject to distinct legal outcomes).

II. OVERCOMING THE PRIVILEGES AND IMMUNITIES CLAUSE

The most obvious argument to be made against an out-of-state transaction ban, other than the dormant Commerce Clause,[43] is that a ban on transactions from out-of-state residents necessarily presumes out-of-state residents to be unfriendly aliens, rather than welcome visitors. From a Privileges and Immunities Clause perspective, the Supreme Court is notably ambiguous on this point. It is true that one of the "privileges" associated with the clause is that out-of-state citizens must be able to conduct business on the same footing as that state's citizens.[44] But this right is by no means absolute. A state's disparate treatment between residents and nonresidents can occur when "there are perfectly valid independent reasons for it."[45] In defending against a Privileges and Immunities challenge, a state can provide a "justification for its different treatment of nonresidents, including an explanation of how the discrimination relates to the State's justification."[46] The current standard for this justification requires demonstrating both that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[47] In particular, this reason should be analyzed while valuing "the principle that the States should have considerable leeway in *analyzing local evils and in prescribing appropriate cures*."[48]

In determining what such an "evil" is, courts are surprisingly ambiguous (though, to be fair, the modern Court has not seen a pandemic on the scale of COVID). Furthermore, the Supreme Court has not ruled on the legality of a forced quarantine for over a century.[49] The opportunity to present "test cases" with relatively minor impacts is passed, and we are now seeing infection rates balloon to levels where local and state governments are implementing quarantine orders for their populations. This makes it inevitable that through political will, at least one state's actions will be brought to court.[50] From case precedent, we have some examples of what

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[43] *See infra* Part III.

[44] Toomer v. Witsell, 334 U.S. 385, 396 (1948) ("[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.").

[45] *Id.*

[46] Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 299 (1998).

[47] *Id.* at 298 (quoting Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 294 (1985)).

[48] *Toomer*, 334 U.S. at 396 (emphasis added).

[49] Parmet, *supra* note 1, at 26.

[50] *See id.* at 31 ("With many more cases, and longer periods of confinement, the probability that some habeas petitions would make their way to appellate decisions would increase substantially.").

does *not* constitute such an evil.[51] We also know that the Court tends to rule against discriminating states when there are less discriminatory ways of accomplishing this target objective.

But there are also some exceptions to this rule that would support governors acting in their states' best interests. In *Baldwin v. Fish and Game Commission*,[52] the Court upheld a Montana hunting regulation requiring nonresidents to purchase a combination license for a cost of over seven times that which a Montana resident would pay for the same license.[53] The question the Court had to wrestle with was whether "the distinction made by Montana between residents and nonresidents . . . threaten[ed] a basic right in a way that offends the Privileges and Immunities Clause,"[54] and in doing so, the Court acknowledged Montana's unique interest in preserving its supply of elk as a reason to dissuade out-of-state hunters.[55] Ultimately, the Court held that such an interest was sufficient to uphold a hunting regulation for out-of-state residents.[56]

While the Supreme Court has not had an opportunity to address the specific issue presented here,[57] courts have recently been more lenient with states asserting substantial interests in discriminating against nonresidents, especially when discrimination is a result of an inability to monitor nonresidents. New York has wrestled with the question of monitoring nonresident behavior before, and given current Second Circuit precedent, it is likely states would succeed in the context of COVID-19. In *Bach v. Pataki*,[58] the Second Circuit upheld a New York regulation which prohibited nonresidents from acquiring a handgun license unless they were local workers.[59] On the Privileges and Immunities question, the court held that New York had a substantial interest in blocking most nonresidents from acquiring this license because it would be unable to monitor questionable

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[51] For examples of where residence classifications run afoul of the Privileges and Immunities Clause, see Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 389–95 (1979) (discussing state bar admission and barriers to running for public office).

[52] 436 U.S. 371 (1978).

[53] *Id.* at 392.

[54] *Id.* at 388.

[55] *Id.* ("The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.").

[56] *Id.*

[57] For further discussion on this scarcity in case law, *see* Parmet, *supra* note 1, at 26.

[58] Bach v. Pataki, 408 F.3d 75 (2d Cir. 2005).

[59] *Id.* at 81 ("The only nonresidents eligible for a license are local workers, who may apply to the licensing officer in the city or county of their principal employment or principal place of business.").

activity that occurred out of state.[60] Furthermore, the court found that other states "cannot adequately play the part of monitor for the State of New York . . . [because t]hey do not have the incentives to do so."[61] However, this does not mean that New York would have been able to get away with a "catch-all" nonresident ban. The court acknowledges that the ban impacts nonresidents based on where they "spend their time" such that the monitoring requirement is "tailored" to the state's monitoring interest.[62]

While the impacts of the COVID-19 pandemic are felt nationwide, it would be hard to exclude the moniker of "local evil," the cure for which would be any immediate measures designed to slow the spread of the pandemic. The Court would likely uphold this proposal as constitutional on Privileges and Immunities grounds, and it would be prudent for governors to take advantage of the lack of jurisprudence on the issue before it is shaped without their input.

III. OVERCOMING THE DORMANT COMMERCE CLAUSE

The Commerce Clause assigns jurisdiction over commerce "among the several States" to the federal government.[63] It does not explicitly provide for intrastate commerce jurisdiction.[64] Nor does it, importantly, *compel* a state to engage in business.[65] It is in this grey area that a ban on transactions from out-of-state residents subject to quarantine finds legal grounding. Even before the Spanish Flu pandemic of 1918-19, legal scholars debated the constitutionality of such a ban in the context of a pandemic.[66] The challenge of answering this question rests in whether it is framed through the lens of quarantine, or if it is framed through the lens of a quarantine *order*.[67] This is where the negative, or "dormant," Commerce Clause inhibits a state's

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[60] *See id.* at 92 ("New York has just as much of an interest . . . in discovering signs of mental instability demonstrated in New Jersey as in discovering that instability in New York. The State can only monitor those activities that actually take place in New York.").

[61] *Id.* at 92.

[62] *Id.* at 94.

[63] U.S. CONST. art. I, § 8, cl. 3.

[64] *Id.*

[65] *Id.*; *see also* Christine Kwon, *The Dormant Commerce Clause Can't Override State and Local Lockdowns*, LAWFARE (May 6, 2020), https://www.lawfareblog.com/dormant-commerce-clause-cant-override-state-and-local-lockdowns (arguing that state lockdowns do not run afoul of the dormant Commerce Clause).

[66] *Compare* Blewett Harrison Lee, *Limitations Imposed by the Federal Constitution on the Right of the States to Enact Quarantine Laws*, 2 HARV. L. REV. 293, 306 (1889) ("The doctrine of the case seems to be that a State police law which obstructs interstate commerce to a greater extent than is strictly necessary for the accomplishment of the purpose of the law, is an unconstitutional regulation of commerce.") *with* H. Campbell Black, *The Police Power and the Public Health*, 25 AM. L. REV. 170, 180 (1891) ("[T]he power to establish quarantine regulations rests with the States and has not been surrendered to the Federal government.").

[67] *See supra* Part II.

ability to discriminate from out-of-state resources. The mere fact that a state regulation such as the proposal outlined here regulates interstate commerce does not make it *per se* unconstitutional, but it does make it subject to a different level of scrutiny.

The "dormant Commerce Clause" is case precedent; however, such a regulation will be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."[68] A statute is "even-handed" when it applies equally to both in-state and out-of-state commerce. From here, the Court looks to a question of "degree" to determine if the state's justification for its regulation is acceptable.[69] For example, in *Old Bridge Chemicals, Inc. v. New Jersey Department of Environmental Protection*,[70] the plaintiff, an energy production corporation, sued an agency of the state of New Jersey on the grounds that a regulation requiring hazardous wastes to be labelled pursuant to a New Jersey-specific scheme was unconstitutional. The court disagreed, recognizing that the label requirements applied to all hazardous wastes handled in the state equally; there were no specific requirements for out-of-state hazardous wastes that did not apply to in-state hazardous wastes;[71] therefore, the regulation was held to be constitutional.

Intellectually separate from the analysis under the Privileges and Immunities Clause, the Supreme Court is even hesitant to recommend a "least-restrictive" analysis under the dormant Commerce Clause, choosing instead to afford deference to a state's chosen manner of regulation so long as it makes sense to do so.[72] In *Minnesota v. Clover Leaf Creamery Co.*[73], the Court upheld a Minnesota statute banning the sale of milk in plastic containers on both Commerce and Equal Protection Clause challenges.[74] Relevant to the analysis here was the Court's commentary on the state's goals of environmental conservation as a legitimate interest, and its

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[68] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[69] *Id.*

[70] Old Bridge Chems., Inc. v. N.J. Dep't of Env't Prot., 965 F.2d 1287 (3d Cir. 1992).

[71] *Id.* at 1295.

[72] Such "rational basis review" is linked to the Commerce Clause's "balancing test," and as such, the relevant analyses are interchangeable as far as the Court is willing to grant a comparative analysis of a State's "interests." *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, n.14 (1981) (describing the "obvious factual connection" between the Equal Protection and Commerce Clause analyses in that case). A similar factual connection is developed in this Note's proposal. *But see* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (detailing how some measures are unconstitutional if they do not meet the "strictest scrutiny of any purported legitimate local purpose" and there are no "non-discriminatory alternatives.").

[73] 449 U.S. 456 (1981).

[74] 449 U.S. at 470.

balancing test[75] when compared to the economic discrimination which would result from the regulation. The Court ultimately concluded that the regulation was "even-handed" because the prohibition on plastic containers extended to both in-state and out-of-state merchants, even if the effect was disproportionately felt out of Minnesota.[76] The "inconvenience" of requiring out-of-state merchants to conform to different packaging requirements was outweighed by the state's interest in conservation,[77] and rendered minimal "in relation to putative local benefits."[78]

Protectionist regulations are not by themselves unconstitutional.[79] Even if the proposal is found to be "protectionist," it still may be upheld as constitutional for two reasons. The first reason is that it is *Congress's* role to decide whether and when to regulate commerce; the courts defend Congress's right to do so, but if Congress is passive in regulating commerce, its intent may not read in by the courts.[80] The second reason is that courts look favorably on states imposing such regulations when the ends justify the means. The cost of individuals quarantining for two weeks (even at their own expense) is small compared to the benefits of reducing the spread of COVID-19, particularly since those benefits *are* spread nationwide.

