# CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 21 FALL - WINTER 2021 NUMBER 1

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# The Stick Over the Carrot: How Congress Can Incentivize Localities to Reform Exclusionary Zoning and Land Use Policies

SCOTT L. GATES

## INTRODUCTION

Amid the deadliest pandemic in a century and despite the worst economic downturn since the Great Depression, America's housing market boomed. Demand in the residential real estate market soared during the pandemic with homebuyers seeking more space for work-from-home arrangements and taking advantage of historically low interest rates.[1] This increase in demand for housing has run up against a severe shortage in supply. The National Association of Realtors reported an 18.2% year-over-year decrease in housing inventory in June 2021, marking "25 straight months of year-over-year declines."[2] This deficit in the supply of housing relative to increasing demand has caused housing prices to rise precipitously.[3] American homeowners with mortgages saw their equity

[1] Kathleen Hawley, *Why is the Housing Market Thriving in a Pandemic?*, HOUS. WIRE (Sept. 2, 2020, 6:18 PM), https://www.housingwire.com/articles/why-is-the-housing-market-thriving-in-a-pandemic/.

[2] Michael Hyman, *June 2021 Existing-Home Sales Bounce Back as Home Prices Hit Second Highest Pace*, NAT'L ASS'N OF REALTORS: ECONOMISTS' OUTLOOK (July 22, 2021), https://www.nar.realtor/blogs/economists-outlook/june-2021-existing-home-sales-bounce-back-as-home-prices-hit-second-highest-pace.

[3] Nicole Friedman, *U.S. Median Home Price Hit New High in June*, WALL ST. J. (July 22, 2021, 1:04 PM), https://www.wsj.com/articles/median-existing-home-price-hit-new-high-in-june-11626963073.

increase by $1.9 trillion in the first quarter of 2021, an increase of 19.6% over the prior year.[4]

Shortfalls in housing supply have also affected rental markets in major urban centers. Though rents in these areas decreased as the pandemic caused an exodus from large cities,[5] some of the most expensive rental markets before the pandemic were urban centers with an inadequate supply of rental units. For example, just over 2,600 units of new housing were built in San Francisco in 2018, a decrease of 41% compared to 2017.[6] This decrease in new housing construction followed an inflow of over 8,000 new residents into the city in 2017.[7] How did this deficit of new housing production relative to population increase affect the city's rents? In May 2019, the median rent for a one-bedroom apartment in San Francisco reached $3,700 per month, the highest in the country at the time by nearly $1,000.[8] As demand for rental housing in major cities returns to pre-pandemic levels, the median rent for a one-bedroom apartment in San Francisco remains the highest in country, even as other major cities experience faster growth in rents.[9]

Urban economists generally agree that local policy decisions regarding zoning and land use regulations contribute significantly to shortfalls in housing supply. There is ample economic research demonstrating that restrictive zoning and land use regulations result in higher housing prices by reducing the construction of new housing.[10] General examples of restrictive zoning and land use regulations include by-right development only for single family housing, lengthy permitting processes and timelines for multifamily development, building height limitations, and minimum lot size restrictions.[11] An empirical study suggests that restrictive zoning and land use regulations inflate housing prices during times of increased demand and are responsible for approximately 20% of variation in housing growth

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[4] *Homeowner Equity Insights: Data Through Q1 2021*, CORELOGIC https://www.corelogic.com/intelligence/homeowner-equity-insights/ (last visited Aug. 5, 2021).

[5] Kriston Capps, et al., *In the U.S., City Rents are Falling, and Suburban Rents are Climbing*, BLOOMBERG (Oct. 30, 2020, 9:00 AM), https://www.bloomberg.com/news/articles/2020-10-30/where-rents-are-falling-and-where-they-are-rising?sref=rT5Gzxsc.

[6] S. F. PLANNING, 2018 SAN FRANCISCO HOUSING INVENTORY 5 (2019).

[7] Adam Brinklow, *San Francisco Population Swells to More Than 884,000*, CURBED SAN FRANCISCO (Mar. 26, 2018), https://sf.curbed.com/2018/3/26/17165370/san-francisco-population-2017-census-increase.

[8] Crystal Chen, *Zumper National Rent Report: May 2019,* ZUMPER: RENT REPS. (Apr. 30, 2019), https://www.zumper.com/blog/zumper-national-rent-report-may-2019/.

[9] Jeff Andrews, *Zumper National Rent Report*, ZUMPER: RENT REPS. (July 28, 2021), https://www.zumper.com/blog/rental-price-data/.

[10] *See, e.g.*, Jenny Schuetz, *No Renters in My Suburban Backyard: Land Use Regulation and Rental* Housing, 28 J. POL'Y ANALYSIS & MGMT. 296 (2009); Joseph Gyourko & Raven Molloy, *Regulations and Housing Supply* (Nat'l Bureau of Econ. Rsch., Working Paper No. 20536, 2014), https://www.nber.org/papers/w20536; Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3 (2018).

[11] *See* Schuetz, *supra* note 10, at 302–05.

among metropolitan areas.[12] Several of America's most productive and populous metropolitan areas, including San Francisco, suffer from high housing costs in large part because their zoning and land use regulations constrain the supply of new housing production.[13]

These negative effects on housing affordability have led to increased scrutiny on how local governments formulate and implement their zoning and land use regulations. A recent book by three Boston University researchers, titled *Neighborhood Defenders*, examines how the "participatory politics" of local planning allow a privileged, unrepresentative class of homeowners, which the authors labels "neighborhood defenders," to be overrepresented in local policymaking decisions regarding zoning and land use regulations.[14] The authors argue that these neighborhood defenders "use participatory institutions and land use regulations to stop, stall, and shrink proposals for new housing."[15]

*Neighborhood Defenders* touches on a key element of any participatory political system: "[d]ecisions are made by those who show up."[16] Who shows up to local planning meetings where zoning and new development decisions are proposed and debated? *Neighborhood Defenders* demonstrates that current homeowners dramatically outnumber renters and first-time homebuyers at these meetings.[17] Considering this dynamic, it should come as no surprise that current homeowners benefit tremendously from the state of the American housing market.[18] Current homeowners show up in greater numbers to the planning meetings where local officials make decisions affecting the value of their homes and have reaped the financial benefits,[19] to the detriment of lower and middle-income individuals and families.[20] From this, we can conclude that the system of formulating and implementing zoning and land use regulations exclusively at the local level does not adequately serve all participants in the American housing market, particularly renters and first-time homebuyers.[21]

With this conclusion in mind, this article examines efforts at the state and federal level to reform local zoning and land use regulations that

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[12] Jonathan T. Rothwell, *The Effect of Density Regulation on Metropolitan Housing Markets* 25–27 (June 4, 2009) (working paper) (on file with the Woodrow Wilson Sch. Pub. & Int'l Aff. Princeton U.), https://ssrn.com/abstract=1154146.

[13] *See* Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21154, 2017), https://www.nber.org/papers/w21154; Gabriel Metcalf, *Sand Castles Before the Tide? Affordable Housing in Expensive Cities*, 32 J. ECON. PERSPS. 1 (2018).

[14] KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 4 (2020).

[15] *Id.* at 25.

[16] *West Wing: What Kind of Day Has It Been* (NBC television broadcast May 17, 2000).

[17] EINSTEIN ET AL., *supra* note 14, at 95–115. For additional discussion of the research in this book *see EconTalk: Katherine Levine Einstein on Neighborhood Defenders*, THE LIBR. OF ECONS. & LIBERTY (Dec. 14, 2020), https://www.econtalk.org/katherine-levine-einstein-on-neighborhood-defenders/.

[18] *See* CORELOGIC, *supra* note 4.

[19] EINSTEIN ET AL., *supra* note 14, at 3–4.

[20] *See id*. at 6–8.

[21] *Id.* at 95–115.

constrain the supply of housing. At the state level, several legislatures have taken proactive steps to preempt local zoning and land use regulations to allow for increased housing development.[22] Connecticut, a state that suffers from significant shortages of housing supply,[23] recently enacted House Bill 6107, which amends the state's Zoning Enabling Act to require local jurisdictions to reform their zoning and land use regulations to allow for greater construction of affordable housing options.[24] Among other reforms, HB 6107 would require municipalities to allow accessory dwelling units (ADUs)[25] on all one-unit lots and cap minimum parking requirements for new housing units.[26] While HB 6107 makes several notable changes to Connecticut's Zoning Enabling Act, the bill's scope was significantly narrowed during the legislative process to ensure that it had sufficient political support to pass.[27] In Section I of this article, I examine HB 6107 in detail and discuss how the concessions that narrowed the bill's scope highlight the political hurdles states must overcome to pass preemptive zoning and land use laws.

Further removed from the politics of local development, conditions on federal funding made available to state and local governments offer another way to reform local zoning and land use regulations. In Section II of this article, I review proposals that would condition various sources of federal funding available to states and local jurisdictions on reforming local zoning and land use regulations to allow for increased housing development. These proposals come in two forms: the carrot and the stick. Under the carrot approach, Congress would make new sources of federal funds available to jurisdictions that reform their zoning and land use regulations to allow for increased housing development. Conversely, the stick approach would condition existing sources of federal funds currently offered to states and local governments on pro-development reforms to local zoning and land use regulations.

I argue that Congress should opt for the stick over the carrot because it is a more effective and legal way to incentivize local jurisdictions to reform restrictive zoning and land use regulations. To demonstrate this point, I first examine recent proposals that would attempt to achieve this goal through the

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[22] *See generally* John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823 (2019).

[23] Jerusalem Demsas, *A fight over housing segregation is dividing one of America's most liberal states*, VOX (Mar. 29, 2021), https://www.vox.com/22335749/housing-prices-connecticut-segregation-zoning-reform-democrats-adu-parking-minimum.

[24] H.B. 6107, 2021 Conn. Acts 29 (Reg. Sess.); *see also* Michael Andersen, *A New Idea for State-led Upzoning: Letting Cities Opt Out*, SIGHTLINE INST. (May 28, 2021), https://www.sightline.org/2021/05/28/a-new-idea-for-state-led-upzoning-letting-cities-opt-out/; Jacqueline Rabe Thomas, *Senate passes controversial tenant reform bill*, THE CONN. MIRROR (May 28, 2021), https://ctmirror.org/2021/05/28/senate-passes-controversial-zoning-reform-bill/.

[25] H.B. 6107, *supra* note 24 (defining these units as "accessory apartments."). The terms "accessory dwelling units" (shortened to "ADUs") and "accessory apartments" functionally represent the same thing, for consistency, I use the term "ADU" in this article.

[26] Andersen, *supra* note 24.

[27] *Id.*

carrot approach and point out their shortcomings. I then closely analyze the Housing, Opportunity, Mobility, and Equity Act of 2019 (the "HOME Act"),[28] a bill co-sponsored by Representative Jim Clyburn (D-SC) and Senator Cory Booker (D-NJ) and identified by President Biden as a centerpiece of his housing agenda during the presidential campaign.[29] The HOME Act would adopt the stick approach by requiring state and local governments receiving two existing streams of federal funding, Community Development Block Grants (CDBG) and Surface Transportation Block Grants (STBG), to implement an affordable housing strategy that would incorporate inclusive zoning and land use regulations.[30] Local jurisdictions, including affluent areas with expensive housing, would likely be loath to lose valuable STBG funding and thus would be incentivized to implement inclusive zoning and land use regulations to make sure the federal transportation dollars keep flowing.

The HOME Act's conditioning of STBG funding on implementation of an affordable housing strategy raises questions regarding the limits of Congress's power under the Spending Clause.[31] In Section III of this article, I examine the Supreme Court's interpretations of the Spending Clause in *South Dakota v. Dole*[32] and *National Federation of Independent Business v. Sebelius*[33] and conclude that the HOME Act's conditions on STBG funding would likely be upheld as a constitutional exercise of Congress's spending power. Since the HOME Act would be more effective than policies adopting the carrot approach at incentivizing localities to reform restrictive zoning and land use regulations and would be a constitutional exercise of Congress's spending power, I conclude that Congress should adopt the stick approach embraced by the HOME Act.

At a general level, this article contributes a legal analysis of specific state and federal efforts to reform local zoning and land use regulations that is currently lacking in the commentary on this subject. It is essential that state and federal proposals to reform local zoning and land use regulations undergo analysis from several academic perspectives. As discussed above, continued shortfalls in housing supply, combined with research findings like those in *Neighborhood Defenders*, will require creative policy interventions to allow for increased housing development. Since many local governments struggle to implement these changes,[34] state and federal government actors will be forced to reform local zoning and land use regulations to increase housing supply.

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[28] Housing, Opportunity, Mobility, and Equity Act of 2019, H.R. 4808, 116th Cong. (2019).

[29] *See* THE BIDEN PLAN FOR INVESTING IN OUR COMMUNITIES THROUGH HOUSING, https://joebiden.com/housing/ (last visited Apr. 20, 2021).

[30] *Id.*

[31] U.S. CONST. art. I, § 8, cl. 1.

[32] South Dakota v. Dole, 483 U.S. 203 (1987).

[33] Nat'l. Fed'n. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[34] *See* EINSTEIN ET AL., *supra* note 14.

## I. STATE PREEMPTION OF ZONING AND LAND USE REGULATIONS

In the face of a worsening affordable housing crisis, several states have asserted greater authority over local zoning and land use regulations in an effort to increase housing supply.[35] California, which faces an extreme shortage of housing,[36] has enacted multiple preemptive laws in recent years in an effort to loosen zoning and land use regulations to allow for increased housing development.[37] Included among these laws were a series of bills passed between 2016 and 2019 resulting in "an essentially unqualified right for every homeowner in the state to add a freestanding backyard ADU of up to 800 square feet, plus a 'junior ADU' of up to 500 square feet within the envelope of an existing structure."[38] In 2019, Oregon enacted House Bill 2001, a sweeping bill that eliminated single-family zoning all over the state and mandated that denser forms housing be allowed in more populous cities.[39] The state preemption efforts have not been limited to the West Coast. Before Connecticut enacted HB 6107, both Virginia and Maryland proposed bills that would pre-empt local zoning ordinances to allow construction of denser forms of housing.[40] Maryland's up-zoning bill took a targeted approach, mandating denser housing in areas with high concentration of jobs or access to public transit, while Virginia's bill would have legalized duplexes in neighborhoods across the commonwealth.[41]

In this section, I first examine how HB 6107 preempts local zoning and land use regulation in Connecticut. Though HB 6107 mandates several promising reforms to local zoning and land use regulations that would allow for increased housing supply, significant concessions that narrowed the bill's scope were necessary to ensure that it had sufficient political support to pass. I conclude this section by discussing how the concessions necessary to pass HB 6107 highlight the political difficulties states face in passing preemptive zoning and land use legislation.

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[35] *See* Infranca, *supra* note 22; Kenneth Stahl, *Home Rule and Local Preemption of Local Land Use Control*, 50 URB. L. 179 (2021).

[36] *See* JONATHAN WOETZEL ET AL., A TOOLKIT TO CLOSE CALIFORNIA'S HOUSING GAP: 3.5 MILLION HOMES BY 2025 (2016) (estimating that California's housing supply is 2 million units short to meet demand).

[37] *See* Stahl, *supra* note 35, at n.6 (listing several California laws enacted between 2017 and 2019 that preempt local zoning and land use regulations); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 114–24 (2019).

[38] Elmendorf, *supra* note 37, at 127.

[39] *See id.* at 181; Laura Bliss, *Oregon's Single-Family Zoning Ban Was a 'Long Time Coming*,' BLOOMBERG (July 2, 2019), https://www.citylab.com/equity/2019/07 /oregon-single-family-zoning-reform-yimby-affordable-housing/593137 ("In cities with more than 25,000 residents, duplexes, triplexes, fourplexes, and 'cottage clusters' would be allowed on parcels that are currently reserved for single-family houses; in cities of at least 10,000, duplexes would be allowed in single-family zones.").

[40] *See* Stahl, *supra* note 35, at n.7; Kriston Capps, *Denser Housing is Gaining Traction on America's East Coast*, BLOOMBERG (Jan. 3, 2020), https://www.bloomberg.com/news/articles/2020-01-03/maryland-s-ambitious-pitch-for-denser-housing; Kriston Capps, *With New Democratic Majority, Virginia Sees a Push for Denser Housing*, BLOOMBERG (Dec. 20, 2019), https://www.bloomberg.com/news/articles/2019-12-20/inside-the-virginia-bill-to-allow-denser-housing.

[41] Capps, *supra* note 40.

### *A. State Preemption of Zoning and Land Use Regulations*

Once HB 6107 takes effect, Connecticut will become the eighth state to enact state-level legislation concerning ADUs.[42] Generally, ADUs are created out of existing or newly built structures on a single-family property and may serve as granny flats or renovated garage or basement apartments.[43] More permissive regulations regarding the construction of ADUs, like those required by HB 6107, can increase flexible and affordable housing options. A report by the AARP highlights how ADUs provide affordable housing options to a broad range of residents, ranging from elderly family members who wish to live near family to younger families seeking entry-level housing options.[44] Indeed, ADUs provide ideal housing options for multi-generational households, which became increasingly more common during the COVID-19 pandemic.[45] Allowing for ADU construction also benefits homeowners, as the accessory units may be used to generate rental income.[46] One study suggests that the "addition of [accessory apartments] increases the property value of an apartment by about 50%," providing further benefits to homeowners, especially seniors who may be living on fixed incomes.[47]

While most municipalities in Connecticut already allow for the construction of ADUs prior to HB 6107 going into effect, the requirements for their construction vary significantly across local jurisdictions.[48] For example, in Greenwich, an affluent suburb of New York City in southern Connecticut, ADUs can be constructed in most parts of the town, but they must "be occupied by elderly persons or dedicated to affordable housing."[49] Conversely, the neighboring town of Stamford, which is zoned almost entirely for single-family housing, does not allow for the construction of ADUs anywhere inside its borders.[50] Granby, a town in the state's north,

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[42] *2021 Legislative Reforms*, DESEGREGATE CONN. (2021), https://www.desegregatect.org/hb6107.

[43] *See, e.g.*, Mimi Kirk, *The Granny Flats Are Coming*, BLOOMBERG (Jan. 16, 2018), https://www.bloomberg.com/news/articles/2018-01-16/the-rise-of-the-backyard-granny-flat; John Infranca, *Housing Changing Households: Regulatory Changes for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53 (2014); AHMAD ABU-KHALAF, NEW REFLECTIONS ON AFFORDABLE HOUSING DESIGN, POLICY AND PRODUCTION: OVERCOMING BARRIERS TO BRINGING ACCESSORY DWELLING UNIT DEVELOPMENT TO SCALE (2020).

[44] AARP, THE ABCS OF ADUS: A GUIDE TO ACCESSORY DWELLING UNITS AND HOW THEY EXPAND HOUSING OPTIONS FOR PEOPLE OF ALL AGES (2019). Additionally, ADUs provide housing options for older adults with disabilities who are often left out of the housing market. *See* Amy Sokolow, *Massachusetts advocates say in-law apartments will help older adults, people with disabilities*, BOS. HERALD (July 28, 2021), https://www.bostonherald.com/2021/07/28/advocates-say-in-law-apartments-will-help-older-adults-people-with-disabilities/.

[45] Michele Lerner, *'Together as a Family': Multigenerational Living Rises In Pandemic*, WASH. POST (May 13, 2021, 12:00 PM), https://www.washingtonpost.com/realestate/together-as-a-family-multigenerational-living-rises-in-pandemic/2021/05/12/bd8598f6-a900-11eb-8d25-7b30e74923ea_story.html.

[46] AARP, *supra* note 44, at 4.

[47] Sarah Thomaz, *Investigating ADUs: Determinants of Location and Effects on Property Values* (Univ. of Calif., Irvine, Working Paper), https://www.economics.uci.edu/files/docs/workingpapers/JobMarketPaper_Thomaz.pdf; AARP, *supra* note 44, at 4.

[48] *Accessory Apartments*, DESEGREGATE CONN. (2021), https://www.desegregatect.org/adu.

[49] *Connecticut Zoning Atlas*, DESEGREGATE CONN. (2021), https://www.desegregatect.org/atlas.

[50] *Id.*

allows ADUs to be detached on lots larger than two acres, while the state capital Hartford allows ADUs to be built in residential or mixed use zones.[51] Adding further complexity, some municipalities only allow ADUs to be constructed after a public hearing.[52]

Effective January 1, 2022, HB 6107 reforms the state's Zoning Enabling Act to require municipalities to allow ADUs to be developed "as of right on each lot that contains a single-family dwelling."[53] Put differently, once HB 6107 goes into effect, municipal zoning and land use regulations across the state must allow ADUs to be constructed without a permit or public hearing on any lot that contains a single-family house.[54] HB 6107 will allow construction of ADUs that are either attached to or detached from the lot's primary dwelling, and the units may be up to 1,000 square feet or 30% of the area of the lot's primary dwelling (whichever is less).[55] In addition, HB 6107 prohibits municipalities from requiring more than one parking space per ADU and from requiring the installation of a new or separate utility connection, other than to the main dwelling.[56] Finally, HB 6107 also prohibits the requirement of maximum or minimum age requirements for ADUs.[57]

HB 6107 also imposes limits on parking requirements in zoning codes, making Connecticut "the fourth state to enact state-level legislation on parking requirements in zoning."[58] Minimum parking requirements can have a significant effect on housing affordability. In many jurisdictions, municipal regulations require developers to provide a minimum number of on-site parking spaces for housing projects, resulting in the large majority of housing units coming with "bundled" parking spaces.[59] A 2016 study concluded that garage parking costs renters about $1,700 per year and bundling a garage space with a rental unit increases its cost by about 17%.[60] As a result of minimum parking requirements imposed by municipalities around the country, about 708,000 households without a car having a garage parking space bundled with their unit, resulting in "a direct deadweight loss to society estimated to be about $440 million per year."[61] An analysis by the American Planning Association found that after the city of Minneapolis eliminated minimum parking requirements for multifamily buildings, prices

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[51] *Id.*

[52] DESEGREGATE CONN., *supra* note 48. Only 56% of towns allow ADUs to be constructed as-of-right, while the rest of municipalities that allow ADU construction first require an onerous public hearing process. *See* DESEGREGATE CONN., *supra* note 49.

[53] H.B. 6107 § 6(a)(1), 2021 Conn. Acts 29 (Reg. Sess.).

[54] DESEGREGATE CONN., *supra* note 42.

[55] Conn. H.B. 6107 § 6(a)(2)–(3); DESEGREGATE CONN., *supra* note 42.

[56] Conn. H.B. 6107 § (a)(6)(C), (F); DESEGREGATE CONN., *supra* note 42.

[57] Conn. H.B. 6107 § (a)(6)(E); DESEGREGATE CONN., *supra* note 42.

[58] DESEGREGATE CONN., *supra* note 42.

[59] C.J. Gabbe & Gregory Pierce, *Hidden Costs and Deadweight Losses: Bundled Parking and Residential Rents in the Metropolitan United States*, 27 HOUS. POL'Y DEBATE 2, 3 (2016).

[60] *Id.* at 4.

[61] *Id.*

for new studio apartments decreased from around $1,200 per month to less than $1,000 per month.[62]

Effective October 1, 2021, HB 6107 will prohibit municipalities from requiring "more than one parking space for each studio or one-bedroom dwelling unit or more than two parking spaces for each unit with two or more bedrooms."[63] Prior to HB 6107, on average, municipalities in the state with minimum parking requirements required 1.73 spaces per studio apartment and 1.87 spaces per apartments with more than two bedrooms.[64] Some towns in Connecticut went so far as to require "as many as 3 parking spaces for a studio apartment."[65] Thus, HB 6107 will have the greatest impact on jurisdictions with minimum parking requirements for studio or one bedroom units by imposing a cap of one parking space per such unit.[66]

### *B. Limitations on HB 6107's Scope*

Though HB 6107 takes several steps to reform restrictive zoning and land use regulations around Connecticut, significant concessions that narrowed the scope of the bill were necessary to ensure it had enough political support to become law. Several provisions were removed from earlier versions of the bill, including language that would have required municipalities to allow as of right construction of multifamily housing around some transit stations and in downtown corridors and that would have specified how many affordable units municipalities must build.[67] Most significantly, HB 6107 provides an escape hatch to local jurisdictions that are strongly opposed to the law's preemption of local zoning and land use regulations. Municipalities can opt out of HB 6107's ADU provisions and minimum parking requirements with a two-thirds vote of the municipality's zoning or planning commission and a two-thirds vote of its city council (or equivalent legislative body).[68] Municipalities have until January 1, 2023 to opt-out of HB 6107's ADU requirements (which is one year after those provisions go into effect), whereas there is no deadline to opt-out of the law's cap on minimum parking requirements.[69]

The concessions necessary to pass HB 6107 have caused concern among housing advocates in the state. Professor Sara Bronin, founder of the advocacy group Desegregate Connecticut, called the bill's opt-out provisions a "poison pill" akin to "the same backwards thinking that allowed

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[62] Jeffrey Spivack, *People Over Parking*, AM. PLAN. ASS'N (2018), https://www.planning.org/planning/2018/oct/peopleoverparking/.

[63] H.B. 6107 § (d)(9), 2021 Conn. Acts 29 (Reg. Sess.).

[64] DESEGREGATE CONN., *supra* note 42.

[65] *Ending Costly Parking Mandates*, DESEGREGATE CONN. (2021), https://www.desegregatect.org/parking.

[66] DESEGREGATE CONN., *supra* note 42.

[67] *See* S.B. 1024, Jan. Sess. 2021 (Conn. 2021); Thomas, *supra* note 24.

[68] H.B. 6107 §§ 5, 6(f).

[69] *Id*. at § 6.

us to be segregated and economically depressed."[70] With Republican legislators united in their opposition to HB 6107 on ideological home rule grounds,[71] concessions limiting the bill's scope were necessary to secure enough support from suburban Democrats for the bill to pass.[72] As a result, municipalities with restrictive zoning and land use regulations, where HB 6107's reforms are most needed, could conceivably muster enough opposition to the bill to opt-out of its two most significant preemptive provisions.

The political opposition to HB 6107 in Connecticut is just one example of the difficulty states face in passing preemptive zoning and land use legislation, despite its advantages over concentrating all authority at local planning meetings.[73] In Virginia, the bill that would have required municipalities to allow duplexes to be constructed in neighborhoods across the commonwealth died in committee after "members raised concerns about allowing the state to exercise more influence over zoning, which is traditionally handled by local governments."[74] The Maryland bill that would have required denser forms of housing to be built in "high-opportunity" areas met resistance in committee from delegates "who expressed doubts that the state should get involved in land use, which is traditionally the purview of local government."[75] In California, proponents of local control claimed that a bill requiring local governments to allow construction of multifamily housing near rail stations and in most single-family neighborhoods was a "significant incursion by the state into local affairs" and blocked it from leaving committee.[76]

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[70] Jacqueline Rabe Thomas, *CT Legislators Underwhelmed With Housing Reform Bill That Passes House*, CONN. MIRROR (May 20, 2021), https://ctmirror.org/2021/05/20/ct-legislators-underwhelmed-with-housing-reform-bill-that-passes-house/.

[71] Thomas, *supra* note 24 ("'Towns know what's right for individual towns and I want to make sure that we protect the different areas that the town sees is important, that we protect our open spaces, that we protect just who we are in our towns,' Sen. Dan Champagne, R-Vernon.").

[72] *Id*. (H.B. 6107 passed on a near party-line vote, with every Republican member of both houses voting against the bill and nine Democrats (eight representatives and one senator) representing suburban districts joining the Republicans.); Thomas, *supra* note 70.

[73] One legal advantage states have in preempting local zoning regulations is the absence of any significant constitutional barriers, unlike those which limit the federal government's efforts to condition federal funds (discussed *infra* Section III). As a general matter, the Federal Constitution treats state and local relations as a matter within the exclusive domain of the states and does not recognize municipal governments. *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2008 (2018).

[74] Ally Schweitzer, *An Ambitious Housing Proposal in Virginia is Dead – For Now*, WAMU (Jan. 23, 2020), https://wamu.org/story/20/01/23/an-ambitious-housing-proposal-in-virginia-is-dead-for-now/. The failure of Virginia's duplex bill speaks to the political strength of the local control argument at the state level, considering that municipalities in Virginia had no formal home rule authority to resist the preemptive law. Stahl, *supra* note 35, at n.10.

[75] Ally Schweitzer, *A Push for Denser Housing in Maryland Faces Doubt Among Lawmakers*, WAMU (Mar. 5, 2020), https://wamu.org/story/20/03/05/a-push-for-denser-housing-in-maryland-faces-doubt-among-lawmakers/.

[76] Liam Dillon, *The Revenge of the Suburbs: Why California's Effort to Build More in Single-Family-Home Neighborhoods Failed*, L.A. TIMES (May 22, 2019), https://www.latimes.com/politics/la-pol-ca-california-sb50-failure-single-family-homes-suburbs-20190522-story.html.

Undoubtedly, it is far more difficult for "neighborhood defenders" to exploit mechanisms of participatory politics to influence zoning and land use decisions at the state level, where their concerns over individual projects affecting "neighborhood character" carry less weight than in local planning meetings.[77] Nonetheless, opponents of preemptive state zoning legislation have successfully exploited concerns regarding loss of local control of zoning and land use regulation to limit or block state legislation.[78] These concerns allow state legislators to adopt an implacable ideological high ground, embracing abstract notions of home rule and local control rather than engaging with claims that numerous municipalities exercising local control over zoning and land use decisions have negatively impacted housing affordability across a state.[79] Because zoning has historically been the prerogative of local government,[80] the argument goes, so shall it remain.

[77] EINSTEIN ET AL., *supra* note 14.

[78] *See id.*; Schweitzer, *supra* note 75; Thomas, *supra* note 24.

[79] Indeed, while HB 6107's opponents decried the bill's attempts to wrest control of zoning and land use regulations away from local governments, a compilation of zoning codes in every Connecticut municipality reveals that when left to their own devices, most local governments in the state will either not allow construction of any multi-family housing or will only allow it in select areas. *See* Thomas, *supra* note 24; DESEGREGATE CONN., *supra* note 49.

[80] Stahl, *supra* note 35, at 182 ("Local control of land use has been so unquestioned for so long that it is tempting to think it must just be a 'municipal affair.'").

## II. FEDERAL EFFORTS TO REFORM LOCAL ZONING AND LAND USE REGULATIONS

The pervasiveness and success of the "local control" argument at the state level suggests a role for the federal government in shaping local zoning and land use policy. The primary means through which the federal government can shape local zoning and land use policy is by placing conditions on federal funds that flow to local jurisdictions.[81] In this section, I first discuss the two different approaches through which the federal government can incentivize local jurisdictions to reform zoning and land use regulations by placing conditions on federal funds: the carrot approach and the stick approach. I then explain why the stick approach is a more effective way for the federal government to shape local zoning and land use policy, before turning to a constitutional analysis of the HOME Act in Section III.

### *A. The Carrot Approach*

The federal government can seek to increase affordable housing supply by offering competitive grants to local jurisdictions. These grants are designed to entice local jurisdictions to enact zoning and land use regulations that would allow for increased housing development. There are some benefits to offering grants on a competitive basis, or, as I phrase it in this article, the carrot approach. For instance, attaching conditions to new competitive grants, rather than threatening to "terminate other significant independent grants," would not raise the constitutional issues I discuss in Section III of this article.[82] In addition, the scarcity of competitive federal grants could incentivize local jurisdictions in need of a particular source of funding to enact policies desired by the federal government.[83]

In this section, I discuss policy proposals through which the federal government would employ the carrot approach to incentivize local jurisdictions to reform their zoning and land use regulations. The carrot approach has gained support from both sides of the aisle and appears to be a feature of President Biden's infrastructure plan. The carrot approach is unlikely to incentivize increased housing development where it is most needed, however, and thus is not the most effective way for the federal government to incentivize local jurisdictions to reform restrictive local zoning and land use regulations.

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[81] I discuss why the federal government would likely be prohibited on Tenth Amendment anti-commandeering grounds from simply mandating that states or local governments implement inclusive zoning and land use policies. *See* discussion *infra* Section III.B.1.

[82] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012); *see also* Grace E. Leeper, Note, *Conditional Spending and the Need for Data on Lethal Use of Force*, 92 N.Y.U. L. REV. 2053, 2080 (2017).

[83] Race to the Top, a competitive grant program created by the 2009 American Recovery and Reinvestment Act that encouraged states to adopt education innovation, is an example of this strategy employed successfully. *See* Leeper, *supra* note 83, at 2087, n.174.

### *1. Federal Housing Policies that Adopt the Carrot Approach*

The carrot approach was popular among the housing policy platforms of candidates for the Democratic Party's nomination for president in the 2020 campaign. Then-candidate Senator Elizabeth Warren proposed "a $10 billion new competitive grant program" that would be available to state and local governments that reformed their zoning and land use regulations.[84] Recipients of these funds could use them "to build infrastructure, parks, roads, or schools" so long as they reformed their zoning and land use regulations "to allow for the construction of additional well-located affordable housing units and to protect tenants from rent spikes and eviction."[85] In her campaign for president, Senator Amy Klobuchar of Minnesota also embraced the carrot approach. Referencing the Minneapolis 2040 initiative,[86] she proposed prioritizing federal housing and infrastructure funding for jurisdictions with "updated" zoning and land use regulations.[87]

The carrot approach has also found support in proposed legislation. Most recently, a bipartisan group of senators, including Senator Klobuchar, introduced the "Housing Supply and Affordability Act" to create a competitive grant program aimed at increasing the supply of affordable housing.[88] The bill would authorize $300 million per year for the next five years for "planning grants" and "implementation grants" for local governments that commit to increase the supply of housing in their jurisdictions.[89] Specifically, local jurisdictions that plan to "(i) improve housing supply and affordability . . . (ii) reduce barriers to affordable housing development; and (iii) avoid the displacement of residents by new housing developments in the area under the jurisdiction of the eligible entity" would receive priority for the grants.[90] The bill would also prioritize local jurisdictions that seek to "increase the supply and affordability of housing" near "local transit options" and "areas in which a significant or expanding supply of jobs is concentrated."[91] In general, the bill represents a bipartisan recognition that local governments are unable to overcome obstacles to new housing development on their own and offers financial carrots that would help local governments achieve this goal.

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[84] PROTECTING & EMPOWERING RENTERS, WARREN DEMOCRATS, https://elizabethwarren.com/plans/protecting-empowering-renters?source=soc-WB-ew-tw-rollout-20191118 (last visited Apr. 7, 2021).

[85] *Id.*

[86] Patrick Sisson, *Can Minneapolis's Radical Rezoning be a National Model?*," CURBED (Nov. 27, 2018), https://archive.curbed.com/2018/11/27/18113208/minneapolis-real-estate-rent-development-2040-zoning.

[87] Amy Klobuchar, *Senator Klobuchar's Housing Plan*, MEDIUM (July 25, 2019), https://medium.com/@Amy_Klobuchar/senator-klobuchars-housing-plan-761e9f93f3a4.

[88] S.B. 5061, 116th Cong. (2020); *see also* Kriston Capps, *Bipartisan Bill Would Bring $1.5 Billion to Spur New Housing*, BLOOMBERG (Mar. 23, 2021), https://www.bloomberg.com/news/articles/2021-03-23/klobuchar-bill-would-offer-yimby-grants-to-cities?sref=rT5Gzxsc.

[89] Housing Supply and Affordability Act, H.R. 2126, 117th Cong. § 2(h), (f)(1)–(2) (2021); Capps, *supra* note 88.

[90] *Id.* at § 2(e)(A)(i)–(iii).

[91] *Id.* at § 2(d)(C)(i)(I), (II).

The idea of using the carrot approach to encourage local jurisdictions to reform their zoning and land use regulations has made its way into President Biden's proposed infrastructure package, called "The American Jobs Plan."[92] Included among the housing elements of the American Jobs Plan is a proposal to eliminate "exclusionary zoning laws" through a "$5 billion incentive program that awards flexible funding to jurisdictions that take concrete steps to reduce barriers to affordable housing production."[93] The zoning reform proposal in the American Jobs Plan appears similar in nature to the Housing Supply and Affordability Act, only that it appears to propose $5 billion in new competitive grants rather than $1.5 billion.[94] Summing up the policy, one White House official described it as "purely carrot, no stick."[95]

*2. Issues with the Carrot Approach*

While policy proposals adopting the carrot approach currently seem to be in favor with policymakers, this approach is not likely to incentivize reforms to local zoning and land use regulations where they are most needed. It is true that programs adopting the carrot approach can provide federal funding streams for smaller cities and localities to reform their zoning and land use policies.[96] While this approach may have a positive effect on housing affordability on the margins, it will not strongly incentivize reform in affluent jurisdictions with an inadequate supply of housing because of restrictive zoning and land use regimes—the very places where such reforms are most needed.[97] This is because localities with restrictive zoning regimes that contribute to expensive housing markets tend to have wealthier residents, meaning they have higher tax bases.[98] As a result, "the threat of

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[92] FACT SHEET: THE AMERICAN JOBS PLAN WILL PRODUCE, PRESERVE, AND RETROFIT MORE THAN 2 MILLION AFFORDABLE HOUSING UNITS AND CREATE GOOD PAYING JOBS, THE WHITE HOUSE (May 26, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/26/fact-sheet-the-american-jobs-plan-will-produce-preserve-and-retrofit-more-than-2-million-affordable-housing-units-and-create-good-paying-jobs/. As of this writing, the housing elements of the American Jobs Plan appear more likely to be included in a subsequent legislative package that will need to pass the Senate on a party-line, budget reconciliation vote, rather than the initial, bipartisan legislative package currently under debate. *See* Georgia Kromrei, *Biden renews push for housing in infrastructure plan*, HOUS. WIRE (July 9, 2021, 2:54 PM), https://www.housingwire.com/articles/biden-renews-push-for-housing-in-infrastructure-plan/.

[93] THE WHITE HOUSE, *supra* note 92.

[94] Andrew Ackerman & Nicole Friedman, *Biden's Infrastructure Plan Seeks to Ease Housing Shortage With Looser Zoning Rules; The Proposed Program of at Least $5 Billion Would Offer Grants to Cities and Towns That Relax Restrictions on New Construction*, WALL ST. J. (Apr. 7, 2021), https://www.wsj.com/articles/biden-seeks-to-ease-housing-shortage-with-looser-zoning-rules-11617796817 (citing an unnamed administration official on the amount of funding); Capps, *supra* note 89 (noting that the Housing Supply and Affordability Act could "eventually wind its way into the massive $3 trillion infrastructure bill.").

[95] Jonathan Allen, *All Carrot, 'no stick' in Biden's affordable housing plan*, NBC NEWS (Apr. 3, 2021), https://www.nbcnews.com/politics/white-house/all-carrot-no-stick-biden-s-affordable-housing-plan-n1262907.

[96] *See* Capps, *supra* note 88.

[97] *See* Metcalf, *supra* note 13.

[98] Emily Hamilton, *Opportunities for Better Federal Housing Policy: How the Biden Administration and Congress Can Improve Housing Affordability*, MERCATUS CTR. GEO. MASON U.

losing federal funds may not be an effective incentive" for those jurisdictions to reform their local zoning and land use regulations because "[t]he importance of federal funds to localities' ability to fund public services is roughly inversely proportional to the benefits of local zoning reform."[99] Put differently, local jurisdictions that would benefit the most from reforms to their zoning and land use regulations would benefit the least from a new source of federal funds for their public services. Because these jurisdictions have less of a need for these newly available federal funds, they would be less incentivized to enact the reforms to their zoning and land use regulations necessary to access them.

In response to the multiple proposals that have adopted the carrot approach, affordable housing practitioners have offered similar critiques. As David Dworkin, president and CEO of the National Housing Conference, put it: "[t]here's no carrot if you don't eat carrots," calling on policymakers to "go further" in order to materially affect the issue of housing supply in jurisdictions with expensive housing because of restrictive zoning and land use regulations.[100] Taking the vegetable refusal analogy further, economist Jenny Schuetz noted that "deliberately exclusionary places are unlikely to bite at fiscal carrots," like those offered by federal housing policies proposing the carrot approach.[101] Touching on a point raised by the authors in *Neighborhood Defenders*, housing analyst Jaret Seiberg noted that "[t]he problem is that local communities impose these zoning limits because voters in those neighborhoods demand them."[102] In order to make headway in these communities, Seiberg reasoned, "federal lawmakers would need to be more aggressive."[103]

Seiberg touches on a common theme among the critiques of the carrot approach from affordable housing practitioners: the federal government is not doing enough to address the issue of shortfalls in housing supply. For example, in lieu of the carrot approach, affordable housing advocates argue that grant money must be "tied to federal dollars for roads and highways" for federal efforts to be successful in wealthier areas.[104] The HOME Act, which I examine in detail in the next section, adopts the stick approach to do just that.

### *B. The Stick Approach*

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(Jan. 28, 2021), https://www.mercatus.org/publications/housing/opportunities-better-federal-housing-policy-how-biden-administration-and.

[99] *Id.*

[100] Ackerman & Friedman, *supra* note 94.

[101] Capps, *supra* note 88.

[102] Jacob Passy, '*The Biggest Proposal We've Seen in a Long Time': How Biden's $2.3 Trillion Infrastructure Plan Will Invest in America's Housing*, MARKETWATCH (Apr. 5, 2021, 9:22 PM), https://www.marketwatch.com/story/the-biggest-proposal-weve-seen-in-a-long-time-bidens-american-jobs-plan-would-make-a-major-investment-in-affordable-housing-11617395362.

[103] *Id.*

[104] Ackerman & Friedman, *supra* note 94 (citing skepticism from affordable housing advocates that the American Rescue Plan's housing proposals would be effective in wealthier areas).

Applying the stick approach, Congress can impose conditions on existing sources of funding to incentivize grant recipients to reform their zoning and land use regulations. Like the carrot approach, the issue of reforming restrictive zoning and land use regulations through the stick approach has drawn bipartisan political support at the federal level. Before changing course in an ill-fated electoral strategy to "save our suburbs,"[105] the Trump Administration's Department of Housing and Urban Development (HUD) viewed reforms to local zoning and land use regulations as an important policy tool to address the housing affordability crisis.[106] Specifically, former HUD Secretary Ben Carson proposed revisions to the Affirmatively Furthering Fair Housing Rule[107] in 2018 that would require local governments receiving CDBG funds to reform zoning and land use regulations in order to increase housing supply.[108] This line of action found support among congressional Republicans. For example, Senator Todd Young (R-IN) introduced the Yes In My Backyard Act in 2019, which would amend the CDBG statute to require grantees to provide a plan to reform "discriminatory land use policies" in order to continue receiving CDBG funding.[109]

The most prominent example of the stick approach from the political left is the HOME Act. In the next section, I provide an overview of the grant programs to which the HOME Act attaches conditions and how the Act would affect those programs. In Section III, I then turn to the potential legal issues raised by the HOME Act's conditions on STBG funds.

*1. The HOME Act*

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[105] Donald J. Trump & Ben Carson, Opinion, *We'll Protect America's Suburbs*, THE WALL ST. J. (Aug. 16, 2020, 4:02 PM), https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133 (the Trump Administration's pivot months before the 2020 Presidential Election to the argument that "[i]t would be a terrible mistake" to involve the federal government in local zoning decisions was striking, considering that HUD proposed a policy in 2018 that would have done just that). *See* Kriston Capps, *Ben Carson Is a YIMBY Now and Everything's Confusing*, BLOOMBERG (Aug. 14, 2018, 4:07 PM), https://www.bloomberg.com/news/articles/2018-08-14/is-hud-secretary-ben-carson-targeting-zoning-or-fair-housing?sref=rT5Gzxsc; Archive: Ben Carson (@Secretary Carson), TWITTER (Sept. 12, 2018, 3:55 PM), https://twitter.com/SecretaryCarson/status/1039965760012132358?s=20; U.S. DEP'T OF HOUS. & URBAN DEV., OFF. OF POL'Y DEV. & RSCH., *Eliminating Regulatory Barriers to Affordable Housing: Federal, State, Local, and Tribal Opportunities* (2021).

[106] *See* Archive: Ben Carson (@Secretary Carson), TWITTER (Sept. 12, 2018, 3:55 PM), https://twitter.com/SecretaryCarson/status/1039965760012132358?s=20; U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 105.

[107] The rule has been a political football in recent years. It was first enacted by the Obama Administration in 2015; *see* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 90s), then withdrawn and replaced by the Trump Administration in 2020; *see* Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903), and as of this writing appears likely to be reinstated by the Biden Administration; *see* Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7,487 (Jan. 29, 2021).

[108] *See* Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,713 (proposed Aug. 16, 2018) (to be codified at 24 C.F.R pts. 5, 91, 92, 570, 574, 576, and 903); Capps, *supra* note 105.

[109] Yes In My Backyard Act, S. 1919, 116th Cong. § 2 (2019) [hereinafter YIMBY Act].

The HOME Act merits close analysis for two reasons. First, President Biden explicitly pledged support for the bill in his campaign for president.[110] Marcia Fudge, President Biden's HUD Secretary, responded to a question about exclusionary zoning in her confirmation hearing by saying "[w]e have to get rid of this notion of not in my backyard . . ." and discussed the need to incentivize developers to "assist us in getting these communities to change their zoning laws."[111] Thus, it is clear that the Biden Administration has an interest in tackling restrictive zoning and land use regulations and previously expressed support for a specific bill that would accomplish this goal through the stick approach.[112] Second, the HOME Act differs significantly from earlier Republican proposals to reform local zoning and land use regulations through the stick approach, as it conditions CDBG *and* STBG funding on local implementation of an inclusionary zoning regime. Adding conditions to STBG funding is significant. As demonstrated in Table 1 below, STBG funding would have accounted for over 75% of the funding at stake between the two programs had the HOME Act been in effect in each of the last four fiscal years.

**TABLE 1.**[113]

| Fiscal Year | Total CDBG Obligations | Total STBG Obligations |
|---|---|---|
| 2017 | $1.9 Billion | $11.9 Billion |
| 2018 | $4.0 Billion | $13.1 Billion |
| 2019 | $3.9 Billion | $12.4 Billion |
| 2020 | $2.6 Billion | $13.6 Billion |

[110] THE BIDEN PLAN FOR INVESTING IN OUR COMMUNITIES THROUGH HOUSING, *supra* note 29.

[111] *Secretary and Chair, Council of Economic Advisers Nomination Hearings: The Honorable Marcia L. Fudge, of Ohio and The Honorable Cecilia E. Rouse, of New Jersey Before the Senate Comm. On Banking, Hous., & Urb. Affs.*, 117th Cong. (2021), https://www.banking.senate.gov/hearings/01/21/2021/nomination-hearing.

[112] Of course, endorsing a bill on the campaign trail requires far less political capital than shepherding it through the legislative process to its eventual passage into law. Shifting political dynamics may make the latter course of action infeasible. Nonetheless, the HOME Act's innovative approach makes it worthy of close analysis as a potential option for Congress to use its power under the Spending Clause to reform restrictive local zoning and land use regulations.

[113] *Spending Explorer*, USASPENDING, https://www.usaspending.gov/explorer/object_class (last visited Apr. 26, 2021) [hereinafter USASPENDING].

*a. The CDBG Program*

The CDBG program provides multiple forms of block grants that are appropriated directly to states and local jurisdictions "to develop viable urban communities . . . and a suitable living environment, and by expanding economic opportunities, principally for low-and-moderate income persons."[114] Of these different funding streams, most relevant for the purposes of the HOME Act is the CDBG Entitlement Program, which uses a statutory formula to allocate block grants to local jurisdictions.[115] In order to be eligible for funds from the CDBG Entitlement Program, (as well as other grants from HUD), local grantees submit a comprehensive assessment of their affordable housing and community development needs (the "Consolidated Plan") to HUD every three to five years.[116] HUD reviews the Consolidated Plan to ensure consistency with the CDBG program's purposes and compliance with various regulatory and statutory requirements.[117] In addition, grantees with an approved Consolidated Plan must submit an annual performance report (the "Annual Performance Report") detailing steps taken to achieve goals laid out in the Consolidated Plan.[118]

The Consolidated Plan is the vehicle through which the HOME Act seeks to reform local zoning and land use regulations. Specifically, the Act would require grantees receiving CDBG funds to "include in the consolidated plan . . . a strategy to support new inclusive zoning policies, programs, or regulatory initiatives that create a more affordable, elastic, and diverse housing supply and thereby increase economic growth and access to jobs and housing."[119] The Act would also require grantees to demonstrate "continuous progress" in achieving the goals of its affordable housing strategy by including reports of such progress in its Annual Performance Reports.[120]

The HOME Act lists several elements that grantees must include in their affordable housing strategy. Many of these required elements relate directly to local zoning and land use regulations. In general, the Act would require grantees to: "(A) demonstrate—

"(i) transformative activities in communities that—

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[114] *Community Development Block Grant Program*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/comm_planning/cdbg#programs (last visited Mar. 23, 2021); Jenny Schuetz, *HUD Can't Fix Exclusionary Zoning by Withholding CDBG Funds,* BROOKINGS INSTITUTE (Oct. 15, 2018), https://www.brookings.edu/research/hud-cant-fix-exclusionary-zoning-by-withholding-cdbg-funds/; *see also* 42 U.S.C. §§ 5321–5322 (2011).

[115] Schuetz, *supra* note 114; *see also* 42 U.S.C. § 5306 (2011).

[116] *Consolidated Plan Process, Grant Programs, and Related HUD Programs*, U.S. DEP'T OF HOUS. & URB. DEV. EXCH., https://www.hudexchange.info/programs/consolidated-plan/consolidated-plan-process-grant-programs-and-related-hud-programs/ (last visited Mar. 23, 2021); *see also* 42 U.S.C. § 5304; 24 C.F.R. § 91 (1995).

[117] *See* 24 C.F.R. § 91.500 (1999).

[118] *See* 24 C.F.R. § 91.520 (2020).

[119] Housing, Opportunity, Mobility, and Equality Act of 2019, S. 2684, 116th Cong. § 2(n)(1)(A) (Oct. 23, 2019).

[120] *Id*. at § 2(n)(1)(B).

"(I) reduce barriers to housing development, including affordable housing; and

"(II) increase housing supply affordability and elasticity; and

"(ii) strong connections between housing, transportation, and workforce planning."[121]

More specifically, the Act directs grantees to include specific policies "relating to inclusive land use," including, "as appropriate":

> (I) authorizing high-density and multifamily zoning;
> (II) eliminating off-street parking requirements;
> (III) establishing density bonuses, defined as increases in permitted density of a housing development conditioned upon the inclusion of affordable housing in such development;
> (IV) streamlining or shortening permitting processes and timelines;
> (V) removing height limitations;
> (VI) establishing by-right development, defined as the elimination of discretionary review processes when zoning standards are met;
> (VII) using property tax abatements; and
> (VIII) relaxing lot size restrictions . . .[122]

The Act also includes separate provisions creating a tax credit for certain renters and requiring grantees to make housing accessible to such renters.[123]

In summary, the HOME Act would significantly alter the parameters of the CDBG program. In order to be eligible for CDBG funding, grantees would be required to implement a variety of policies that would make it easier to develop new housing. The Act would take direct aim at many of the specific zoning and land use regulations identified by economists as responsible for driving up housing prices by limiting the development of new housing.[124] These provisions of the HOME Act are similar, at least in principle, to other housing proposals advanced by Republicans.[125] Taken together, they represent a bipartisan federal interest in adopting the stick approach by conditioning certain federal housing funds on the adoption of pro-development zoning and land use regulations at the local level.

Despite having bipartisan support and employing the stick approach, there is reason to believe that only conditioning CDBG funding on implementation of an affordable housing strategy would pose the same issues as proposals adopting the carrot approach. Jenny Schuetz analyzed

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[121] *Id*. at § 2(n)(2)(A).
[122] *Id*. at § 2(n)(2)(B).
[123] *Id*. at §§ 2(n)(2)(B), 3(2)(i).
[124] *See, e.g.*, Schuetz, *supra* note 10, at 302–05.
[125] *See* Ben Carson, *supra* note 106; YIMBY Act, *supra* note 109.

local jurisdictions that received CDBG funds in California and New Jersey to determine whether there was overlap between CDBG grantees and local jurisdictions with restrictive zoning and land use policies.[126] Schuetz noted that the statutory formula through which HUD calculates CDBG funding levels is influenced heavily by a jurisdiction's poverty rates and quality of housing.[127] As a result, Schuetz concluded that CDBG funds are more likely to go to lower income jurisdictions with less exclusive housing markets.[128] In California, Schuetz found that "only 17[%] of the most exclusive communities receive any CDBG funding, compared with 37[%] of less exclusive communities."[129] Moreover, those exclusive communities in California received only $5 per capita in CDBG funding, compared to $10 per capita in less exclusive communities.[130] In New Jersey, Schuetz found that none of the state's most exclusive communities received any direct CDBG funding.[131]

These findings suggest that conditioning *only* CDBG funding on implementation of an inclusive zoning regime is unlikely to increase new housing development in expensive jurisdictions that may have restrictive zoning and land use regulations. In other words, like the carrot approach, it would not go far enough to meaningfully increase housing supply in expensive jurisdictions. As Schuetz noted, "CDBG would be a blunt instrument to influence governments most in need of zoning reform."[132] Considering how HUD allocates CDBG funds, this makes sense. Jurisdictions with higher levels of poverty and lower quality housing are more likely to receive greater amounts of CDBG funds than jurisdictions with expensive housing.[133] Therefore, conditioning CDBG funding on implementation of an affordable housing strategy would likely fail to incentivize zoning and land use reforms in more affluent jurisdictions with restrictive zoning and land use regulations—where such reforms are most needed.

*b. The STBG Program*

Perhaps heeding this advice, the HOME also conditions STBG funding on the implementation of an affordable housing strategy.[134] The STBG program was created in 2015 by the Fixing America's Surface

[126] Schuetz, *supra* note 114. Schuetz focused on California because it "has some of the nation's most expensive housing" and New Jersey because it "has a decades-long history of wealthy suburbs attempting to block housing that is affordable to low-income renters."

[127] *Id.*; *see also* 42 U.S.C. § 5306 (2011).

[128] Schuetz, *supra* note 114.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *See* 42 U.S.C. § 5306 (2010).

[134] Housing, Opportunity, Mobility, and Equity Act of 2019, H.R. 4808, 116th Cong. § 3 (2019).

Transportation (FAST) Act.[135] The FAST Act only authorized appropriations for federal highway programs, including STBG, through fiscal year 2020, but Congress extended the funding through September 30, 2021.[136] The program is funded by contract authority from the Highway Account of the Highway Trust Fund, subject to statutory limits on obligations.[137] STBG funds, like CDBG funds, are structured as block grants and are meant to provide "flexible funding to address State and local transportation needs."[138]

Unlike the CDBG program, Congress does not appropriate STBG funds directly to local jurisdictions. The process through which STBG funds make their way into transportation projects is complex and closely intertwined with other federal transportation programs administered by the Federal Highway Administration (FHWA).[139] In general, Congress authorizes appropriations from the Highway Trust Fund for several surface transportation programs, including STBG funds.[140] The FWHA then apportions STBG funds for each of these programs to states pursuant to a statutory formula.[141]

States allocate a specified percentage of apportioned STBG funds among areas of the state based on population, then states sub-allocate the funds based on additional divisions of the state's population.[142] Finally, after setting aside a percentage of funds for certain bridge projects, states may use the remaining funds for projects eligible for STBG funding anywhere in the state.[143] In practice, state departments of transportation usually initiate eligible projects, receive bills from contractors for work performed, send vouchers to FHWA requesting federal funds, and then, after approval from FHWA, receive from the Treasury Department the federal share of a project's cost.[144] For STBG projects, the federal government will generally fund 80% of the project cost, unless the project is part of the Federal Interstate System, in which case the federal government will usually fund 90% of the project.[145]

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[135] Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312, 1339 (2015). More specifically, the FAST Act converted a predecessor program, the Surface Transportation Program, into the STBG program.

[136] *See* Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, 134 Stat. 709, 725–26 (2020). As of this writing, the final text of a bipartisan infrastructure bill reauthorizes appropriations for federal highway programs through 2026. *See* Zachary Sherwood & Brandon Lee, *What to Know in Washington: Senate Poised to Pass Infrastructure*, BLOOMBERG GOV'T (Aug. 2, 2021), https://about.bgov.com/news/what-to-know-in-washington-senate-poised-to-pass-infrastructure/.

[137] 23 U.S.C. §§ 104(a)(1), (b)(2).

[138] 23 U.S.C. § 133(a).

[139] *See* 23 U.S.C. § 104 (providing how funds are appropriated from the Highway Trust Fund among various highway transportation programs); *see also* U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., FUNDING FED. - AID HIGHWAYS (2017).

[140] 23 U.S.C. §§ 104(a)–(b).

[141] *Id.* at § 104(b).

[142] 23 U.S.C. § 133(d).

[143] *Id.* at § 133(d)(1)(B).

[144] U.S. DEP'T OF TRANSP., *supra* note 139.

[145] *See* 23 U.S.C. §§ 120(a)–(b).

As mentioned above, STBG funding is flexible in nature. "Virtually any federally eligible mass transit use may receive STBG funds."[146] Eligible projects include federal-aid highways, bridge projects on public roads, bridge and tunnel inspection (and training of bridge and tunnel inspectors), and capital transit projects, among several others.[147] A number of transportation infrastructure projects are also eligible for STBG funding, such as railway-highway grade crossings, fringe and corridor parking facilities, and certain pedestrian and bicycle projects.[148] The emphasis on transportation infrastructure comports with Congress's intent that STBG be used for a variety of projects, beyond just the construction and maintenance of roadways. Of particular relevance to the HOME Act is a subsection titled "Transportation needs of 21st Century," which is a policy declaration that "the connection between land use and infrastructure is significant."[149]

Projects must meet a few requirements in order to be eligible for STBG funding. For instance, projects must be identified in and consistent with various state-wide transportation plans that states submit to the Department of Transportation.[150] These plans are similar in nature to the Consolidated Plan and Annual Performance Report.[151] In addition, when allocating funds for projects, states must coordinate with the relevant metropolitan or rural planning organizations and projects must comply with statutory transportation planning provisions.[152]

The HOME Act would add significant requirements for projects to be eligible for STBG funding. Specifically, the Act would add a subsection to the STBG statute providing that "[a] project under this section may not be carried out unless the community in which the project is located has implemented a strategy to increase affordable housing stock as described in subsection (n) of section 104 of the Housing and Community Development Act of 1974 (42 U.S.C. 5304)."[153] In effect, the HOME Act would incorporate by reference into the STBG statute the affordable housing strategy that the Act would require CDBG grantees to implement in order for projects to be eligible for STBG funds. Therefore, any "community" in which a transit project receiving STBG funding was to be carried out would need to implement an affordable housing strategy, as provided in Section 2 of the HOME Act and detailed above.[154]

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[146] Robert S. Kirk, CONG. RSCH. SERV., R44332, FEDERAL-AID HIGHWAY PROGRAM (FAHP): IN BRIEF (2021).

[147] 23 U.S.C. § 133(b).

[148] *Id.*

[149] 23 U.S.C. § 101(b)(3)(F).

[150] 23 U.S.C. § 133(d)(5).

[151] *See supra* Section II.B.1.a.

[152] *See* 23 U.S.C. §§ 134–135.

[153] Housing, Opportunity, Mobility, and Equity Act of 2019, S. 2684, 116th Cong. § 3. (Oct. 23, 2019).

[154] *See supra* Section II.B.1.a. I discuss how the Act's use of the term "community" would likely work in practice. *See* discussion *infra* Section III.A.2.

The Biden Administration's proposal to allocate billions of additional dollars in transportation funding to states[155] creates an ideal legislative environment to use the stick approach to condition STBG funds on reforms to local zoning and land use regulations. If the HOME Act's conditions were added to newly increased amounts of STBG funds, states would presumably be required to show that a project benefitting from those funds took place in a "community" that had implemented an affordable housing strategy in order to receive approval from the FHWA for use of the STBG funds.[156] Otherwise, states would be on the hook for the federal share of any otherwise-eligible STBG projects in these communities, which in most cases would amount to 80% of a project's cost.[157] This would create a strong incentive for states to pressure exclusionary local jurisdictions to reform their restrictive zoning and land use regulations, either by applying indirect political pressure or by enacting legislation to pre-empt restrictive zoning and land use regulations.[158] Arguments from opponents of preemptive state zoning legislation may be less influential when maintaining "local control" over zoning and land use decisions results in local governments losing access to valuable federal transportation dollars. States that refused to influence exclusionary local jurisdictions to take these steps would risk losing access to billions of dollars in flexible federal transportation funding. As a result, the transportation infrastructure in areas of these states would suffer, especially in comparison to jurisdictions in other states that were able to benefit from STBG funds.

The HOME Act's conditions on STBG funds would also effectively employ the stick approach by imposing a more difficult cost-benefit analysis directly on local jurisdictions with restrictive zoning and land use regulations. Because STBG projects "touch nearly every community," conditioning funding for these projects on implementation of an affordable housing strategy "would have a significant widespread impact" on local transportation policy.[159] Consequently, "it would be hard for a city to pass on STBG money to avoid having to reform its zoning laws."[160] Local governments may struggle to find other resources to maintain or upgrade their transportation infrastructure. Thus, losing access to previously available STBG funds could carry negative political consequences for local elected officials if they were unable to maintain or upgrade transportation infrastructure in their jurisdictions. These negative political consequences

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[155] *See* Sherwood & Lee, *supra* note 136.

[156] Housing, Opportunity, Mobility, and Equity Act of 2019 § 3; U.S. DEP'T OF TRANSP., *supra* note 139.

[157] *See* 23 U.S.C. § 120(b).

[158] *See* Infranca, *supra* note 22.

[159] Melissa Winkler, *Leveraging Federal Funds to Incentivize Land Use and Zoning Reform*, UP FOR GROWTH (Jan. 7, 2021), https://www.upforgrowth.org/sites/default/files/2021-01/UFGPolicyBriefFederalIncentives2021-01-07.pdf.

[160] Jeff Andrews, *Cory Booker and Elizabeth Warren Want to Force Cities to Adopt YIMBY Policies. Can They?*, CURBED (July 22, 2019), https://archive.curbed.com/2019/7/22/20699372/yimby-cory-booker-elizabeth-warren-election-2020.

would create a more difficult cost-benefit analysis for local officials that maintained restrictive zoning and land use regulations, despite a deterioration in local transportation infrastructure.

As compared to policies that would adopt the carrot approach, the HOME Act's conditions on STBG funding would more directly and consequentially impact a greater number of jurisdictions with restrictive zoning and land use regulations. Both state and local governments would face difficult decisions regarding whether to lose access to flexible federal transportation funding or to continue to allow restrictive zoning and land use regulations to drive up housing costs. For these reasons, the HOME Act would more effectively incentivize these jurisdictions to reform their zoning and land use regulations to allow for increased housing supply than other proposals that would adopt the carrot approach.

## III. CONSTITUTIONAL ISSUES RAISED BY THE HOME ACT

Though more likely to be effective, the HOME Act's conditions on STBG funding raise legal questions regarding Congress's authority under the Spending Clause and the Tenth Amendment. In this section, I examine the constitutionality of the HOME Act's conditions on STBG funding under both constitutional provisions, drawing primarily from the Supreme Court's decisions in *South Dakota v. Dole*[161] and *National Federation of Independent Business v. Sebelius*.[162] These two cases create a five-prong test, which I refer to as the "*Dole-NFIB*" framework.[163] I conclude that the HOME Act's stick approach to conditioning STBG funding would likely survive scrutiny under this framework, though a court applying the framework narrowly may find reason to invalidate the Act.

As I discuss in greater detail below, the limits on Congress's power under the Spending Clause have not been fully fleshed out by courts, making the *Dole-NFIB* framework more akin to a skeleton. The fifth prong of this framework, which I refer to as the "coercion prong," implicates both the Spending Clause and the Tenth Amendment's anti-commandeering doctrine. Therefore, I consider it separately from the first four prongs and in conjunction with the relevant Tenth Amendment case law.

I focus my legal analysis on the HOME Act's conditions on STBG funding, and not CDBG funding because the Act's conditions on the latter source of federal funds do not pose significant legal risk. As the discussion below will make clear, the HOME Act's conditions on CDBG funding do not raise significant issues under the Spending Clause because they are closely tied to the federal interest in the CDBG program.[164] Moreover, the amount of money at risk is small enough that it is highly unlikely that a court

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[161] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[162] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[163] Daniel S. Cohen, *A Gun to Whose Head? Federalism, Localism, and the Spending Clause*, 123 DICK. L. REV. 421, 421 (2019).

[164] *See* 42 U.S.C. §§ 5301–5322 (2018); *see also* discussion *infra* note 232.

would find conditions attached to the funding to be "coercive" and thus unconstitutional.[165] Considering both of these points, the conditions attached to CDBG funding only warrant brief discussion and I instead focus the bulk of my analysis on the conditions attached to STBG funding.

### *A. The Spending Clause*

The Spending Clause grants Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and the general Welfare of the United States."[166] Starting with landmark decision of *United States v. Butler*,[167] the Supreme Court has interpreted the Spending Clause as granting Congress the power to offer monetary grants to states with certain conditions attached.[168] The Court has held that Congress can attach conditions to funds it offers to states in order to "attain" objectives not included within Article I's "enumerated legislative fields."[169] In other words, Congress can use the stick approach to condition federal funds in pursuit of policy objectives beyond those enumerated in Article I, subject to limitation by the Spending Clause. This point is especially relevant in the context of the HOME Act, since zoning and land use regulation has traditionally been thought of as an exercise of state police power.[170]

In addition to being the leading Supreme Court decision on the Spending Clause, *Dole* conveniently featured a prior instance of Congress imposing conditions on transportation funding. In 1984, Congress directed the Secretary of Transportation to withhold 5% of federal highway funds, which today would include STBG funds, from states that did not implement a minimum drinking age of twenty-one years old.[171] Legislative history for this provision indicates that Congress sought to "combat drunk driving" and cites research demonstrating that "increasing the drinking age results in a decrease in alcohol-related crashes among young people."[172] South Dakota challenged the constitutionality of § 158(a), arguing that withholding federal highway funds in this manner exceeded Congress's power under the Spending Clause.[173] The Court disagreed and upheld the conditions attached to the highway funding.[174]

*Dole* synthesized the Court's prior opinions on the Spending Clause issued after *Butler* into a four-prong test and alluded to the possibility of a fifth prong. First, *Dole* provided that Congress must exercise its Spending

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[165] *See* discussion *infra* note 313.
[166] U.S. CONST. art. I, § 8, cl. 1.
[167] United States v. Butler, 297 U.S. 1 (1936).
[168] *Id.*; Cohen, *supra* note 163, at 435.
[169] Cohen, *supra* note 163, at 436 (quoting South Dakota v. Dole, 483 U.S. 203, 207 (1987)).
[170] *See* Vill. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Stahl, *supra* note 35, at 192.
[171] *See* 23 U.S.C. § 158(a) (2012).
[172] S. REP. NO. 98-283, at 6 (1983).
[173] *See Dole*, 483 U.S. at 206–11.
[174] *Id.* at 211–12.

Clause power "in pursuit of the 'general welfare.'"[175] Second, the Court noted that Congress must "condition the States' receipt of federal funds . . . unambiguously" so that states can "exercise their choice knowingly, cognizant of the consequences of their participation."[176] Third, the conditions attached to funding must be related "to the federal interest in particular national projects or programs."[177] Fourth, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[178] The Court also noted that "in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'" though it also noted the difficulty of applying this inquiry.[179] This is the "coercion prong" I refer to above, and I discuss it in further detail in Section III.B.

Of the five prongs articulated by the *Dole* court, the first and fourth prongs I list above bear little relevance to this article's analysis and merit only brief discussion. With regard to the first prong, the Court stressed that "courts should defer substantially to the judgment of Congress" in interpreting this provision.[180] The issue is generally considered to be non-justiciable.[181] To illustrate the fourth prong, the *Dole* court offered as an example "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment."[182] The HOME Act clearly does not seek to incentivize such behavior by states or localities, and thus easily satisfies this prong.