Furthermore, courts often find in favor of overarching state interests justifying discrimination on interstate commerce when the relevant interests are distinct from commerce itself. This is especially true when the legitimate interest is somehow tied to the police power, and the best example of this is when states legislate to protect public health and safety. There have been quarantine measures that were found constitutional because the measures were taken to prevent "contagion and other evils."[81] The boundaries of this definition are explored in *City of Philadelphia v. New Jersey*, in which the Court held that a New Jersey regulation permitting only certain types of waste to enter the state was unconstitutional economic-protectionism.[82] The biggest obstacle to the regulation was that the State of New Jersey failed to argue how the distinction between in-state and out-of-state waste was

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[75] *See also Old Bridge Chems.*, 965 F.3d at 1291 (explaining the balancing test applies to all cases not subject to deferential review for "peculiarly strong state interest" or subject to heightened scrutiny for actions "that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity").

[76] *Clover Leaf Creamery Co.*, 449 U.S. at 472.

[77] *Id.* at 472.

[78] *Id.* at 472 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[79] *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 430 (1982) ("The commerce clause does not expressly prohibit the states from enacting protectionist economic legislation. It merely gives Congress the power to rectify such excesses by superseding enactments.").

[80] *See id.* ("[O]ne might tend to conclude that the Framers left protection of the national market to congressional supervision rather than judicial enforcement.").

[81] City of Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978).

[82] *Id.* at 629.

necessary, rather than convenient.[83] However, if the overall result of such a regulation was more substantial, the Court implies it would pass constitutional muster.[84] Even if the result were not as substantial, New Jersey could have still seen its regulation survive if it required the same obstacle to be overcome by *all* waste coming into the state.[85] In the case of regulating *people* instead of waste, other questions must be asked. When restrictions are tailored to impact *persons* and not categories of goods, does the Commerce Clause apply? If it does apply, does the Court treat persons in the same way it treats goods?

The best answer to this question comes from applying the evidentiary standards courts tend to accept when deciding dormant commerce clause cases. Under a statute that does not facially discriminate, this is a two-pronged process. First, the state has to "rebut the facial discrimination claim."[86] If they are successful, the state must next "prov[e] that the benefits of the regulation outweigh the incidental impact on the interstate market defined by the court."[87] Governors should not be dissuaded from having their regulations labeled as facially discriminatory because the Supreme Court has outlined the "degree analysis" they need to justify their actions.[88] They should instead argue such substantial circumstances when defending their laws in front of federal judges, in much the same way as they do in front of the public.

The cases where the Court has discussed this analysis show that a pandemic is on an unprecedented scale to which state deference is owed.[89] Far from being an arbitrary ban on interstate commerce, a proposal to ban in-person transactions from out-of-state residents serves the legitimate interest of protecting a population from COVID-19. Unlike in the many cases where the Court has ruled against protectionist measures, here states would be protecting the population, rather than their economies, with merely an *auxiliary* effect of such a policy being the interference in interstate

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[83] *See id.* ("The harms caused by waste are said to arise *after* its disposal in landfill sites . . . . ") (emphasis added).

[84] *See id.* (discussing how the Court looked favorably on protectionist measures taken to prevent the movement of "noxious articles").

[85] *See id.* at 626 ("[I]t may be assumed . . . that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected.").

[86] Blair P. Bremberg & David C. Short, *The Quarantine Exception to the Dormant Commerce Power Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases*, 21 N.M. L. REV. 63, 68 (1990).

[87] *Id.*

[88] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[89] *But see* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (invalidating a state statute requiring different truck lengths for safety reasons); Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) (same).

commerce. The instrumentalities of commerce shift to become all those seeking to do business in the state, and the dangerous variable being introduced into the economy is far worse and more volatile than a "noxious article[]."[90] Governors should heed the lesson the Court has gifted them: persons are a far more dangerous means of introducing threats into a jurisdiction than mere goods.

Criticisms against protectionism as undue interference with other states are largely unfounded. The Court has taken steps to address *reverse* discrimination against states' commercial interests, and a similar standard could be applied to any proposed regulation deemed to infringe on states that are quarantining correctly and adhering to the correct public health standards. In *Hunt v. Washington State Apple Advertising Commission*,[91] the Court dealt with a North Carolina regulation that required apples sold in the state to contain state-specific labels. Apple growers from the state of Washington sued North Carolina, contending that this regulation was a violation of the Commerce Clause. The Court found that North Carolina had a burden to justify the regulation "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[92]

The Court is equally interested in analyzing *internal* economic policy outcomes from this perspective, which bodes well for any state looking to secure its borders.[93] This does *not*, however, negate the leniency the Court provides under a "least-restrictive analysis" as the Court still looks to the "factual connection" in each instance.[94] The fact that the Court is willing to consider economic policy suggests that the Court has developed a framework for judging a state's policy justification as well, and that it does have a role to play in the constitutionality of protectionist regulations.[95] From a free-market perspective, it is logical to expect a state to control its own borders and the instrumentalities of commerce. It would only make sense for the Court to affirm a state's decision to exclude, to its own fiscal detriment, commerce which would otherwise save a state in financial peril. This is especially true for any state relying heavily, if not almost exclusively,

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[90] *City of Philadelphia*, 437 U.S. at 629.

[91] Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333 (1977).

[92] *Id.* at 353.

[93] *See* Farber, *supra* note 42, at 579 (discussing the Court's cost-benefit approach to judging interstate regulation).

[94] *E.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 456 (1981).

[95] *See* Farber, *supra* note 42, at 579 (discussing the Court's tendency to favor *laissez-faire* economics in its decision-making).

on wealthy taxpayers to fund its lagging cities.[96] It might seem attractive for fiscally challenged states to prioritize the entry of wealthy nonresidents to stimulate their pandemic-stricken economies, but it is simultaneously the state's prerogative to prioritize the health of its residents at the expense of intrastate commerce. Such a decision should be welcomed by any court trafficking in *laissez-faire* economics and state independence.[97]

States are already showing eagerness by taking the first steps to make this proposal a reality. In August 2020, the University of Connecticut banned out-of-state students—even those taking online classes—from residing in university housing for the fall semester.[98] While the ban does not require out-of-state students to remain outside the state's borders, it will effectively keep most out-of-state students from Connecticut, much less the physical university campus. Similar to my proposal, the ban does not apply to students already on campus,[99] for as long as they have been in the state for the requisite period of time, they likely pose no greater risk for transmission than any other Connecticut resident. In many ways, the University of Connecticut policy is primed for a constitutional challenge, as evidenced by the university president teeing up a rational interest as justification in case the university policy is challenged.[100]

My proposal would be less restrictive than the University of Connecticut policy because out-of-state residents would be allowed to intermingle with in-state business provided they had proof of quarantine. On the other hand, there is no path for out-of-state University of Connecticut students to eventually live in university housing if they decided to quarantine for a length of time mandated by the state. There is no way for students to "prove" they are not infectious with a negative coronavirus test.[101] The government is *less* restrictive than the university. It is already clear that out-of-state resident tuition classifications are acceptable.[102] It is surely a matter of time

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[96] *See* Derek Thompson, *What on Earth Is Wrong With Connecticut?*, THE ATLANTIC (July 5, 2017), https://www.theatlantic.com/business/archive/2017/07/connecticut-tax-inequality-cities/532623/ ("The so-called Gold Coast in southwest Connecticut is one of the richest places in the world. Meanwhile, the poverty rate in Connecticut's largest city, Bridgeport, is still rising.").

[97] *See* Farber, *supra* note 42, at n.78 ("In particular, the Court believed that the Illinois statute increased the risk that tender offers would fail, an outcome that it viewed as undesirable.").

[98] *UConn Will Not Allow Out-of-State Students Taking Online Classes to Live on Campus*, NBC CONN. (Aug. 11, 2020), https://www.nbcconnecticut.com/news/coronavirus/uconn-will-not-allow-out-of-state-students-taking-online-classes-to-live-on-campus/2317145/#:~:text=UConn%20has%20just%20announced%20that,stay%20home%20for%20the%20semester

[99] *Id.*

[100] *See id.* ("'By asking our out-of-state students who don't need to be here in person for their studies to stay home, we are aiming at preserving the extraordinary progress Connecticut has made in arresting the spread of the virus.'").

[101] *Contra* Conn. Exec. Ord., *supra* note 16.

[102] Simson, *supra* note 51, at 395–97.

before the government catches up.

IV. CONCLUSION

As the pandemic rages on, states must be empowered to take actions which benefit the overall health and welfare of their residents. The boundaries of federalism need not constrict states' powers to protect their populations in the most prudent fashion. While safe and effective vaccines have finally been made available, we must be prepared for the possibility that vaccine hesitancy and the spread of new coronavirus variants will require a return to social distancing and quarantining. Should the unthinkable recur, individual states have the power to curb the pandemic within their borders, and by banning out-of-state residents from conducting in-person transactions, they can take proactive measures to protect their citizens, even if other states fail to cooperate.

POLICING THE DIGITAL PUBLIC SQUARE: THE DUTY OF NON-MANIPULATION AS AN ALTERNATIVE TO FREE SPEECH RESTRICTIONS ON SOCIAL MEDIA

BEN KABE[†]

INTRODUCTION

James Madison was profoundly concerned with preventing passion from undermining reason in the realm of popular government.[1] Factions—which Madison defined as groups of citizens united by a common impulse or interest—were, in his mind, inevitable.[2] His addition to our Constitution makes clear that free speech is a vital and inviolable right, but one that it is not without dangers. Though its benefits surely outweigh its costs, its ability to provoke and persuade the people's passions is an ever-present hazard. These democratic dilemmas are as salient in today's hyper-communicative world as they were at the Founding. Madison believed that America's sprawling geography and growing population would help "prevent passionate mobs from mobilizing."[3] He obviously did not predict social media.

At present, YouTube may be one of this century's "most powerful radicalizing instruments."[4] Like its contemporaries—Twitter, Facebook, Instagram, and others—it has been used to rapidly spread misinformation and conspiracy theories to broad, susceptible swaths of people.[5] The

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[1] *See* THE FEDERALIST NO. 10 (James Madison), available at https://avalon.law.yale.edu/18th_century/fed10.asp.

[2] *Id.*

[3] Jeffrey Rosen, *America Is Living James Madison's Nightmare* THE ATLANTIC (Oct. 2018), https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/.

[4] Max Fisher & Amanda Taub, *How YouTube Radicalized Brazil*, N.Y. TIMES (Aug. 11, 2019), https://www.nytimes.com/2019/08/11/world/americas/youtube-brazil.html (quoting social media scholar Zeynep Tufekci).