*1. The Relatedness Prong*

I begin my analysis with the third prong of the *Dole-NFIB* framework, which I refer to as the "relatedness prong," because it poses the greatest legal risk to the HOME Act. The relatedness prong requires that conditions on federal grants be related "to the federal interest in particular national projects or programs."[183] The *Dole* court held that the minimum drinking age requirement was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[184] In reaching this decision, the *Dole* court refused to "define the outer bounds of the 'germaneness' or 'relatedness' limitation" or to "address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power."[185] Subsequent Supreme Court

[175] *Id.* at 207.
[176] *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).
[177] *Id.* at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
[178] *Id.* at 208.
[179] *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 550 (1937)).
[180] *Id.* at 207.
[181] Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL'Y 71, 74 (2014).
[182] *Dole*, 483 U.S. at 210.
[183] *Id.* at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
[184] *Id.* at 208 (citing 23 U.S.C. § 101(b)).
[185] *See supra* text accompanying note 3.

decisions do not provide more clarity. In *New York v. United States*, the Court cited *Dole* for the proposition that conditions on federal funds must "bear some relationship" to the purpose of the spending.[186] In *NFIB*, the Court cited *Dole's* holding that the minimum-drinking age condition was "directly related" to a federal interest in highway spending but focused its analysis on different prongs of the *Dole-NFIB* framework.[187] Notably, the Supreme Court has "[n]ever overturned Spending Clause legislation on relatedness grounds."[188]

In the absence of clear boundaries, there are multiple ways to interpret Congress's authority under the relatedness prong of the *Dole-NFIB* framework. The Supreme Court's decisions do seem to implicitly create a workable standard of review. To articulate the relatedness prong of its framework, the *Dole* court relied on an earlier decision, *Massachusetts v. United States*, which provided that the federal government may impose conditions on federal funding that are "*reasonably* related to the federal interest in particular national projects or programs."[189] Elsewhere in its *New York* opinion, issued five years after *Dole*, the Court approvingly described conditions on federal funds offered to states as "*reasonably* related to the purpose of the expenditure."[190] It is also noteworthy that in her dissenting opinion in *Dole*, Justice O'Connor disagreed with the majority's "application of the requirement that the condition imposed be *reasonably* related to the purpose for which funds are expended."[191] Taken together, it seems plausible to summarize the Supreme Court's holdings as implicitly requiring, at a minimum, that conditions on federal grants be "reasonably related" to "the federal interest in particular national projects or programs" to satisfy the relatedness prong. For example, the *Dole* court judged that the minimum-drinking age condition was "directly related" to a federal interest in highway spending (namely, highway safety).[192] Thus, adopting this implicit standard, the condition satisfied the relatedness prong of the *Dole-NFIB* framework because two things that are "directly related" bear a closer relationship to each other than two things that are "reasonably related."

Of course, simply establishing an implicit standard that conditions on federal funds must be "reasonably related" to the federal government's interest in a program does not offer much guidance. Decisions in lower courts are instructive here, where numerous courts have adopted the Supreme Court's implicit standard to uphold a number of spending conditions under the relatedness prong of the *Dole-NFIB* framework. In their 2003 critique of *Dole*, Professor Baker and Professor Berman catalogued a

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[186] New York v. United States, 505 U.S. 144, 167 (1992).

[187] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012) (plurality opinion); *see also infra* Section III.B. (discussing the NFIB plurality's application of the coercion prong).

[188] Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1168 (D.C. Cir. 2004).

[189] Massachusetts v. United States, 435 U.S. 444, 461 (emphasis added).

[190] New York v. United States, 505 U.S. at 172 (emphasis added) (citing Massachusetts v. United States, 435 U.S. at 461).

[191] South Dakota v. Dole, 483 U.S. 203, 213 (1987) (O'Connor, J., dissenting) (emphasis added).

[192] *Id.* at 208.

number of decisions in which lower courts upheld challenged conditions on federal funds as "reasonably related to the federal interest" in a wide variety of programs.[193] Professor Baker and Professor Berman noted that a number of these upheld conditions did not bear "a clearly explained relationship to the underlying legislation."[194] Examples included "the condition that the state provide emergency medical services to illegal aliens in order to receive Medicaid funds" and "the condition that the state comply with a heightened standard of free exercise of religion for prisoners and other individuals in its institutions in order to receive federal funds for those institutions."[195]

A seemingly looser standard has emerged from a line of lower court decisions determining whether states waived Eleventh Amendment immunity from suit by accepting federal funds under the § 504 of the Rehabilitation Act with anti-discriminatory conditions attached.[196] In *Koslow v. Pennsylvania*, the Third Circuit held that anti-discriminatory conditions on federal funds received by a state prison were not unconstitutional so as to preclude a waiver of Eleventh Amendment immunity from suit by Pennsylvania.[197] In reaching this decision, the *Koslow* court reasoned that because *Dole* had declined to explicitly define the outer limit of the relatedness prong, "one need *only* identify a *discernible* relationship" between conditions added to funding and a federal interest in the program funded.[198] Since Congress had expressed "a clear interest in eliminating disability-based discrimination in state departments or agencies," the court found that a "discernible relationship" existed between that interest and the anti-discriminatory conditions on funding received by Pennsylvania.[199] The Third Circuit has adopted the *Koslow* "discernible relationship" approach in subsequent challenges[200] under the Spending Clause to Eleventh Amendment waivers of immunity, as have the Fifth and Tenth Circuits.[201]

Despite the seemingly low bar spending legislation needs to clear to satisfy the standards articulated by *Dole* and *Koslow*, lower courts have

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[193] Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 466–67 (2003) (quoting Kansas v. United States, 24 F.Supp. 2d 1192, 1196 (D. Kan. 1998)).

[194] Baker & Berman, *supra* note 193, at 466.

[195] *Id.* at 466–67.

[196] *See* U.S. CONST. amend. XI; 42 U.S.C. § 2000d-7; Hans v. Louisiana, 134 U.S. 1, 13 (1890) (providing states with immunity from suits brought by their own citizens); Lane v. Pena, 518 U.S. 187, 200 (1996) (recognizing that § 504 of the Rehabilitation Act was an "unambiguous waiver of the States' Eleventh Amendment immunity").

[197] Koslow v. Pennsylvania, 302 F.3d 161, 176 (3d Cir. 2002).

[198] *Id.* at 175 (emphasis added).

[199] *Id.* at 175–76.

[200] *See* M.A. *ex rel.* E.S. v. State-Operated Sch. Dist. of Newark, 344 F.3d 335, 351 (3d Cir. 2003); A.W. v. Jersey City Pub. Schs., 341 F.3d 234, 241 (3d Cir. 2003).

[201] *See* Miller v. Tex. Tech Univ. Health Scis. Ctr., 421 F.3d 342, 349–50 (5th Cir. 2005) (holding that conditions on education funds were sufficiently related to the goals of § 504 to be constitutional under Dole); Arbogast v. Kansas, Dep't Lab. 789 F.3d 1174, 1187 (10th Cir. 2015) (finding a sufficient link between Congress's intent to eliminate disability-based discrimination and the Rehabilitation Act's condition requiring waiver of sovereign immunity).

invalidated conditions placed on federal funds under the Spending Clause in recent Sanctuary City decisions.[202] In 2017, the Department of Justice (DOJ), acting on President Trump's direction, required local jurisdictions to "allow federal immigration access to detention facilities, and provide 48 hours' notice before they release an illegal alien wanted by federal authorities" in order to continue receiving certain federal law enforcement grants.[203] In response, several local jurisdictions filed lawsuits against the administration alleging, among other issues, that the DOJ's order violated the relatedness prong of the Spending Clause, as interpreted by *Dole* and its progeny.[204] The DOJ generally responded to these claims by arguing that immigration enforcement and law enforcement were sufficiently related to survive scrutiny under the relatedness prong and pointing to a number of statutes illustrating the intersection of criminal and immigration law.[205]

One district court applied the *Koslow* court's analysis narrowly to invalidate immigration enforcement conditions added to federal law enforcement grants under the relatedness prong. In *City of Philadelphia v. Sessions*, the court held, in part, that these conditions failed to satisfy the relatedness prong of the *Dole-NFIB* framework because there was not a "discernible relationship" between the immigration enforcement-related conditions and the federal interest in certain law enforcement grants.[206] The court emphasized that "framing the Court's inquiry as whether a discernible relationship exists between immigration law and law enforcement, as the Attorney General seeks to do, situates the discussion at much too general a level."[207] Instead, the *Sessions* court noted that "[t]he relevant question, under *Koslow*, is whether this Court can 'identify a discernible relationship' between a grant condition on a department or agency and 'a federal interest in a program'" funded by the law enforcement grants.[208]

Viewing the conditions through this narrow lens, the *Sessions* court found that it was "difficult to discern" a relationship between the federal law enforcement grant program and a federal interest in immigration enforcement conditions attached to the funds.[209] The court reached this conclusion by reasoning that "the fact that immigration enforcement depends on and is deeply impacted by criminal law enforcement does not mean that the pursuit of criminal justice in any way relies on the enforcement of immigration law."[210] In subsequent litigation between local jurisdictions

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[202] *See* Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8,799 (Jan. 30, 2017) (revoked by Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7,051 (Jan. 25, 2021)).

[203] Cohen, *supra* note 163, at 431 (quoting Kathryn Watson, *DOJ Cracking Down on Sanctuary City Funding*, CBS NEWS (July 25, 2017), https://perma.cc/N6D4-64TS).

[204] *See* Cohen, *supra* note 163, at 431.

[205] *See, e.g.*, City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 637–38 (E.D. Pa. 2017).

[206] *Id.* at 639–44.

[207] *Id.* at 641.

[208] *Id.*

[209] *Id.* at 641–43.

[210] *Id.* at 642. The court's logic can be demonstrated through a hypothetical; a murder will be prosecuted as a murder whether an illegal alien or a United States citizen commits it. In the former case,

and the DOJ over the Sanctuary City issue, three district courts relied in part on the *Sessions* court's reasoning to invalidate certain immigration enforcement conditions placed on federal law enforcement grants under the relatedness prong of the *Dole-NFIB* framework.[211]

Before attempting to apply any decisions interpreting the relatedness prong to the HOME Act, it is important to identify the scope of the federal government's interest in the STBG program. The congressional declaration of intent that "the connection between land use and infrastructure is significant," is of particular relevance to this analysis.[212] Also relevant is the broad range of projects eligible for STBG funding, including a number of transportation infrastructure projects, and the flexible nature of the program.[213] Taken together, these factors evidence a federal interest in the STBG program broader in scope than just the construction and maintenance of roadways. Therefore, it is reasonable to conclude that the federal government has an interest in the general transportation infrastructure of a community that benefits from STBG funding, including how a community's land use policies affect that infrastructure. Despite this broad interest in a community's transportation infrastructure, however, there is no reference in the STBG statute or other relevant statutes to matters of affordable housing or community development.[214]

Since there is no explicit connection between affordable housing and the STBG program, it is unlikely that a court would conclude that the affordable housing conditions imposed by the HOME Act are "directly related" to a federal interest in the STBG program.[215] The minimum drinking age condition at issue in *Dole* bore a direct relationship to highway safety. "[V]arying drinking ages among the States" frustrated the federal interest in a safe interstate highway system because underage drivers would "commut[e] to border States where the drinking age is lower," thus increasing the risk of underage drunk driving.[216] Even interpreting the federal interest in the STBG program broadly to include all local issues related to land use, it is still difficult to discern a direct relationship to affordable housing. Land use policy is critical to affordable housing, and, as discussed above, less restrictive zoning and land use regulations can make housing more affordable by increasing its supply.[217] Land use policy,

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there may be ancillary immigration consequences, but they would be separate from the criminal legal proceeding.

[211] *See* City & County of San Francisco v. Sessions, 349 F.Supp. 3d 924, 958–61 (N.D. Cal. 2018) (*rev'd in part on other grounds* by City & County of San Francisco v. Barr, 965 F.3d 753 (9th Cir. 2020)); City & County of San Francisco v. Sessions, 372 F.Supp. 3d 928, 947–48 (N.D. Cal. 2019); Colorado v. U.S. Dep't Justice, 455 F.Supp. 3d 1034, 1055–56 (D. Colo. 2020), *appeal dismissed*, No. 20-1256, 2021 WL 3026820 (10th Cir. May 6, 2021).

[212] 23 U.S.C. § 101(b)(3)(F).

[213] *See* 23 U.S.C. § 133(b).

[214] *See* Federal-Aid Highways, 23 U.S.C. ch. 1.

[215] South Dakota v. Dole, 483 U.S. 203, 208 (1987).

[216] *Id.* at 209 (alteration in original) (citation omitted).

[217] *See supra* Introduction.

however, touches a broad range of issues related to local development.[218] When Congress declared in § 101(b)(3)(F) that "the connection between land use and infrastructure is significant," it is likely that they were speaking to the broad scope issues related to local land use policy, including and in addition to affordable housing. Such a broad interest that touches all aspects of local land use policy cannot be said to bear the sort of direct relationship to the HOME Act's conditions on STBG funding like that present in *Dole*.

Nonetheless, the absence of a direct relationship between the federal interest in the STBG program and the HOME Act's affordable housing conditions would not render those conditions invalid under the relatedness prong. A court could certainly find that the two concepts are "reasonably related" and thus satisfy the Supreme Court's implicit standard for the relatedness prong. This is especially true if a court adopts a loose interpretation of the relatedness prong, as many courts did in the cases catalogued by Professor Baker and Professor Berman.[219] As they note, lower courts have upheld a wide variety of conditions on federal funding, even when they lacked "a clearly explained relationship to the underlying legislation."[220] Congress's declaration of policy in § 101(b)(3)(F) would likely provide a sufficient relationship to satisfy a court engaging in such a cursory analysis under the relatedness prong to uphold the HOME Act's affordable housing conditions on STBG funding.

Moreover, the HOME Act's conditions on STBG funding would likely satisfy the relatedness prong under the standard articulated by *Koslow*. Congress's policy declaration in § 101(b)(3)(F) expresses a "clear interest" in the connection between land use and infrastructure.[221] A court adopting the permissive reading of the relatedness prong suggested by *Koslow* would seek to "only identify a discernible relationship" between the HOME Act's affordable housing conditions and a federal interest in the STBG statute.[222] Under that standard, the "clear interest" expressed by the § 101(b)(3)(F) declaration would likely be enough for a court to determine that the HOME Act's conditions satisfy the relatedness prong.

If a court were to adopt a narrower reading of the *Koslow* decision, as did the *Sessions* court and other courts in sanctuary city decisions, the HOME Act's affordable housing conditions on STBG funding could be at risk of being overturned. Adopting the *Sessions* court's analysis, a court may find that simply establishing a link between transportation and affordable housing would "situate[] the discussion at much too general a level."[223] A court applying the relatedness prong narrowly could find no discernible relationship between the condition that STBG funded projects take place in

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[218] *See, e.g.*, William J. Stull, *Land Use and Zoning in an Urban Economy*, 64 AM. ECON. REV. 337 (1974).

[219] Baker & Berman, *supra* note 193, at 466–67.

[220] *Id.* at 466.

[221] 23 U.S.C. § 101(b)(3)(F); Koslow v. Pennsylvania, 302 F.3d 161, 176 (3d Cir. 2002).

[222] *Id.*

[223] City of Philadelphia v. Sessions, 280 F.Supp. 3d 579, 641 (E.D. Pa. 2017).

a community that has implemented an affordable housing strategy and a federal interest in the STBG program. Though Congress has recognized the "significant" connection between "land use and infrastructure,"[224] there is no mention of affordable housing or community development in the STBG statute or other federal highway statutes.[225] A court could conclude that Congress's stated interest in the connection between land use and infrastructure is too broad to establish a discernible relationship with any specific element of local land use policy, such as affordable housing. Under such an analysis, the federal interest in STBG funding would be too broad, like the DOJ's interest in the law enforcement grants, to justify conditions attached to the funds requiring the implementation of an affordable housing plan.

There is a key distinction in the relationship between housing and transportation, as compared to immigration and law enforcement, that may allow the HOME Act's conditions to survive even a narrow application of the relatedness prong. As the *Sessions* court notes, "the pursuit of criminal justice" does not rely on federal immigration law and the relationship between the two does not "operate in both directions."[226] Local governments enforce criminal law and prosecute violations of it separate and independent of the workings of federal immigration law.[227] In contrast, the relationship between affordable housing and the federal interest in local transportation infrastructure *does* "operate in both directions." Local decisions regarding whether to develop more affordable housing have a downstream effect on a community's transportation infrastructure.[228] A community may need to make changes to its transportation infrastructure to support the differentiated travel behavior resulting from the new housing units coming online.[229] Many of these transportation projects a community would need to undertake would likely be eligible for funding under the STBG program's flexible terms.[230] Thus, under the *Sessions* court's reasoning, there would be a discernible relationship between affordable housing and the federal interest in local transportation infrastructure because the relationship "operate[s] in both directions."[231] This could allow the HOME Act to survive even a narrow application of the relatedness prong, like that adopted by the *Sessions* court and courts in other Sanctuary City decisions.

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[224] 23 U.S.C. § 101 (b)(3)(F).

[225] A court could find this point especially relevant in light of the numerous statutory connections between law enforcement and federal immigration, which were not sufficient to establish a discernible relationship. *See Sessions*, 280 F.Supp. 3d at 637–38.

[226] *Id.* at 641–42.

[227] *See supra* hypothetical at note 211.

[228] *See, e.g.*, Amanda Howell et al., *Transportation Impacts of Affordable Housing: Informing Development Review with Travel Behavior Analysis*, 11 J. TRANSP. & LAND USE 103 (2018) (finding changes in travel behavior in urban communities that built more affordable housing).

[229] *Id*. at 104–05.

[230] *See* 23 U.S.C. § 133(b).

[231] *Sessions*, 280 F.Supp. 3d at 641.

In summary, it is likely that the HOME Act's requirement that STBG funded projects take place in a community that has implemented an affordable housing strategy would satisfy the relatedness prong of the *Dole-NFIB* framework. Courts have varied in their application of the relatedness prong, but they generally have opted to uphold conditions attached to funding. In the recent Sanctuary City cases, multiple lower courts invalidated conditions attached to funding, and a court could rely on these decisions to invalidate the HOME Act's conditions under a narrow application of the relatedness prong. It is worth noting, however, that these decisions premised their analysis on a relationship between local criminal justice and federal immigration law that is fundamentally different than the relationship between affordable housing and the federal interest in local transportation infrastructure. Since this relationship flows in both directions, a case involving the HOME Act's conditions would be distinguishable from the sanctuary city cases and thus should survive even a narrow application of the relatedness prong.[232]

*2. The Clear Notice Prong*

As interpreted by *Dole*, the clear notice prong of the *Dole-NFIB* framework would appear to be fairly straightforward. The *Dole* court explained this prong as requiring that Congress "unambiguously" express its desire to condition federal funds meant for states, so that states could "exercise their choice knowingly, cognizant of the consequences of their participation."[233] This prong is derived from *Pennhurst State School and Hospital v. Halderman*, a 1981 decision in which the Court analogized spending power legislation as "much in the nature of a contract."[234] The *Pennhurst* court reasoned that "Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepted the terms of the 'contract.'"[235] Applying this "contract" framework, *Pennhurst* upheld conditions on federal funds that required states to provide certain institutionalized persons "appropriate treatment in the least restrictive environment."[236] The *Dole* court concluded that the minimum drinking age condition on federal highway funds "could not be more clearly stated by Congress" and thus satisfied *Pennhurst's* articulation of the clear notice prong.[237]

After the Court decided *NFIB*, it appeared that the clear interest prong had taken on a new meaning. Though the bulk of the plurality's opinion

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[232] The conditions on CDBG funding would easily survive even a narrow application of the relatedness prong because the issues of affordable housing and community development are closely intertwined with the CDBG program's statutory grant formula. *See* 42 U.S.C. §§ 5301-5322.

[233] South Dakota v. Dole, 483 U.S. at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[234] 451 U.S. 1, 17 (1981).

[235] *Id*.

[236] *Id*. at 17–18; Baker, *supra* note 181, at 76.

[237] *Dole*, 483 U.S. at 208.

invalidating the Affordable Care Act (the ACA)'s Medicaid expansion focused on the program's coercive nature,[238] the plurality seemed to conclude that the ACA's Medicaid expansion did not satisfy the clear notice prong. Shortly after *NFIB* was decided, Professor Baker noted that the plurality opinion "read the *Dole* test's *Pennhurst* prong in an entirely new way."[239] Specifically, Chief Justice Roberts considered the Medicaid expansion to be, in effect, a "new health care program."[240] Many analysts, including Professor Bagenstos, concluded that Justice Roberts specifically reasoned that states had not received notice upon originally entering the Medicaid program that, and that "Congress would later condition their continued participation on their agreement to *also* participate in" the new program.[241] The plurality opinion concluded that Congress had violated the "contract-based principle" from its previous Spending Clause jurisprudence against "surprising States with post-acceptance or 'retroactive' conditions on federal spending."[242] Professor Baker read the *NFIB* opinion as posing "a significant threat to any new condition on previously available funds, even if the condition is both clear and entirely prospective in its application."[243]

Neither the Supreme Court nor lower courts have further developed this supposed new reading of the clear notice prong. In his article also published shortly after the Court decided *NFIB*, Professor Bagenstos noted that "Congress does in fact make changes to federal spending programs all the time" and "[s]tates never had any reason to expect that Medicaid would be exempt from these sorts of changes."[244] Thus, he reasoned, Chief Justice Roberts' "opinion is not best read as prohibiting large, fundamental, or unanticipated changes to ongoing spending programs."[245] Professor Bagenstos' analysis appears to have been vindicated by the courts. In a 2020 decision, the Fifth Circuit rejected an argument from a state university that conditions attached to federal funds offered under Title IX violated the clear notice prong of the Spending Clause and concluded that the university had waived Eleventh Amendment immunity by accepting the funds.[246] Writing eight years after *NFIB* had been decided, the court concluded that "*NFIB* does not unequivocally alter *Dole's* conditional-spending analysis" and could not find "any case holding that *NFIB* marks such a transformation of Spending Clause principles."[247]

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[238] *See infra* Section III.B.

[239] Baker, *supra* note 181, at 76.

[240] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. at 584.

[241] *Id*.; Samuel R. Bagenstos, *The Anti-Leveraging Principle and The Spending Clause After NFIB*, 101 GEO. L.J. 861, 870 (2013).

[242] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 584 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981)); Bagenstos, *supra* note 241, at 870.

[243] Baker, *supra* note 181, at 76.

[244] Bagenstos, *supra* note 241, at 888–89.

[245] *Id*. at 891–92.

[246] Gruver v. La. Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll., 959 F.3d 178, 184 (5th Cir. 2020).

[247] *Id*. At the time of this writing, the Gruver court's point remains true.

It does not appear that courts have interpreted the clear notice prong after *NFIB* to prohibit new conditions on previously available funds. Thus, it appears likely that the HOME Act's conditions on STBG funds would satisfy the clear notice prong, as articulated by *Dole* and *Pennhurst*. The HOME Act is unambiguous in adding additional conditions to STBG funds; communities in which projects funded by STBG are located must have implemented an affordable housing strategy as prescribed in § 2 of the Act.[248] As detailed in Section II.A.1, § 2 of the HOME Act lists numerous specific policies related to zoning and land use that local jurisdictions must include in this affordable housing strategy.[249] States entering into a "contract" with the federal government to accept STBG funds would have clear notice of the new conditions attached to those funds by the HOME Act.[250]

Even if the Supreme Court or a lower court were to apply Professor Baker's interpretation of *NFIB* to the HOME Act, it would probably still survive scrutiny under the clear notice prong. States have different expectations from the federal government with regard to STBG funds, as compared to Medicaid funds. STBG funds are a form of discretionary spending made available to states for a specified period of time by Congress.[251] Thus, if Congress opted to add the HOME Act's conditions to reauthorized STBG funds, they would not be adding "new condition[s] on previously available funds."[252] Congress would make new funds available by reauthorizing the program, and states would "voluntarily and knowingly accept[] the terms of the 'contract'" if they chose to use the newly available STBG funding with additional conditions attached.[253] In contrast, Medicaid funds are a permanent entitlement program with funding authorized for states in perpetuity.[254] Congress does not make new Medicaid funds available to states through reauthorization, so any conditions are necessarily added to "previously available funds."[255]

One potential ambiguity in the HOME Act's conditions on STBG funding is the meaning of the term "community." The Act requires that the "community" in which the STBG project is to be carried out has implemented an affordable housing strategy. The HOME Act does not

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[248] Housing, Opportunity, Mobility, and Equality Act of 2019, H.R. 4808, 116th Cong. § 2 (2019).

[249] *Id.*

[250] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. at 17 (1981).

[251] *See* FAST Act, Pub. L. No. 114-94, 139 Stat. 1312 (2015) (authorizing STBG funds through fiscal year 2020); Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, 134 Stat. 709 (2020) (reauthorizing appropriations for STBG funds previously made available under the FAST Act until September 30, 2021).

[252] Baker, *supra* note 181, at 76.

[253] *Pennhurst*, 451 U.S. at 17.

[254] *See generally Policy Basics: Introduction to Medicaid*, CTR. ON BUDGET & POL. PRIORITIES (Apr. 14, 2020), https://www.cbpp.org/research/health/introduction-to-medicaid#:~:text=Medicaid%20is%20an%20%E2%80%9Centitlement%E2%80%9D%20program,cost%20of%20their%20Medicaid%20programs; 42 U.S.C. § 1396d (providing the statutory minimum and maximum federal share of a state's Medicaid expenditures).

[255] Baker, *supra* note 181, at 76.

define the term "community," however, nor is the term defined elsewhere in federal highway statutes.[256] Thus, it is not immediately clear from an initial reading of the Act to which unit of government the Act's affordable housing conditions on STBG funds would attach. In contrast, it is clear that the HOME Act would require local governments receiving CDBG funding to include an affordable housing strategy in their Consolidated Plan submissions to the federal government.[257]

This ambiguity could be cleaned up with more precise drafting, but it likely does not pose any legal risk to the Act under the clear notice prong. STBG funds flow to projects differently than CDBG funds flow to grantees. As discussed in Section II.A.2., the funds are allocated directly to states and then sub-allocated among different areas of the state based on population pursuant to a statutory formula.[258] This means that the HOME Act is imposing obligations onto states, since they will determine where STBG funds will be used for projects and ultimately will seek payment from the federal government for the federal share of those projects.[259] In order to receive reimbursement for the federal share of these projects from STBG funds, states must ensure that projects take place in local jurisdictions that have implemented an affordable housing strategy, as prescribed by the HOME Act. If the HOME Act became law, the FHWA would presumably not approve a project as eligible for STBG funds if it took place in a community that had not implemented an affordable housing strategy, and the state would then be on the hook for the federal share of the project.

The HOME Act should easily satisfy the clear notice prong. Courts do not appear to have taken up the *NFIB* court's expansion of the clear notice prong's requirements and instead rely on the more lenient standard articulated by *Dole* and *Pennhurst*. Even if a court did adopt such an expansive reading of the clear notice prong, the HOME Act's conditions on STBG funding would probably pass muster because Congress could add new conditions to reauthorized funds. Some provisions of the HOME Act could be more precisely drafted to reduce ambiguity, but the conditions it places on federal funds are sufficiently clear and unambiguous for states to know what is required to maintain access to STBG funds.

### *B. Coercion and the Tenth Amendment*

In *NFIB*, seven justices across two opinions held that the conditions attached to the ACA's Medicaid expansion unconstitutionally coerced the states and thus violated the Spending Clause.[260] It marked "*the first time*

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[256] *See generally* 23 U.S.C. ch. 1 – Federal-Aid Highways.

[257] *See* Housing, Opportunity, Mobility, and Equity Act of 2019, H.R. 4808, 116th Cong. § 2 (2019); *supra* Section II.B.1.a.

[258] *See* 23 U.S.C. § 104; *see also* U.S. DEP'T OF TRANSP., *supra* note 139, at 17.

[259] *See* 23 U.S.C. § 133(d).

[260] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (plurality opinion), 689 (Scalia, J., dissenting) (2012).

*ever*" that the Court invalidated a spending condition as too coercive.[261] Though the *NFIB* plurality invoked the Spending Clause to invalidate the ACA's Medicaid expansion, it grounded its analysis in the anti-commandeering doctrine under the Tenth Amendment.[262] As a result, the coercion prong of the *Dole-NFIB* framework blends Spending Clause and Tenth Amendment anti-commandeering principles.[263] Specifically, the *NFIB* plurality relies on *New York v. United States*[264] and *Printz v. United States*[265] for its coercion analysis. In this section, I first summarize these two cases, before turning to a more detailed analysis of the *NFIB* opinion. After fully developing the coercion prong, I then apply it to the HOME Act and conclude that the Act would satisfy its requirements with no issue.

*1. The Anti-Commandeering Doctrine*

The *New York* decision is often referred to as the dawn of the "federalist revival," an era in which the Rehnquist Court issued a number of decisions that attempted to tip the scales of power back towards states after decades of decisions increasing federal power.[266] In *New York*, the Court considered the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPAA), which required states to take certain steps to dispose of radioactive waste.[267] The provisions at issue were incentives designed to encourage states to comply with the LLRWPAA's disposal requirements.[268] The first provision at issue under the LLRWPAA provided for fees that states which received radioactive waste from other states could collect from the federal government (the "monetary incentives").[269] The second provision (the "access incentives") levied penalties against states that failed to formulate a plan to develop a disposal facility for radioactive waste.[270] The third provision (the "take title provision") required states to either dispose of waste within its borders within ten years of the LLRWPAA's passage or to take title to any waste remaining after that period upon notice from the owner and "becom[e] liable

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[261] *Id.* at 625 (Ginsburg, J., concurring in part and dissenting in part).

[262] *See* Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 592 (2013). Professor Pasachoff noted that the *NFIB* plurality did not rely on *Dole* to detail its limits on the Spending Power. I interpret *NFIB*'s coercion analysis differently and discuss how the *NFIB* plurality used the spending conditions at issue in *Dole* as a point of comparison for the ACA's Medicaid expansion. *See* discussion *infra* Section III.B.2.

[263] Courts have adopted this framework to analyze the coercion prong. *See, e.g.*, City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 647 (E.D. Pa. 2017) (analyzing issue of coercion under Spending Clause in connection with Tenth Amendment).

[264] New York v. United States, 505 U.S. 144 (1992).

[265] Printz v. United States, 521 U.S. 898 (1997).

[266] Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003).

[267] New York v. United States, 505 U.S. at 149.

[268] *Id.* at 152.

[269] *Id.*

[270] *Id.* at 153.

for all damages waste generators suffer as a result of the States' failure to do so promptly."[271]

The Court sought to determine "the circumstances under which Congress may use the States as implements of regulation; that is whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way."[272] Ultimately, the Court determined that the take title provision offered states an untenable "choice of either accepting ownership of waste or regulating according to the instructions of Congress."[273] The Court determined that both courses of action were "beyond the authority of Congress."[274] The former would "commandeer state governments into the service of federal regulatory purposes," while the latter would amount to "a simple command to state governments to implement legislation enacted by Congress," which the Constitution did not authorize Congress to issue.[275] Since both courses of action were unconstitutional, Congress could not "offer the States a choice between the two."[276]

In *Printz*, the Court considered whether provisions of the federal Brady Handgun Violence Prevention Act (the "Brady Act") imposed unconstitutional obligations on state officers to execute federal law.[277] The Brady Act provisions at issue would have required local law enforcement officials to conduct background checks and perform related investigative tasks until a national system came online.[278] Writing for the majority, Justice Scalia found these provisions to be unconstitutional because they "purport[ed] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."[279] The Court relied on prior decisions that "made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[280]

Before turning to how the *NFIB* plurality incorporated these two decisions into its coercion prong analysis, it is worth examining whether the HOME Act faces legal risk from an anti-commandeering challenge. The brief answer is likely no, at least with regard to a direct challenge under either *New York* or *Printz*. This is because the HOME Act is fundamentally

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[271] *Id.* at 153–54, 175.

[272] *Id.* at 161.

[273] *Id.* at 175 (internal quotations omitted).

[274] *Id.* at 176.

[275] *Id.* at 174–175 (internal quotations omitted). *See also* Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 579 (2012) ("The States are separate and independent sovereigns. Sometimes they have to act like it.").

[276] New York v. United States, 505 U.S. 144, 176 (1992). Elsewhere in the opinion, the Court found that the monetary incentives and the access incentives were lawful exercises of Congress's power under the Commerce Clause.

[277] Printz v. United States, 521 U.S. 898, 902 (1997).

[278] *Id.*

[279] *Id.* at 904.

[280] *Id.* at 925–26 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Fed. Energy Regul. Comm'n v. Mississippi, 456 U.S. 742 (1982); New York v. United States, 505 U.S. 144 (1997)).

different than the LLRWPAA or the Brady Act. It imposes conditions on funding offered to state and local governments from Congress, rather than establishing affirmative obligations to which states must adhere. For example, if the HOME Act simply mandated that states or local jurisdictions implement inclusive zoning and land use policies, it would likely raise commandeering issues under both *New York* and *Printz* because the federal government would be compelling local jurisdictions to enact a federal regulatory program through legislation.[281] As the *New York* court notes, the relationship between states and the federal government is different in the conditional spending context, because state governments can decline to accept the federal funds if they do not wish to comply with the associated conditions.[282] What if the conditions attached to funding or the amount of money at stake reach a point that states cannot simply refuse the funds? *NFIB* takes up this question in the context of the ACA's Medicaid expansion.

### *2. The Coercion Prong*

While the *Dole* court spends little time discussing the issue of coercion in its Spending Clause analysis, the issue becomes the "central show" in the *NFIB* court's Spending Clause discussion.[283] At issue was the "Medicaid expansion" provision of the ACA, "which would have increased the number and categories of individuals that participating states must cover."[284] States risked losing both the new Medicaid funding offered by the ACA *and* previously available Medicaid funds if they did not comply with the ACA's expanded coverage requirements.[285] At the time, Medicaid spending accounted "for over 20[%] of the average State's total budget, with federal funds covering 50 to 83[%] of those costs."[286] Medicaid spending generally was the highest line item in the average state's budget, with most states receiving more than $1 billion per year in Medicaid funds from the federal government, and a quarter of all states receiving over $5 billion per year.[287]

In holding that the ACA expansion's conditions on Medicaid funds were coercive, the *NFIB* plurality cited *Printz* and *New York* for the proposition that Congress may not "commandeer[] a State's legislative or administrative apparatus for federal purposes."[288] Chief Justice Roberts then analogized commandeering legislation to coercive Spending Clause legislation, which he said the Court must "scrutinize . . . to ensure that

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[281] *See* New York v. United States, 505 U.S. at 175; *Printz*, 521 U.S. at 925–26.

[282] New York v. United States, 505 U.S. at 168.

[283] Pasachoff, *supra* note 262, at 591.

[284] Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL'Y 71, 73 (2014); Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 576 (2012) (plurality opinion).

[285] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 576 (plurality opinion).

[286] *Id.* at 581.

[287] *Id.* at 682 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[288] *Id.* at 577 (citing Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 174–75 (1997)).

Congress is not using financial inducements to exert a 'power akin to undue influence.'"[289] The plurality opinion reasoned that "when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds," there is no danger that Spending Clause legislation will insulate federal officials "from the electoral ramifications of their decision."[290] "But when the State has no choice," the plurality opinion noted, "the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*."[291]

According to the *NFIB* plurality,[292] the question whether a state has a "legitimate choice" between taking the conditional federal money or walking away depends on "whether the financial inducement offered by Congress was so coercive as to pass the point at which pressure turns into compulsion."[293] Here, Chief Justice Roberts compared the spending conditions at issue in *Dole* with those imposed by the ACA's Medicaid expansion. While "the threat of losing [5%] of highway funds" constituted "relatively mild encouragement to the States," the risk of losing *all* of a state's Medicaid funding if it did not comply with the ACA's Medicaid expansion was "a gun to the head."[294] Chief Justice Roberts then detailed the significant portion of state budgets for which federal Medicaid funding accounts.[295] He employed another colorful metaphor to describe the effect of a "threatened loss of over 10[%] of a State's overall budget," equating it to "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[296] The joint dissent, which agreed with the plurality on the issue of coercion, noted that in *Dole*, South Dakota stood to lose "less than 1% of its annual expenditures," and the total amount of highway funding conditioned amounted to 0.19% of all state expenditures combined.[297] In *NFIB*, the joint dissent noted, South Dakota stood to lose "28.9% of its annual state expenditures," and the total amount at stake "equaled 21.86% of all state expenditures combined."[298]

Though the "line where persuasion gives way to coercion" is not precisely fixed, we can deduce from the plurality and joint dissent opinions in *NFIB* that it probably lies somewhere between less than 1% and 10% of a state's overall annual expenditures.[299] One way to approximate where this

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[289] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 577 (plurality opinion) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[290] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 578 (internal citation omitted).

[291] *Id.*

[292] The joint dissent also agreed that spending conditions could violate the commandeering prohibition and cited *New York* and *Printz* to support this position. *See id.* at 677–78 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[293] *Id.* at 580 (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)) (internal quotations omitted).

[294] *Id.* at 580–81.

[295] *Id.* at 581.

[296] *Id.* at 582.

[297] *Id.* at 684–85 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); Pasachoff, *supra* note 262, at 606.

[298] *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 685 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[299] Pasachoff, *supra* note 262, at 651.

line falls is to apply the coercion prong of the *Dole-NFIB* framework to other spending programs. In the wake of the *NFIB* decision, Professor Pasachoff did so in the context of conditions attached to federal grants to states for elementary and secondary education.[300] She concluded that conditional federal spending on elementary and secondary education would likely survive the *NFIB* plurality's coercion analysis because the amounts at issue are not large enough to be coercive.[301] Professor Pasachoff's conclusion is significant because, at the time, federal education spending was second only to Medicaid spending in terms of federal dollars provided to states.[302] In general, Professor Pasachoff found that "[f]ederal education funding plays a significantly smaller role in state budgets than does federal Medicaid funding."[303] For example, in fiscal year 2010, "the state least affected by federal Medicaid funds still relied on these funds for 10% of its state expenditures," whereas "the state least affected by federal funds for elementary and secondary education relied on these funds for only 1.2% of its state expenditures."[304] Due to the fact that these numbers "are far closer to *Dole's* figures than the Medicaid figures in *NFIB*," Professor Pasachoff concluded that "[t]here are thus very good reasons to think that the laws conditioned on all federal education funding fall within 'the outermost line where persuasion gives way to coercion.'"[305]

Professor Pasachoff's analysis provides a useful framework for determining whether the HOME Act's conditioning of STBG funds would be considered coercive. The National Association of State Budget Officers (NASBO) estimated in its 2020 State Expenditure Report (NASBO 2020 Report) that elementary and secondary education would remain the second largest source of state spending from federal funds in fiscal year 2020, above state spending on transportation from federal funds.[306] This is significant because states spent more in total on elementary and secondary education than transportation in each of those fiscal years. Put differently, the sum of *all* federal dollars that flow to state transportation spending, which includes additional federal transportation programs other than STBG, was lower than the federal share of state spending on elementary and secondary education from fiscal years 2015 to 2019.[307] And, just as in Professor Pasachoff's

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[300] Professor Pasachoff examined the Elementary and Secondary Education Act, which at the time was reauthorized as No Child Left Behind, the Individuals with Disabilities Education Act, and civil rights laws prohibiting discrimination against protected classes. *See id.* at 581–82.

[301] *Id.* at 582.

[302] *Id.* at 613.

[303] *Id.* at 648.

[304] *Id.* at 649.

[305] *Id.* at 625, 651 (quoting Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (plurality opinion)).

[306] NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL YEAR 2020 STATE EXPENDITURE REPORT: EXAMINING FISCAL YEARS 2018-2020, 15 (2020) [hereinafter NASBO 2020 REPORT], available at https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/2020_State_Expenditure_Report_S.pdf.

[307] Specifically, the NASBO 2020 REPORT illustrated that federal funds accounted for a higher percentage of actual elementary and secondary education spending by states than actual spending on transportation in each fiscal year between 2015 and 2019. *Id.* at 13, tbl.3.

article, the federal share of total state spending on elementary and secondary education remained far lower than the federal share of total state spending on Medicaid during that period.[308] Therefore, it is apparent that the HOME Act's conditions on STBG funding would fall well within the "the outermost line where persuasion gives way to coercion."[309]

Looking at specific state budgets further demonstrates how unlikely it is that a court would find conditions on STBG funding to be coercive. Table 2 includes the following data points from Texas, California, and New Jersey in fiscal year 2019[310]: the total amount of STBG funds apportioned to each state, the total amount of expenditures by each state, 10% of each state's total expenditures,[311] and the percentage of total state expenditures comprised by STBG funds.

**TABLE 2.**[3]

| State | Apportioned STBG Funds | Total Expenditures | 10% of Total Expenditures | STBG Percentage of Total Expenditures |
|---|---|---|---|---|
| TX | $1.1 Billion | $120.1 Billion | $12.01 Billion | 0.9% |
| CA | $649.1 Million | $294.7 Billion | $29.47 Billion | 0.22% |
| NJ | $313.6 Million | $61.9 Billion | $6.2 Billion | 0.5% |

Even if the HOME Act were to condition *all* of a state's STBG funding on implementing an affordable housing strategy, the amount at risk would likely account for less than 1% of a state's budget.[313] Since the HOME Act would only withhold STBG funds from projects in a "community" that did not implement an affordable housing strategy, the actual conditional spending would be withheld on a project-by-project basis, and thus the amounts at risk would likely be even lower than the figures in Table 2.

[308] *Id.*

[309] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937)) (internal quotations omitted).

[310] I use Texas as an example because it consistently receives the highest amount of STBG funding from the federal government. *See* SPENDING EXPLORER, *supra* note 113. I use New Jersey and California as an example for the same reasons that Schuetz does in her policy brief discussed earlier: both states have issues with housing affordability and could potentially lose STBG funding under the HOME Act. *See* Schuetz, *supra* note 114. I use figures from fiscal year 2019 to avoid any irregularities in state budgeting caused by the COVID-19 pandemic.

[311] I use 10% of a state's overall budget as a data point because conditions on funds that exceed this amount risk being labeled "economic dragooning" by Chief Justice Roberts, and thus too coercive. *See Nat'l Fed'n Indep. Bus.*, 567 U.S. at 582 (plurality opinion).

[312] USASPENDING, *supra* note 113; NASBO 2020 REPORT, *supra* note 306, at 108, tbl.A-1.

[313] The total amount of funding appropriated annually for CDBG is significantly less than STBG. *See supra* Table 1. Therefore, the HOME Act's conditions on CDBG funds would almost certainly not be considered coercive, since the amount of STBG funds at risk is far larger in amount but not large enough to be considered coercive.

Clearly, the amount of STBG funds conditioned by the HOME Act "are far closer to *Dole's* figures than the Medicaid figures in *NFIB*,"[314] and thus the Act should easily satisfy the coercion prong of the *Dole-NFIB* framework.

To summarize this article's legal analysis, the HOME Act's stick approach would likely withstand scrutiny from courts under the Spending Clause and the Tenth Amendment. The relatedness prong of the *Dole-NFIB* framework would pose the greatest legal risk to the Act. But affordable housing and the federal government's interest in local transportation infrastructure are probably sufficiently related to survive even a narrow application of the relatedness prong. The Act should easily satisfy the clear notice and coercion prongs of the *Dole-NFIB* framework. Policymakers considering the HOME Act or similar legislation that would adopt the stick approach to tie affordable housing conditions to STBG funding can move forward with plans to implement it without significant risk of invalidation by the courts.

## CONCLUSION

As the *Neighborhood Defenders* authors demonstrate, existing homeowners are overrepresented in the participatory politics of local zoning and land use.[315] They can exert their outsized influence over the local planning process to prevent or delay new housing from being constructed, which contributes to supply shortages that drive up housing prices.[316] Because decisions at the local level regarding zoning and land use policy have a significant effect on housing affordability,[317] this outsized influence distorts the housing market by making it prohibitively expensive for renters and first-time homebuyers. In effect, the current system of local planning serves a privileged class of participants in the housing market, to the detriment of less fortunate participants.

Though state legislation to preempt local zoning and land use regulations can overcome the distorting effect existing homeowners have on the local planning process, states have struggled to overcome political opposition to passing such laws that is rooted in a desire to maintain local control over zoning and land use decisions. At the federal level, policy interventions that would attempt to incentivize local governments to reform their zoning and land use regulations to alleviate shortages in housing supply have bipartisan support. But policymakers currently appear to prefer

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[314] Pasachoff, *supra* note 262, at 625 (citing *Nat'l Fed'n Indep. Bus.*, 567 U.S. at 585 (plurality opinion)).

[315] EINSTEIN ET AL., *supra* note 14, at 95–114.

[316] *Id.*

[317] *See* Jenny Schuetz, *No Renters in My Suburban Backyard: Land Use Regulation and Rental Housing*, 28 J. POL'Y. ANALYSIS & MGMT. 296 (2009); Joseph Gyourko & Raven Molloy, *Regulations and Housing Supply* (Nat'l Bureau of Econ. Research Working Paper No. 20536); Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPECTIVES 3 (2018).

offering fiscal carrots to local jurisdictions, rather than threatening them with a stick. This approach is less likely to increase housing supply in jurisdictions with expensive housing because of restrictive zoning and land use regimes—the very place where reforms are most needed to increase the supply of housing and alleviate price pressures. Because it is both a more effective and legal way to incentivize local zoning and land use reforms, Congress should adopt the stick approach embodied by the HOME Act. Doing so is more likely to lead to reforms in exclusionary and expensive jurisdictions because the Act would create a more difficult cost-benefit analysis for states and local governments that wish to maintain restrictive zoning and land use regulations. The stick approach is also more likely to result in a housing market that better serves all participants, an outcome to which policymakers should aspire.

# The High Cost of Incarceration: A Call for Gender-Responsive Criminal Justice Reforms for Women and Their Children

DONA PLAYTON[†]

## INTRODUCTION[*]

> [W]omen's crime is different from men's crime. Women commit different crimes than men, generally nonviolent crimes. Their life circumstances are different from the life circumstances of men as are the factors that motivate them to break the law. Family ties play a more significant role in women's offenses, in the likelihood that they will recidivate, and in their chances of rehabilitation. Because family obligations fall disproportionately on women in this society, their imprisonment has a disproportionate impact on the children in their care.[1]

Today, women are the fastest-growing segment of the United States prison population.[2] An often-overlooked consequence of the skyrocketing rate of incarcerated women is its impact on the children they leave behind. The number of children with a parent in prison is 2.7 million,[3] or roughly one in every twenty children in the United States. This number equates to at least one child in every classroom with a parent in prison or jail.[4] Thousands more children are affected when considering parental experiences of arrest, probation, and parole. Though there are parallels between women's and men's incarceration, there are many additional hardships that incarcerated

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[*] "Gender" in this article refers to a "cisgender" person whose sense of personal identity and gender corresponds with their birth sex. The author recognizes that there are a variety of gender identities in our society including non-binary, genderqueer, and transgender identities. Additional research relating to the experiences of non-cisgender primary caretakers of children in the criminal justice system is beyond the scope of this article but should be undertaken in future research and articles.

[1] Nancy Gertner, *Women and Sentencing*, 57 AM. CRIM. L. REV. 1401, 1402 (2020) (quoting Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291, 293 (2002)).

[2] *See Facts About the Over-Incarceration of Women in the United States*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/facts-about-over-incarceration-women-united-states (last visited Mar. 1, 2021).

[3] Lindsey Cramer et al., *Parent-Child Visiting Practices in Prisons and Jails*, URB. INST. (2017), https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails_0.pdf.

[4] Bryan L. Sykes & Becky Pettit, *Measuring the Exposure of Parents and Children to Incarceration*, *in* HANDBOOK ON CHILDREN WITH INCARCERATED PARENTS 11–23 (J. Mark Eddy & Julie Poehlmann-Tynan eds., 2019) (about 3.5% of U.S. children under age 18—or one child in every classroom of about 29 students—had a parent behind bars in 2015, mainly their fathers.).

mothers and their children face.[5] This Article explores those hardships and proposes reforms that will mitigate the damages and prevent future harm.

Part I of this Article begins by looking at the current level of mass incarceration[6] in the United States in tandem with the economic and social costs of the number of incarcerated individuals. Many efforts are underway to reduce the prison population and control the collateral consequences of existing policies. The need for evidence-based solutions that account for gender differences is critical to the national conversations on reforms.

Part II explains the need for gender-informed policy and reforms. As the number of women incarcerated continues to rise, so do efforts to explain the reasons and measure the consequences. Since the early 1980s, the casualty of incarcerating women from the war on drugs has become evident. As the rate of incarcerated women has climbed sharply, so has the number of children separated from their primary caregivers. While most of the research focusing on incarcerated parents continues to be on fathers, incarcerated mothers are more likely to have been their children's primary caretakers.[7] The resulting research thus fails to account for the disparate impacts on children when their mothers are incarcerated.[8] Though statistics demonstrate that women of color are disproportionately overrepresented in the criminal justice system,[9] this Article focuses on the intersections of incarcerated women's shared experiences as mothers and primary caretakers of dependent children.[10]

Unfortunately, there is a lack of comprehensive data distinguishing between maternal and paternal incarceration and the impacts on children; therefore, many of the sources cited throughout will appear outdated but, more likely, are the most recent data available for the various premises discussed.[11] There are profound consequences of disregarding gender in

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[5] *See* LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON & THEIR MINOR CHILDREN (2010) (demonstrating the most recent Bureau of Justice Statistics report that compares incarcerated parents of minor children by gender); *see also* Hayli Millar & Yvon Dandurand, *The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities*, 29 CRIM. L.F. 227, 235–36 (2018).

[6] Discussion and analysis on incarceration in the United States generally focuses on state prisons, federal prisons, and local jails.

[7] GLAZE & MARUSCHAK, *supra* note 5, at 5 (mothers in state and federal prisons were almost three times more likely than fathers to report they had provided most of the daily care for their children).

[8] Dawn K. Cecil, et al., *Female inmates, family caregivers, and young children's adjustment: A research agenda and implications for corrections programming*, 36 J. CRIM. JUST. 513, 513 (2008); *see also* Dan Levin, *As More Mothers Fill Prisons, Children Suffer 'A Primal Wound'*, N.Y. TIMES (Dec. 28, 2019) ("The toll it takes on children is often far more severe when the inmate is their mother. More than 60 percent of women in state prisons, and nearly 80 percent of those in jail, have minor children, and most are their primary caretaker."), https://www.nytimes.com/2019/12/28/us/prison-mothers-children.html.

[9] *See Incarcerated Women and Girls*, THE SENT'G PROJECT 2 (Nov. 24, 2020) (citing PRISONERS SERIES, WASH., DC: BUREAU OF JUST. STAT.), https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf.

[10] Keva M. Miller, et seq., *Variations in the Life Histories of Incarcerated Parents by Race and Ethnicity: Implications for Service Provision*, 87 SMITH COLL. STUD. SOC. WORK 59, 69–70 (2017); *see also* GLAZE & MARUSCHAK, *supra* note 5, at 5.

[11] *See* Lauren G. Beatty & Tracy L. Snell, *Profile of Prison Inmates, 2016*, BUREAU OF JUST. STAT. 19 (2021), https://bjs.ojp.gov/content/pub/pdf/ppi16.pdf (this report refers to a survey of prison inmates

policy discussions and implementation, including skyrocketing rates of incarcerated women and irreparable harm to millions of children.

Part III points out significant differences in risk factors for children with mothers who were their primary caretakers prior to incarceration, including financial insecurity, interruptions in caregiving during the parent's incarceration, adverse childhood experiences, and loss of contact with parents in prison.[12] The trauma and harm children experience from parental incarceration are often more severe and disruptive when their mothers are incarcerated.[13] A gender-informed understanding of the consequences for incarcerated mothers and their dependent children is critical to accounting for and explaining the reforms necessary to mitigate the harm.

Section IV is perhaps the best example of how incarceration sets mothers up to have parental rights to their children permanently terminated. While the stated purpose of the 1997 Adoption and Safe Families Act (ASFA) was to prevent children from languishing in foster care by making them eligible for adoption,[14] the result for incarcerated parents, especially those with sentences over fifteen months, is often the termination of their parental rights.[15] Without the resources and services necessary to maintain contact and a relationship with children, termination of parental rights constitutes an often-overlooked enhanced penalty for incarcerated mothers.[16]

Part V provides a brief history of sentencing policies in federal and state courts and notes the disproportionate impacts on women and children. As a result of efforts to eliminate discrimination, judicial discretion in sentencing decisions was significantly restricted. The focus of criminal sentencing shifted from a rehabilitative model to one of law and order. As a result, criminal justice policies and efforts fail to anticipate predictable and disparate impacts on women when implemented. Today, the United States holds the highest rate of incarcerated women in the world.[17] Despite the numbers, there is no corresponding increase in women's criminality; instead,

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from 2016 that does not differentiate between mothers, fathers, and stepparents.); *see also* GLAZE & MARUSCHAK, *supra* note 5, at 5.

[12] Julie Poehlmann, *Children of Incarcerated Mothers and Fathers*, 24 WIS. J.L. GENDER & SOC'Y 331, 332–33 (2009) (citing Danielle H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 FAM. REL. 440, 444, 448–49 (2007)).

[13] *See* Thomas E. Hanlon et al., *Research on the Caretaking of Children of Incarcerated Parents: Findings and Their Service Delivery Implications*, 29 CHILD. & YOUTH SERV. REV. 348, 350 (2007).

[14] Adoption and Safe Families Act of 1997, 42 U.S.C. 1305, Pub. L. 105-89, 111 Stat. 2115 (1997) (the stated purpose of the Adoption and Safe Families Act of 1997 signed into law on November 19, 1997, was to "promote the adoption of children in foster care.").

[15] Viki Klee, *Information Packet: ASFA*, NAT'L RESOURCE CTR. FOR FOSTER CARE & PERMANENCY PLANNING 2, 6 (2002).

[16] KRISTEN S. WALLACE, THE ADOPTION AND SAFE FAMILIES ACT: BARRIER TO REUNIFICATION BETWEEN CHILDREN & INCARCERATED MOTHERS 2 (Lyn Ariyakulkan ed., 2012).

[17] Aleks Kajstura, *States of Women's Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (2018), https://www.prisonpolicy.org/global/women/2018.html (indicating that while only 4% of the world's female population lives in the United States, the United States accounts for over 30% of the world's incarcerated women); *see also* Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, *in* GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 1 (Barbara E. Bloom ed., Carolina Academic Press 2003).

the rise in women in prisons and jails is directly related to underlying criminal justice policies.[18] Unfortunately, shifting the focus of sentencing systems to the collateral costs of criminal sentences on women and children has been an uphill battle. If the criminal justice system focuses on men, sentencing policies will continue to have disproportional impacts on women and their children.[19]

Before 1970, the sentencing system in the United States focused on tailoring each sentence to the specific circumstances and needs of the offender, with rehabilitation being the primary aim of punishment.[20] The "war on drugs" and "tough on crime" initiatives of the 1970s and 1980s spurred the movement away from consideration of individual needs and toward harsher sentences with specific timeframes. The result is the patchwork of sentencing policies in the United States today. Several scholarly articles advocate for the overhaul of current federal and state sentencing policies that would then be improved or replaced by the requirement to consider family responsibilities at sentencing.[21] Unfortunately, there has been little progress in the past fifty years toward widespread policy changes that help incarcerated mothers and their children. This Article highlights efforts to allow and encourage judges to resume consideration of the impact and collateral consequences on the mother, her children, and her community as part of sentencing. Since most women are incarcerated in state prisons and jails,[22] this Article highlights innovative state and local reforms and programs that consider family responsibilities and alternatives to incarceration at sentencing.

Part VI of this Article sets forth many of the benefits of and barriers to accessible prison visitation. The evidence confirms that policies that encourage parent-child contact offer many benefits and can be implemented without jeopardizing prison safety or security.[23] For instance, several studies conclude that increased prison visitation opportunities can improve inmate behavior by reducing disruptive and violent conduct in institutional

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[18] *Id.*

[19] Barbara Bloom et al., *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders*, U.S. DEPT. OF JUST., NAT'L INST. FOR CORR. 1, 4–8 (2003), https://www.prisonpolicy.org/scans/NIC_018017.pdf; *see also* Michal Gilad & Tal Gat, *U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 36 N.Y.U. REV. L. & SOC. CHANGE 371, 380 (2013).

[20] Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME & JUST. 141, 141–42 (2013).

[21] *See* Emma DeCourcy, *The Injustice of Formal Gender Equality in Sentencing*, 47 FORDHAM URB. L.J. 395 (2020); Lauren Feig, *Breaking the Cycle: A Family Focused Approach to Criminal Sentencing in Illinois*, UNIV. CHI. (2015); Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J. L. & SOC. POL'Y. 24 (2013); Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 700 (2006); Myrna S. Raeder, *Gender and Sentencing-Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 3 (1993).

[22] *Incarcerated Women and Girls*, *supra* note 9, at 1.

[23] BRYCE PETERSON ET AL., MODEL PRACTICES FOR PARENTS IN PRISONS AND JAILS: REDUCING BARRIERS TO FAMILY CONNECTIONS, BUREAU OF JUSTICE ASSISTANCE & THE NATIONAL INSTITUTE OF CORRECTIONS 1 (2019), https://s3.amazonaws.com/static.nicic.gov/Library/033094.pdf.

settings.[24] There is also evidence suggesting offenders are less likely to reoffend after release when familial bonds are maintained during incarceration.[25] Thus, a comprehensive approach would recognize that accessible prison visitation is beneficial for corrections staff, incarcerated parents, and children.

In Part VII, this Article explains the limitations of court challenges to prison visitation policies. The overall benefits of prison visitation outweigh the costs.[26] Yet, recognition of the benefits of prison visitation by prison administrators is crucial to overcoming the status quo of restrictive visitation policies and procedures. Courts give considerable deference to prison officials and their decisions, even those that may infringe on inmates' constitutional rights, so long as they are "reasonably related to legitimate penological interests."[27] The 2003 United States Supreme Court decision in *Overton v. Bazzetta*[28] demonstrates the difficulty of challenging prison visitation policies on constitutional grounds. The interests espoused by correctional institutions will almost always override any infringement on an incarcerated parent's rights or those of their children.

Part VIII offers solutions for improving meaningful access to visitation for children other than challenging prison policies in court. Tangible changes to reduce barriers will only happen when prison officials and others within the correctional system make the necessary programmatic and policy decisions to improve parent-child communications and contact.[29] In 2019, the Bureau of Justice Assistance (BJA) and the National Institute of Corrections (NIC) collaborated with the Urban Institute and Community Works West to roll out a set of model practices to facilitate parent-child communication and contact during parental incarceration. This Article highlights some of the model practices that are available for correctional facilities to implement. It also provides examples of states and facilities that have employed innovative programs to facilitate prison visitation.

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[24] *See* Joshua C. Cochran, *The Ties That Bind or the Ties That Break: Examining the Relationship Between Visitation and Prisoner Misconduct*, 40 J. CRIM. JUST. 433 (2012); Kristie R. Blevins et al., *A General Strain Theory of Prison Violence and Misconduct: An Integrated Model of Inmate Behavior*, 26 J. CONTEMP. CRIM. JUST. 148, 151–52 (2010); Chesa Boudin et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149, 152 (2013) (citing GARY C. MOHR, AN OVERVIEW OF RESEARCH FINDINGS IN THE VISITATION, OFFENDER BEHAVIOR CONNECTION, OH. DEP'T OF REHAB & CORR. (2012).).

[25] *See* Meghan M. Mitchell, et al., *The Effect of Prison Visitation on Reentry Success: A Meta-Analysis*, 47 J. CRIM. JUST. 74 (2016); Karen De Claire & Louise Dixon, *The Effects of Prison Visits from Family Members 74 on Prisoners' Well-Being, Prison Rule Breaking, and Recidivism: A Review of Research since* 1991, 18 TRAUMA VIOLENCE ABUSE 185 (2017); Daniel P. Mears et al., *Prison Visitation and Recidivism*, 29 JUST. Q. 888, 888, 893–94 (2012).

[26] Mitchell, et al., *supra* note 25, at 81.

[27] Turner v. Safley, 482 U.S. 78, 84–85 (1987) (internal quotation marks omitted) (recognizing the level of expertise needed to run a prison).

[28] Overton v. Bazzetta, 539 U.S. 126 (2003).

[29] PETERSON ET AL., *supra* note 23, at 4.

## I. THE HIGH COST OF INCARCERATION IN THE UNITED STATES

Although an incarceration-based punishment system has existed in the United States for over two centuries, mass incarceration is a relatively recent phenomenon.[30] Imprisoning people convicted of crimes has become the default response in this country, with 70% of convictions resulting in confinement.[31] There are approximately 2.3 million people in prisons and jails in the United States;[32] federal, state, and local governments supervise another 4.5 million adults on parole or probation.[33] These numbers translate to about one in one hundred American adults behind bars, and about one in thirty-three American adults under some form of correctional control.[34] Today, the United States maintains the highest rates of incarceration in the world.[35] The number of women incarcerated in the United States has grown at a rate twice that of men's incarceration.[36]

The ideological underpinnings of incarceration have historically relied on an empirical perspective that measures the benefits of imprisonment by the amount of crime prevented.[37] The reality, however, is that neither the crime rate nor criminal deterrence decreased in correlation with the skyrocketing rates of incarceration in the United States.[38] Instead, the high incarceration rates have been considerably costly, particularly on state governments who bear the bulk of the fiscal burden.[39] According to the Center on Budget and Policy Priorities, corrections spending is the third-largest spending category for most states, behind education and health care.[40] The annual economic burden on the United States is also substantial. The United States spends more than $80 billion each year for the nearly 2.3

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[30] *See* Melissa S. Kearney et al., *Ten Economic Facts about Crime and Incarceration in the United States*, THE HAMILTON PROJECT (May 1, 2014), https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf.

[31] Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (2018), https://www.prisonpolicy.org/global/2018.html.

[32] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html.

[33] DANIELLE KAEBLE, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATistics PROBATION AND PAROLE IN THE UNITED STATES, 2016 1 (2018) ("An estimated one in fifty-five adults in the United States were under community supervision at year-end 2016. Persons on probation accounted for the majority (81%) of adults under community supervision.").

[34] *One in 100: Behind Bars in America 2008*, THE PEW CHARITABLE TRS. (2008), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2008/one20in20100pdf.

[35] The United States has the highest prison population rate in the world at 707 per 100,000 of the national population. *See* NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 13, 33, 68 (Jeremy Travis et al. eds., 2014) [hereinafter GROWTH OF INCARCERATION IN THE U.S.].

[36] Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE, (Oct. 29, 2019), https://www.prisonpolicy.org/reports/pie2019women.html.

[37] *See* Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71 (2019).

[38] GROWTH OF INCARCERATION IN THE U.S., *supra* note 35, at 9.

[39] Kearney et al., *supra* note 30, at 12.

[40] Michael Mitchell & Michael Leachman, *Changing Priorities: State Criminal Justice Reforms and Investments in Education*, CTR. ON BUDGET POL'Y PRIORITIES 1 (Oct. 28, 2014), https://www.cbpp.org/research/changing-priorities-state-criminal-justice-reforms-and-investments-in-education.

million people incarcerated.[41] According to the Institute for Advancing Justice Research and Innovation, if essential social costs to incarcerated persons, families, children, and communities are considered, the cost of incarceration in the United States is closer to $1.2 trillion per year.[42]

## II. THE NEED FOR GENDER INFORMED CRIMINAL JUSTICE POLICIES AND REFORMS

Recognition of the enormous costs of incarceration has triggered national discussion around criminal justice reforms to reduce the number of people incarcerated and scale back the collateral consequences of a conviction.[43] To make real progress, efforts to reform the criminal justice system in the United States must address the underlying forces that shaped the current policies. Such efforts must also analyze the actual costs, including humanitarian and social costs, perpetuated by underlying policies. For example, trends in women's incarceration can be directly traced to longer sentences, including mandatory minimum sentences for nonviolent drug offenses, and sentencing systems that eliminate or reduce judicial discretion.[44] Policies resulting from the war on drugs are possibly the best example of a failure to account for foreseeable consequences:

> [n]o issue has had more impact on the criminal justice system in the past three decades than national drug policy. The "war on drugs," officially declared in the early 1980s, has been a primary contributor to the enormous growth of the prison system in the United States during the last quarter-century and has affected all aspects of the criminal justice system and, consequently, American society.[45]

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[41] Kearney et al., *supra* note 30, at 2; s*ee also* Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html; *Cf.* Neil Schoenherr, *Cost of Incarceration in the U.S. More Than $1 Trillion*, THE SOURCE, WASH. UNIV. ST. LOUIS (Sept. 7, 2016), https://source.wustl.edu/2016/09/cost-incarceration-u-s-1-trillion/ (referring to Michael McLaughlin, et al., *The Economic Burden of Incarceration in the U.S.* 2–4 (Concordance Inst. for Advancing Soc. Just., Working Paper No. CI072016 July 2016), https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf ("The $80 billion spent annually on corrections is frequently cited as the cost of incarceration, but this figure considerably underestimates the true cost by ignoring important social costs.")).

[42] *See* Schoenherr, *supra* note 41.

[43] Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, THE SENT'G PROJECT 1–4 (Jan. 17, 2020), https://www.sentencingproject.org/wp-content/uploads/2020/01/Top-Trends-in-State-Criminal-Justice-Reform-2019.pdf.

[44] *See* Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE 6–7 (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

[45] Marc Mauer & Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, THE SENT'G PROJECT 1 (2007), https://www.sentencingproject.org/wp-content/uploads/2016/01/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf.

Incarcerated women of all races and ethnicities are also more likely than their male counterparts to report having minor children.[46] Thus, Women and children have been hit particularly hard by criminal justice policies emphasizing increased mandatory penalties for low-level drug offenses.[47] Before 1980, women were less than 5% of all prisoners.[48] Now, females account for approximately one of every fourteen prisoners in the United States.[49] Since the inception of the war on drugs, the number of women incarcerated in the United States has increased by over 700%.[50] While the dramatic rise of female offenders entering the corrections system has enhanced scholarly research on the causes and consequences of the increases, the disparate impacts of policies and reforms continue today.

Women are considerably more likely to be in prison for a drug conviction than men.[51] According to the Drug Policy Alliance, more than 61% of women in federal prison are there for nonviolent drug offenses.[52] Consequently, women of color have been disproportionately impacted by harsh drug policies. Drug use occurs at similar rates across racial and ethnic groups, but racialized women are far more likely to be criminalized for drug law violations than white women.[53] The systemic criminal justice reforms necessary to tackle mass incarceration require an acceptance of the realities of inherent race and gender disparities.

Women in state prisons are also more likely than men to be incarcerated for a drug or property offense. For example, 26% of women compared to 13% of men in prison have been convicted of a drug offense.[54] Almost 25% of incarcerated women have been convicted of a property crime, compared to 16% among incarcerated men.[55] At the end of 2018, more female offenders were serving time in state prisons for drug (26%) or property (24%) offenses than males (13% drugs, 16% property).[56]

Over the decades, women have remained far less likely to be convicted of violent offenses than men and continue to be less threatening to the safety of the community.[57] Instead, the offenses women commit are often motivated by socioeconomic factors. Furthermore, "[m]any of the violent crimes committed by women are against a spouse, ex-spouse, or partner, and

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[46] *Id.* at 13.

[47] *Id.*

[48] Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 133 (1999) (citing Elizabeth F. Moulds, *Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System, in* WOMEN IN THE CRIMINAL JUSTICE SYSTEM 277, 286–87 (Susan Datesman & Frank Scarpitti eds., 1980)).

[49] Sawyer, *supra* note 44.

[50] *Incarcerated Women and Girls, supra* note 9, at 1.

[51] *Women, Prison, and the Drug War*, THE DRUG POL'Y ALL. (2018), https://drugpolicy.org/sites/default/files/women-and-the-drug-war_0.pdf.

[52] *Id.*

[53] *Id.*

[54] *Incarcerated Women and Girls, supra* note 9, at 4.

[55] *Id.*

[56] E. Ann Carson, *Prisoners in 2019*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. 1, 20 (2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf.

[57] *Incarcerated Women and Girls, supra* note 9, at 4; *see also* Bloom et al., *supra* note 19, at 1.

the women committing such crimes are likely to report having been physically and/or sexually abused, often by the person they assaulted."[58]

Most female offenders also report previous victimization, mental illness, and substance abuse.[59] Domestic violence is the most reported type of abuse reported by female prisoners.[60] It should be no surprise that women are also more likely to enter prison with mental health problems or to develop them while incarcerated.[61]

Nevertheless, even as the number of incarcerated women has increased, research exploring crime and incarceration still focuses on male offenders.[62] Consequently, criminal justice policies and interventions continue to disregard the differences between male and female offenders. Therefore, these policies do not sufficiently reflect an understanding of the realities of women's lives.[63] Though there is continuing debate about the discriminatory aspects of treating women differently from men in the criminal justice realm, that debate has created a model of justice that purports to treat all offenders the same regardless of gender.[64] This model has resulted in the implementation of criminal justice policies that fail to anticipate disparate impacts on female offenders and lead to collateral consequences associated with their incarceration.[65]

The spike in the number of incarcerated women does not correspond with the rate or seriousness of their crimes.[66] Instead, the rate of women in prisons and jails appears to result from shifts in political and public policy trends based on male criminality, relegating female offenders and their children as collateral damage within the United States criminal justice system.[67] Many of the underlying causes for the spike in the number of women incarcerated resulted from policies surrounding the war on drugs. Other contributing factors include:

> [T]he shift in legal and academic realms toward a view of lawbreaking as individual pathology, ignoring the structural

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[58] Covington & Bloom, *supra* note 17, at 1.