[5] "Examples include the lunacy of the Comet Pizza story (a.k.a. Pizzagate), the various anti-Obama

algorithms utilized by these sites capture vast amounts of data and continue to get better at ensuring that users stay engaged for longer periods of time. Social media companies are able to compile their users' data into detailed psychological profiles, which can be used to "nudge" users toward ever more extremist and conspiratorial content in pursuit of virality and advertising revenue.[6] An experiment by *The Atlantic* revealed the distance on YouTube between a pasta cooking tutorial and anti-LGBT junk science—three clicks.[7]

Facebook alone has over two billion users across the planet.[8] The company's task now is to keep users scrolling the site for an incessantly greater portion of their day.[9] In this endeavor, Facebook uses engagement algorithms as closely held as YouTube's, as do many other comparable sites.[10] This is startling considering that these algorithms often alter user behavior without identifying profoundly biased content or stories designed to promote fear, mistrust, or outrage.[11]

Still, social media may also be a powerful tool for good. These platforms allow for instantaneous communication with any other user capable of accessing the internet. They can help spread democratic ideals in otherwise closed regimes.[12] The seemingly infinite sources of

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birther conspiracies, and Alex Jones's claim that the Sandy Hook Elementary School shooting that left 20 children dead was a 'complete fake' staged by the government to promote gun control." Thomas B. Edsall, *The Trump Voters Whose 'Need for Chaos' Obliterates Everything Else*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/opinion/trump-voters-chaos.html (citing Michael Bang Petersen, Mathias Osmundsen, & Kevin Arceneaux, *The "Need for Chaos" and Motivations to Share Hostile Political Rumors,* PSYARXIV (May 2020), https://psyarxiv.com/6m4ts)

[6] *See* Fisher & Taub, *supra* note 4; *see* McKay Coppins, *The Billion-Dollar Disinformation Campaign to Reelect the President*, THE ATLANTIC (Feb. 10, 2020), https://www.theatlantic.com/magazine/archive/2020/03/the-2020- disinformation-war/605530/

[7] Derek Thompson, *Why the Internet is So Polarized, Extreme, and Screamy*, THE ATLANTIC (May 23, 2019), https://www.theatlantic.com/ideas/archive/2019/05/how-did-the-far-right-take-over-the-web/590047/

[8] Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 995 (2018).

[9] *Id.* at 995–96.

[10] Tobias Rose-Stockwell, *This is How Your Fear and Outrage Are Being Sold for Profit*, QUARTZ (July 28, 2017), https://qz.com/1039910/how-facebooks-news-feed-algorithm-sells-our-fear-and-outrage-for-profit/.

[11] *Id.* Notably, in an October 2019 hearing before Congress, Facebook's founder and CEO, Mark Zuckerberg, said that Facebook would not remove objectively false political advertising. *Hearing Before the House Committee on Financial Services*, 116th Cong. 63 (Oct. 23, 2019) (testimony of Mark Zuckerberg), available at https://www.c-span.org/video/?465293-1/facebook-ceo-testimony-house-financial-services-committee. This is particularly distressing in light of the advancing viability of the "deepfake." This practice makes it possible to alter videos using complex machine learning in a manner which makes manipulation quite difficult to detect.

[12] Philip N. Howard et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* (Project on Info. Tech. & Pol. Islam, Working Paper No. 2011.1, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595096. A good example of this is social

information online, coupled with the user engagement cultivated by these sites, may be helping to facilitate a more participatory democracy.[13] Social media is neither devil nor angel. It is simply an instrument which may be employed to complement human nature, for better or worse.

Courts have been cautious in attempting to balance individual interests in free association and communication with the dangers of our increasingly algorithmic and anonymous world.[14] In *Packingham v. North Carolina*, the Supreme Court struck down a law that prohibited sex offenders from accessing social networking sites.[15] Justice Kennedy, holding that the law violated the First Amendment, noted that this was one of the first cases taken by the Court to address the relationship between free speech and the modern internet.[16] When addressing this relationship, he said, the Court "must exercise extreme caution."[17]

Congress also finds itself in a difficult position legislatively. Section 230 of the Communications Decency Act provides social media companies with immunity from liability based on speech shared on their platforms by their users.[18] Although this law is increasingly unpopular, experts warn against its hasty alteration.[19] Only one real change has been made to the provision since its enactment.[20] As it stands, social media companies enjoy broad immunities from civil or criminal liability based on content that they merely host rather than create.[21]

Neither courts nor lawmakers have sufficiently addressed potential alternatives to this challenge. Professor Jack Balkin, however, has argued for a new regime to deal with some of the questions presented by our new

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media's role in the Egyptian uprising during the Arab Spring, which is discussed further in Section I(a) below.

[13] Homero Gil de Zúñiga, Nakwon Jung, & Sebastián Valenzuela, *Social Media Use for News and Individuals' Social Capital, Civic Engagement and Political Participation*, 17 J. COMPUT.-MEDIATED COMM'N 319 (2012), https://academic.oup.com/jcmc/article/17/3/319/4067682#94905782.

[14] *See* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (addressing First Amendment protections on social media); Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016) (finding that the social networking policy, which operated as a prior restraint on speech, violated the First Amendment's Free Speech Clause).

[15] 137 S. Ct. 1730.

[16] *Id.* at 1736.

[17] *Id.*

[18] 47 U.S.C. § 230 (1996).

[19] Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, WIRED (Aug. 13, 2019), https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/

[20] Platforms are no longer protected from liability related to prostitution and sex trafficking. *Id.*

[21] *Id.*

digital age.[22] Professor Balkin put forward the idea of treating large social media companies as "information fiduciar[ies]" based on end-users' limited information and vulnerability and the companies' expertise and position of trust.[23] As a result of this power imbalance, he argues, social media companies owe their end-users fiduciary duties, including a duty of non-manipulation.[24]

Through relevant common law doctrine, this Note will expand on the duty of non-manipulation as an alternative to abridging First Amendment rights related to dangerous behavior online. Social media companies use algorithms that incentivize extremist and sensationalist content.[25] By imposing a duty of non-manipulation, these companies would be forced to halt the mechanisms that actively encourage radicalization. As a result, much of the speech that courts are hesitant to proscribe would be less likely to materialize or spread.

This Note will begin (in Part I) by discussing social science that highlights aspects of social media as a social good as well as research that describes many of the platforms' unintended societal harms. Part II will review the relationship between social media and the First Amendment in modern case law and legal scholarship. It will also assess online platforms' current statutory liability for their users' speech and content. Finally, in Part III, this Note will explain Professor Jack Balkin's theory of social media companies as "information fiduciaries" and expand on the duty of non-manipulation as an alternative to some restrictions of First Amendment rights.

I. SOCIAL MEDIA AND BEHAVIOR

Social media is comprised of "forms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other content . . . ."[26] This definition is illuminating because, at face value, these platforms serve only to facilitate the creation and diffusion of ideas. Social networking sites often open up lines of communication that were previously beyond reach and, in doing so, benefit their users and society generally. What this definition does not capture, however, is the way in which communication is altered on these sites. The online public sphere, in some cases, can transform our behavior and

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[22] Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

[23] *Id.* at 1186, 1222.

[24] *Id.* at 1233.

[25] *See* Fisher & Taub, *supra* note 4.

[26] *Social Media,* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/social%20media (last visited Apr. 9, 2021).

dialogue in dangerous ways—based in part on human nature, but also on the algorithmic exploitation of our innate tendencies. In order to understand and properly prevent potential social harms, it is necessary to review some of the positive and negative aspects of our modern forms of connection.

A. The Promise of Connectivity

The Arab Spring shows just how quickly social media can accelerate social change. In December 2010, a Tunisian street vendor named Mohammed Bouazizi set himself on fire in protest of his government.[27] About one month later, in response to protests sparked by Bouazizi's act of defiance, then-Tunisian president Zine al-Abidine Ben Ali abandoned his more than twenty-year rule and fled the country.[28] Tunisia, one of the Arab world's "most repressive regimes," held its first democratic parliamentary elections in October of that same year.[29] This astonishingly swift change in power set in motion similar protests in other countries across the region.[30] Of course, as with any large-scale social change, there was not one single causal factor. Even so, it appears now that social media was pivotal in the acceleration of these events.[31]

According to research from the Project on Information Technology & Political Islam, social media played a central role in the Arab Spring by facilitating and shaping political discussion, allowing for the conversations that preceded important protests on the ground, and spreading democratic ideas internationally.[32] This is not to say that these revolutions could not have occurred without social media, nor that the outcomes of the Arab Spring were universally successful. Instead, this example simply shows that social networking sites provide a new avenue for polities to effectively organize for some form of social change.

People who have formerly been blocked from political conversation are now widely provided some access through social media. Media Professor Clay Shirky argues that political freedom requires a society that is "densely connected enough to discuss the issues presented to the

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[27] *Arab Spring*, HISTORY.COM (Jan. 10, 2018), https://www.history.com/topics/middle-east/arab-spring

[28] Angelique Chrisafis, *Zine al-Abidine Ben Ali Forced to Flee Tunisia as Protesters Claim Victory*, THE GUARDIAN (Jan. 14, 2011), https://www.theguardian.com/world/2011/jan/14/tunisian-president-flees-country-protests

[29] HISTORY.COM, *supra* note 27; Chrisafis, *supra* note 28.

[30] HISTORY.COM,*supra* note 27.

[31] Philip N. Howard et al., *supra* note 12.

[32] *Id.*

public."[33] With low barriers to entry, people from every economic and social class can use social media's dense web of connection to ingest—and express views on—the important issues of the day. Indeed, there is some evidence that suggests social media's ubiquity may lead to a more participatory democracy.[34]

The Arab Spring is the most often used example of social media's informing and organizing power, and for good reason. Beyond the Arab Spring, however, social media has been implicated in a range of pro-democratic outcomes—from increasing government accountability in the small town of Jun, Spain,[35] to providing the means to organize and overturn a fraudulent election in Moldova.[36] People are empowered to resist oppression when supplied with a free flow of information and a means to coordinate action. Those same hopeful characteristics, however, can be manipulated to cause harm to society.

B. Unintended Social Harms

Social media companies' most valuable asset is their end-users' data.[37] In 2017, Google, Facebook, Amazon, Apple, and Microsoft made over $25 billion in profit.[38] The rapid growth of personal data collection, and the power that it grants these tech behemoths, prompted the Economist to claim that data has surpassed oil as the world's most valuable resource.[39] In response to this power, many authorities have initiated antitrust

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[33] Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 152 (2012) (quoting Clay Shirky, *The Political Power of Social Media*, 90 FOREIGN AFF. 28, 34 (2011)).

[34] Homero Gil de Zúñiga, et al., *supra* note 13, at 329.

[35] Jun is a small town in southern Spain. For many of its 3,500 residents, Twitter is the main way that they can communicate with their local government. Communicating in this way not only shaved 13% off the local budget, but also increased the interaction between residents and local officials. Mark Scott, *The Spanish Town That Runs on Twitter*, N.Y. TIMES (Jun. 7, 2016), https://www.nytimes.com/2016/06/09/technology/the-spanish-town-that-runs-on-twitter.html.

[36] In 2009, the Moldovan Communist Party tried to maintain control of Parliament through a fraudulent election, but lost power because of massive protests coordinated by text, Facebook, and Twitter. Joseph, *supra* note 33.

[37] *See* Matthew Johnson, *How Facebook Makes Money: Advertising, Payments, and Other Fees*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/120114/how-does-facebook-fb-make-money.asp (last updated Jan. 30, 2021).

[38] *The World's Most Valuable Resource is no Longer Oil, but Data*, THE ECONOMIST (May 6, 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

[39] *Id.*

investigations into some of these large companies.[40]

There are a couple of major concerns over social media companies' capture and use of data. The first, and most natural, is privacy. For instance, Google recently partnered with the second-largest health system in the U.S.[41] Through their secret "Project Nightingale," they began to collect and utilize massive amounts of health data, including lab results, patient names, and complete health histories.[42] This was done without notifying doctors or patients.[43] Beyond its Orwellian nature, this project is concerning in light of Google's past data protection failures, such as an undisclosed flaw that exposed hundreds of thousands of users' personal data.[44] Data privacy is an urgent concern. Yet another urgent concern, and the focus of this Note, is data collecting companies' algorithmic manipulation of users.

Social media companies depend on capturing ever-more of their users' attention to continue their increasing profitability.[45] They do this by algorithmically maximizing user engagement.[46] For example, Facebook, like many of these companies, uses an algorithmic news- feed editor that follows every move users make on the site, allowing it to constantly get better at predicting what each user will click and what will capture their attention.[47] It then curates users' news-feeds to include the most engaging material while filtering out the material less likely to keep the user on their site.[48] It does not do so, however, with any consideration for the material it is propagating; meaning that it "doesn't identify content that is profoundly biased, or stories that are designed to propagate fear, mistrust, or outrage."[49]

This method of engagement has been enormously influential across the globe. In Brazil, YouTube's recommendation algorithm "systematically

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[40] *See*, *e.g.*, Steve Lohr, *New Google and Facebook Inquiries Show Big Tech Scrutiny Is Rare Bipartisan Act*, N.Y. TIMES (Sep. 6, 2019), https://www.nytimes.com/2019/09/06/technology/attorney-generals-tech-antitrust-investigation.html

[41] Rob Copeland, *Google's 'Project Nightingale' Gathers Personal Health Data on Millions of Americans*, WALL. ST. J., https://www.wsj.com/articles/google-s-secret-project-nightingale-gathers-personal-health-data-on-millions-of-americans-11573496790 (last updated Nov. 11, 2019).

[42] *Id.*

[43] *Id.*

[44] In 2018, a Wall Street Journal investigation revealed that Google decided not to disclose this flaw, in part, out of fear of a regulatory backlash. *Id.*

[45] *See generally*, TIM WU, ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (Alfred A. Knopf 2016).

[46] Rose-Stockwell, *supra* note 10.

[47] *Id.*

[48] *Id.*

[49] *Id.*

diverted users to far-right and conspiracy channels."[50] This aided in the election of a formerly fringe, far-right politician to the presidency.[51] In one instance, YouTube led a young man from amateur guitar lesson videos deep into far-right conspiracies.[52] Many parents were given disinformation while in search of medical advice, which impinged authorities' efforts to fight the Zika outbreak.[53] The false information in these videos was so compelling that it incited death threats against public health advocates.[54] Brazil is just one example of the effects of manipulation on a mass scale.[55]

This manipulation can compel individual users to carry out extremist acts. Professor Taina Bucher argues that social media algorithms like Facebook's create a "threat of invisibility" which manifests in a "constant possibility of disappearing and becoming obsolete."[56] Just as these algorithms drive consumers toward more radical content in order to keep them engaged, they incentivize creators to produce more radical content if they hope to remain relevant. One example of this phenomenon is Cesar Sayoc, who began his social media career posting about food, workouts, and sports.[57] He soon, however, resembled a modern extremist, radicalized online by misinformation and right-wing conspiracies.[58] In 2018 he was arrested in Florida and charged with sending at least twelve pipe bombs to President Trump's critics.[59] In March 2019, an Australian extremist shot and killed fifty-one Muslim worshipers at their mosques in New Zealand

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[50] Fisher & Taub, *supra* note 4, (citing Virgilio Almeida et al., *Understanding Video Interactions in YouTube*, 16TH ACM INT'L CONFERENCE ON MULTIMEDIA, MM '08 (2008), *available at* http://www.decom.ufop.br/fabricio/download/multimedia08).

[51] *Id.*

[52] This is the story of then-sixteen year old Brazilian Matheus Dominguez. When he began using YouTube, he was only interested in learning to improve his skills on the guitar. YouTube's artificial intelligence system, which learns from users' behavior, recommended videos for Matheus. It eventually ended up recommending videos of "paranoid far-right rants" and conspiracies. Matheus bought in. Members of Brazil's far-right, who now control the Brazilian presidency, said their ascendency would not have been possible without YouTube's recommendation engine. *Id.*

[53] *Id.*

[54] *Id.*

[55] Another often-discussed instance of data manipulation is Cambridge Analytica's role in the 2016 U.S. presidential election. The company collected data from millions of users and utilized psychographics to target political advertising. *See* Carole Cadwalladr et al., *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html.

[56] Taina Bucher, *Want to Be on the Top? Algorithmic Power and the Threat of Invisibility on Facebook*, NEW MEDIA & SOC'Y 1164, 1171–75 (2012), https://journals.sagepub.com/doi/10.1177/1461444812440159

[57] Kevin Roose, *Cesar Sayoc's Path on Social Media: From Food Photos to Partisan Fury*, N.Y. TIMES (Oct. 27, 2018), https://www.nytimes.com/2018/10/27/technology/cesar-sayoc-facebook-twitter.html

[58] *Id.*

[59] *Id.*

and livestreamed the entire massacre on Facebook.[60] Social media algorithms fostered, validated, and encouraged these hateful views.[61]

As machine learning continues to improve, another worrying development has entered the public discourse—the "deepfake."[62] In a deepfake, artificial intelligence is used to alter faces, voices, or both to create a believable fake video.[63] It is incredibly difficult to detect manipulation in a deepfake.[64] Recently, a video of a speech by Democratic House Speaker Nancy Pelosi was slowed to make her appear drunk.[65] This was believed and spread by millions of people online.[66] In fact, the President of the United States shared a doctored video of the Speaker, and his personal attorney, Rudolph Giuliani, tweeted a link to the video with the message, "What is wrong with Nancy Pelosi? Her speech pattern is bizarre."[67] This video was merely slowed.

Deepfake technology, however, could have believably changed the face of the speaker and altered the content of her speech.[68] Facebook's policy against policing political speech—even blatant lies—would allow these videos to stand.[69] This presents a catch-22; either allow disinformation to spread online, or allow a private company to decide what speech needs to be censored. Neither is an ideal outcome for democracy.

Big technology companies are understandably protective of their algorithms.[70] But these tools dramatically affect users' online experiences. Some algorithms utilize around 100,000 different variables to "optimize"

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[60] Allyson Haynes Stuart, *Social Media, Manipulation, and Violence*, 15 S.C. J. INT'L L. & BUS. 100, 117–118 (2019) (citing Daniel Victor, *In Christchurch, Signs Point to a Gunman Steeped in Internet Trolling*, N.Y. TIMES (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/world/asia/new-zealand-gunman-christchurch.html

[61] *Id.*

[62] Nina I. Brown, *Deepfakes and the Weaponization of Disinformation*, 23 VA. J. L. & TECH. 1 (2020).

[63] David Güera & Edward J. Delp, *Deepfake Video Detection Using Recurrent Neural Networks*, VIDEO AND IMAGE PROCESSING LAB. (VIPER), PURDUE UNIV. (Feb. 14, 2019), https://ieeexplore.ieee.org/abstract/document/8639163/citations#citations

[64] *Id.*

[65] Drew Harwell, *Faked Pelosi Videos, Slowed to Make Her Appear Drunk, Spread Across Social Media*, WASH. POST (May 24, 2019), https://www.washingtonpost.com/technology/2019/05/23/faked-pelosi-videos-slowed-make-her-appear-drunk-spread-across-social-media/

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See Hearing before the House Committee on Financial Services*, *supra* note 11.

[70] *See* Ryan Holmes, *Do Social Networks have an "Algorithmic Responsibility" to Users?*, MEDIUM (Jan 25, 2017), https://medium.com/@invoker/do-social-networks-have-an-algorithmic-responsibility-to-users-44e481332420 (citing Josh Constine, *How Facebook News Feed Works*, TECH CRUNCH (Sept. 6, 2016), https://techcrunch.com/2016/09/06/ultimate-guide-to-the-news-feed/).

users' news feeds, and all of them are constantly changing.[71] Of course, these algorithms are only exploiting what is already innate in human behavior.[72] The challenge for the law is to prevent them from indulging humanity's worst impulses while protecting these companies' rights and the rights of the individuals who use their platforms.

II. FIRST AMENDMENT CONCERNS

Many of the previously discussed benefits of online social networks stem from users' ability to speak and associate without restriction. Concerned parties have tried to alter the free speech landscape on social media platforms in a few ways. Proponents of First Amendment protections on social media have argued that the platforms are public fora that should be governed by First Amendment doctrine.[73] Legislators, experts, and activists have argued over a section of the U.S. Code that frees platforms from liability for their users' speech.[74] Lawmakers have also attempted to restrict speech on social media in certain circumstances, but courts have been resistant of their efforts.[75] In most cases, when authorities have attempted to prevent speech online, they have been unable to clear the significant hurdles created by constitutional and statutory protection of free speech.