[59] Emily M. Wright et al., *Gender-Responsive Lessons Learned and Policy Implications for Women in Prison: A Review*, 39 CRIM. JUST. & BEHAV. 1612, 1613 (2012).

[60] *Id.* at 1616.

[61] *Principles of Drug Abuse Treatment for Criminal Justice Populations*, NAT'L INST. OF HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., NAT'L INST. OF DRUG ABUSE 28 (2014), https://www.drugabuse.gov/sites/default/files/txcriminaljustice_0.pdf ("Incarcerated women in treatment are significantly more likely than incarcerated men to have severe substance abuse histories, co-occurring mental disorders, and high rates of past treatment for both; they also tend to have more physical health problems. . . . Approximately 50[%] of female offenders are likely to have histories of physical or sexual abuse, and women are more likely than men to be victims of domestic violence.").

[62] Covington & Bloom, *supra* note 17, at 2–3.

[63] *Id.*

[64] *Id.* at 4.

[65] *Id.* at 2–3, 7.

[66] *Id.* at 1.

[67] *See* Stephanie S. Covington, *A Woman's Journey Home: Challenges for Female Offenders and Their Children*, U.S. DEP'T OF HEALTH & HUM. SERV., THE URB. INST. (Jan. 30, 2002), https://www.aspe.hhs.gov/sites/default/files/migrated_legacy_files//42361/Covington.pdf?_ga=2.87608600.1629971122.1642899818-1567356651.1642899818.

> and social causes of crime; government policies that prescribe simplistic, punitive enforcement responses to complex social problems; federal and state mandatory sentencing laws; and the public's fear of crime even though crime in the United States has been declining for nearly a decade.[68]

Today, there is a foundation for reform that can be realized only through the implementation of gender-informed policies that consider the realities of women's lives. Unfortunately, increasing research on the collateral costs of long prison sentences for mothers and their children has had a negligible impact on reform policies. Even the FIRST STEP Act,[69] claimed by many as the most significant reform legislation to our criminal justice system in decades,[70] contains only two provisions specific to women. The first mandates that "healthcare products" like tampons and sanitary napkins be provided free of charge.[71] The other provision prohibits officials from using restraints on pregnant inmates and those in postpartum recovery.[72] Additionally, the FIRST STEP Act affects federal prisoners only; however, more women are held in local jails than state prisons.[73]

Without considering gender, policymakers cannot begin to comprehend the full impact of existing policies on women involved in the criminal justice system. Only when gender differences and the inequitable implications on women are addressed will there be a recognition of the collateral consequences for women's lives, circumstances, and experiences in incarceration.

## III. SIGNIFICANT RISK FACTORS: MOTHERS AS PRIMARY CARETAKERS AND THEIR DEPENDENT CHILDREN

While the overall picture of incarcerated women is less than complete, motherhood is an overwhelming common denominator requiring more research focusing on incarcerated women's unique experiences as mothers,[74] including their roles as primary caretakers of dependent children.[75] Today, almost two-thirds of incarcerated women in state prisons[76] and 80% of those

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[68] Covington & Bloom, *supra* note 17, at 1–2.

[69] This Act was passed in 2018 to limit mandatory minimums for non-violent drug offenses, to retroactively reduce sentences under the 100 to 1 crack cocaine disparity and expand rehabilitation in federal prisons. First Step Act of 2018, 18 U.S.C. § 4042 (2018).

[70] *Senate Passes Landmark Criminal Justice Reform*, COMM. JUDICIARY (Dec. 18, 2018), https://www.judiciary.senate.gov/press/rep/releases/senate-passes-landmark-criminal-justice-reform.

[71] First Step Act, *supra* note 69.

[72] *Id.*

[73] *See* Kajstura, *supra* note 36.

[74] Katarzyna Celinska & Jane A. Siegel, *Mothers in Trouble: Coping with Actual or Pending Separation from Children Due to Incarceration*, 90 PRISON J. 447, 448 (2010).

[75] Acoca & Raeder, *supra* note 48 (citing MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT 84–85 (2014)).

[76] Emily Halter, *Parental Prisoners: The Incarcerated Mother's Constitutional Right to Parent*, 108 J. CRIM. L. & CRIMINOLOGY 539, 542 (2018); *see also* Wendy Sawyer, *Bailing Moms Out for Mother's*

in jails are mothers,[77] and most of them are primary caretakers of dependent children.[78] Thus, more research on incarcerated women's unique experiences as mothers, including their roles as primary caretakers of dependent children, is required.

Consequently, the surge in women's incarceration rates means the number of children impacted by the mass incarceration of the last several decades has reached unprecedented numbers. The war on drugs has seen the number of children with a mother in prison spike by 100% and those with incarcerated fathers increase by more than 75%.[79] "Recent estimates show that 2.7 million [United States] children have a parent who is incarcerated, and more than 5 million children—7[%] of all [United States]children—have had a parent in prison or jail at some point."[80] While one in twenty-eight children have an incarcerated parent,[81] if exposure to the criminal justice process beyond incarceration is considered, including arrest, probation, and parole, the estimate of affected children rises to ten million.[82] Making matters worse, the actual number and demographic details of children affected are unknown because this information is not systematically collected by correctional facilities, child welfare agencies, or schools.[83] Even today, no evidence indicates any coordinated effort by law enforcement or sentencing judges at any time in the criminal justice process to inquire whether an offender has children. Furthermore, despite the number of children impacted, most of the research thus far examining incarceration and parenting focuses on fathers without differentiating between paternal versus maternal incarceration.[84]

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*Day*, PRISON POL'Y INITIATIVE (May 8, 2017), https://www.prisonpolicy.org/blog/2017/05/08/mothers-day/ (stating that 80% of women in jails are mothers).

[77] Elizabeth Swavola et al., *Overlooked: Women and Jails in an Era of Reform*, VERA INST. OF JUST. 1, 7 (2016), https://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf (citing SUSAN W. MCCAMPBELL, THE GENDER-RESPONSIVE STRATEGIES PROJECT: JAIL APPLICATIONS, NAT'L INST. CORR. 4 (2005)).

[78] Sawyer, *supra* note 76.

[79] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. JUST. 1, 2 (2017), https://www.ojp.gov/pdffiles1/nij/250349.pdf.

[80] Cramer et al., *supra* note 3, at 6 (citing David Murphy & P. Mae Cooper, *Parents Behind Bars: What Happens to their Children?*, CHILD TRENDS (2015), https://www.academia.edu/31374279/Parents_Behind_Bars_What_Happens_to_Their_Children)).

[81] *Collateral Costs: Incarceration's Effect on Economic Mobility*, THE PEW CHARITABLE TRS. 4, 21 (2010), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcostspdf.pdf.

[82] Myrna S. Raeder, *Making a Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. 23, 23 (2012).

[83] Julie Poehlmann et al., *Children's Contact with Their Incarcerated Parents, Research Findings and Recommendations*, 65 AM. PSYCH. 575, 575 (2010); *see also* Charlene Wear Simmons, *Children of Incarcerated Parents*, 7 CAL. RES. BUREAU 1, 2 (2000), https://files.eric.ed.gov/fulltext/ED444750.pdf (summarizing what is known about children of incarcerated parents in California in 2000 and providing example of a systemic failure to coordinate data collection of children with an incarcerated parent existing today).

[84] Kristen Turney & Christopher Wildeman, *Maternal Incarceration and Child Wellbeing: Detrimental for Some? Heterogeneous Effects of Maternal Incarceration on Child Wellbeing*, 14 CRIMINOLOGY & PUB. POL. 125, 127 (2015); *see also* Cramer et al., *supra* note 3, at 6.

The increasing number of children with an incarcerated parent represents one of the most significant collateral consequences of incarcerating women in the United States.[85] Where a child lives and who cares for the child when a parent is incarcerated often dictates the extent of the collateral damage children will endure throughout their lifetimes. Understanding how the outcomes and risk factors can vary depending on the incarcerated parent is imperative to framing policies to mitigate the damage. While most children suffer when either parent is incarcerated, the collateral effects are often dramatically different for children when their mother, not their father, is imprisoned.[86] A significant reason for the disparate impact is because a higher percentage of female offenders than male offenders are the primary caretakers of their young children.[87]

Furthermore, between 70 and 90% of incarcerated women are single parents. Thus, not only are they the primary caretakers, but they are often the only caretakers.[88] As a result, children with an incarcerated mother have an increased risk of being placed in foster care or moved from caretaker to caretaker.[89] Notably, 88% of fathers in state prisons reported the other parent as their child's caregiver, compared to only 37% of mothers.[90] When mothers are incarcerated, 68% of children live with a grandparent or other relative instead of their fathers.[91] According to one study, over 40% of children with an incarcerated mother live with their grandmothers.[92]

Since most women sent to prison face financial insecurity, relatives caring for their children must take on the additional burdens of raising children with little or no financial assistance from the incarcerated parent.[93] The economic strain in children's households is worse for families with other dependents or grandparents with limited income.[94] The financial hardships caused by parental incarceration are related to the increased risks to children of multiple moves, school changes, childhood poverty, and contact with the child welfare system.[95] In addition, when a child loses a

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[85] *See, e.g.*, NELL BERNSTEIN, ALL ALONE IN THE WORLD, CHILDREN OF THE INCARCERATED (2005).

[86] Poehlmann, *supra* note 12, at 331.

[87] GLAZE & MARUSCHAK, *supra* note 5, at 5.

[88] Gilad & Gat, *supra* note 19, at 372; *see also* Jordana Hart, *Bill Lets Mothers in Prison Keep Tots: Benefits to Parent and Child Are Cited*, BOSTON GLOBE, June 26, 1997, at B1.

[89] Poehlmann, *supra* note 12, at 332–33 (citing Rebecca J. Shlafer & Julie Poehlmann, *Attachment and Caregiving Relationships in Families Affected by Parental Incarceration*, 12 ATTACHMENT & HUM. DEV. 395 (2010)).

[90] Steve Christian, *Children of Incarcerated Parents*, NAT'L CONF. OF STATE LEGISLATURES 1, 4 (2009), https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf.

[91] *Id*.

[92] GLAZE & MARUSCHAK, *supra* note 5, at 5.

[93] Creasie Finney Hairston, *Children with Parents in Prison: Child Welfare Matters*, *in* CW360°: A COMPREHENSIVE LOOK AT A PREVALENT CHILD WELFARE ISSUE 4, 4 (2008), https://cascw.umn.edu/wp-content/uploads/2013/12/CW360.pdf.

[94] Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 475 (2006) (describing the emotional, financial, and social struggle many family members face in addition to caretaking responsibilities as a result of having a family member incarcerated).

[95] Christian, *supra* note 90, at 3.

primary caregiver, their sense of security and continuity of care are often significantly disrupted, making them vulnerable to other risk factors.

The Centers for Disease Control and Prevention have established that children with an incarcerated parent experience disruptions that qualify as adverse childhood experiences (ACE).[96] An ACE is defined as "a traumatic experience that serves as a pathway for social, emotional, and cognitive neurodevelopmental impairments."[97] There is also evidence that children with an incarcerated parent are exposed to almost five times as many ACEs as children without incarcerated parents, including experiences preceding parental incarceration.[98]

It is helpful to understand the concept of attachment theory when considering the link between parental incarceration and childhood trauma. Attachment theory emphasizes the significance of disruptions in parent-child relationships, including the connection between parental incarceration and negative outcomes for children.[99] When an attachment figure is removed from a child's life, the child's vulnerability to later adversity increases.[100] Additionally, when children are separated from a primary caregiver at critical stages of development, they are prevented from forming healthy bonds, a particularly devastating consequence for children with incarcerated mothers.[101]

Consequently, a significant factor important for predicting harm is the child's age at the time of the parental separation.[102] One study found that "22% of children with a parent in state prison and 16% of children with parents in federal prison were four years of age or younger."[103] Children in this age group are in the process of forming primary attachments, making them particularly vulnerable to the effects of parental separation.[104]

The available evidence demonstrates that for children whose primary caretaker parent is incarcerated, the disruption and trauma caused by separation can lead to depression, anxiety, and developmental delays.[105] Studies also confirm people exposed to severe early childhood stress can have an earlier onset of psychological disorders that are more difficult to

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[96] *See Preventing Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/aces/fastfact.html (last visited May 15, 2021).

[97] Joyce A. Arditti, *Child Trauma Within the Context of Parental Incarceration: A Family Process Perspective*, 4 J. FAM. THEORY & REV. 181, 181 (2012) (explaining that having a parent incarcerated can cause levels of stress and trauma similar to children who experience abuse, domestic violence, and divorce).

[98] Kristin Turney, *Adverse Childhood Experiences Among Children of Incarcerated Parents*, 89 CHILD & YOUTH SERV. REV. 218, 218 (2018).

[99] Arditti, *supra* note 97, at 183.

[100] *Id.* at 184.

[101] Dallaire, *supra* note 12, at 15.

[102] Poehlmann, *supra* note 12, at 576.

[103] *Id.* (citing GLAZE & MARUSCHAK, *supra* note 5, at 3).

[104] Poehlmann, *supra* note 12, at 576.

[105] Martin, *supra* note 79, at 3.

treat in adulthood.[106] For example, "adverse childhood experiences account for about 45% of the population-attributable risk for childhood-onset psychiatric disorders."[107]

Removing a child from an emotional environment required for their development is one of the most profound traumas a child can experience.[108] Parents act as a buffer between their children and psychological stress and adversity.[109] When parents are removed from children's lives, they cannot act as that buffer and cannot protect their children from the psychological harm that the separation will cause them later in their lives.[110]

While the empirical data is incomplete, there is some evidence of an intergenerational cycle of incarceration for children who have had a parent incarcerated.[111] This risk of involvement in the criminal justice system may be even higher for children of incarcerated mothers.[112] Adolescents are often more vulnerable to peer pressure and are more likely to engage in deviant conduct without parental intervention.[113] Children exposed to more adverse childhood experiences, such as parental abuse, neglect, addiction, and parental incarceration, are also disproportionately susceptible to criminal behavior as adolescents and adults.[114]

Too many traumatic experiences can even lead to a recognized phenomenon known as Reactive Attachment Disorder (RAD), a trauma- and stressor-related condition of early childhood caused by social neglect and maltreatment.[115] RAD results in difficulty forming emotional attachments and an inability to be comforted or feel secure.[116] Children with RAD are "more likely than their neuro-typical peers to engage in high-risk sexual

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[106] Martin H. Teicher & Jacqueline A. Samson, *Childhood Maltreatment and Psychopathology: A Case for Ecophenotypic Variants as Clinically and Neurobiologically Distinct Subtypes*, 170 AM. J. PSYCHIATRY 1114, 1114 (2013).

[107] Martin H. Teicher, *Childhood Trauma and the Enduring Consequences of Forcibly Separating Children from Parents at the United States Border*, 16 BIOMED CENT. MED. 146, 147 (2018), https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-018-1147-y.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Christian, *supra* note 90 (citing CREASIE FINNEY HAIRSTON, FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE 1, 4–5 (2007), https://repositories.lib.utexas.edu/bitstream/handle/2152/15158/aecasey_children_incparents.pdf?sequence=2).

[112] Albert M. Kopak & Dorothy Smith-Ruiz, *Criminal Justice Involvement, Drug Use, and Depression Among African American Children of Incarcerated Parents*, 6 RACE & JUST. 89, 92–93 (2016); *see also* Dallaire, *supra* note 12, at 449 (finding one study concluding that mothers were two and a half times more likely than fathers to report that their own adult children were incarcerated and that generally the risk of poor outcomes intensified with maternal incarceration).

[113] Hanlon et al., *supra* note 13, at 350.

[114] *Id.* at 349–50.

[115] *E.g.*, *Reactive Attachment Disorder*, TRAUMA DISSOCIATION, (quoting 6B44 *Reactive Attachment Disorder*, ICD-11 FOR MORTALITY & MORBIDITY STATS. (2021)), http://www.traumadissociation.com/rad (last visited May 16, 2021).

[116] *Id.*

behavior, substance abuse, involvement with the legal system, and experience incarceration."[117]

Many of the impacts of parental incarceration on children are often related to the problems leading to the parent's involvement with the criminal justice system.[118] The trauma of having a parent incarcerated often intensifies the problems that already exist for children.[119] Since women involved in the criminal justice system have a higher likelihood of family instability, usually resulting from addiction and mental health problems,[120] their children face certain increased risks. Their children's risks include increased financial insecurity, social stigma, caregiving changes during incarceration, and limited contact with their parents in prison.[121] Assessing the effects on children with an incarcerated parent may require distinguishing between the risk factors present before the parents' incarceration and afterward.[122]

There are limited studies distinguishing the impacts on children facing separation because of parental incarceration and other risk factors the children face. For example, it is difficult to disentangle the research to distinguish the effects of parental incarceration from substance abuse, child abuse, domestic violence, and mental illness that may have existed long before a parent is incarcerated.[123] In addition, research that tries to assess parenting skills before and after incarceration is also challenging. Nevertheless, there is general acceptance that children experience a high level of disruption when their mother is incarcerated.[124]

## IV. TERMINATION OF PARENTAL RIGHTS: THE ULTIMATE PUNISHMENT

Since incarceration is not a discrete event but "a dynamic process that unfolds over time,"[125] the long-term impacts on children whose mother is incarcerated differ depending on various factors.[126] Moreover, not all risk factors for children with an incarcerated parent are the same. Policy

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[117] Elizabeth E. Ellis et al., *Reactive Attachment Disorder*, STATPEARLS, https://www.ncbi.nlm.nih.gov/books/NBK537155/ (last visited May 16, 2021).

[118] Susan D. Phillips et al., *Differences Among Children Whose Mothers Have Been in Contact with the Criminal Justice System*, 17 WOMEN & CRIM. JUST. 43, 45 (2006).

[119] John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 123 (1999).

[120] *Id.*

[121] Poehlmann, *supra* note 12, at 332 (citing Dallaire, *supra* note 12, at 444, 448–49).

[122] *See* Hanlon et al., *supra* note 13, at 349.

[123] *Id.* at 349–50.

[124] *See generally* Hanlon et al., *supra* note 13 (focusing on the impact of incarceration on urban African American children and on the incarceration of mothers "because children are less likely to be cared for by their fathers during their incarceration") (citing CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000)).

[125] Ross D. Parke & K. Alison Clarke-Stewart, *From Prison to Home: Effects of Parental Incarceration on Young Children*, NAT'L POL'Y CONF. 1, 3 (2001) (working paper prepared for the "From Prison to Home" Conference Jan. 30–31, 2002), https://aspe.hhs.gov/system/files/pdf/74981/parke%26stewart.pdf.

[126] *Id.*

solutions must "take into account the child's unique needs, the child's relationship with the incarcerated parent, and alternative support systems."[127] There is general agreement in the literature that because mothers are more likely to be the sole caregivers, a child's continuity of care and sense of security are more dramatically disrupted by a mother's incarceration than a father's.[128] One reason is fathers, unlike mothers, typically have a spouse or partner providing childcare during their incarceration.[129]

Children are more likely to be placed into foster care when their mother rather than their father is incarcerated.[130] Though the data is incomplete, reports to the Bureau of Justice Statistics by parents in state prisons found incarcerated mothers were five times more likely than fathers to report their children were in foster care.[131] A more recent Department of Health and Human Services report from 2016 estimated that 20,939 American children are placed in foster care when a parent is incarcerated.[132]

> Mothers and fathers who have a child placed in foster care because they are incarcerated — but who have not been accused of child abuse, neglect, endangerment, or even drug or alcohol use — are more likely to have their parental rights terminated than those who physically or sexually assault their kids, according to a Marshall Project analysis of approximately 3 million child-welfare cases nationally.[133]

As a result, because female prisoners are more likely than male inmates to have their children placed in foster care, they are also more likely to have their parental rights terminated.[134]

Incarcerated parents and their children are impacted by several child welfare laws, including timeline requirements outlined in the Adoption and

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[127] Martin, *supra* note 79.

[128] *See* Hanlon et al., *supra* note 13, at 350 (citing ALLEN J. BECK, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 1999 1 (2000)).

[129] *Id.*

[130] Poehlmann, *supra* note 12, at 332.

[131] Christian, *supra* note 90, at 4; *accord* WOMEN'S PRISON ASS'N, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY BASED ALTERNATIVES, INST. ON WOM. & CRIM. JUST. 1 (2009) (stating 2% of the children of incarcerated fathers and 10% of the children of incarcerated mothers are in foster care), https://www.prisonlegalnews.org/media/publications/womens_prison_assoc_report_on_prison_nurseries_and_community_alternatives_2009.pdf.

[132] U.S. DEP'T OF HEALTH & HUM. SERV., THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT, NO. 24, (Oct. 20, 2017), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport24.pdf.

[133] Eli Hager & Anna Flagg, *How Incarcerated Parents are Losing Their Children Forever*, THE MARSHALL PROJECT (Dec. 2, 2018), https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever.

[134] *Id.*

Safe Families Act of 1997 (ASFA).[135] When children are in foster care, ASFA requires an expeditious permanency plan for the child's placement, which involves filing petitions to terminate parental rights to children living in out-of-home care for fifteen of the last twenty-two months.[136] Termination of parental rights means a parent loses any rights to visitation or decision-making authority while in prison and after release. The involuntary termination of parental rights is such a devastating and final consequence for a parent and child that some people declare it is tantamount to a civil death penalty.[137]

Given the strict timelines for initiating termination of parental rights proceedings, incarcerated parents lose their parental rights at a disproportionate rate.[138] According to the Bureau of Justice Statistics, state prisoners serving time for drug offenses, including trafficking and possession, served an average of twenty-two months.[139] As a result, incarcerated parents with children in foster care face the real possibility of having their rights terminated.[140]

Though ASFA is a federal provision requiring filing for termination of parental rights in certain cases, state laws dictate additional conditions or grounds for termination of parental rights.[141]

> These conditions include length of confinement relative to the child's age; failure to make provision for the child's care; the quality of the parent-child relationship and the effect of incarceration thereon; pre-incarceration contact with and support of the child; repeated incarceration; failure to cooperate with the child welfare agency's efforts to help with case planning and visitation; and the nature of the crime for which the parent is incarcerated.[142]

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[135] *E.g.*, WALLACE, *supra* note 16.

[136] MARTHA L. RAIMON ET AL., *Sometimes Good Intentions Yield Bad Results: ASFA's Effect on Incarcerated Parents and Their Children*, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 121, 123 (2009) (under the timelines of ASFA, termination proceedings are mandated unless the child is in the care of a relative, reasonable efforts to reunify the family have not been provided, or there is a compelling reason why it is not in the best interest of the child to terminate the parental relationship).

[137] Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989) ("Because termination of a parent's rights to her child is tantamount to imposition of a civil death penalty, we have previously declared that 'the degree and duration of parental fault or incapacity necessary to establish jurisdictional grounds for termination is greater than that required for other forms of judicial intervention.'").

[138] RAIMON ET AL., *supra* note 136.

[139] KAEBLE, *supra* note 33 (the average time served by state prisoners released in 2016, from initial admission to initial release, was 2.6 years, and the median time served was 1.3 years. State prisoners serving time for drug offenses, including trafficking and possession, served an average of twenty-two months and a median time of fourteen months before their initial release).

[140] Christian, *supra* note 90, at 5–6.

[141] *Id.* at 6.

[142] *Id.* at 6; *see also* Myrna S. Raeder, *Gender-Related Issues in a Post*-Booker *Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 700 (2006).

The parents of children placed in foster care are required to navigate the child welfare system in a way that indicates they are making active efforts toward family reunification.[143] Maintaining contact, preferably face-to-face visitation, with a child in foster care can be critical for a court to decide whether to grant a termination decree for incarcerated parents.[144] In addition, dependency proceedings often require a parent's meaningful participation in the case plan. One of the many barriers to visitation for incarcerated parents is the inability or refusal of the child's caretaker to transport the child to the correctional facility for visitation.[145] The obstacles to visitation are even worse when children are in foster care because parents rely on caseworkers for approval and arranging visitations. Most caseworkers, however, have high caseloads and may be less inclined to pursue the prospect of the reunification of a child with a parent who is incarcerated.[146] It is also critical that an attorney representing the incarcerated parent maintain contact with the parent and ensure that prison officials cooperate to allow the parent an opportunity to review the state's evidence and be available for termination proceedings.

For parents to avoid having their rights terminated, they must have the opportunity to participate in the dependency proceedings actively. Participation requires informing parents of the status of the proceedings, ensuring they understand the requirements of a case plan, and having the ability to meet their obligations for reunification.[147] Unfortunately, few caseworkers maintain necessary communication about the proceedings with the incarcerated parent.[148] Additionally, many incarcerated parents cannot receive the reunification services required, including substance abuse treatment or mental health interventions while incarcerated.[149]

> In the BJS study, more than half of parents in state prison (55[%] of fathers and 74[%] of mothers) reported a mental health problem and more than two-thirds (67[%] of fathers and 70[%] of mothers) reported substance dependence or abuse. Only [four] in [ten] of these parents, however, reported receiving treatment for substance abuse since admission, and only one-third received treatment for mental health problems.[150]

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[143] *See* CHILD WELFARE INFORMATION GATEWAY, *Reunifying Families*, U.S. DEP'T OF HEALTH & HUM. SERVS. ADMIN. FOR CHILD. & FAM., CHILDS. BUREAU, https://www.childwelfare.gov/topics/permanency/reunification/ (last visited May 24, 2021).

[144] Christian, *supra* note 90, at 6.

[145] *Id.* at 5.

[146] *Id.* at 6.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.* (referring to GLAZE & MARUSCHAK., *supra* note 5, at 8, 19).

The impacts of legally terminating the relationship between a parent and a child can have life-long consequences for both, including severe anxiety, depression, and PTSD. [151] Many incarcerated parents are unaware of the risk of having their rights terminated or do not understand how to avoid it. Even if they know the risks, the obstacles to meeting their obligations, including attending hearings and complying with case plan requirements, can be impossible to overcome.[152] Addressing these concerns will require incarcerated parents to access competent attorneys who understand the child welfare system and how it interfaces with the correctional system.[153] It is also necessary to have improved coordination between law enforcement, child welfare agencies, and the courts.[154] Even when parental rights are not at risk of being terminated, maintaining a strong parent-child bond can play a significant role in a child's ability to overcome challenges and increase their chances for a successful life.[155] It is also generally understood that children with a strong support system under any circumstances are more likely to develop resilience despite the risks.[156]

## V. CONSIDERATION OF FAMILIAL RESPONSIBILITIES AND IMPACTS AT SENTENCING

Many incarcerated parents intend to reunify with their families and children; however, the barriers to successfully doing so are steep.[157] Prison policies oriented towards family reunification must consider the parent-child relationship from sentencing to post-release.[158] Doing so necessarily requires consideration of a person's familial responsibilities throughout the criminal legal proceedings, including at the time of sentencing.

### *A. Brief History of Federal and State Sentencing*

A brief history of federal and state sentencing sheds light on potential challenges against and possibilities for reforms, including facilitating meaningful consideration of offending mothers and responsibility for their children. Historically, the dominant purposes of punishment were deterrence, incapacitation, and rehabilitation.[159] In support of these goals,

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[151] *See* Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting*, NOVA NEXT (June 20, 2018), https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/.

[152] Christian, *supra* note 90, at 11.

[153] *Id.*

[154] *Id.*

[155] *See* Rebecca Shlafer et al., *Children with Incarcerated Parents, Considering Children's Outcomes in the Context of Family Experiences*, UNIV. OF MINN. CHILD., YOUTH & FAM. CONSORTIUM 1, 7 (2013).

[156] *See* Julie Poehlmann & J. Mark Eddy, *Introduction and Conceptual Framework*, 78 SOC'Y. RSCH. CHILD DEV. 1 (2013).

[157] Hairston, *supra* note 93, at 4.

[158] PETERSON ET AL., *supra* note 23, at 71.

[159] Richard S. Frase, *Why Have U.S. State and Federal Jurisdictions Enacted Sentencing Guidelines?*, SENT'G GUIDELINES RES. CTR. (Mar. 25, 2015), https://sentencing.umn.edu/content/why-have-us-state-and-federal-jurisdictions-enacted-sentencing-guidelines.

judges and parole boards had broad discretion to consider various factors and characteristics of each offender, including the nature of the crime and potential for rehabilitation.[160] "Since women were, in accordance with the norms and psychological teachings of the era, deemed fit subjects for rehabilitation, it followed that the duration of their incarceration should reflect the time needed to rehabilitate rather than the time needed to punish."[161]

Before 1970, every American state and the federal system operated under an indeterminate sentencing system premised on rehabilitation through tailoring sentences in each case to the offender's circumstances and needs.[162] This level of discretion often resulted in highly individualized or "indeterminate" and inevitably disparate sentences.[163] Additionally, studies available then demonstrated that broad discretion failed to deter crime and was, instead, leading to troubling disparities, including racial inequality.[164] These findings led to a widespread attack on indeterminate sentencing in several states and a bi-partisan consensus that discretion in sentencing and prison release decisions should be substantially reduced.[165]

Between the 1920s and 1970s, the rate of incarceration remained stable.[166] In 1971, however, President Nixon's declaration of the "war on drugs" started a long-term climb in prison rates with mandatory sentences of incarceration, reduced access to parole, and pressure to expand the capacity of prison populations by constructing new facilities.[167] By 1980, President Reagan's "tough on crime" campaign[168] eventually led to the Sentencing Reform Act of 1984 (SRA) and Federal Sentencing Guidelines (Guidelines) that followed, in which initiatives sought to make sentences harsher and more uniform.[169]

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[160] *Id.*

[161] Marianne Popiel, *Sentencing Women: Equal Protection in the Context of Discretionary Decisionmaking*, 6 WOMEN'S RTS. L. REP. 85, 85 (1979); *see also* Carolyn Engel Temin, *Discriminatory Sentencing of Women Offenders: The Argument for ERA in a Nutshell*, 11 AM. CRIM. L. REV. 355, 358 (1973).

[162] Tonry, *supra* note 20.

[163] Frase, *supra* note 159.

[164] *Id.*

[165] *Id.* (citing RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1–4 (Alfred Blumstein et al. eds., 1983); Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 223–24 (Michael Tonry & Richard S. Frase, eds., 2001)).

[166] GROWTH OF INCARCERATION IN THE U.S., *supra* note 32, at 1.

[167] Aldina Mesic, *Women and the War on Drugs*, PUB. HEALTH POST (May 16, 2017), https://www.publichealthpost.org/research/women-and-the-war-on-drugs.

[168] Ryan S. King, *A Change of Course: Developments in State Sentencing Policy and Their Implications for the Federal System*, 22 FED. SENT'G REP. 48, 48 (2009).

[169] *See* Emily W. Andersen, *Not Ordinarily Relevant: Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. REV. 1501, 1501 (2015) (for an excellent discussion of the history of courts' consideration of family ties and responsibilities to determine a sentence. This Note advocates that Rule 32 of the Federal Rules of Criminal Procedure should be amended to require that a family impact assessment be incorporated in presentence investigation reports to provide courts with information about a defendant's family ties and responsibilities); Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (Supp. IV

Indeterminate sentences with a primary goal of rehabilitation gave way to determinate sentences characterized by fixed sentence lengths.[170] The Guidelines were mandatory, and absent "extraordinary" circumstances, there could be no substantial deviations.[171] As a result of the SRA and the Guidelines, family ties and responsibilities were no longer relevant in determining whether a sentence should be outside the applicable guideline range.[172] After years of federal courts operating under the Guidelines, the often devastating effects of disregarding family ties and responsibilities came to light in various court challenges and national headlines.[173]

In the landmark 2005 case, *United States v. Booker*,[174] the United States Supreme Court held that judges had leeway to "tailor" sentences by considering each defendant's history and characteristics, thus making the Guidelines advisory instead of mandatory.[175] Many believed this decision reversed course by opening the door to considering factors that previously were "not ordinarily relevant" in sentencing, such as an offender's family ties and responsibilities.[176] *Booker* seemed to offer judges a method for balancing holding offenders uniformly accountable while avoiding blindly compounding the severity of a sentence with its impacts on parents and their dependent children.

Even after *Booker*, many courts remained reluctant to depart from the Guidelines.[177] Though other seminal cases followed *Booker* that, theoretically, offered courts a way around the Guidelines to consider a defendant's familial circumstances in sentencing,[178] court consideration of

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1986), & 28 U.S.C. §§ 991–998 (Supp. IV. 1986)); U.S. SENT'G COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1988).

[170] Tonry, *supra* note 20, at 142.

[171] *See* Gall v. United States, 446 F.3d 884 (2006), *rev'd*, 552 U.S. 38 (2007), *and cert. granted*, 551 U.S. 1113 (2007).

[172] Patricia M. Wald, "*What About the Kids?": Parenting Issues in Sentencing*, 8 FED. SENT'G REP. 137, 137 (1995).

[173] *See* Andersen, *supra* note 169, at 1502 (citing several national newspaper articles on the effects of parental incarceration on children, including Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america (discussing the results of the National Research Council report); Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), http://nyti.ms/1hPCkIu (discussing incarceration in the United States generally and the 2014 National Research Council report); *When a Parent Goes to Prison, a Child Also Pays a Price*, NAT'L PUB. RADIO (June 8, 2014, 6:22 PM), http://www.npr.org/2014/06/08/320071553/when-a-parent-goes-to-prisona-child-also-pays-a-price (discussing the National Research Council report and the effects of parental incarceration on children)).

[174] 543 U.S. 220.

[175] *Id*. at 222.

[176] Jennifer A. Segal, *Family Ties and Federal Sentencing: A Critique of the Literature*, 13 FED. SENT'G REP. 258, 258 (2001).

[177] *See* Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 402–03 (2018) (this article provides an excellent discussion of the shifts in federal case law holdings on judicial discretion when considering departures from the Federal Sentencing Guidelines).

[178] *See* Gall v. United States, 552 U.S. 38, 49 (2007) (describing the Guidelines as the starting point in sentencing); Rita v. United States, 551 U.S. 338, 351 (2007) (stating that the Guidelines are the first consideration in sentencing, but each party can still argue for departures); Kimbrough v. United States,

family ties and responsibilities for sentencing remain wholly inconsistent. As more research confirms the often-devastating impacts on children when a parent, particularly a primary caretaker parent, is incarcerated, more judges may be willing to consider the potential "collateral damage" on children for sentencing purposes.[179] For now, there is little evidence that the advisory nature of the federal and state guidelines has increased courts' willingness to consider "family ties" when sentencing parents.[180]

### *B. State Sentencing Policies and Guidelines*

Although each state has a unique sentencing system, many are modeled on the federal guidelines, which encourage sentencing defendants with comparable criminal histories and offenses to similar sentences.[181] Some states approach sentencing by assigning a wide sentencing range to crimes, while other states provide fixed sentence lengths.[182] Many state sentencing statutes also allow courts to consider certain mitigating factors, including family financial and emotional needs when deciding whether to depart downward from the presumptive sentencing range.[183] Other states have found that the impact of an offender's sentence on their children is not a proper consideration for a downward departure or alternative sentence.[184] It is clear that addressing parenting responsibilities at sentencing and implementing policies that mitigate the collateral damage of incarcerating primary caretakers will require more than a reliance on judicial discretion in individual cases. Transformative changes are necessary and require a gender-informed approach that considers unique risk factors for incarcerated women and their children.

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552 U.S. 85, 109–10 (2007) (limiting circumstances when a judge can reject the Guidelines' policies and suggests closer appellate review may be appropriate when courts do so).

[179] *See* Eck, *supra* note 53.

[180] Millar & Dandurand, *supra* note 5, at 261.

[181] Neal B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines, Profiles and Continuum*, NAT'L CTR. ST. CTS. 1, 3 (2008).

[182] *See* Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies* 1, NAT'L CONF. OF STATE LEGISLATURES (2015).

[183] Marjorie A. Shields, Annotation, *Downward Departure Under State Sentencing Guidelines Based on Extraordinary Family Circumstances*, 106 A.L.R.5th § 377 (2003); *see* State v. Gebeck, 635 N.W.2d 385 (Minn. Ct. App. 2001) (the court held that the trial court's downward dispositional departure when sentencing a driver convicted of criminal vehicular homicide was justified, where the driver was a single mother of two minor children, as well as the fact that the driver was amenable to treatment and a ten-year sentence of probation provided greater leverage to assure the driver's success in rehabilitation).

[184] *Gebeck*, 635 N.W.2d 385; *see also* State v. Bray, 738 So. 2d 962 (Fla. Dist. Ct. App. 1999) (the court held that the fact that the defendant had to support and provide shelter for his minor daughter over whom he had custody and that the defendant's crimes were not violent were not valid reasons supporting the court's downward departure sentence in a prosecution of motor vehicle violations. The court stated, while it was not unsympathetic to the trial judge's concern that incarcerating the defendant could place the burden of caring for the child on the taxpayers of the state, such a consideration could not be employed in determining whether one defendant will be incarcerated while another will be given a non-incarcerative sentence. The court thus concluded that the downward departure sentence must be set aside).

### *C. The Need for Gender-Informed Sentencing Considerations*

To effectuate strategic reforms, the realities of offenders' lives, such as gender, racial, and socioeconomic disparities, must be included in designing and implementing sentencing reforms and policies. A significant challenge for women facing incarceration today is that, in the past fifty years, little progress has been made toward effecting widespread changes in the sentencing policies that primarily impact caretakers and their children.[185] Even though reform advocates have been calling for changes in the current laws and regulations to allow for more judicial and prosecutorial discretion for decades, there are renewed calls for policymakers and courts to consider consequences of sentencing policies on women offenders and their children.[186] Since incarcerated women are more likely than incarcerated men to be the sole or primary caregivers for their dependent children, the dramatic increase in incarcerated women has proven devastating for their children.[187] As the number continues to rise, the impacts of separation on mothers are also becoming more evident.[188]

A primary outcome of incarceration is reducing access to the outside world; it follows then that separation of mother and child achieves the most punitive aspect of this goal.[189] The consequences of lengthy prison sentences, including financial hardships and damaged relationships with their children, often follow mothers long after release. Few studies in corrections and criminal justice focus on women's experiences as mothers.[190] Nevertheless, available research confirms that most incarcerated mothers report separation from their children as the most damaging consequence they suffer.[191] As more women are entangled in a criminal justice system designed for men, sentencing policies will continue to have disparate impacts on women, especially those with children.[192] None of this is to say that men and their children are not impacted when fathers are incarcerated; instead, it is to urge a gender-responsive understanding of the realities of incarcerated women's lives and to apply policies and considerations accordingly.

Family-focused approaches to sentencing will enact a shift in prison policy and expand the range of policy solutions available to reduce prison populations, support rehabilitation efforts, and decrease recidivism.[193]

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[185] Emma DeCourcy, *The Injustice of Formal Gender Equality in Sentencing*, 47 FORDHAM URB. L.J. 395, 398, 423 (2020).

[186] *Id.* at 417.

[187] Millar & Dandurand, *supra* note 5, at 235–36.

[188] *See* Amy Dworsky et al., *Addressing the Needs of Incarcerated Mothers and Their Children in Illinois*, CHAPIN HALL U. CHI. & U. CHI. SCH. SOC. SERV. ADMIN. 1, 24–25 (2020).

[189] *See generally* Lorna Collier, *Incarceration Nation*, AM. PSYCH. ASSOC. (2014), https://www.apa.org/monitor/2014/10/incarceration.

[190] Celinska & Siegel, *supra* note 74.

[191] *Id.* at 449.

[192] Bloom et al., *supra* note 19; *see also* Gilad & Gat, *supra* note 19, at 380.

[193] *See* Todd R. Clear & Dennis Schrantz, *Strategies for Reducing Prison Populations*, 91 PRISON J. 138S (2011).

Trends in criminal justice reform offer insights and possibilities for sentencing alternatives, including more reforms that address the adverse effects of incarceration on children.[194] Before courts can be expected to consistently inquire about dependent children and consider their best interests when their parent is sentenced to prison, safe and effective alternatives to prison must exist.[195]

Fortunately, more reforms are starting to focus on women's unique risks and needs, including reducing nonviolent admissions to prison and adopting evidence-based reentry practices.[196] In addition, more states are considering differences in women's offending patterns and offenses, including that they are more likely to be incarcerated farther from their children with fewer opportunities for visitation than their male counterparts.[197] Other states provide gender-responsive alternatives to incarceration for women with children, including suspended and conditional sentences served in the community.[198]

### *D. Primary Caretaker Sentencing Reforms*

In 2010, Washington State passed the Parenting Sentencing Alternative for nonviolent inmates with minor children, which provides two different types of sentencing alternatives.[199] The first program is the Family and Offender Sentencing Alternative (FOSA), which allows judges to waive a sentence and impose twelve months of community supervision so that eligible nonviolent offenders[200] can continue to parent their child in the community under intensive supervision.[201] For those who qualify, this program is one tool to potentially lessen the damage that occurs when a parent is incarcerated by affording the incarcerated parent and their children the ability to maintain a family bond.

Another program in Washington State, the Community Parenting Alternative (CPA), allows qualified offenders who have physical or legal custody of a minor child to serve up to the last twelve months of their prison

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[194] *See Children of Incarcerated Parents*, FED. INTERAGENCY REENTRY COUNCIL (2014), https://nrccfi.camden.rutgers.edu/files/SnapShot_Children_Incarcerated_Parents.pdf.

[195] Millar & Dandurand, *supra* note 5, at 268 n.162.

[196] Clear & Schrantz, *supra* note 193, at 150S.

[197] Millar & Dandurand, *supra* note 5, at 235.

[198] *Parent Sentencing Alternative (PSA)*, DEP'T OF CORR., WASH. STATE, https://www.doc.wa.gov/corrections/justice/sentencing/parenting-alternative.htm (last visited May 24, 2021); *Community Parenting Alternative (CPA)*, DEP'T OF CORR., WASH. STATE, https://doc.wa.gov/corrections/justice/sentencing/community-parenting.htm (last visited May 24, 2021) [hereinafter *CPA*].

[199] Substitute S.B. 6639, 61st Leg., Reg. Sess., (Wash. 2010), http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Passed%20Legislature/6639-S.PL.pdf.

[200] *CPA*, *supra* note 198 (stating that eligible offenders include: (i) A parent with physical custody of a minor child; (ii) An expectant parent; (iii) A legal guardian of a minor child; or (iv) A biological parent, adoptive parent, custodian, or stepparent with a proven, established, ongoing, and substantial relationship with a minor child that existed at the time of the offense).

[201] WASH. REV. CODE § 9.94A.655 (2020).

sentence in their community under electronic monitoring.[202] "Early evidence from Washington State suggests that family-centered sentencing reform is an effective recidivism reduction tool, with only two out of a total of two hundred and thirty FOSA/CPA participants returning to prison between June 2010 and January 2013."[203]

In 2018, Massachusetts passed a primary caretaker statute that allows judges to consider the defendant's status as a "primary caretaker of a dependent child" before imposing a sentence.[204] Massachusetts' law places the burden on the defendant to request the court's consideration of primary caretaker status within ten days after the entry of the judgment.[205] Once the motion and any supporting affidavits are presented to the court, the judge must make written findings concerning the defendant's status as a primary caretaker of a dependent child and consider alternatives to incarceration.[206]

In 2019, Tennessee passed legislation giving nonviolent offenders who are primary caregivers of children a community-based alternative to incarceration. This major criminal sentencing reform directs judges to consider "[a]vailable community-based alternatives to confinement and the benefits that imposing such alternatives may provide to the community . . . when the offense is non-violent and the defendant is the primary caregiver of a dependent child."[207] In Tennessee, before the passage of their primary caretaker sentencing reforms in 2019, proponents estimated that 3,733 parents in state prisons and county jails would have been eligible for the alternatives at the time of their sentencing.[208]

Community-based sentencing alternatives for primary caretakers will expand the options for parents and their children. Additionally, states stand to save millions of dollars each year by offering alternatives to incarceration for primary caretakers. For example, in Louisiana, advocates for similar sentencing alternatives predict the state can save over $18 million annually in incarceration costs alone.[209] Community-based sentencing alternatives are far more cost-effective than incarceration. These programs also help families become more self-sufficient by keeping parents connected to their local workforce.[210]

Community-based alternative sentencing programs offer treatment, education, and social services that often are not available in a prison or jail

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[202] WASH. REV. CODE § 9.94A.6551 (2020).

[203] Lauren Feig, *Breaking the Cycle: A Family Focused Approach to Criminal Sentencing in Illinois*, U. CHI. ADVOCS. F. 13, 18 (2015).

[204] MASS. GEN. LAWS ch. 279 § 6B (2018).

[205] *Id.*

[206] *Id.*

[207] TENN. CODE ANN. § 40-35-103(7) (West 2019).

[208] Kim Gilhuly & Lee Taylor-Penn, *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in Tennessee*, HUM. IMPACT PARTNERS, at i (2018), https://humanimpact.org/wp-content/uploads/2018/02/HIP_PrimaryCare-TN-Report.pdf.

[209] *Community-Based Sentencing for Primary Caretakers Improves Health Outcomes*, HUM. IMPACT PARTNERS (2017), https://humanimpact.org/wp-content/uploads/2017/12/HIP_FactSheet_LouisianaPrimaryCaretakers_11-16-17.pdf.

[210] *Id.*

setting.[211] Programs, including drug and alcohol treatment, behavioral health interventions, therapeutic counseling, and vocational and educational resources, allow for rehabilitation, accountability, and strengthening of parent-child relationships.[212] In addition, community-based sentencing alternatives offer children and parents trauma-informed interventions that increase parental attachments leading to healthier child development outcomes.[213] The benefits of providing alternatives to incarceration for qualifying primary caretakers and their children far outweigh the costs of establishing such programs.

## VI. BENEFITS AND BARRIERS OF PARENT-CHILD PRISON VISITATION

While the benefits of visitation for children and their incarcerated parents are highly dependent on each family's dynamics and each facility's visitation accommodations,[214] for most, visitation from family and friends provide long-lasting benefits.[215] Unfortunately, according to the Prison Policy Initiative, less than a third of those incarcerated in state prisons receive a visit from a family or friend in a typical month.[216] For incarcerated mothers and their children, visitation can be a lifeline.

When considering the importance of familial ties between children and their incarcerated mothers, the most direct way to maintain a relationship with family or friends is through visits; however, many correctional facilities' policies and procedures for visitation are expensive, complicated, or overly restrictive.[217] Often, policies that are needlessly difficult or degrading reflect societal and institutional beliefs that "incarcerated individuals, including parents, do not deserve privileges."[218] In addition, just the social stigma of entering the facility and the process of waiting and going through security can be frustrating and confusing for children and their caretakers:[219]

> Parental incarceration may also lead to fear, uncertainty, anxiety, frustration, and confusion among children as they navigate correctional institutions and policies when trying

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[211] *Id.*

[212] *Id.* at 1–2.

[213] *Id.* at 9.

[214] Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 85 (2011).

[215] *See generally* Melinda Tasca et al., *Moving Visitation Research Forward: The Arizona Prison Visitation Project*, 17 CRIMINOLOGY, CRIM. JUST. L & SOC'Y 55, 56–57 (2016) ("While the majority of research suggests that visitation is positive for inmates, some studies show that under certain circumstances, visitation can have adverse effects.").

[216] Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prison*, PRISON POL'Y INITIATIVE (Oct. 20, 2015), https://www.prisonpolicy.org/reports/prisonvisits.html.

[217] *Id.*

[218] *See generally* Parke & Clarke-Stewart, *supra* note 125, at 8–9.

[219] Eric Martin, *The Changing Nature of Correctional Visitation: Can Video Visitation Provide the Same Benefits as In-Person Visits?*, CORR. TODAY 22, 23 (2016), https://www.ojp.gov/pdffiles1/nij/250197.pdf.

> to communicate or visit their parents. For example, phone calls with parents in prison and jail are often expensive; correctional facilities' visiting guidelines can be difficult to understand or follow; children may be living far from where their parents are incarcerated; and search procedures and encounters with uniformed officers during correctional visits can be daunting and emotionally draining.[220]

The more burdensome the process to visit in-person, the less likely family members are to travel long distances to see their loved ones.[221] For example, some states, including Arkansas and Kentucky, require prospective visitors to provide their social security numbers before visiting.[222] Other states, like Arizona, require visitors to undergo and pay for background checks before being allowed to visit.[223] In addition, some rules are inherently subjective such as Washington State's ban on "excessive emotion," leaving families' visiting experience to the whims of individual officers.[224] Other barriers include lack of privacy, the physical layout of the visitation room, child-unfriendly facilities, and other conditions that deter family members and caregivers from visiting.[225] As more information and research becomes available, policymakers are being urged to reconsider the reality of the prison experience on families.[226]

### *A. Distance as a Barrier to Prison Visitation*

Incarcerated mothers face challenges that decrease visitation with their children.[227] One challenge is that mothers are more likely to take children to visit an incarcerated father.[228] Another challenge is that there are fewer

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[220] PETERSON ET AL., *supra* note 23, at 1.

[221] SANETA DEVUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 11 (2015), https://perma.cc/9Q4J-WS6F (concluding that incarceration adversely affects inmates' and their families' health, finances, and relationships); *id.* at 11 (concluding that the growth rates of state correctional budgets have outpaced those of education, transportation, and public assistance); *see also* THE PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 16 (2009), https://www.pewtrusts.org/~/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf (stating incarceration is also expensive for taxpayers); *see also* TRACEY KYCKELHAHN, U.S. DEP'T OF JUST., LOCAL GOVERNMENT CORRECTIONS EXPENDITURES, FY 2005-2011 3 (2013), https://www.bjs.gov/content/pub/pdf/lgcefy0511.pdf (finding that correctional facilities cost local communities over twenty-two billion dollars in 2011).

[222] Rabuy & Kopf, *supra* note 216.

[223] *Id.*

[224] *Id.*

[225] Parke & Clarke-Stewart, *supra* note 125, at 8.

[226] Rabuy & Kopf, *supra* note 216.

[227] *See* Elena Hontoria Tuerk & Ann Booker Loper, *Contact Between Incarcerated Mothers and Their Children: Assessing Parenting Stress*, 43 J. OFFENDER REHAB. 23 (2006) (the result of these difficulties is that 54% of mothers in state prisons and 42% of mothers in Federal prison never receive visits from their children.).

[228] Martin, *supra* note 219, at 23 (citing Melinda Tasca, "It's Not All Cupcakes and Lollipops": An Investigation of Predictors and Effects of Prison Visitation for Children During Maternal and Parental Incarceration 5 (2014) (Ph.D. dissertation, Arizona State University) (https://www.ojp.gov/pdffiles1/nij/grants/248650.pdf)).

correctional facilities for women, so incarcerated mothers are at an increased risk of being located farther from their children.[229] The farther away from home a person is locked up, the fewer visits they receive.[230] Distance from their children and lack of transportation are the most frequent reasons given for so few visits.[231] Caregivers, including grandmothers, are less likely to have the resources necessary to endure a long trip to take children to visit an incarcerated mother.[232]

A prison's distance from the offender's family can be a significant barrier to visitation.[233] Many of the prisons built in recent decades are in rural areas, contributing to transportation challenges for children and their caretakers.[234] "Incarcerated people often serve their sentences far from home in places unreachable by public transport. In-person visits can place a substantial burden on the visitor, who may have to miss work, pay for childcare, and cover the costs of travel."[235] Inmates serving their sentences more than fifty miles from their city of residence are much less likely to receive phone calls or be visited by children, family, or friends.[236] A National Council on Crime and Delinquency report confirms that 60% of incarcerated mothers are incarcerated more than one hundred miles from their children, making visitation geographically and financially prohibitive.[237]

### *B. Remote Video Visitation*

Most agree there are benefits of video visitation in prisons and jails.[238] Research demonstrates that prison visitation is vital to the success of

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[229] Parke & Clarke-Stewart, *supra* note 125, at 8 (citing to Mark S. Kaplan & Jennifer E. Sasser, *Women Behind Bars: Trends and Policy Issues*, 23 J. SOCIO. & SOC. WELFARE 43, 49 (1996)); *see also* Johnna Christian, *Riding the Bus: Barriers to Prison Visitation and Family Management Strategies*, 21 J. CONTEMP. CRIM. JUST. 31 (2005).

[230] Kelly Bedard & Eric Helland, *The Location of Women's Prisons and the Deterrence Effect of "Harder" Time*, 24 INT'L REV. L. & ECON. 147, 152 (2004) (focusing on the punitiveness of reduced visitation as a result of being incarcerated far away from home).

[231] *Id.* (referring to the 1994 Bureau of Justice Statistics report that 52% of women with children receive no visits from their children and that the cost of traveling to distant prisons is the most stated reason for the lack of contact).

[232] Martin, *supra* note 219, at 23.

[233] HAIRSTON, *supra* note 111, at 4–5.

[234] *Id.*

[235] LÉON DIGARD ET AL., A NEW ROLE FOR TECHNOLOGY? IMPLEMENTING VIDEO VISITATION IN PRISON, VERA INST. OF JUST. 2 (2016), https://www.vera.org/downloads/publications/video-visitation-in-prison_02.pdf.

[236] Bedard & Helland, *supra* note 230, at 153 ("For example, 47% of women whose city of residence is less than 50 miles of the prison see their children at least once a month compared to only 24% of women whose city of residence is fifty miles or more from the prison.").

[237] *Id.* at 152.

[238] *See* BERNADETTE RABUY & PETER WANGER, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITATION INDUSTRY IN PRISONS AND JAILS, PRISON POL'Y INITIATIVE 2 (2015), https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf (stating the benefits of video visitation, including addressing the challenges of long distances to most prisons and jails; not as restrictive as in-person visitation, especially for children, the elderly, and for people with disabilities; allows children to visit from familiar setting; eliminates physically moving incarcerated people from cells to visitation rooms; and that it is not possible to transmit contraband via computer screen).

incarcerated people through improving conduct, reducing the risk of reoffending, and promoting positive parent-child relationships.[239] Video visitation can decrease the burden and costs of caregivers to bring children to prison facilities long distances from their homes. Additionally, video visitation may be a viable option for some children who respond negatively to in-person visitation with a parent in a prison setting.[240]

Of concern, however, is that the implementation of video visitation in prisons and jails is far from uniform across the states. Some states limit the availability and accessibility to certain categories of incarcerated people.[241] For instance, they restrict access to video visitation for those held in segregation as a form of discipline.[242] Other states limit the availability to specific locations, to parents whose children cannot visit the facility, or to those who have not received in-person visits for more than a year.[243]

Video visitation costs can still be financially out of reach for many incarcerated people and their visitors.[244] In-person visitation is usually free for the inmate,[245] while video visitation can be costly and plagued with technological glitches, making the experience frustrating.[246] Costs of implementing a video visitation system can vary depending on whether the facility owns and operates its system, or whether a contracted vendor installs and maintains the video visitation system. Even with some contracted services, the facility can use the service to generate income by charging a commission.

> The average user fee for video visits was [forty-one] cents per minute, with the highest fee reported by the Alabama DOC at [sixty] cents per minute. The DOCs in Georgia, Indiana, and Oregon reported the lowest user fees—[thirty-three] cents per minute. Many jurisdictions require users to pay for a minimum number of minutes; in Pennsylvania, for example, visits last 55 minutes and cost $20 (36 cents per minute).[247]

When a correctional facility does not provide video visitation services free of charge, it passes the costs on to the users.[248] Prisons must carefully

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[239] Mitchell et al., *supra* note 25; Boudin et al., *supra* note 24; Cochran, *supra* note 24.

[240] Tasca, *supra* note 228, at 146.

[241] DIGARD ET AL., *supra* note 235, at 6.

[242] *Id.*

[243] *Id.* at 8.

[244] *Id.* at 14.

[245] *See* RABUY & WAGNER, *supra* note 238, at 11 (noting that 74% of jails that adopt video visitation then eliminate in-person visitation).

[246] *Id.* at 10 (noting that in-person visitation is traditionally free); *but see, e.g.*, Erica Goode, *Inmate Visits Now Carry Added Cost in Arizona*, N.Y. TIMES, Sept. 5, 2011, at A10 (reporting that the Arizona Department of Corrections charges visitors a one-time twenty-five-dollar fee for a background check).

[247] DIGARD ET AL., *supra* note 235, at 13.

[248] DEVUONO-POWEL ET AL., *supra* note 221, at 11 (concluding that incarceration adversely affects inmates' and their families' health, finances, and relationships).

consider the cost to family users of these services and consider subsidizing and controlling these costs.[249] The costs of video visitation for the prison or jail can be minimal when a state's department of corrections uses a contracted provider that bundles video visitation with other services.[250] Prisons can partner with remote locations to support telecommunications from around the state for those who cannot access required technology or high-speed internet from home.[251] As a supplement to sometimes costly and time-consuming in-person visits, remote visits can encourage and reinforce gains made by those in-person visits.[252]

A study funded by the National Institute of Justice examined the availability of video visitation and its impact on incarcerated persons' family contact and prison behavior in the Washington State Department of Corrections (WADOC).[253] The study found that video visitation allows incarcerated persons additional opportunities for visits with their loved ones and complements in-person visits.[254] It also confirmed that receiving visitation, including video visitation, can help by "reducing . . . behavioral infractions, [and] decreasing the risk of [an incarcerated person] reoffending after release."[255]

In Washington State's Department of Corrections program, which is considered a model for implementing a video visitation program at minimal cost, the cost-prohibitive nature of video visitation was still apparent.

> While this user fee is low compared to travel costs and other expenses associated with in-person visits, it was reportedly still prohibitively high for many of the incarcerated people surveyed in WADOC facilities— nearly half of all the incarcerated people surveyed (47[%]) said that the cost of video visitation prevented them from using the service or from using it more often.[256]

"With the advent of inexpensive . . . video technology, like Skype and FaceTime," many more departments of correction have begun to explore video visitation as a way to increase opportunities for visitation in prisons and jails.[257] There are reasons to be cautious about implementing video

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[249] *See* Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration.

[250] DIGARD ET AL., *supra* note 235, at 11 (explaining that even when a DOC contracts with an external vendor to bring communications systems including video visitation into a prison, the agency can charge a commission for these services).

[251] *Id.* at 18.

[252] *See id.* at 10.

[253] *Id.* at 6.

[254] *Id.* at 10.

[255] *Id.* at 4.

[256] *Id.* at 14.

[257] *Id.* at 4.

visitation in correctional settings.[258] Video visitation has the potential to jeopardize in-person visitation when instituted as a replacement instead of an additional form of prison visitation.[259] While complementing in-person visitation with video visitation may save correctional institutions money and increase opportunities for incarcerated parents to visit their children, it may not be an adequate, long-term substitution for in-person visitation between prisoners and their families.[260] The fact is, visiting over a video screen is not the same as seeing someone in person.[261] Physical, face-to-face visits with loved ones influence an incarcerated person's behavior and provide superior psychological benefits compared to video visitation.[262] Despite the benefits of in-person visitation, there is a growing trend of replacing in-person visitation with video visitation,[263] especially today, in reaction to the public health crisis that resulted from the COVID-19 pandemic.

### *C. Impacts of COVID-19 on Prison Visitation Policies*

The COVID-19 pandemic required many correctional facilities to terminate in-person visits to slow the spread of the virus, prompting increased pleas for telephone and video calls.[264] It is apparent now that the isolating measures taken in response to the pandemic will inevitably affect temporary and even permanent visitation policies throughout the American prison system. As virtually all correctional facilities were required to eliminate in-person visitation for containment purposes, demand increased for access to virtual visitation for prisoners, particularly parents.[265] Concerns about the widespread adoption of virtual visitation in place of in-person visitation remain essential. Some prisons and the Federal Bureau of Prisons waived virtual visitation fees during the coronavirus pandemic, but there are no assurances the waivers will continue.[266] Regardless, there is no doubt that

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[258] PETERSON ET AL., *supra* note 23, at 52 (video visits "have the potential to exacerbate the stress and frustration children and families experience during visits because children cannot touch or see how their parent is doing in person.").

[259] Alexandre Bou-Rhodes, *Straight to Video: America's Inmates Deprived of a Lifeline Through Video-Only Visits*, 60 B.C. L. REV. 1243, 1244 (2019).

[260] PETERSON ET AL., *supra* note 23, at 53; *see also* RABUY & WAGNER, *supra* note 238, at 2–3.

[261] *Id.* (explaining that video visitation is even less intimate than visiting through a glass, which families already find less preferable than contact visits).

[262] *See, e.g.*, SUSAN PINKER, THE VILLAGE EFFECT: HOW FACE-TO-FACE CONTACT CAN MAKE US HEALTHIER, HAPPIER, AND SMARTER 9 (2014) (noting the critical importance in-person communication and that it affects thought and trust processes).

[263] RABUY & WAGNER, *supra* note 238, at 11 (noting that 74% of jails that adopt video visitation then eliminate in-person visitation).

[264] Bernadette Rabuy & Wanda Bertram, *Jails and Prisons Are Suspending Visits to Slow COVID-19. Here's What Advocates Can Do to Help People Inside*, PRISON POL'Y INITIATIVE (Mar. 17, 2020), https://www.prisonpolicy.org/blog/2020/03/17/covid19-visits/.

[265] *We Must Urgently Do More to Address COVID-19 Behind Bars and Avoid Mass Infection and Death: Guidance for Attorney General Barr, Governors, Sheriffs, and Corrections Administrators*, VERA INST. OF JUST. (May 12, 2020), https://www.vera.org/downloads/publications/coronavirus-guidance-crisis-behind-bars.pdf.

[266] *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (May 18, 2021), https://www.prisonpolicy.org/virus/virusresponse.html.

video visitation in prisons and jails will continue to prevail for the foreseeable future.[267]

While correctional facilities have increasingly been exploring ways to improve the accessibility and efficacy of family-centered visitation, there was no way to anticipate the impact and unexpected consequences of the COVID-19 pandemic for incarcerated individuals or their families. The pandemic has changed the landscape of institutional administration in ways inconsistent across the states, and changes are anticipated to evolve in the indefinite future. Correctional responses to the unfolding pandemic are challenging to predict. There is a patchwork of fifty different state correctional authorities plus the Federal Bureau of Prisons, which makes family visitation uneven across the United States and has made pandemic responses similarly inconsistent. Now more than ever, there needs to be a renewed focus on improving access between incarcerated parents and their children.

### *D. Benefits of Visitation on Custodial Behavior of Incarcerated Parents*

The implications and benefits of visitation reach beyond the individual prisoner or her children. Studies that focus on the pains of incarceration, including loss of unlimited access to family and friends, have found the stressors and anxiety related to not having contact with loved ones during incarceration often lead to disruptive behaviors.[268] Available research confirms that incarcerated mothers who do not receive visits from their minor children are more likely to engage in serious and often violent misconduct.[269] Other studies confirm that visitations improve prisoner behavior and increase prison safety.[270]

Less disruptive behavior of inmates benefits internal security in correctional facilities.[271] Incarcerated parents who receive frequent visits by their children are less likely to break a prison rule than those visited less frequently.[272] Correctional staff and administrators are increasingly aware of the benefits of inmate visitation and how it improves behaviors while incarcerated.[273] Correlating visitation with prison security is a significant development, especially since institutional security is frequently cited as a

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[267] *See* DIGARD ET AL., *supra* note 235, at 19.

[268] *See* Blevins et al., *supra* note 24, at 151–52.

[269] Mari B. Pierce et al., *Assessing the Impact of Visitation on Inmate Misconduct Within a County Jail*, 31 SEC. J. 1, 5 (2018) ("As this study assessed a particular population of inmates, mothers of minor children, and a specific type of visit, visits by minor children, the findings may be unique.").

[270] Boudin et al., *supra* note 24, at 152.

[271] *See* 34 U.S.C. § 60501(b)(6) (stating that inmates who remain connected to loved ones while incarcerated are less likely to have "negative incidents") (originally enacted as 42 U.S.C. § 17501); Sonja E. Siennick et al., *Here and Gone: Anticipation and Separation Effects of Prison Visits on Inmate Infractions*, 50 J. RSCH. CRIME & DELINQ. 417, 435 (2013) (finding that in the weeks leading up to an in-person visit the probability of an inmate committing a facility infraction decreased).

[272] *See* Bou-Rhodes, *supra* note 259, at 1270.

[273] Pierce et al., *supra* note 269, at 4.

reason to limit visitations.[274] The administrators of correctional facilities are vital to facilitate improvements that preserve family connections during incarceration. As more research confirms the benefits of improved visitation policies that support legitimate penological interests, the more likely it is that prison administrators can implement transformative reforms and policies.[275]

### *E. Reducing Recidivism*

Despite increased numbers of incarcerated women, courts continue to pay "little attention to the cyclical nature of incarceration among women and how it often" destabilizes families further.[276] While recent reforms have reduced the total number of people in state prisons, almost all the decreases have been among men.[277] Failure to consider essential differences between female and male involvement with the criminal justice system, including women generally having lower recidivism rates,[278] disproportionately contributes to the collateral costs of mass incarceration. Fortunately, efforts to reduce recidivism have received increased attention due to inadequate prison capacity and overcrowding.[279] The increased interest in promoting success after prison release requires policymakers to consider ways to make prison visitation more accessible.

Since nearly 95% of those sentenced to prison are eventually released,[280] more research is needed to study ways to decrease recidivism and increase successful reintegration for ex-prisoners back into their communities and their families.[281] Several theoretical efforts support the beneficial effects of visitation, not only during incarceration but also post-

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[274] George L. Blum, Annotation, *Right of Jailed or Imprisoned Parent to Visit from Minor Child*, 6 A.L.R.6th 483 (2005) (setting forth cases that disallowed visits between an incarcerated parent and their minor child by courts holding that any possible constitutional infringement on the inmate's rights were outweighed by legitimate penological interests, or rejecting the prisoner's argument that restrictions on child visitation violated the right of association guaranteed by the First Amendment or that such restrictions were a violation of due process and equal protection); *see also* Overton v. Bazzetta, 539 U.S. 126 (2003).

[275] *See* Martin, *supra* note 219, at 22.

[276] Christina Scotti, *Generating Trauma: How the United States Violates the Human Rights of Incarcerated Mothers and Their Children*, 23 CUNY L. REV. 38, 63 (2020); *see generally* Kajstura, *supra* note 36.

[277] Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html#statelevel; *see also Incarcerated Women and Girls*, THE SENT'G PROJECT (Nov. 24, 2020) ("The female incarcerated population stand over seven times higher than in 1980.").

[278] Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER, RACE & JUST. 73, 82 (2010).

[279] *See generally* First Step Act of 2018, 18 U.S.C. § 1 (passing in Congress in 2018, with former President Trump signing. The First Step Act (FSA) of 2018 is a bipartisan criminal justice bill that reforms sentencing laws to reduce recidivism, decrease the federal inmate population and maintain public safety).

[280] Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States: Inmates Returning to the Community After Serving Time in Prison*, BUREAU OF JUST. STAT. (Apr. 14, 2004), https://www.bjs.ojp.gov/content/pub/pdf/reentry.pdf.

[281] *See generally* E. Rely Vîlcică, *The Influence of Inmate Visitation on the Decision to Grant Parole: An Exploratory Study*, 43 J. CRIM. JUST. 498 (2015).

release.[282] A variety of studies confirm that increased contact between inmates and their families is an important way for inmates to maintain or rebuild relationships that can improve the likelihood of success once released.[283]

By maintaining social bonds during incarceration, offenders are less likely to engage in criminal activity and more likely to rely on family and friends for support, including employment, financial assistance, and housing once released.[284] Former inmates often turn to their spouses, parents, siblings, grandparents, and other family members for assistance when transitioning back into the community.[285] Visitation with family members, including children, while incarcerated is pivotal to successful reintegration after release.[286] For example, a Minnesota prison study found that maintaining family support and relationships while incarcerated can decrease recidivism and increase public safety upon release.[287]

> Tracking over 16,000 prisoners released from Minnesota prisons between 2003 and 2007, the study showed that, when controlling for numerous other factors, prisoners who received visits were thirteen percent less likely to be reconvicted of a felony after release and twenty-five percent less likely to have their probation or parole revoked.[288]

Another researcher found that inmates who receive visitation experience an estimated reduction of recidivism of around 3.5% per visit.[289] Many corrections officials understand the positive role of maintaining familial contact for those going through the reentry process upon release; however, they do not often know how to help people in prison maintain the

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[282] Mears et al., *supra* note 25, at 888, 893–94.