A. Constitutional Restrictions—or Lack Thereof—on Social Media Companies

Twitter and other social media companies can, and do, ban users from their site.[76] They can also delete posts that conflict with their content policies.[77] Given their immense public importance, does this violate users' Constitutional rights? The First Amendment applies to state, rather than private, actors.[78] Still, advocates have argued that social media sites serve

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[71] *Id.*

[72] Algorithmic racial or gender bias, for example, is based in part on the human bias in the data from which the artificial intelligence was trained. *See* John Naughton, *To Err is Human – Is That Why we Fear Machines that can be Made to Err Less?*, THE GUARDIAN (Dec. 14, 2019), https://www.theguardian.com/commentisfree/2019/dec/14/err-is-human-why-fear-machines-made-to-err-less-algorithmic-bias

[73] Mason C. Shefa, *First Amendment 2.0: Revisiting* Marsh *and the Quasi-Public Forum in the Age of Social Media*, 41 U. HAW. L. REV. 159, 184–86 (2018).

[74] 47 U.S.C. § 230(c)(2) (2018).

[75] *See*, *e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (striking down a North Carolina law that prevented sex offenders from accessing certain social media pages as a violation of the First Amendment).

[76] *See Twitter Terms of Service*, TWITTER, https://twitter.com/en/tos (last visited Mar. 21, 2021).

[77] *Id.*

[78] U.S. CONST. amend. I.

as public or quasi-public fora, and as such, are governed by relevant First Amendment law.[79]

This argument often stems from the Supreme Court case *Marsh v. Alabama*, decided in 1946.[80] In *Marsh*, a Jehovah's Witness, Grace Marsh, was arrested for handing out religious pamphlets in a town wholly owned by a private corporation.[81] The corporation had posted a notice banning solicitation without its permission.[82] The Court held that the state could not infringe on Marsh's First Amendment right to distribute her pamphlets simply because she was on privately owned property.[83] It noted that, other than the community's ownership, it had "all the characteristics of an American town."[84] Due to this, the Court said, the freedom afforded by the First Amendment outweighs the Constitutional property rights of the private corporation in a balancing test.[85]

In the same vein, the Court discussed the public forum doctrine in *Amalgamated Food Employee Union Local 590 v. Logan Valley Plaza, Inc.*[86] Here, the Court answered whether union picketers outside of a shopping mall could be enjoined by the mall's owner—again balancing property interests with First Amendment rights.[87] Justice Marshall reiterated the Court's holding in *Marsh* and found that the shopping center was the equivalent of a "business block" for the purposes of the First Amendment.[88] As such, the business owners were not allowed to enjoin the peaceful picketers solely by asserting their property rights.[89]

Over the subsequent decades, however, the Supreme Court overruled *Logan Valley*[90] and, along with U.S. Circuit Courts, limited *Marsh* significantly.[91] In *Lloyd Corp. v. Tanner*, a shopping mall that was open to

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[79] *See* Shefa, *supra* note 73.

[80] Marsh v. Alabama, 326 U.S. 501 (1946).

[81] *Id.* at 502–03.

[82] *Id.* at 503.

[83] *Id.* at 509.

[84] *Id.* at 502.

[85] *Id.* at 509.

[86] Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), abrogated by Hudgens v. N. L. R. B., 424 U.S. 507 (1976).

[87] *Id.* at 309.

[88] *Id.* at 325.

[89] *Id.*

[90] Hudgens v. N.L.R.B., 424 U.S. 507 (1976).

[91] *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019); Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442 (10th Cir. 1995).

the public[92] banned the distribution of handbills made to protest the war in Vietnam.[93] The court distinguished *Logan Valley* by limiting its holding to acts "directly related in [their] purpose" to the function of the shopping center and where an injunction would allow no other opportunity for the picketers to express their view.[94] It similarly distinguished *Marsh* by noting that this shopping center did not exercise municipal power.[95] The Court explained that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes," and held that the public use of this mall did not entitle its visitors to such First Amendment rights.[96]

In *Flagg Bros Inc. v.* Brooks,[97] decided in 1978, the Court adopted Justice Black's interpretation of *Marsh*'s limited reach, finding that private property is a public forum "when that property has taken on *all* the attributes of a town."[98] The Eleventh Circuit declined to extend *Marsh*'s public function rationale to a concert at a state university in *Gallagher v. Neil Young Freedom Concert*.[99] In June 2019, the Supreme Court dealt the most recent blow to *Marsh*'s possible revival or expansion.[100] The Court held in *Manhattan Cmty. Access Corp. v. Halleck* that a private nonprofit corporation that operated a public access channel was not a state actor subject to First Amendment constraints.[101] It explained that a private entity must exercise powers "traditionally exclusively reserved to the State" and stressed that "very few functions fall into that category."[102] Most importantly for social media companies, the Court stated that "merely hosting speech by others . . . does not alone transform private entities into state actors subject to First Amendment constraints."[103]

The evolution of public fora doctrine governing private owners is revealing. It is now unlikely that social media companies will be considered state actors subject to the speech constraints of the U.S. Constitution. Legislatures and the executive branch, however, are also

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[92] The center had private stores but open walkways which remained walkable after the shops were closed. In fact, the center encouraged the public to come and window shop. *Lloyd Corp.*, 407 U.S. 551.

[93] *Id.*

[94] *Id.* at 563.

[95] *Id.* at 569.

[96] *Id.* 569–70.

[97] 436 U.S. 149 (1978).

[98] *Id.* at 159 (emphasis in original).

[99] Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1457 (10th Cir. 1995).

[100] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

[101] *Id.*

[102] *Id.* at 1928–29.

[103] *Id.* at 1930.

attempting to alter the free speech landscape on these platforms. As recent decisions show, they are having mixed success doing so.

B. Statutory Protection of Speech on Online Platforms

Congress enacted Title 47 Chapter 5 of the United States Code in order to regulate common carriers of telecommunication signals.[104] Tucked within this Chapter is 47 U.S.C. § 230, which protects platforms from liability for content created or posted by their users.[105] The relevant section of the code states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[106] "Interactive computer service" is defined broadly in subsection (f)(2) of the provision.[107] This definition includes social media companies.[108] The courts have also interpreted this section broadly,[109] applying the section's protection to "claims for defamation, negligence, intentional infliction of emotional distress, privacy, terrorism support, and more."[110]

Section 230 was enacted to enable innovation online and to protect free speech principles.[111] Since then, its popularity has declined.[112] Numerous legislators from both sides of the aisle now attack the law and offer differing views on how it should be altered or destroyed.[113] Still, as the law currently stands, social media companies are shielded from liability based on user generated content and there is no consensus on whether or how to fix this section.[114] In 2018, Congress amended the law to prevent it from providing immunity to platforms that promote or facilitate prostitution or

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[104] 47 U.S.C. § 151 (1996).

[105] 47 U.S.C. § 230 (1996).

[106] 47 U.S.C. § 230(c)(1) (2018).

[107] These services are defined as follows: "'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

[108] *See, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014).

[109] *See* Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101 (2007).

[110] Brown, *supra* note 62, at 42, (citing Batzel v. Smith, 333 F.3d 1018, 1020, 1026–27 (9th Cir. 2003)) (defamation); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 983–84 (10th Cir. 2000) (defamation & negligence claims); Zeran v. Am. Online, Inc., 129 F.3d 327, 330, 332 (4th Cir. 1997) (negligence claims); Beyond Sys. v. Keynetics, Inc., 422 F. Supp. 2d 523, 525, 536 (D. Md. 2006) (claim under Maryland Commercial Electronic Mail Act).

[111] Matt Laslo, *supra* note 19.

[112] Id.

[113] *Id.*

[114] *Id.*

sex trafficking.[115] Even this amendment, however, has led to some backlash, and lawmakers and experts are urging restraint to avoid unintended consequences.[116]

C. Government Regulation of Online Speech

The judiciary has recently wrestled with both legislative and executive suppression of speech on social media. *Packingham v. North Carolina* is the most notable case in this context.[117] Here, the Supreme Court examined a North Carolina statute that barred registered sex offenders from accessing commercial social networking sites.[118] Justice Kennedy, writing for the majority, began the opinion by stressing the importance of social media as a new democratic public square.[119] He explained that, because this was one of the first cases the Court had taken to address the First Amendment on this new public sphere, it "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."[120]

The Court discussed the fundamental promise of the First Amendment—that all persons may access forums where they can speak and listen.[121] The internet is such a forum and, therefore, the Court held that individuals are protected from unlawful government restrictions on access.[122] Still, the internet and social media are tools that can be exploited for criminal purposes, and the Court noted the legitimate interest served by

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[115] *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1254, (codified as amended at 47 U.S.C. § 230(e)). This amendment created Subsection (e)(5) of the act which provides that "[n]othing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of [T]itle 18, United States Code; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of [T]itle 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted."

[116] Laslo, supra note 19. At the time of writing, a bill had been introduced in the House of Representatives to amend Section 230 to "provide that an owner or operator of a social media service that hinders the display of user- generated content shall be treated as a publisher or speaker of such content, and for other purposes." H.R. 492, 116th Cong. (2019). The bill was sent to committee and its path forward is unclear.

[117] Packingham v. North Carolina, 137 S.Ct. 1730 (2017).

[118] *Id.* at 1731.

[119] *Id.* at 1735.

[120] *Id.* at 1736.

[121] *Id.* at 1735.

[122] *Id.* at 1735–37.

the statute.[123] But even after the Court assumed the statute was content neutral, and subject to only intermediate scrutiny,[124] it found that the statute violated the First Amendment by banning substantially more speech than necessary.[125]

Before the decision in *Packingham*, the Fourth Circuit reached a similar conclusion in *Liverman v. Petersburg*.[126] The court in *Liverman* was addressing a social networking policy promulgated by a police department which prohibited officers from posting discrediting or unfavorable speech about the department online.[127] Although the court weighed the policy against the governmental interest, paying attention to "the capacity of social media to amplify expressions of rancor and vitriol," it ultimately struck down the policy as overbroad, noting its capture of speech that is undoubtedly in the public interest.[128] After these decisions, statutory and municipal restraints on speech over social media face a steep uphill battle in the courts.

Relatedly, although the Supreme Court has not yet addressed an analogous case, lower courts are split on whether governmental actors can ban users from their social media pages under the First Amendment.[129] In the most prominent case to date, *Knight First Amendment Institute at Columbia University v. Trump*, the Second Circuit Court of Appeals held that the President's blocking of users from his Twitter account was unconstitutional viewpoint discrimination under the First Amendment.[130] President Trump kept a public Twitter account, over which he often tweeted about official government business or otherwise interacted with the public.[131] The court held that, because the President is a governmental actor acting in that capacity on a platform open to the public, he may not discriminate based on differing viewpoints.[132] The court notably limited its holding to public officials' *public accounts* used for *"all manner of official*

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[123] *Id.* at 1736 (explaining that "it is clear that a legislature 'may pass valid laws to protect children' and other victims of sexual assault 'from abuse.'").

[124] In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." McCullen v. Coakley, 134 S.Ct. 2518, 2534 (2014).