[283] Tasca et al., *supra* note 215, at 55–56 (citing JOYCE A. ARDITTI, PARENTAL INCARCERATION AND THE FAMILY: PSYCHOLOGICAL AND SOCIAL EFFECTS OF IMPRISONMENT ON CHILDREN, PARENTS, AND CAREGIVERS (2012)); *see also* Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 1, 10 (Jeremy Travis & Michelle Waul eds., 2003); William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RSCH. CRIME & DELINQ. 287, 304–05 (2008); Jeremy Travis, 69 FED. PROBATION 31, 31–32 (2005); Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191, 191–92 (2006) (analyzing the development of parenting skills in prison).

[284] Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382 (2011).

[285] Mike Bobbitt & Marta Nelson, *The Front Line: Building Programs that Recognize Families' Role in Reentry*, VERA INST. OF JUST. (2004), https://www.prisonpolicy.org/scans/vera/249_476.pdf.

[286] Tasseli McKay et al., *If Family Matters: Supporting Family Relationships During Incarceration and Reentry*, 15 CRIMINOLOGY & PUB. POL'Y 529 (2016).

[287] *The Effects of Prison Visitation on Offender Recidivism*, MINN. DEP'T OF CORRS. (2011), https://mn.gov/doc/assets/11-11MNPrisonVisitationStudy_tcm1089-272781.pdf.

[288] Boudin et al., *supra* note 24, at 152.

[289] Bales & Mears, *supra* note 283, at 304–05.

necessary connections.[290] When offenders no longer return to prison for probation or parole violations, the economic costs of incarceration are lowered and, importantly, so are the costs to familial relationships.

## VII. LIMITATIONS OF COURT CHALLENGES TO PRISON VISITATION POLICIES

As a result of the historical lack of gender-informed correctional policies, the different needs of female and male offenders and their ability to maintain contact with their children still are not considered in most prison visitation policies. Despite the benefits, prison visitation is often severely restricted by correctional facilities, and courts have been reluctant to intervene.[291] For decades courts have given considerable deference to correction officials' decisions, policies, and procedures purporting to ensure the security and order of the institution.[292] The broad scope of penological interests claimed to be protected by restrictive visitation policies include "interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc.) of persons convicted of crimes."[293]

While there is no federal law or case declaring inmates have a right to visitation, visitation policies exist in almost all correctional facilities today.[294]As prison sentences have increased, so too have offenders' challenges against barriers to familial visitation and access to social support networks. A key challenge to such policies occurred in 2003 when the United States Supreme Court decided *Overton v. Bazzetta*.[295]

The case involved controversial visitation bans implemented by Michigan prison officials in 1995 to address drug smuggling and disciplinary problems.[296] The policies included a ban on visitation by minor nieces and nephews and children for whom the inmate's parental rights had been terminated, including those children adopted by family or friends.[297]

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[290] Alex Friedmann, *Lowering Recidivism Through Family Communication*, PRISON LEGAL NEWS 24 (Apr. 15, 2014), https://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication/.

[291] Bou-Rhodes, *supra* note 259, at 1243.

[292] *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979) ("Prison administrators therefore should be accorded wide-ranging deference on the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. . . 'Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated the response to these considerations, courts should ordinarily defer to their expert judgment in such matters.' . . . Prison administrators may be 'experts' only by Act of Congress or of a state legislature." (Marshall, Stevens, and Brennan, JJ., dissenting)); *see also* Turner v. Safley, 482 U.S. 78, 85 (1987) (recognizing the level of expertise needed to run a prison).

[293] Bull v. City & Cnty. of S.F., 595 F.3d 964, 996 (9th Cir. 2010) (quoting Benjamin v. Fraser, 264 F.3d 175, 187 n.10 (2d Cir. 2001)).

[294] *See generally* Boudin et al., *supra* note 24.

[295] Overton v. Bazzetta, 539 U.S. 126 (2003).

[296] *Id.* at 129. Christie Thompson, *When Prisons Cut Off Visits — Indefinitely*, THE MARSHALL PROJECT (Apr. 9, 2019, 6:00 AM), https://www.themarshallproject.org/2019/04/09/when-prisons-cut-off-visits-indefinitely.

[297] *Id.* at 126.

The plaintiffs were a group of incarcerated women who asserted the Michigan Department of Corrections policies restricting visitation violated their rights to "intimate association" and the consequences for violations constituted "cruel and unusual punishment." [298] To support their claims, the plaintiffs introduced as a key witness a psychiatrist, Dr. Terry Kupers, who was an expert on prison conditions, including the opportunity to maintain family ties. [299] Dr. Terry Kupers testified about a 1972 study that connected reduced recidivism and familial contact during incarceration:

> The central finding of this research is the strong and consistent positive relationship that exists between parole success and maintaining strong family ties while in prison. Only [fifty] percent of the "no contact" inmates completed their first year on parole without being arrested, while [seventy] percent of those with three visitors were "arrest free" during this period. In addition, the "loners" were [6] times more likely to wind up back in prison during the first year (12[%] returned compared to 2[%] for those with [3] or more visitors). For all Base Expectancy levels, we found that those who maintained closer ties performed more satisfactorily on parole.[300]

The state court and the Sixth Circuit Court of Appeals ruled in favor of the women.[301] The Michigan Department of Corrections appealed to the United States Supreme Court, bringing public attention to the issue of prison visitation.[302] Before the Supreme Court heard the case, the department changed the policy to allow young siblings to visit, but both the substance abuse law and the ban on other relatives under eighteen remained.[303] Applying a four-factor test from *Turner v. Safley*,[304] all nine justices sided

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[298] *Id.* at 136–37, 141.

[299] Christie Thompson, *When Prisons Cut Off Visits — Indefinitely*, THE MARSHALL PROJECT (Jan. 23, 2022, 6:00 AM), https://www.themarshallproject.org/2019/04/09/when-prisons-cut-off-visits-indefinitely.

[300] Friedmann, *supra* note 295 (citing to NORMAN HOLT & DONALD MILLER, EXPLORATIONS IN INTIMATE-FAMILY RELATIONSHIPS 1 (Cal. Dep't of Corr. ed., 1972)).

[301] Thompson, *supra* note 299; *see also* Bazzetta v. McGinnis, 148 F.Supp.2d 813 (E.D. Mich. 2001); Bazzetta v. McGinnis, 286 F.3d 311 (6th Cir. 2002).

[302] Thompson, *supra* note 299.

[303] *Id*.

[304] Turner v. Safley, 482 U.S. 78, 89–90 (1986) (declaring four factors relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge, including: (1) whether regulation has valid, rational connection to legitimate governmental interest; (2) whether alternative means are open to inmates to exercise the asserted right; (3) what impact an accommodation of right would have on guards, inmates and prison resources; and (4) whether there are ready alternatives to the regulation. *Turner* involved challenges to the Missouri Department of Corrections policies on inmate marriage and correspondence between inmates. Writing for the majority, Justice Sandra Day O'Connor declared "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." On the claims, the Court upheld the correspondence regulation and struck down marriage ban, recognizing prison administrators should be given deference in the management of their institutions.).

with the prison officials finding the prison regulations protected legitimate penological interests and therefore could withstand a constitutional challenge.[305] The result was a seminal case upholding the restrictions on prisoner visitation, including visitation between the inmates and their children.[306]

Though prison staff claimed that visiting children created disturbances, not one documented incident occurred.[307] Conversely, studies have found that "[t]he presence of children makes prisons easier, not harder, to manage, and that lawsuits have not been a problem."[308] There is also no support for the defendant's proposition that child visitors would become "too comfortable" with prison life and less deterred from criminal acts.[309] Instead, studies show many children separated from an incarcerated parent suffer considerable psychological harm and may have a higher likelihood of criminality.[310] The Court in *Overton* "assumed the truthfulness of the prison officials' concerns about visitation by minors despite empirical evidence to the contrary."[311]

The Court also sided with prison officials finding that more inmates implies more visitors, and those visitors require supervision and control by an already overburdened prison system.[312] The *Overton* court uses safety precautions as a shield to ignore the negative impacts of restricting visitation between parents and their children.[313] Doing so obscures the positive impacts of visitation for inmates, their children, communities, and the correctional institutions. The Court's decision declaring the regulations bear a rational relation to legitimate penological interests, permits restrictive visitation policies to be sustained regardless of whether respondents have a constitutional right of association that has survived incarceration.[314] It has been over twenty-five years since Michigan adopted the controversial visitation policy, and families are still fighting it today. *Overton's* overall

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[305] Thompson, *supra* note 299.

[306] Overton v. Bazzetta, 539 U.S. 126, 127 (2003) (examining prison regulations that include the exclusion of certain family, including minor nieces and nephews and children, as to whom parental rights had been terminated, and other regulations which (1) prohibit inmates from visiting with former inmates, (2) require children to be accompanied by a family member or legal guardian during visitation, and (3) subject inmates with two substance-abuse violations to a ban of at least two years on future visitation).

[307] James Robertson, *The Rehnquist Court and the "Turnerization" of Prisoner's Rights,* 10 N.Y.C. L. REV. 97, 121 (2006); *Overton*, 539 U.S. at 127.

[308] *Overton*, 539 U.S. at 135; *see also* Kelsey Kauffman, *Mothers in Prison*, 63 CORR. TODAY 62, 65 (2001).

[309] Robertson, *supra* note 307, at 121.

[310] *Id*. at 120–21; *see also* BARBARA BLOOM, *Children of Prisoners*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 298 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (stating imprisoned mothers also benefit from visits with their children); Mary Martin, *Connected Mothers: A Follow-Up Study of Incarcerated Women and Their Children*, 8 WOMEN & CRIM. JUST. 1, 18–19 (1997) (finding a strong relationship between post-prison success and imprisoned mothers who frequently visited with their children while incarcerated in the Minnesota Correctional Facility at Shakopee).

[311] Robertson, *supra* note 307, at 133 (citing *Overton*, 539 U.S. at 126).

[312] *Overton*, 539 U.S. at 126–27.

[313] *See id*. at 135.

[314] *Id.* at 132 (stating that the Supreme Court would "accord substantial deference to the professional judgment of prison administrators").

effect has been to establish the constitutionality of restricting the right of association for inmates. As acknowledged by the Court in *Overton*, "freedom of association is among the rights least compatible with incarceration."[315]

## VIII. FAMILY-FOCUSED VISITATION POLICIES: REDUCING BARRIERS

For incarcerated parents and their families, challenging prison policies through litigation is rarely successful.[316] Since *Overton*, courts frequently cite the ruling to uphold a range of prison visitation policies over prisoners' rights to visitation with their children.[317] As demonstrated, even when there is an understanding of the benefits of supporting parent-children's relationships during incarceration, implementing comprehensive reforms can be difficult. One reason is that visitation policies and resources vary in each correctional facility.[318] Another reason is that increasing access and facilitating appropriate and beneficial contact in a prison setting requires buy-in from the administrators and staff of each facility. While more research confirms the importance of visitation practices in correctional settings,[319] many professionals and some family members continue to question the appropriateness and potential effects on children having contact with an incarcerated parent.[320] It may take time to collect data on the results, but since *Overton*, several states have successfully enacted legislation that encourages and increases the accessibility of prison visitation.[321]

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[315] *Id.* at 131.

[316] Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 163 (2015).

[317] *See In re* Gossett, 435 P.3d 314, 320 (Wash. Ct. App. 2019) (holding state and federal constitutions' due process clauses did not create a protected liberty interest in prison visitation between prison inmate and his minor children; an inmate did not have a liberty interest under federal due process clause in the denial of contact visits by a spouse, relatives, children, and friends, and state due process clause was presumptively coextensive with the federal due process clause); Brown v. Divelbliss, 963 N.Y.S.2d 791, 793 (N.Y. App. Div. 2013) (finding insufficient the opposition of mother and attorney for child, when unsupported by any evidence that visitation would be detrimental to child, as determinative to support Family Court's denial of incarcerated father's petition for visitation with child); Wirsching v. Colorado, 360 F.3d 1191, 1193 (10th Cir. 2004) (holding that prison officials did not violate a convicted sex offender's rights of familial association nor his due process rights by refusing to allow visits between his child and himself due to his refusal to comply with the requirements of his treatment program, where the protection of the children and the furthering of rehabilitation of convicted sex offenders were legitimate governmental interests justifying the policy, and where prison officials allowed the offender to contact his child by letter and telephone); Nouri v. Cnty. of Oakland, 615 F. App'x 291, 297–300 (6th Cir. 2015) (declaring County did not violate high security inmate's rights under First, Eighth, or Fourteenth Amendment when it denied him visitation rights with his minor children, as restriction on visits to high security inmates had rational relation to legitimate penological interest of maintaining internal security and protecting minor visitors, inmate had alternate means of communicating with children, and impact on jail staff and prison resources was obviously disruptive to inmate security).

[318] Boudin et al., *supra* note 24, at 157–66.

[319] Branden A. McLeod & Janaé Bonsu, *The Benefits and Challenges of Visitation Practices in Correctional Settings: Will Video Visitation Assist Incarcerated Fathers and Their Children?*, 93 CHILD. YOUTH SERVS. REV. 30, 30–35 (2018).

[320] *See generally* Poehlmann et al., *supra* note 83, at 576.

[321] Thompson, *supra* note 295 (asserting that even in Michigan, corrections officials have allowed, under certain conditions, inmates to apply to have visits reinstated).

### *A. Child-Focused Considerations*

The daunting needs of children of prisoners often go unrecognized. In 2003, the San Francisco Children of Incarcerated Parents Partnership adopted and published the Children of Incarcerated Parents Bill of Rights (Children's Bill of Rights) to ensure that every child with an incarcerated parent is guaranteed certain rights.[322] The Children's Bill of Rights was later considered a model for the United Nations Human Rights Council Resolution on the Rights of the Child.[323] According to the Children's Bill of Rights, children with an incarcerated parent are entitled to know the truth about their parent, be well cared for during their parent's absence, and maintain relationships with their incarcerated parents.[324] Children also have the right to speak to and touch their incarcerated parents during visitations.[325]

The Children's Bill of Rights focuses on the needs of the children of incarcerated parents by calling on the relevant agencies and institutions to consider the needs of children when their parents are incarcerated.[326] "There is no requirement that the various institutions charged with dealing with those accused of breaking the law—police, courts, jails and prisons, probation departments—inquire about the children's existence, much less concern themselves with the children's care."[327] Implementation of consistent and systemic data collection by police, courts, prison administrators, schools, and child welfare agencies is necessary to identify children with an incarcerated parent.[328] Only then can children be acknowledged, and their needs considered. Hawaii is one state taking the lead on understanding the costs to children when parents are incarcerated. In 2015, to improve data collection in Hawaii, the state passed legislation requiring the Department of Public Safety to collect data relating to the number of parents in the state correctional system who have children under eighteen to provide services to incarcerated parents and their children.[329] Once the children's circumstances are known, their needs, including safe caregivers, housing, food, clothing, and medical care can be addressed.

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[322] S.F. CHILD. INCARCERATED PARENTS P'SHIP, *Children of Incarcerated Parents: A Bill of Rights* (rev. 2005), http://sfonline.barnard.edu/children/SFCIPP_Bill_of_Rights.pdf; *see also* G.A. Res. 19/L.31 (Mar. 20, 2012) (mirroring "The Bill of Rights for Children of Incarcerated Parents") [hereinafter Children's Bill of Rights].

[323] G.A. Res. 66/141 (Apr. 4, 2012).

[324] Children's Bill of Rights, *supra* note 322, at 1 (referencing rights one through eight).

[325] *Id.* at 12 (referencing right 5).

[326] *Id*. ("There is no requirement that the various institutions charged with dealing with those accused of breaking the law—police, courts, jails and prisons, probation departments—inquire about the children's existence, much less concern themselves with the children's care.").

[327] *Id.*

[328] Poehlmann et al., *supra* note 83, 575; *see also* Simmons, *supra* note 81, at 3 (summarizing what is known about the children of incarcerated parents in California).

[329] HAW. REV. STAT. ANN. § 353-35 (West 2015).

### *B. Family-Focused Placement Considerations*

There are many benefits of family-focused visitation in correctional settings for inmates, their family and friends, and others associated with the environment in the correctional facilities, including staff and administrators. Implementing policies necessary to maintain a parent-child relationship during incarceration requires family-focused placement or proximity considerations. "Hawaii, for example, enacted legislation in 2007 that, among other things, requires the director of public safety to establish policies that place parent inmates in facilities consistent with public safety and inmate security, based on the best interest of the family rather than on economic or administrative factors."[330]

In 2010, New Jersey adopted the Strengthening Women and Families Act, which requires the Department of Corrections Commissioner to make every effort to assign incarcerated women to the prisons closest to their families.[331] Florida followed suit in 2015 by directing correction officials to consider the proximity of the correction facility to an incarcerated person's family when making placements.[332] More recently, in December 2020, New York passed proximity legislation that directs the State Department of Corrections and Community Supervision to place incarcerated parents in the facility closest to their minor children per their designated security level and program and health needs.[333] It took family members and advocates over nine years to pass this legislation in New York, citing that many of the state's fifty-two prisons were not accessible by public transportation and are hundreds of miles away from where families live.[334]

While some states have taken the initiative to pass proximity legislation to ensure that parents are sent to detention facilities closer to their children's homes, more needs to happen to facilitate the maintenance of familial relationships between incarcerated mothers and their children.[335] Disrupting the status quo of inaccessible and restrictive prison visitation requires supporting correctional administrators with detailed practices and tools that

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[330] Christian, *supra* note 90, at 8 (citing Haw. Spec. Sess. Law 932 (2007)).

[331] N.J. REV. STAT. § 30:4-8.6 (2009).

[332] FLA. STAT. § 944.171(4) (2009), *amended by* FLA. STAT. § 34.191(5) (2014).

[333] N.Y. MCKINNEY'S CORR. L. § 72-c (McKinney 2021) (repealed 2006).

[334] Velmanette Montgomery, *Governor Cuomo Signs Proximity Legislation into Law Bringing Parents and Children Closer Together*, THE N.Y. STATE SENATE (Dec. 25, 2020), https://www.nysenate.gov/newsroom/press-releases/velmanette-montgomery/governor-cuomo-signs-proximity-legislation-law.

[335] *See, e.g.*, Women and Families Strengthening Act, 328 N.J. STAT ANN. § 30:4-8.6 (2009) (leading to N.J. REV. STAT. § 30:4-8.6 (2009), which required that the Department of Corrections Commissioner make every effort to assign incarcerated women to a prison in close proximity to their families); FLA. STAT. § 944.171(4) (2014) (stating that, as much as possible, the department should consider the proximity of a prison to an incarcerated person's family when making placements). In New York, similar legislation has been put forward in light of COVID-19 and its disparate impacts on people of color. *See* Paul Frangipane, *Senate Passes Montgomery's Bill to Localize Incarceration for Families*, OSBORNE (Aug. 6, 2020), https://www.osborneny.org/stay-informed/senate-passes-montgomerys-bill-to-localize-incarceration-for-families.

can be implemented to remove barriers to parent-child contact and communication.

### *C. Model Practices for Parents in Prison*

In 2019, a research report entitled Model Practices for Parents in Prisons and Jails, Reducing Barriers to Family Connections (Model Practices), acknowledged the importance of parent-child visitation in correctional facilities.[336] The Model Practices includes several evidence-based model practices to facilitate parent-child communication and contact during parental incarceration that do not compromise a facility's safety or security.[337] The report lays out ten chapters, each with recommended practices for state and federal correctional facilities to consider when developing policies to improve family-centered visitations.[338] The model practices "outlines a group of practices, describes their importance, and lists tips and resources that may help with their implementation."[339] The administrators of each facility can choose which practices to implement to improve support and increase the preservation of parent-child relationships during a parent's incarceration.[340] The report also considers the many difficulties children encounter when attempting to communicate and maintain contact with their incarcerated parents.[341] The researchers gathered multi-disciplinary perspectives on the institutional barriers to parent-child visitation in the prison setting to offer a comprehensive guide for correctional administrators to improve access to and outcomes of children's communications with their incarcerated parents.[342]

The Model Practices present findings in support of earlier research that suggests a division between academic research and correctional programming and practices.[343] The report stresses the importance of family visitation and its relationship to the prison's security goals by offering administrators and staff the tools necessary to effectively address and mitigate the collateral damage on children when their parents are incarcerated.[344] The report also has helpful resources for training correctional employees on the scope of parental incarceration, including the harmful effects on children, and the potential for positive effects on prison discipline, safety, and outcomes at reentry.[345] Finally, the Model Practices

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[336] PETERSON ET AL., *supra* note 23, at 1 (this project was funded with a grant by the National Institute of Corrections and the Bureau of Justice Assistance).

[337] *Id.* at 1, 57–61.

[338] PETERSON ET AL., *supra* note 23.

[339] *Id.* at 5 (covering model practices for Partnership Building, Training and Core Competencies, Intake and Assessment, Family Notification and Information Provision, Classes and Groups, Visitor Lobbies, Visiting, Parent-Child Communication, Caregiver Support, and Family-Focused Reentry).

[340] *Id.* at 2.

[341] *Id.* at 1.

[342] *Id.* at 4.

[343] Julie Campbell & Joseph R. Carlson, *Correctional Administrators' Perceptions of Prison Nurseries*, 39 CRIM. JUST. & BEHAV. 1063, 1072 (2012).

[344] PETERSON ET AL., *supra* note 23, at 3.

[345] *Id.* at 4.

stress the importance of partnerships between prison programs and community organizations, institutions, and other government agencies to increase resources that support family relationships.[346]

Institutional support and staff buy-in are essential for facilitating family relationships through incarceration. For in-person visitation to occur, even in the friendliest institutional environment with the most well-appointed facilities, the child must be brought to the facility. The question of *which* children visit their parents is often a question of who the caregiver is.[347] Since caregivers can be non-incarcerated parents, grandparents, other family members, friends, and even foster parents, the barriers caregivers face are also diverse.[348] Most frequently, the caregiver will be a grandmother, especially in cases where the incarcerated parent is the child's mother.[349] These caregivers inevitably make significant financial and emotional investments in the relationship between child and parent. Accordingly, it also benefits corrections reformers to invest in supporting these caregivers, whose participation in the system and the accessibility is a predicate to visitation in the first place.[350]

Since most caregivers bringing children to visits may be traveling a long way to see the incarcerated parent, the visitation policies and procedures must be transparent and easily understood.[351] The investment necessary to facilitate visitations often comes with substantial costs, including transportation, food, and time.[352] There is a significant risk of investing these resources into traveling to the parent's facility only to discover that, for example, the facility is in lockdown, the parent has been transferred, or the parent's visitation privileges have been temporarily revoked.[353] Frustrating for caregivers and scary for children, failures to inform families of status changes can create a chilling effect on visits.[354] For this reason, prisons must ensure clear and timely lines of communication with caregivers and family, both outgoing and incoming.[355] Outgoing communications can take the form of allowing incarcerated parents the opportunity to call family and give updates as their status changes, or at minimum, calls, texts, or emails from administration informing the families of status changes.[356] Facilities must also be prepared to respond to incoming

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[346] *Id.* at 3–4 (examples given include forging a partnership with local churches, which can provide carpools to and from the facility on visitation days, or local libraries and bookstores donating books to prisons for parents to record themselves reading for their children. Universities can provide interns and volunteers to help coordinate programs. Local schools can facilitate video communications, even extending parent-teacher conferencing into the walls of the prison).

[347] *Id.* at 64.

[348] *Id.*

[349] *See* GLAZE & MARUSCHAK, *supra* note 5, at 5.

[350] *See* PETERSON ET AL., *supra* note 23, at 64.

[351] *See* Rabuy & Kopf, *supra* note 215 (determining that over 50% of survey respondents are incarcerated between 101 and 500 miles from the place they lived prior to incarceration).

[352] PETERSON ET AL., *supra* note 23, at 66.

[353] *Id.* at 28.

[354] *Id.*

[355] *Id.*

[356] *Id.*

communications from family, perhaps through a centralized hotline, to allow prospective visitors to verify the incarcerated parent's status and whether she can currently receive visitors.[357]

Beyond individualized information related to specific incarcerated people, prisons must be careful to communicate the general policies related to visitation. Statewide and local rules can change without clear and advance notice to interested visitors. For this reason, it is essential to post them in a manner accessible to the public.[358] When policies and rules are available, it increases the likelihood visitors can comply and have successful, productive visitations with their incarcerated family; when policies are not readily accessible or changed without notice, visitation is likely to be difficult or impossible.[359]

The Model Practices also provide tools and ideas for addressing the accessibility of prison facilities to use trauma-informed practices that promote visitation and enhance safety and security in women's correctional facilities.[360] Having addressed the human resources which support visitation and the outreach to those most responsible for facilitating it, correctional administration must naturally also address the setting where visits occur. Changing the facilities available to caretakers and visiting children at the outset of their visit can improve their experience, help meet their basic needs, and fundamentally set the tone of visits.[361]

Encouraging family relationships through prison visitation begins at the reception area. Facilities should consider designs for reception areas that prison architects may not typically consider, including the need for bathrooms large enough to accommodate children and their caretakers, with changing tables.[362] Also, prisons should consider designing their lobbies to reduce the anxiety and fear children might feel when waiting in lobby areas for visits.[363] Visitors often spend a significant amount of time waiting for visitations to begin—sometimes as long as an hour.[364] The lobby acts as a transitional space between the outside world and the visitation room, and it often "looks and feels like an extension of the correctional institution, . . . uninviting, constrained, noisy, and crowded."[365] Here, children are often first subjected to prison security procedures: metal detectors, drug-sniffing dogs, and invasive searches.[366] It should be a priority for prisons to reduce the traumatic character of waiting to see the parent by making visitor lobbies as child-friendly as possible. The Model Practices have suggestions for

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[357] *Id.*
[358] Boudin et al., *supra* note 24, at 160.
[359] *Id.* at 149.
[360] PETERSON ET AL., *supra* note 23, at 19.
[361] *Id.* at 50.
[362] *Id.* at 41.
[363] *Id.* at 39.
[364] Joyce A. Arditti et al., *Saturday Morning at the Jail: Implications of Incarceration for Families and Children*, 52 FAM. REL. 195, 197 (2003).
[365] PETERSON ET AL., *supra* note 23, at 39.
[366] *Id.*

improving visitor lobbies, including adding brightly colored décor, toys, books, or games.[367] Given the possibility of long waiting times, which may occur after even longer travel times, some prisons also provide healthy, affordable food options for young visitors.[368] The Model Practices also recommend painting family visitation rooms in soft or bright colors with child-appropriate, soft furnishing.[369] Children may be more comfortable and visitation more interactive when "props" like games, play tables, art supplies, and books for various ages are available.[370]

The experiences leading up to the visitation can set the tone for the main event. Prisons can be stressful, alienating places for both children and caretakers.[371] Not all children respond positively to visiting a parent in prison. Several studies indicate that many children experience "fear, anger, anxiety, crying, depression, emotional outbursts."[372] Others, however, have more positive experiences and are excited and well-behaved during the visits.[373] According to the data, family dynamics and the "daunting prison atmosphere" are two factors that significantly impact how children respond to prison visitation.[374] Correctional administrators and staff may not control the existing family dynamics between a parent and a child; however, there is evidence that improving the atmosphere where prison visitations take place influences the positive aspects for children visiting a parent in prison.[375] Modifying facilities to be more friendly for children can encourage meaningful, productive contact between children and their parents.[376]

Proponents of in-person visitation urge, wherever appropriate, parent-child prison visits should involve contact.[377] Contact visits allow physical interaction that can reduce a child's anxiety and enable the child to see that their parent is safe and healthy.[378] The argument is that "contact visits conducted in supportive, safe, and child-friendly environments are likely the best option to help most families mitigate the harmful effects of parental incarceration" and children's feelings of abandonment and anxiety.[379] Where in-person contact visitation is impracticable or inappropriate, reducing trauma and anxiety in non-contact visits is essential.[380] Even if through a plexiglass partition, children get the opportunity to see their parents, even though it can be confusing to understand why they do not get

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[367] *Id.*

[368] *See* FLA. STAT. § 944.8031(2)(c) (2020) (for provision requiring that Florida prisons provide "[f]ood services with food choices which are nutritious and acceptable for children and youth visitors.").

[369] PETERSON ET AL., *supra* note 23, at 50.

[370] *Id.*

[371] *Id.*

[372] Eric Martin & Doris Wells, *Dissecting the Issue of Child Prison Visitation*, CORRS. TODAY 20, 20 (2015), https://www.ojp.gov/pdffiles1/nij/249457.pdf (last visited Sept. 22, 2021).

[373] *See, e.g.*, Tasca et al., *supra* note 214, at 57.

[374] Martin & Wells, *supra* note 372, at 21.

[375] Tasca et al., *supra* note 215, at 57.

[376] PETERSON ET AL., *supra* note 23, at 50.

[377] *Id.*

[378] Cramer et al., *supra* note 3, at 3.

[379] *Id.*

[380] PETERSON ET AL., *supra* note 23, at 52.

to touch their parents.[381] The Model Practices offer several other solutions, all of which can improve outcomes and reduce mass incarceration's human and social costs.

## CONCLUSION

The rates of mass incarceration in the United States and the resulting collateral costs are no longer sustainable. Moreover, treating female offenders equally to male offenders ignores the realities in women's lives and, consequently, those of their dependent children. Undoing the devastation caused by the failed policies of the last fifty years requires immediate implementation of gender-informed interventions and changes to criminal justice policies and reforms that consider the costs, including from the child's perspective.[382]

Understanding the significance of female offenders and their life experiences is vital to implementing effective criminal justice reforms. Marginalizing differences between male and female offenders by favoring gender-neutral approaches to criminal justice reforms have resulted in far more damage than good. Without serious and systematic gender-informed research, the collateral consequences and disparate impacts on female offenders as primary caretakers and their dependent children will remain neglected and unaddressed considerations in the policy framework surrounding the national conversation on criminal justice reform.

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[381] *Id.*; *see also* MEGAN COMFORT, DEVELOPMENTS AND NEXT STEPS IN THEORIZING THE SECONDARY PRISONIZATION OF FAMILIES 76 (2019) ("In San Francisco, advocacy organizations in partnership with criminal justice system actors developed a Bill of Rights for children of incarcerated parents, which includes the right 'to be well cared for in my parent's absence' and "to speak with, see, and touch my parent") (citing CHILDREN'S BILL OF RIGHTS, *supra* note 322).

[382] *See generally* Poehlmann et al., *supra* note 83.

# PRETRIAL RELEASE IN THE AGE OF COVID-19: WHAT DID WE LEARN?

ALAINA WILLIS SPENCE

*"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."*[1]

## INTRODUCTION

Before signing the Bail Reform Act of 1966, President Lyndon B. Johnson stated that a poor defendant:

> [L]anguishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty . . . He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only—he stays in jail because he is poor.[2]

During his speech, President Johnson discussed the cycle that often plagues poor incarcerated defendants by sharing the story of a man who lost his job, his car, and his family because he could not afford bail, and as a result had no other choice but to spend two months in jail.[3] Although more than fifty years have passed since President Johnson's signing of the now repealed Bail Reform Act of 1966, many advocates still believe that his words ring true today.

The Bail Reform Act of 1984 (Act) shifted the focus to flight risk and public safety.[4] Under the Act, if the "judicial officer" determines that "no condition or combination of conditions" will guarantee the defendant's appearance in court or the safety of "any other person and the community," the defendant should be incarcerated pretrial.[5] In *United States v. Salerno*, the defendant challenged this language, asserting that it violated the Eighth Amendment.[6] The Constitution references pretrial detention only once in the Eighth Amendment where it states that "excessive bail shall not be

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[1] United States v. Salerno, 481 U.S. 739, 755 (1987).

[2] Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966*, THE AM. PRESIDENCY PROJECT (June 22, 1966), https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966.

[3] *Id.* President Johnson also stressed the importance of the 1966 Act by including another example of the sometimes-harsh monetary bail system. A man arrested on a traffic violation, a crime punishable by no more than 5 days imprisonment, spent 54 days in jail because he could not afford the $300 bail.

[4] 18 U.S.C. § 3142(e)(1).

[5] *Id.*

[6] *Salerno*, 481 U.S. at 752.

required."[7] The *Salerno* Court interpreted this language to prohibit the use of excessive bail without granting an absolute right to bail.[8] Historically, pretrial release was the default as the Court expressed in *Salerno*; that release is preferred when appropriate and bail should not be used for punitive purposes.[9]

In the early months of 2020, the novel coronavirus, commonly referred to as COVID-19, began its rapid sweep across our nation. In March 2020, the World Health Organization (WHO) declared COVID-19 a pandemic while President Donald Trump declared a National Emergency, which led to travel bans, quarantines, and unprecedented shutdowns.[10] In hopes of slowing infection rates, forty-two states and territories implemented mandatory stay-at-home orders between March 1st and May 31st.[11]

When the Centers for Disease Control and Prevention (CDC) recommended individuals maintain at least a six-foot distance from others, otherwise referred to as "social distancing,"[12] many became concerned about inmates and prison staff. With social distancing practically impossible in the confined spaces shared by inmates, it became apparent that this population was far more likely to become infected with COVID-19.[13]

Many lawyers quickly began advocating for their incarcerated clients, pushing for their release so as to protect them from contracting the virus. As the pandemic progressed, progressively more jurisdictions began implementing strategies to prevent the spread of the virus and protect those incarcerated. Some of the strategies implemented had a dramatic impact on the criminal justice system. Now, we ask, did the COVID-19 pandemic teach us anything?

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[7] U.S. CONST. amend. VIII.

[8] *Salerno*, 481 U.S. at 755 ("[T]he Eighth Amendment does not require release on bail.").

[9] *Id.* at 747 ("Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'").

[10] AM. J. MANAGED CARE Staff, *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020.

[11] Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement – United States, March 1–May 31, 2020*, *in* 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1199 (Sept 4, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm.

[12] *How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 13, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

[13] Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. L. REV. 59, 62 (2020).