[125] *Packingham,* 137 S.Ct. at 1737–38.

[126] Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016).

[127] Id. at 404.

[128] *Id.* at 407–09.

[129] See, e.g., Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019) (holding President Trump's blocking of users from his social media account was unconstitutional viewpoint discrimination under First Amendment); but see Morgan v. Bevin, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (finding that a governor's

[130] *Knight First Amendment Inst.*, 928 F.3d 226.

[131] *Id.* at 230.

[132] *Id.* at 234–39.

purposes."[133] Determining whether a public official's social media account is a public forum for the purposes of First Amendment protection is a fact-specific inquiry.[134] Other federal courts have come to similar conclusions.[135]

Some courts, however, have found no cause of action when a government actor bans users from its social media page. One representative example, among many,[136] is *Morgan v. Bevin*.[137] Here, some citizens of Kentucky were blocked on their Governor's social media pages because of their viewpoints.[138] The court denied their motion for preliminary injunction against the Governor and held that, even though his accounts were used "to communicate his policies and visions, and to seek specific feedback," the accounts were private channels of communication that did not become public fora simply because a public official was using them.[139] Differing from *Knight*, where the court seemed concerned with the blocked users being able to *listen* to the President's speech, the court in *Bevin* seemed to be focused on the fact that the citizens did not have a right to a government audience.[140] In other words, it is important to frame the inquiry by considering which free speech right is being infringed—the right to be heard or the right to listen.[141]

Judges have been less hesitant to restrain First Amendment rights on social media as conditions of probation. Not all agree on the limits, however, and this issue has created a rift in the courts.[142] Even in these

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[133] *Id.* at 230 (emphasis added).

[134] *Id.* at 236.

[135] *See* Leuthy v. LePage, 2018 WL 4134628 (D. Me. 2018) (denying a governor's motion to dismiss an action against him, based on his excluding constituents from his Facebook page, and ruling that plaintiffs plausibly stated a claim for violation of First Amendment rights); Dingwell v. Cossette, 2018 WL 2926287 (D. Conn. 2018) (finding a viable claim against a police department for free speech violations after the department blocked a resident from its social media pages due to his criticism).

[136] *See* Davison v. Plowman, 247 F. Supp. 3d 767 (E.D. Va. 2017), *summarily aff'd*, 715 Fed. Appx. 298 (4th Cir. 2018) (holding that a resident was not entitled to First Amendment protection for posting critical comments on the social media page of the commonwealth's attorney); Robinson v. Hunt County, Tx., 2018 WL 1083838 (N.D. Tex. 2018) (dismissing claim against county's sheriff's office that it violated the plaintiff's First Amendment rights by blocking him from the sheriff's office's Facebook page).

[137] *Morgan*, 298 F. Supp. 3d 1003.

[138] *Id.*

[139] *Id.* at 1012.

[140] *Id.* at 1011.

[141] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

[142] *See* Manning v. Powers, 281 F. Supp. 3d 953 (C.D. Cal. 2017) (granting a preliminary injunction against a parole condition that banned a parolee's access to social media as a violation of First Amendment rights); Yunus v. Robinson, 2018 WL 3455408 (S.D.N.Y. 2018) (magistrate judge recommending that the court grant an injunction against a condition of parole that banned social media

limited circumstances it is clear that the judiciary is suspicious of infringing on one's ability to speak online.

The state undoubtedly has a significant interest in preventing violence that is exacerbated or incited over social media.[143] But it has proven difficult to prevent these harms without trampling on First Amendment rights, even in the most limited circumstances.[144] Federal courts are struggling with the same issue, also without settling on a satisfactory answer.[145] Given the increasingly accepted view of social media as a new public square, entitled to robust First Amendment protections, governments may need to formulate alternative means to prevent the violence that these forums may incite.

III. INFORMATION FIDUCIARIES

Social media provides a forum for anyone to participate in the marketplace of ideas. Users' speech has proven difficult to regulate, presenting an arduous challenge: how can policymakers prevent unlawful speech and dangerous speakers without incidentally suppressing anything else? This conversation mainly focuses on the speech itself. However, this fails to consider the ways in which social media alters and incentivizes the content sent and received by its users. To avoid infringing on lawful speech, it may be more effective to reform the mechanisms used to disseminate communications that poison the public discourse in the first place.

A. Big Data Companies as Fiduciaries

The theory of social media companies as "information fiduciaries" was first put forth by Professor Jack Balkin.[146] A fiduciary duty is a special duty owed by one party to another based on a relationship of trust.[147] Many fiduciary duties have a long history in the common law, such as "trustee to beneficiary, agent to principal, lawyers to clients, doctors to patients, [and] personal representatives to the estates they represent."[148] Other, less

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access as violative of the First Amendment); *but see* United States v. Carson, 924 F.3d 467 (8th Cir. 2019) (declining to extend *Packingham* to supervised release); United States v. Perrin, 926 F.3d 1044 (8th Cir. 2019) (holding that a special condition of supervised release prohibiting defendant from using computer or accessing online service did not violate First Amendment).

[143] *Packingham*, 137 S. Ct. at 1736

[144] *Id.*

[145] *See supra*, note 142.

[146] Balkin, *supra* note 22; Jack M. Balkin, *Information Fiduciaries in the Digital Age*, BALKINIZATION (Mar. 5, 2014, 4:50 PM), http://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html

[147] DAN B. DOBBS ET AL., LAW OF TORTS § 267 (2d ed. 2020).

[148] *Id.*

formal, confidential relationships may also give rise to fiduciary duties.[149] These relationships are based on undertakings of loyalty by one party which generate a beneficiary's confidence in them and may oblige the fiduciary to act affirmatively to protect its beneficiary.[150] A beneficiary has a cause of action against a fiduciary if: (1) a fiduciary relationship existed; (2) the fiduciary breached that duty; and (3) that breach was the proximate cause of the beneficiary's injury.[151]

These relationships, and their corresponding duties, can—and should—apply to social media companies' relationships with their end-users.[152] Concepts of fiduciary duties have roots in early common law, but evolve over time to recognize new relationships.[153] Social trends may be augmenting the prevalence and importance of fiduciary relations in modern society.[154] As Professor Balkin argues, social media companies' relationship to their end-users constitutes such a legally-recognized relationship of trust for four main reasons: (1) Because big data companies have superior knowledge and expertise, and users do not, there is a vast difference in the ability of each party to monitor the other, forcing users to trust the companies to use their personal information in their best interest; (2) users depend on these companies, as they provide services that are now close to necessary in modern life; (3) these companies hold themselves out as experts, and in doing so, induce the exchange of users' personal information for their services; and (4) both parties know that the companies hold confidential and valuable information that may be used to an end-user's disadvantage.[155]

Social media companies have superior knowledge and expertise, which, coupled with their extensive ability to monitor, forces users to put a lot of trust in them. A fiduciary relationship is formed when one party gains another's confidence and incidentally obtains a position of superiority and influence over that party.[156] Such relationships may arise

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[149] *Id.*

[150] *Id.*

[151] *See, e.g.*, French Broad Place, LLC v. Asheville Sav. Bank, S.S.B., 816 S.E.2d 886 (N.C. Ct. App. 2018). Herein lies one of the most important benefits of recognizing social media companies' fiduciary duties. As previously discussed, authorities worry about bestowing speech controlling power to either governments or the companies themselves. Fiduciary duties put the power in the hands of the users because enforcement takes the form of individual causes of action. Social media companies will be incentivized to avoid this liability just as they are incentivized to avoid other forms of potential legal liability.

[152] *See* Balkin, *supra* note 22.

[153] *Id.*; *see* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 (1983).

[154] Frankel, *supra* note 153, at 979.

[155] Balkin, *supra* note 148, at 1222.

[156] *See* 19 ILL. PRAC., ESTATE PLAN. & ADMIN. § 200:9 (4th ed.); Herbolsheimer v. Herbolsheimer, 60 Ill.2d 574 (1975).

out of a diverse set of dealings, including "any type of legal, moral, social, domestic or personal situation."[157] The average social media user does not know how the sites are using their information.[158] These companies can track each move that their users make, while the users only get a glimpse of the fraction of the interface tailored to them.[159] This power imbalance causes users to necessarily bestow the most fundamental element of a fiduciary relationship in these companies—trust. As social media becomes more ubiquitous, it also becomes more necessary to modern life. As early as 2007, 94% of first-year college students spent some time on social media each week.[160] Social media has also crept into the realm of employment. One recent study found that a comprehensive LinkedIn profile gave job seekers a 71% better chance at landing an interview.[161] In some ways, users depend on social media companies to navigate the modern world.

Dependency in transactions and relations may give rise to a fiduciary relationship, even if the parties are otherwise on even terms.[162] In this case, however, the consideration of dependency in the relationship is only multiplied by the previously discussed disparate power between the parties.

Similarly, when one party in a relationship holds itself out as an expert, it may create a fiduciary relationship. As society becomes more complicated, it may be necessary to have more expert-fiduciaries to help individuals navigate the world.[163] Lawyers are one of the oldest examples of expert-fiduciaries recognized by law.[164] The Restatement of the Law Governing Lawyers explains that their expectation of diligence,

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[157] *See* 19 ILL. PRAC., ESTATE PLAN. & ADMIN. § 200:9 (4th ed.) (citing Pepe v. Caputo, 408 Ill. 321, 326 (1951)).

[158] Aaron Smith, *Many Facebook users don't understand how the site's news feed works*, Pew Research Center (Sept. 5, 2018), https://www.pewresearch.org/fact-tank/2018/09/05/many-facebook-users-dont-understand-how-the-sites-news-feed-works/

[159] *See generally* Rose-Stockwell, *supra* note 10.

[160] Paige Abe & Nickolas A. Jordan, *Integrating Social Media Into the Classroom Curriculum*, 18 ABOUT CAMPUS: ENRICHING THE STUDENT LEARNING EXPERIENCE 16 (Mar. 1, 2013), https://journals.sagepub.com/doi/abs/10.1002/abc.21107?journalCode=acaa

The economic phenomenon known as "network effects" explains why other sites cannot simply pop up and compete with current incumbent social media giants. A network effect occurs when the value of a good or service increases exponentially as more people join in its consumption. These are particularly strong in the communications industry. *See* Caroline Banton, *Network Effect*, INVESTOPEDIA (Oct. 15, 2019), www.investopedia.com/terms/n/network-effect.asp.

[161] Peter Yang, *Resume Study: How Linkedin Affects the Interview Chances of Job Applicants*, RESUMEGO (2019), https://www.resumego.net/research/linkedin-interview-chances/.

[162] *See* In re Daisy Sys. Corp., 97 F.3d 1171 (9th Cir. 1996) (finding that an investment banker retained by a corporation may owe a fiduciary duty even though both parties are sophisticated in business dealings because of the corporation's dependence on the banker).

[163] *See* Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 FORDHAM L. REV. 1357 (1994).

[164] *Id.*

competence, and loyalty, as well as the nature of their complex and technical work, which often takes place in the client's absence, contributes to the formation of this fiduciary relationship.[165] Social media companies' work—gathering and utilizing their users' data—requires expansive teams of highly-trained employees to craft sophisticated code and technology outside of the users' grasp.[166] They also use this expertise to bring users to their sites in the first place by curating pages and creating a desirable experience. The formation of this connection, based on one party's expertise, mimics the formation of many associations recognized by common law as fiduciary relationships.

Most importantly, social media companies hold immense amounts of confidential information about their users.[167] Facebook, for example, collects data based on a user's interactions with pages and posts on the site, which it then analyzes in order to curate the user's experience and target advertising to them based on, for example, their political views.[168] Doctors, like lawyers, gain fiduciary duties to their patients based on their access to confidential information.[169] In both cases, as is the case in many similar relationships, information entrusted to the fiduciary obtains special protection.[170] Social media companies gain not only personal information that is provided by the users, but also information about the users based on complex analysis of their behavior patterns.[171] In fact, they have been shown to divulge this information for arguably sinister uses.[172] These platforms' unique connection with end-users, and their possession of such private information, resembles other, currently legally-recognized relationships of confidentiality.

Social media companies and end-users do not have the same relationship as a doctor to a patient or an attorney to a client. Each fiduciary relationship has different characteristics and duties. They have in the aggregate, however, been expanding over time, exponentially so in the

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[165] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000).

[166] Facebook's newsfeed algorithm, for instance, is "closely guarded [,] constantly shifting, . . . and stubbornly opaque." Will Oremus, *Who Controls Your Facebook Feed*, Slate (Jan. 2016), http://www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm_works.html

[167] *See id.* (noting that another important rationale for the fiduciary relationship between lawyer and client is that the lawyer deals with a client's confidential and vital information).

[168] Jeremy B. Merrill, *Liberal, Moderate or Conservative? See How Facebook Labels You*, N.Y. TIMES (Aug. 23, 2016), https://www.nytimes.com/2016/08/24/us/politics/facebook-ads-politics.html

[169] Frankel, *supra* note 155, at 796.

[170] Hammonds v. Aetna Cas. & Sur. Co., 237 F. Supp. 96, 102 (N.D. Ohio 1965) (citing Smith v. Driscoll, 94 Wash. 441, 443 (1917).

[171] *See* Merrill, *supra* note 168.

[172] *See* Cadwalladr, et al., *supra* note 55.

modern era.[173] Fiduciary duties vary in nature and scope, but are based on the original relationship of trust.[174] Broadly, social media companies' fiduciary duties, stemming from the trust relationship defined above, should include the duties of non-discrimination, non-disclosure, and non-manipulation.[175] While each of these duties deserves further treatment, the duty of non- manipulation is the most relevant to the danger of algorithmic coercion of users toward misinformation, inflammatory and conspiratorial content.

B. The Duty of Non-Manipulation

A duty of non-manipulation, though sometimes going by a different name, exists in many fiduciary relationships. It stems from the fact that a fiduciary must put its beneficiary's interest above its own and not abuse its unique position of power over the beneficiary to its advantage.[176] This concept underlies duties imposed on a broad range of legally recognized relationships of trust, which are breached when a fiduciary takes advantage of a beneficiary physically, emotionally, or financially.

Breach of a fiduciary duty occurs when a party in a position of trust physically or emotionally harms another party that is vulnerable to their abuse of that position.[177] In *Destefano v. Grabrian*, the Supreme Court of Colorado decided a case involving a priest that induced his parishioner, whom he was also serving as a marriage counselor, into a sexual relationship.[178] The court held that the plaintiff stated a viable claim because, if true, the priest used his position of trust to take advantage of his beneficiary's vulnerability which was known to him based on that special relationship.[179] The physician-patient relationship was similarly examined by the Supreme Court of Nevada in *Hoppes v. Hammargren*.[180] The court noted that physicians often hold a position of superior knowledge, skill, and information, putting them in a unique position to take advantage of a patient's vulnerabilities.[181] The essence of these relationships, the court explained, was that there exists a condition of unequal power giving one

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[173] Frankel, *supra* note 155, at 79.

[174] RESTATEMENT (THIRD) OF AGENCY § 8.01(c) (AM. LAW INST. 2006).

[175] Balkin, *supra* note 22, at 1233.

[176] DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 267 (2d ed. 2016); Barbara A. v. John G., 193 Cal. Rptr. 422 (Cal. Ct. App. 1983).

[177] *See, e.g.*, Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); McDaniel v. Gile, 281 Cal. Rptr. 242 (Cal. Ct. App. 1991); Barbara A., 193 Cal. Rptr. 422; Hoopes v. Hammargren, 102 Nev. 425 (Nev. 1986); Erickson v. Christenson, 99 Or. App. 104 (Cal. Ct. App. 1989).

[178] 763 P.2d 275.

[179] *Id.* at 284.

[180] 102 Nev. 425.

[181] *Id.* at 431–32.

party unique influence over the other.[182] Taking advantage of this unequal power, as in this case by inducing a sexual relationship, constitutes an abuse of power and violates the duties that this special relationship imposes.[183]

There are numerous examples of this kind of abuse of power throughout the common law. Courts have also found similar duties to not take advantage of unequal power in attorney- client,[184] pastor-congregation,[185] and psychotherapist-patient[186] relationships. All of these cases involve a fiduciary using a confidential relationship, and the information obtained from it, to further its own interests at the expense of the beneficiary's well-being.

Breach of the duty of non-manipulation or non-coercion also occurs when a fiduciary takes advantage of a beneficiary financially.[187] For instance, courts are sufficiently concerned about an attorney's unequal position of power over a client that many find a presumption of undue influence when an attorney transacts with their client.[188] The Illinois Supreme Court addressed this issue in *Klaskin v. Klepak*.[189] The court explained that there was a strong presumption of undue influence anytime an attorney transacts with a client and is benefited thereby.[190] The attorney in this case was left a condominium unit as part of one of his former client's estates.[191] Although the client in this case was a savvy entrepreneur and "mentally alert at the time he executed the trust," the attorney did not provide evidence: "(1) that he or she made a full and frank disclosure of all relevant information; (2) that adequate consideration was given; and (3) that the client had independent advice before completing the transaction" sufficient to overcome the significant undue influence presumption.[192] Due to their position of trust and unequal possession of knowledge and

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[182] *Id.*

[183] *Id.*

[184] *See, e.g.*, Barbara A. v. John G., 193 Cal. Rptr. 422, 432 (Cal. Ct. App. 1983).

[185] *See, e.g.*, Erickson v. Christenson, 99 Or. App. 104 (Or. Ct. App. 1989) (plaintiff stated a claim when pastor "mentally manipulated" her to have sexual relations with him using his position of trust).

[186] *See, e.g.*, Malone v. Sewell, 168 S.W.3d 243 (Tex. App. 2005) (assuming that therapist "hugging and caressing [patient], giving [her] a book that advocated sexual relationships between therapists and patients, and asking [her] on a date" violated the therapist's fiduciary duty).

[187] *See, e.g.*, Klaskin v. Klepak, 126 Ill. 2d 376 (Ill. 1989); Fair v. Bakhtiari, 125 Cal. Rptr. 3d 765 (Cal Ct. App. 2011).

[188] *Klaskin*, 126 Ill. 2d at 379–80, 386.

[189] 126 Ill. 2d 376.

[190] *Id.* at 386–87.

[191] *Id.* at 379.

[192] *Id.* at 387, 390.

information, attorney-fiduciaries[193] are closely scrutinized when dealing with their clients.[194]

The case law is clear: parties that are in a position of trust—holding superior knowledge and confidential information—may not abuse the power entrusted in them. Although courts discuss undue influence, non-coercion, and the like, this duty can reasonably be called a duty of non-manipulation. Fiduciary duties alter and develop overtime in response to the changing social landscape.[195] Based on the common law developments discussed in this section, a general duty of non-manipulation for fiduciaries possessing superior knowledge and confidential information may be formulated as follows: *A fiduciary may not, by exercising its influence over a beneficiary, use that beneficiary's confidential information, obtained as a result of the relationship, for its own gain and to the beneficiary's detriment.*

C. Application to Social Media Companies

Social media companies are in a relationship with their end-users that entails the duty of non-manipulation. These companies possess vast collections of data and know an extensive array of confidential information about their users.[196] The users, on the other hand, know little to nothing about how these companies collect, store, and use their data, let alone how their algorithms control content with which their users engage.[197] As a result of this gulf between the parties' knowledge, skill, and information, the end-users are "uniquely vulnerable" in this relationship.[198] When companies use this disparity in power to their advantage, and to the detriment of the end-user, they are violating a duty created by their position of trust.[199]

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[193] Courts have also recognized similar fiduciary duties for accountants based on confidential information. *See* Miller v. Harris*,* 985 N.E.2d 671 (Ill. App. Ct. 2013) (recognizing cause of action in Illinois against accountant for breach of fiduciary duty due to relationship including confidential information).

[194] *Klaskin*, 126 Ill. 2d at 386, 390.

[195] *See* Frankel, *supra* note 155, at 796.

[196] *See*, *e.g.*, Copeland, *supra* note 41 (noting Google's collection of massive amounts of health data); THE ECONOMIST, *supra* note 38 (describing data as surpassing oil as the world's most valuable resource).

[197] *See*, *e.g.*, Josh Constine, *How Facebook News Feed Works*, TECH CRUNCH (Sept. 6, 2016, 3:07 PM), https://techcrunch.com/2016/09/06/ultimate-guide-to-the-news-feed/ (explaining roughly how Facebook's newsfeed algorithm operates).

[198] The reason court's presume undue influence in some fiduciary relationships is because of a disparity in information and knowledge that puts the beneficiary in a vulnerable position. *See, e.g.*, Klaskin v. Klepak, 126 Ill. 2d 376 (Ill. 1989); Fair v. Bakhtiari, 125 Cal. Rptr. 3d 765 (Cal. Ct. App. 2011).

[199] Destefano v. Grabrian, 763 P.2d 275, 284 (Colo. 1988).

A counter-argument to this theory is that, if social media companies are viewed as some kind of fiduciary, then many large companies[200] may begin to look like fiduciaries as well. But social media companies' relationships with their users are entirely different than those of most modern corporations. Of course, other companies may hold their consumers' contact and credit card information, know their general preferences, or perhaps even know their social security numbers. Social media companies, on the other hand, know their users on an entirely different level. They collect a much broader array of personal and behavioral data to create a holistic view of their users' identities.

Facebook[201] now gets over 90% of its advertising revenue from its mobile applications.[202] This is at a time when the average person spends about four hours per day on their phone, about half of that on social media.[203] Even this does not account for the additional time that people spend on social media on computers or other devices. Facebook not only has all of its users' contact and personal information shared on or held by the site, but continually monitors users' every click and view to build individual psychological profiles.[204] These profiles can be used to "nudge" users toward content that is promoted by Facebook's algorithms (or by the party that it sold this data to).[205] Facebook's product is its users, whose data it can mine to provide eyes for highly targeted advertising or for the highest bidding third-party data purchaser.[206] But it is also the new public square, where people go to chat with local elected officials, communicate their ideas to their peers and neighbors, and gather their news. In fact, a recent Pew Research study revealed that two-thirds of Americans get at

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[200] Some companies, like *23andMe*, which collects and analyzes genetic data, may also require some similar duties. Holding individuals' genetic information requires the utmost sensitivity. Many similar emerging companies in the world of big data deserve closer scrutiny through further research. Those companies are outside of the scope of this paper.

[201] Here, Facebook is used as an example, but Twitter, Instagram, or YouTube could have easily replaced it.

[202] Emil Protalinksi, *Over 90% of Facebook's Advertising Revenue Now Comes from Mobile*, VENTUREBEAT (Apr. 25, 2018), https://venturebeat.com/2018/04/25/over-90-of-facebooks-advertising-revenue-now-comes-from-mobile/.

[203] Melanie Curtin, *Are You on Your Phone Too Much? The Average Person Spends This Many Hours on it Every Day*, INC. (Oct. 30, 2018), https://www.inc.com/melanie-curtin/are-you-on-your-phone-too-much-average-person-spends-this-many-hours-on-it-every-day.html

[204] Coppins, *supra* note 6.

[205] *Id.*

[206] *See* Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html.

least some of their news on social media.[207]

Social media is becoming an institution in American life, taking over part of the role of the press, the telecommunication industry, the town hall, and more. In doing so, it has captured vast amounts of data from its users which it uses to create almost all of its revenue.[208] It therefore has a very different relationship with its end-users than traditional corporations that simply sell consumers their products or services.

Algorithms employed by these companies that have the purpose of increasing user engagement with no regard for propagating fear, misinformation, and inflammatory content are an example of abuse based on a position of trust. Indeed, even if it is not their purpose, these algorithms tend to spread lies faster than truth, and discourage reasoned, civil conversation while encouraging echo-chambers and polarization.[209] The purpose of these algorithms is to keep users engaged for longer periods of time, thus increasing profit for the companies.[210] The unintended consequence is that user behavior can be affected, often in negative ways, by the prioritized false and extreme content.[211] Social media companies, because of their position of trust, are benefiting at the expense of their beneficiaries' well-being.

Social media companies' relationship with their end-users then requires them to correct or alter their algorithms. To the extent possible, they must aim to prevent these harms, even if such action would reduce the benefit they receive from the relationship. Just as lawyers must go to great lengths to prove to courts that they did not exercise undue influence over their clients based on a fiduciary relationship,[212] social media companies should be required to make their algorithms more transparent. Like psychotherapists and clergy, who cannot manipulate their clients' position

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[207] Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH Ctr. (Sept. 7, 2017), https://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/.

[208] Matthew Johnston, *How Facebook Makes Money*, INVESTOPEDIA (June 25, 2019), https://www.investopedia.com/ask/answers/120114/how-does-facebook-fb-make-money.asp

[209] *See* Marcia Stepanek, *The Algorithms of Fear*, STANFORD SOC. INNOVATION REV. (June 14, 2016), https://ssir.org/articles/entry/the_algorithms_of_fear; Soroush Vosoughi, et al., *The Spread of True and False News Online*, 359 SCIENCE 1146 (Mar. 9, 2018), available at https://science.sciencemag.org/content/359/6380/1146

[210] Rose-Stockwell, *supra* note 10.

[211] *See* Fisher & Taub, *supra* note 4 (explaining the radicalizing effect of YouTube video algorithms on Brazil, in part responsible for death threats against public health officials).

[212] Courts may even require affirmative disclosures from lawyers and alternate professional opinions for clients before the parties engage in transactions that benefit the attorney. Klaskin v. Klepak, 126 Ill. 2d 376, 387 (1989).

of vulnerability for their personal gain,[213] social media companies should not be able to use their ever-increasing knowledge of users' psychological profiles to keep them engaged for longer periods, especially by promoting inflammatory and false content.[214]

Algorithms now prioritize engagement, but recognizing a duty of non-manipulation would require social media companies to be more conscious of the effects of the algorithms on their users' behavior. They would have to be more transparent and better control for the algorithmic manipulation that can occur when engagement is prioritized over credibility. They would have to correct for polarizing and inciting content being given the most value. Of course, this is not an antidote to what is in part a product of human nature, but this duty would require algorithms to tame humanity's worst impulses, or at least to not exploit them.

Facebook (and other social media companies) have the ability to change their algorithms.[215] As far back as 2012, Facebook was able to demote content made by two independent companies that was annoying its users.[216] Their visibility fell greatly, and shortly after, both companies shut down.[217] In 2013, two viral news companies were flooding Facebook users' timelines.[218] After Facebook tweaked its newsfeed algorithm, traffic to these sites fell dramatically.[219] When Facebook has been faced with agents spreading content that hurts its bottom-line, it has successfully thwarted their efforts. Facebook as a fiduciary would have to control its algorithms not only to maximize profit, but to protect users from dangerous behavior modification.

It could accomplish this in a few ways. One example, put forward by Alexis Madrigal of *The Atlantic*, is to make algorithms "antiviral."[220] Social media companies could slow the spread of content calculated to go viral. Such content is currently highly valued by the algorithms, as it is of the kind that keeps users engaged and sharing.[221] Antivirality would devalue posts that may spread uncontrollably in the same way that Facebook demoted annoying independent companies' apps and the

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[213] *See*, *e.g.*, Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); McDaniel v. Gile, 281 Cal. Rptr. 242 (Cal. Ct. App. 1991); Barbara A. v. John G., 193 Cal. Rptr. 422 (Cal. Ct. App. 1983); Hoopes v. Hammargren, 102 Nev. 425 (Nev. 1986); Erickson v. Christenson, 99 Or. App. 104 (Or. Ct. App. 1989).

[214] *See, e.g.*, Rose-Stockwell, *supra* note 10; *see*, Matthew Rosenberg et al., *supra* note 206.

[215] Erin Griffith, *Facebook Can Absolutely Control Its Algorithm*, WIRED (Sept. 26, 2017), https://www.wired.com/story/facebook-can-absolutely-control-its-algorithm/.

[216] The companies were SocialCam and Viddy. *Id.*

[217] *Id.*

[218] *Id.*

[219] Facebook also fairly successfully prevents posts with nudity and complies with alcohol advertisement regulation. *Id.*

[220] Thompson, *supra* note 7.

[221] *Id.*

visibility of viral news sites.[222] Another example, currently offered by a bill in the House of Representatives, is to remove Section 230 immunization from companies whose algorithms present content in users' feeds based on any ordering other than chronological.[223] A final example[224], presented by internet entrepreneur Ryan Holmes, is to value contrary views highly for individuals,[225] or to devalue patently fake or salacious material.[226]

These companies can—and do—alter their algorithms to control the dissemination of certain posts. There are many options that would prevent the spread of extremist and sensationalist content, or combat it with opposing viewpoints. If these platforms were required to value algorithms based on users' best interests, rather than profit alone, many different methods could be tried and evaluated. Each of the previously discussed dangers is better served, albeit imperfectly, by enforcing fiduciary duties on large data-companies to alter algorithms in favor of different, non-manipulative values, rather than limiting their users' free speech.[227]

IV. CONCLUSION

Certainly, Voltaire was not considering social media when he observed that "those who can make you believe absurdities can make you commit atrocities."[228] But these words seem to take on new, perhaps more urgent meaning in the modern world. Social media is becoming an unavoidable necessity of life. The algorithms utilized by these large companies currently value user engagement above all else, incentivizing dangerous, false, and inflammatory content. This exposure harms users at an individual level and can even damage long-cherished institutions at a larger scale.

Despite these harms, courts are hesitant to suppress speech on these platforms for good reasons. Social media has a documented history of

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[222] *Id.*

[223] H.R. 492, 116th Cong. (2019).

[224] This list of examples is not exhaustive of the different options available.

[225] This practice would force users to confront their own biases much more often.

[226] Ryan Holmes, *supra* note 70.

[227] The Supreme Court has previously entertained (though it did not ultimately adopt) a theory of newspapers as fiduciaries to the public due to their unique democratic responsibility. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 251 (1974); *see also* Red Lion Broad. Co., Inc. v. F.C.C., 395 U.S. 367, 389 (1969). As this paper lays out at great length, social media companies have a different relationship with democracy and individual users that much more closely represents a traditional fiduciary relationship. The fiduciary rationale that seemed to the *Tornillo* court worthy of further discussion is more present and important in social media's relationship to the public and its end- users. 418 U.S. at 251.

[228] VOLTAIRE, QUESTIONS ON MIRACLES TO M. CLAPAREDE, PROFESSOR OF THEOLOGY IN GENEVA, BY A PROPONENT: OR EXTRACT FROM VARIOUS LETTERS FROM M. DE VOLTAIRE (1764).

democratizing information, fostering political participation, and connecting people and groups otherwise foreign to each other. It also appears that these companies are unlikely to want, or be required, to police false and inciting content on their sites. Imposing fiduciary duties may be more effective than regulating online speech. Social media companies operate from a position of trust and superior information to control their vulnerable users' engagement. As such, their relationships with their users resemble many legally regulated associations of trust.

Social media companies are undoubtedly different in many ways from paradigmatic fiduciaries. Fiduciary duties, however, evolve over time in common law to meet the changing social landscape. A derivative duty of non-manipulation would require social media companies to modify the mechanisms that push users to accept and act on dangerous ideas in the first place. Such a reform is not a cure-all for what ails society and social media, but it provides an alternative to choosing between suppressing the free flow of ideas and inflaming our most abhorrent tendencies.