## I. WHAT ARE THE CONCERNS WITH PRETRIAL DETENTION?

### *A. Jail Overcrowding*

Over the past several decades, America has relied heavily on imprisonment as a form of punishment.[14] Imprisonment is used so often that the term "mass incarceration" has become a widely used phrase to describe this "tough on crime" phenomenon.[15] In fact, the United States incarcerates more people per capita than any other nation in the world with around 2.3 million citizens incarcerated nationwide.[16]

Surprisingly, a majority of incarcerated individuals held in local jails across the United States have not been convicted. In fact, 74% of individuals being held in local jails are being held pre-conviction.[17] To put that percentage into perspective, approximately 470,000 individuals are detained in local jails across the country pre-conviction.[18] While the number of individuals incarcerated pre-conviction is alarming to those concerned with mass incarceration, the crimes associated with such a high amount of incarceration seem to be of greater concern. It is estimated that 13 million misdemeanor charges result in jail time each year.[19] These misdemeanor charges "account for over 25% of the daily jail population nationally, and much more in some states and counties."[20]

Research shows that a significant portion of those held in local jails pending trial are being held on drug charges and other non-violent offenses.[21] Approximately 25% of those held in local jails pre-conviction have been accused of drug possession, drug trafficking, or some other drug related offense.[22] Interestingly, around 43% are being held for property or public order related crime with around 32% being held for violent crime.[23] Considering the majority of people being held pre-conviction are charged with non-violent offenses, many believe we have failed in our efforts to combat the mass incarceration problem in the United States.

Not surprisingly, the large amount of jail overcrowding occurring across our nation created concerns about unsafe conditions long before the COVID-19 pandemic. Local jails house "pretrial detainees" and those incarcerated for probation or parole violations.[24] The unfortunate reality is, at the time of booking, many inmates are already suffering from "medical or

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[14] Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OH. ST. J. CRIM. L. 133, 133 (2011).

[15] *Id.*

[16] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See* Carroll, *supra* note 13, at 73.

emotional distress."[25] The jail population fluctuates rapidly due to new inmates coming in and out of the facility, the inmates suffering from medical or emotional distress are at a much higher risk of contracting illnesses while incarcerated.[26] Further, due to the costs associated with providing inmates appropriate medical treatment, many jails cannot afford to, or, opt not to provide treatment for these diseases or illnesses.[27] Therefore, when the inmates are released untreated, it can create a strain on local communities.[28]

*1. Kentucky Specific Information*

Eastern Kentucky has historically been plagued with jail overcrowding. The Kentucky River Regional Jail, located in Hazard, holds county inmates from both Perry and Knott counties.[29] While the jail is only a 135-bed facility, in the fall of 2018, it held 240 inmates.[30] The Kentucky River Regional Jail is certainly not the only jail in Kentucky operating over capacity. In February 2020, two-thirds of county jails were operating between 128% and 170% over capacity.[31] When asked what leads to the high rate of incarceration in this area, Lonnie Brewer, the Kentucky River Regional Jail administrator, listed many reasons, one of which being the loss of jobs in the area.[32] Brewer stated that he witnessed "a hundred dollars hold a guy in [jail] for a month."[33]

Not only does jail overcrowding lead to concerns for inmate and jail staff safety, the large jail population has led to enormous costs on states and counties. The Kentucky River Regional Jail charges Perry and Knott counties twenty-six dollars per day per inmate.[34] In contrast, the jail charges the state thirty-five dollars per day per inmate which encourages local jails to house large amounts of state inmates to recover some of the cost.[35] In fact, of the 240 inmates housed there in the fall of 2018, one third were state inmates.[36] Unfortunately, the desire to house many state inmates can lead to massive overcrowding considering the amount of county inmates moving in and out of jails.

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[25] *Id.*

[26] *Id.*

[27] *Id.* at 74.

[28] *Id.*

[29] Jack Norton & Judah Schept, *Keeping the Lights On: Incarcerating the Bluegrass State*, VERA IN OUR BACKYARD STORIES (Mar. 4, 2019), https://www.vera.org/in-our-backyards-stories/keeping-the-lights-on.

[30] *Id.*

[31] Kyle Ellison, *Overview of Kentucky's Prison and Jail System*, LOUISVILLE FOR (Oct. 12, 2020), https://louisvillefor.org/2020/11/03/overview-of-kentuckys-prison-and-jail-system/ ("[I]f horses were treated this way there would be public outrage.").

[32] *See* Norton & Schept, *supra* note 29 (Brewer stated that "[t]here are people here for whom there is no reason they should be in jail." Brewer highlighted the loss of jobs in the area, the high rate of mental health issues among inmates in jail, and the amount of people incarcerated for child support obligations.).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

With the rise of pretrial detention, these rates can prove astronomical in counties that do not have a jail. At the time of this note, there are forty-one counties in Kentucky that do not have a jail. Of course, the counties without jails receive none of the benefits associated with housing state inmates. Instead, these counties are often left with large jail bills that impact the county's ability to place more money into different programs for its citizens.

For example, Lyon County, Kentucky does not operate its own jail and contracts with other counties to house its inmates.[37] The county's jail bill more than doubled from $240,000 in 2018 to $500,000 in 2019.[38] Lyon County Judge Executive Wade White stated that the county "collect[s] about $780,000 for property taxes and [the] jail."[39] With inmate housing accounting for $500,000, White stated that one can see "how small [the] budget gets real[ly] quick."[40] Concerned with the prospect of raising taxes to support the growing jail bill, White spent much of the 2019 year speaking out about and urging people to recognize the problem in his county.[41]

While many Kentucky counties experience great economic costs associated with jail overcrowding, the financial strain on communities arising from expensive jail bills is shared in other states as well. For example, West Virginia has struggled with the cost associated with housing inmates.[42] Several counties have reported full jails and large bills that they are unable to pay with some owing over one million dollars.[43] Logan County Commission President Danny Godby discussed the concerns that arise when between 15 to 18% of the county budget goes toward the jail bill.[44] Godby discussed the rising jail bill and how this uncertainty leads to concerns about how the county will fund programs for its youth, such as Little League baseball fields and athletic programs for high school students.[45]

### *B. Disproportionate Impact on Impoverished Communities*

Another common concern for advocates is the disproportionate impact that pretrial detention has on impoverished communities. Research shows that people with low incomes are far more likely to experience the negative impact of pretrial detention because they cannot afford bail amounts.[46] On average, those incarcerated are already considered poorer than the overall

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[37] Kelly Farrell, *Jail Costs, Housing of Inmates Prove County Burdens*, THE HERALD LEDGER (Oct. 30, 2019), https://www.heraldledger.com/news/local/jail-costs-housing-of-inmates-prove-county-burdens/article_859d0260-a538-547f-bf76-9a20baa0795d.html.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Lacie Pierson, *Crowded Jails Costing Counties More Than They Can Pay*, THE HERALD DISPATCH (Jan. 31, 2021), https://www.herald-dispatch.com/news/crowded-jails-costing-counties-more-than-they-can-pay/article_0f1176c8-743a-5c99-a170-ed40e8c016f7.html.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See* Sawyer & Wagner, *supra* note 16.

population.[47] With the median felony bail bond at $10,000, many incarcerated individuals find it difficult to break the cycle.[48] Considering $10,000 equals roughly eight months' income for the average incarcerated individual,[49] it is easy to understand how many simply cannot afford to leave jail.

While Kentucky has been dubbed the "opioid capital of the world,"[50] methamphetamine (meth) use has been on the rise over the past several years.[51] With meth use increasing across the Commonwealth, some are concerned with the harsh penalties that are imposed on simple meth users. In Kentucky, mere possession of meth, or any other qualifying substance, is a Class D felony.[52] Although Kentucky is among the top ten poorest states in the country,[53] the amount of substance abuse in the state is alarming. With the high cost associated with a felony possession charge, we may assume that many cannot afford to pay bail and become trapped in the cycle that affects so many struggling with drug addiction.

Not only are those incarcerated typically poorer than the overall population, research shows that extended periods of incarceration lead to further problems in defendants' lives.[54] Long periods of incarceration can potentially lead to loss of employment,[55] hefty fines and court costs,[56] and the pressure to accept plea bargains.[57] Many worry that the pretrial process places too much emphasis on a defendant's financial abilities, or lack thereof, rather than whether they pose a risk to the community.[58]

There are also concerns that the negative implications flowing from incarceration significantly impact the nation's poor by leaving them in a worse position than when they entered jail. Despite the goal of pretrial detention being to guarantee court appearance and protect the community, studies have found that those detained pretrial were actually more likely to

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[47] *Id.*

[48] *Id.*

[49] *Id.* (this is an estimate based on the United States population. In some areas, this amount may equal more than eight months' income).

[50] Al Cross, *Meth is Pikeville's 'Drug of Choice.' It's Epidemic, Involved in 80% of Arrests, and its Addiction is Harder to Treat than Opioid Addiction*, KY. HEALTH NEWS (Sept. 2, 2019), https://ci.uky.edu/kentuckyhealthnews/2019/09/02/eth-is-pikevilles-drug-of-choice-its-epidemic-involved-in-80-of-arrests-and-its-addiction-is-harder-to-treat-than-opioid-addiction/.

[51] *Id.* (citing Pikeville Police Sergeant Chad Branham, who revealed that "at least eight out of every ten arrests involve meth").

[52] KY. REV. STAT. § 218A.1415(1)(c); KY. REV. STAT. § 218A.1415(2).

[53] *Top 10 Poorest States in the U.S.*, FRIENDS COMM. ON NAT'L LEGIS. (Oct. 5, 2020), https://www.fcnl.org/updates/2020-10/top-10-poorest-states-us.

[54] Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 202 (2018).

[55] *Id.*

[56] *See* Sawyer & Wagner, *supra* note 16 ("Time spent in prison destroys wealth, creates debt, and decimates job opportunities.").

[57] *See* Dobbie et al., *supra* note 54.

[58] *Id.*

reoffend than those who posted bail.[59] In fact, one study based in Harris County, Texas,[60] found that "detained misdemeanor defendants were charged with 22[%] more misdemeanors" within one year after release compared to those who were released at their bail hearing.[61] Considering these bleak findings, many are concerned that the outcomes of pretrial detention are actually adverse to the goal of lowering crime rates.

## II. WHAT HAS BEEN THE RESPONSE TO THESE CONCERNS?

Over the years, pretrial reform efforts have frequently been met with success. Recently, recent years, states have begun moving away from monetary bail and are now focusing on assessing defendants' risk levels.[62] When it comes to pretrial decision making, there has also been a shift away from allowing judges to make subjective decisions regarding the likelihood of future criminal activity.[63]

One example of change comes from New Jersey. In 2017, New Jersey began requiring the use of citations rather than arrest for low-level offenses while also "instructing judges to release defendants on non-monetary bail."[64] Even so, this requirement left the option open for judges to require monetary bail, so long as it was the only reasonable way to ensure the defendant did not reoffend before trial and that he or she appeared in court.[65] New Jersey's reform has proven largely successful since its implementation with no real increase in crime rates.[66]

Just this year, the Supreme Court of California ruled that state courts must consider an individual's financial abilities when setting monetary bail and shall not set bail at an amount that the defendant cannot afford unless there is no other reasonable alternative that would protect community safety while also ensuring the defendant appears in court.[67] The case involved Kenneth Humphrey, a man arrested for allegedly stealing seven dollars and a bottle of cologne from his neighbor.[68] When the court set his bail in the hundreds of thousands of dollars, Humphrey was unable to pay.[69] While the

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[59] Wendy Sawyer & Emily Widra, *Findings from Harris County: Money Bail Undermines Criminal Justice Goals*, PRISON POL'Y INITIATIVE (Aug. 24, 2017), https://www.prisonpolicy.org/blog/2017/08/24/bail/.

[60] *Id.* (stating that Harris County, Texas, is the third largest county in the United States with 4.5 million citizens of very diverse backgrounds).

[61] *Id.*

[62] NAT'L CTR. FOR STATE CTS., PRETRIAL PREVENTIVE DET. (Feb. 2020), https://www.ncsc.org/__data/assets/pdf_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf [hereinafter NCSC WHITE PAPER].

[63] *Id.*

[64] Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. POVERTY L. & POL'Y 451, 467 (2018).

[65] *Id.*

[66] *Id.*

[67] Ari Shapiro, *California Does Away with Cash Bail for Those Who Can't Afford It*, NAT'L PUB. RADIO (Mar. 29, 2021, 4:23 PM), https://www.npr.org/2021/03/29/982417595/california-does-away-with-cash-bail-for-those-who-cant-afford-it.

[68] *Id.*

[69] *Id.* ("The court set bail at $600,000 and later reduced it to $350,000.").

Court recognized that the state has a compelling interest in protecting public safety and ensuring a defendant appears in court,[70] the Court also asserted that "conditioning freedom solely on whether an arrestee can afford bail is unconstitutional."[71]

Illinois took matters one step further this year by becoming the first state in the country to completely eliminate cash bail.[72] Under this new approach, judges will no longer be permitted "to set any kind of bail for a defendant charged with a crime."[73] Instead, judges will determine whether to detain a defendant pretrial solely on his or her flight and public safety risks.[74] Considering judges and attorneys will need time to adjust to this new system, which was part of a much larger law that focused on criminal justice reform, the complete elimination of cash bail will not occur until 2023.[75]

Over the years, actuarial risk assessment tools have also been used to "provide accurate, relevant, and reliable information to better inform the exercise of discretion by judges and other pretrial decision makers."[76] While these assessment tools may prove helpful, they are not used to predict whether a specific defendant will reoffend.[77] Nonetheless, they do use information available, such as previous criminal history, and past court attendance, to determine whether the defendant is in a category of people that are more likely to reoffend.[78]

Considering these tools are "formulaic," many believed they would be helpful in accurately assessing a defendant's risk level.[79] Although the mentioned tools have the potential to help form decisions based on a defendant's background information, researchers warn that there are still concerns that risk assessment mechanisms utilize historical biases in evaluating the defendant's likelihood of reoffending.[80]

In 2014, then United States Attorney General Eric Holder cautioned that these assessment mechanisms may inadvertently "exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society."[81] ProPublica conducted a study on the assessment tool called COMPAS by evaluating the risk scores of

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[70] In re Humphrey, 11 Cal. Rptr. 135, 142 (App. Dep't Super. Ct. 2021).

[71] *Id.* at 143.

[72] Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, NAT'L PUB. RADIO (Feb. 22, 2021, 9:35 PM), https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail.

[73] Maria Cramer, *Illinois Becomes First State to Eliminate Cash Bail*, N.Y. TIMES (Feb. 23, 2021), https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html.

[74] *Id.*

[75] *Id.*

[76] *See* NCSC WHITE PAPER, *supra* note 62.

[77] *Id.*

[78] *Id.*; Emily Hamer, *What Effects Do Pretrial Risk Assessments Have on Racial Biases in Justice System?*, WISCONTEXT (Feb. 18, 2019, 12:00 PM), https://www.wiscontext.org/what-effects-do-pretrial-risk-assessments-have-racial-biases-justice-system.

[79] Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 508 (2018).

[80] *See* NCSC WHITE PAPER, *supra* note 62; *see* Carroll, *supra* note 13, at 71.

[81] Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

7,000 people arrested in Broward County, Florida between 2013 and 2014.[82] The study found the tool to be unreliable as it related to predicting violent crime with only 20% of those labeled high risk actually committing future violent crimes.[83] The study also found "significant racial disparities" with minority defendants nearly twice as likely to be incorrectly labeled high risk when compared with white defendants.[84]

In contrast, proponents of pretrial risk assessment tools assert that the study conducted by ProPublica is "flawed and misleading," mainly because the results were based on one specific tool in one specific area.[85] Some law professors and criminologists who support the use of these tools recognized that "any assessment that relies on the data used by criminal justice agencies will have some level of bias."[86] They assert that, while the use of the tools will not completely eliminate biases in pretrial decision making, they are "easier to fix than biased human decision-making."[87] Therefore, instead of completely banning the use of these tools, they believe the appropriate response is to improve the tools by working toward limiting the amount of bias as much as possible.[88]

## III. 2020 AND ITS IMPACT

The COVID-19 pandemic undoubtedly had a significant impact on the criminal justice system in general. With infection rates climbing rapidly in the early months, many jurisdictions began implementing strategies to keep people out of jails as much as possible. While some chose to release inmates serving time for low-level offenses, probation or parole violations, and those nearing the end of their sentences, [89] others opted to increase cite and release procedures to avoid new jail entries altogether. Still, many jurisdictions decided on a combination of methods in an attempt to lower the jail population.

In April 2020, with COVID-19 cases on the rise, Attorney General William Barr implored federal prosecutors to consider the dangers associated with keeping defendants incarcerated pretrial.[90] Barr's memo stressed the importance of allowing flexibility when considering appropriate action for defendants.[91] While Barr stated that "COVID-19 present[ed] real risks," he recognized that "allowing violent gang members and child

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Ted Gest, *Pretrial Risk Assessment Tools More Accurate Than 'Human Judgments Alone': Experts*, CRIME REP. (Dec. 8, 2020), https://thecrimereport.org/2020/12/08/pretrial-risk-assessment-tools-more-accurate-than-human-judgments-alone-experts/.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *See* Carroll, *supra* note 13, at 75.

[90] Josh Gerstein, *Barr Says Bail Decisions Should Consider Virus Risks*, POLITICO (Apr. 6, 2020, 5:17 PM), https://www.politico.com/news/2020/04/06/william-barr-attorney-general-coronavirus-169232.

[91] *Id.*

predators to roam free" also posed social dangers that outweighed health risks associated with COVID-19.[92] Still, he encouraged federal prosecutors to utilize other alternatives, such as home confinement programs, whenever they were deemed appropriate.[93]

One study revealed that, between April 16 and June 1, 2020, more than 81% of jurisdictions increased release during the pretrial stage.[94] The same study revealed that nearly 68% of jurisdictions increased the use of personal recognizance for non-violent offenses.[95] In fact, between March 1 and June 30, 2020, nearly 9% of individuals booked in jail "received an expedited release in response to COVID-19."[96]

Before the COVID-19 pandemic, Kentucky had "the second highest rate of jail admissions in the nation."[97] Similar to Barr's approach, in March 2020, Kentucky Supreme Court Chief Justice John Minton, Jr. encouraged judges in the state to work towards lowering the jail population in an effort to slow the spread of COVID-19 and protect those incarcerated and working in those facilities.[98] Due to the efforts of judges, defense attorneys, and prosecutors across the state, the amount of individuals held pretrial "decreased dramatically" and, by mid-July 2021, Kentucky's overall jail population had decreased by more than 15%.[99]

Along with these efforts to minimize the jail population, many areas also began implementing cite and release procedures.[100] The cite and release procedure allows law enforcement officers to deprioritize certain offenses, opting not to arrest an individual depending on the crime.[101] In some areas, this procedure has been used when an individual is suspected of simple

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[92] *Id.*

[93] *Id.*

[94] COVID-19 POLICY RESPONSE SURVEY, NAT'L ASS'N PRETRIAL SERVS. AGENCIES (June 19, 2020), https://www.nyapsa.org/resources/national-association-of-pretrial-services-agencies-covid-19-policy-response-survey.

[95] *Id.*

[96] Alexi Jones & Wendy Sawyer, *New Data on Jail Populations: The Good, the Bad, and the Ugly*, PRISON POL'Y INITIATIVE (Mar. 17, 2021), https://www.prisonpolicy.org/blog/2021/03/17/jails/.

[97] *COVID-19 and Criminal Justice: City and State Spotlights: Kentucky*, VERA, https://www.vera.org/covid-19/criminal-justice-city-and-state-spotlights/kentucky (last visited July 29, 2021).

[98] *Id.*

[99] *Id.*

[100] Liz Kellar, *Cite and Release, Not Jail, for Some Over COVID-19 Concerns*, THE UNION (Mar. 18, 2020), https://www.theunion.com/news/cite-and-release-not-jail-for-some-over-covid-19-concerns/; Michael Gelb, *'Dramatic' Reforms to Pretrial Practice Triggered by Pandemic: Survey*, CRIME REP. (July 2, 2020), https://thecrimereport.org/2020/07/02/dramatic-reforms-to-pretrial-practice-triggered-by-pandemic-survey/.

[101] Cite and release procedures provide law enforcement officers with greater discretion on how to handle certain types of offenses. Depending on the offense, officers have the option to issue a citation or ticket rather than place the offender under arrest. Of course, cite and release may not be appropriate in certain situations. If the offender has committed a low-level offense, cite and release is an effective way to punish offenders while keeping them out of jail.

marijuana possession.[102] During 2020, 65% of jurisdictions surveyed increased use of this procedure.[103]

With a population of 12,500, Bath County, Kentucky is one county that does not operate its own jail. Instead, the county contracts with nearby jails to house its inmates. Between July 1, 2019, and June 30, 2020, Bath County paid $379,704.84 to other counties to house its inmates.[104] During the COVID-19 pandemic, like many other areas, the county attempted to limit the amount of arrests occurring in the county. Therefore, between July 1, 2020, and March 31, 2021, the county paid $202,179.00, resulting in $126,145.84 worth of savings during the COVID-19 pandemic.[105]

Not only were arrest rates down during 2020, but many states also opted to release inmates that were being held for nonviolent offenses and had completed most of their sentence. Between April and August 2020, Kentucky Governor Andy Beshear released 1,800 inmates.[106] The first wave of releases was reserved for those inmates who had compromised immune systems and were within five years of their release date.[107] The second wave of releases included those inmates that were not immunocompromised but were within six months of their release date.[108] Inmates held for violent or sexual offenses were not eligible for release.[109]

Certainly, Kentucky was not the only state that opted to release inmates during the COVID-19 pandemic. States like Ohio, New Jersey, and Virginia all implemented plans to release inmates that were serving time for nonviolent offenses and nearing the end of their sentence.[110] Although the release of inmates played at least some part in reducing the number of people incarcerated, research tends to suggest that the real decrease in the number of individuals incarcerated comes from fewer jail admissions.[111]

In addition to the measures taken by states to release inmates and reduce the amount of arrests, jails, prisons, and sheriff's departments also began taking drastic measures to combat the potential for a COVID-19 outbreak. After many inmates and jail staff tested positive for the virus, some states decided to stop accepting new inmates in their facilities.[112] For example,

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[102] Jolie McCullough, *Texas DPS Officers Told not to Arrest in Low-Level Marijuana Cases After New Hemp Law*, TEX. TRIB. (Aug. 1, 2019, 4:00 PM), https://www.texastribune.org/2019/08/01/texas-dps-marijuana-cite-and-release-hemp/.

[103] *See* Gelb, *supra* note 100.

[104] Financial Statement, Appropriation Condition Report, Bath County, May 27, 2021.

[105] *Id.*

[106] Deni Kamper, *Beshear Administration Defends Decision to Release Inmates Amid Criticism*, WLKY (Dec. 3, 2020, 7:59 PM), https://www.wlky.com/article/beshear-administration-defends-decision-to-release-inmates-amid-criticism/34864778#.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (Nov. 10, 2021), https://www.prisonpolicy.org/virus/virusresponse.html.

[111] *Id.*

[112] Brendon Derr et al., *States are Shutting Down Prisons as Guards are Crippled by Covid-19*, N.Y. TIMES (May 19, 2021), https://www.nytimes.com/2021/01/01/us/coronavirus-prisons-jails-closing.html.

states like Texas and Ohio changed their protocol during the pandemic. Some prisons in Texas stopped accepting new inmates for several months during the pandemic[113] and, in November 2020, the Cuyahoga County Jail in Cleveland, Ohio refused to accept inmates charged with new misdemeanor offenses unless it involved domestic violence.[114] Others, like the Chippewa County Sheriff's Office in Wisconsin, decided to allow inmates working in the community to return home following their shifts rather than return to the jail.[115]

The ultimate goal during the pandemic was to reduce the amount of people incarcerated whenever possible. Due to drastic efforts taken by law enforcement, courts, and jails, jail populations experienced a significant decrease.[116] Between June 2019 and June 2020, there were "1.67 million fewer jail admissions" in the United States, equaling about a 16% decrease.[117] Nevertheless, despite the decrease in jail admissions during the pandemic, in June 2020, "1 in 14 jails still held over 100% of their rated capacity."[118]

## IV. WHAT HAVE WE LEARNED?

### *A. Re-Arrest Rates*

It seems that the re-arrest rates of COVID-19's released inmates vary depending on the location. While some areas have witnessed no real change in re-arrest rates, other areas have experienced a suspected increase. Due to the amount of early release from jails and prisons, the increased use of cite and release, and an increase in release during the pretrial stage, it is difficult to calculate which group of offenders are responsible for either an increase or decrease in the crime rate.

One specific example of concern regarding release comes from New York where the New York Police Department has expressed frustration in those arguing for more releases.[119] In the early months of the pandemic, 1,500 inmates were released in New York, the majority being held for minor

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[113] Jolie McCullough, *With a Stalled Court System, Some Texas Jails are Dangerously Overcrowded in the Pandemic*, TEX. TRIB. (Jan. 28, 2021, 5:00 AM), https://www.texastribune.org/2021/01/28/texas-jails-overcrowded-coronavirus/.

[114] Cory Shaffer, *Cuyahoga County Jail Stops Accepting New Inmates Charged with Most Misdemeanors to Prevent 'Explosion' of Coronavirus Cases Amid Historic Surge*, CLEVELAND.COM (Nov. 17, 2020, 4:59 PM), https://www.cleveland.com/court-justice/2020/11/cuyahoga-county-jail-stops-accepting-new-inmates-charged-with-most-misdemeanors-to-prevent-explosion-of-coronavirus-cases-amid-historic-surge.html.

[115] Rich Kremer, *County Jails Reducing Inmate Populations to Prevent COVID-19 Outbreaks*, WIS. PUB. RADIO (Apr. 10, 2020, 3:00 PM), https://www.wpr.org/county-jails-reducing-inmate-populations-prevent-covid-19-outbreaks.

[116] *See* Jones & Sawyer, *supra* note 96.

[117] *Id.*

[118] *Id.*

[119] Craig McCarthy et al., *Dozens of NYC Inmates Back in Jail After Coronavirus Release*, N.Y. POST (Apr. 19, 2020, 2:57 PM), https://nypost.com/2020/04/19/dozens-of-nyc-inmates-back-in-jail-after-coronavirus-release/.

or nonviolent crimes.[120] By April 2020, at least fifty, or roughly 3% of those released, had reoffended.[121] This report seems to indicate that, of that 3%, many reoffended multiple times following release.[122] The police department provided examples of several repeat offenders, one of which was arrested five times in a matter of weeks after being released due to COVID-19 concerns.[123]

Another example of concern comes from Tulare County, California. In April and July 2020, the Tulare County Superior Court ordered the release of more than 100 inmates over objection from prosecutors.[124] The Tulare County District Attorney's office conducted a study that found that around 50% of those released by the court reoffended.[125] Perhaps more concerning for District Attorney Tim Ward is that "one-third of these repeat offenders are now facing felony charges involving crimes such as robbery, kidnapping, and domestic violence."[126]

The Criminal Justice Research Institute also conducted a study by following 108 of Hawaii's COVID-19 released inmates.[127] The results determined that 58.3% of those released had reoffended.[128] Of the charges accumulated by those released individuals, 17% were felonies while 3% were violent crimes.[129] The Criminal Justice Research Institute director, Erin Harbinson, stated that the recidivism rate is low "for the few serious charges that were included in there."[130] Despite this, Hawaii ended the early release program in November 2020 and has instead decided to focus its efforts on building a new jail to combat jail overcrowding in the state.[131]

While some states have expressed concerns about reoffending, Kentucky Supreme Court Chief Justice Minton stated that the "re-arrest rate for defendants released by pretrial services between April 15 and May 31, 2020 was 4.6%, which was the same re-arrest rate for defendants released by pretrial services during the same period in 2019."[132] During that time period in 2020, 6,000 people were released from custody.[133] Interestingly,

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[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] Sheyanne N. Romero, *DA: Half of Tulare County Inmates Released Under Emergency COVID-19 Order Have Re-Offended*, VISALIA TIMES DELTA (Nov. 23, 2020, 10:28 AM), https://www.visaliatimesdelta.com/story/news/2020/11/23/50-inmates-released-under-emergency-covid-19-order-have-re-offended/6363251002/.
[125] *Id.*
[126] *Id.*
[127] Chelsea Davis, *Study: Half of the Hawaii inmates released early because of COVID reoffended*, HAWAII NEWS NOW (Jan. 15, 2021, 3:15 PM), https://www.hawaiinewsnow.com/2021/01/15/new-study-reveals-more-than-half-hawaii-inmates-released-under-last-years-emergency-orders-reoffended/.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] Steve Rogers, *Fraction of inmates released early have reoffended so far: Judge*, WTVQ (June 8, 2020), https://www.wtvq.com/2020/06/08/fraction-inmates-released-early-reoffended-far-judge/.
[133] *Id.*

the rate did not increase despite being almost two times the 3,124 people released during that period in 2019.[134]

Administrative release was afforded to roughly 10% of Kentucky arrestees in 2018 and 2019.[135] During the COVID-19 pandemic, this figure increased by 20%, resulting in an estimated additional 20,000 people released from custody.[136] Despite the large increase, the public safety rate[137] remained nearly the same in Kentucky.[138] With 7% arrested on new offenses compared to 6% in 2018 and 2019, the increase seems minor when considering the nearly 300% increase in people released from jail.[139]

### *B. Changes in Crime*

The Federal Bureau of Investigation (FBI) revealed in its Preliminary Uniform Crime Report that between January and June 2020, property crime experienced nearly an 8% decline from 2019, with larceny down nearly 10% and burglaries down nearly 8%.[140] Overall, property crime rates decreased in all city population groups.[141] Cities with populations under 10,000 people reported the largest decrease in crime at 14.2%.[142]

One study evaluating crime rates in more than twenty-five of the United States' largest cities revealed a change in crime compared to previous years.[143] The study revealed that the amount of residential burglaries decreased while commercial burglaries and car thefts increased.[144] The amount of drug crimes in these areas also decreased by a drastic 65%.[145]

While the low crime rates seem promising, the study revealed that between April and May 2020, when states began issuing stay-at-home orders, crime fell drastically in more than twenty-five large cities when compared with previous years.[146] This study seems to suggest that the crime rate correlates with the "mobility drop" that occurred when people began staying home.[147] The study also revealed a decrease in residential burglaries

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[134] *Id.*

[135] Marcus Ray & Nicole Krider, *2020 Forced Kentucky to Think in New Ways about Criminal Justice*, KY. TODAY (Oct. 6, 2021), https://www.kentuckytoday.com/stories/2020-forced-ky-to-think-in-new-ways-about-criminal-justice,30273.

[136] *Id.*

[137] The public safety rate is determined by whether the individuals released pretrial went on to commit new offenses following release.

[138] *See* Ray & Krider, *supra* note 135.

[139] *Id.*

[140] FED. BUREAU INVESTIGATION NAT'L PRESS OFF., *Overview of Preliminary Uniform Crime Report, January–June, 2020* (Sep. 15, 2020), https://www.fbi.gov/news/pressrel/press-releases/overview-of-preliminary-uniform-crime-report-january-june-2020.

[141] *Id.*

[142] *Id.*

[143] David S. Abrams, *Crime in the Time of COVID*, ECONOFACT (Mar. 30, 2021), https://econofact.org/crime-in-the-time-of-covid.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

which may be attributed to the simple fact that many people were staying home during the COVID-19 pandemic.[148]

The study also revealed an increase in commercial burglaries and car thefts with Philadelphia reporting a car theft rate two and a half times higher than before the pandemic.[149] With businesses closed and people staying home, many commercial buildings were left unattended compared to previous years.[150] The study suggests that the lack of security surrounding these businesses could have led to more opportunities for offenders and the approximate 38% increase in these types of burglaries.[151] Further, because of the stay-at-home orders and many people working from home during the pandemic, people were not using their vehicles for travel during these times which could have led to the increase in vehicle thefts during the pandemic.[152]

Although drug crimes have seemingly decreased,[153] we cannot be sure that this is not directly related to the pandemic. In fact, every state reported an increase in overdose deaths during the pandemic.[154] Drug crimes are most often reported by police rather than citizens[155] and, as we know, police presence decreased during the pandemic with many states reporting much fewer arrests during 2020 than previous years in an effort to slow the spread of COVID-19. Considering the spike in overdose deaths across the nation, the decrease in drug crime is likely attributable to the lessened police presence during COVID-19.

The same can be said about domestic violence cases in 2020. While statistics show no significant change, many are skeptical.[156] Domestic violence is difficult to assess before factoring in COVID-19 complications because victims are in a fragile state where reporting abuse may be nearly impossible. With most people under mandatory quarantines, especially in the early months of the pandemic, it is reasonable to assume that many potential victims were trapped in the home with an abuser.[157] Similar to the decrease in drug crimes, domestic violence may have gone unreported during the pandemic as well.

Interestingly, while violent crime either stayed the same or experienced a slight decline in most areas,[158] murder and nonnegligent manslaughter experienced a sharp increase in many areas.[159] Specifically, homicides and

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[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] AM. MED. ASS'N, *Issue Brief: Nation's Drug-Related Overdose and Death Epidemic Continues to Worsen* (Sept. 20, 2021), https://www.ama-assn.org/system/files/2020-12/issue-brief-increases-in-opioid-related-overdose.pdf.
[155] *See* Abrams, *supra* note 143.
[156] German Lopez, *The Rise in Murders in the US, Explained*, VOX (Dec. 2, 2020, 10:35 AM), https://www.vox.com/2020/8/3/21334149/murders-crime-shootings-protests-riots-trump-biden.
[157] *Id.*
[158] *See* FED. BUREAU INVESTIGATION NAT'L PRESS OFF., *supra* note 140.
[159] *Id.*

shootings soared in the early summer months and continued into the fall before abruptly dropping.[160] While there is no concrete explanation for this increase, there are many things to consider when evaluating this information.

There are several theories as to why the increase in homicides and shootings occurred in 2020. One theory does not revolve around COVID-19, but rather around the Black Lives Matter protests sparked by the death of George Floyd in mid-April.[161] One study found that the rise in some violent crime coincides with the protests and the lifting of some quarantine orders that occurred during the summer months.[162] Some assert that "depolicing," especially during the protests, could have led to more crime.[163] Yet, studies found that these rates "surge[d] again weeks later, after the protests had calmed."[164] Therefore, it is impossible to identify the protests as the sole cause of this increase.

Other theories involve simple boredom, an unstable economy, the partial re-opening of society, and unpredictable behavior because of the virus.[165] While there are theories as to why this surge occurred, there are many factors that could have led to this increase in violence. Because there are a multitude of things that could have led to the increase in homicides and shootings, and while we may be able to speculate, we simply cannot identify a root cause for it.

## V. IS THERE ANY ROOM FOR RECOMMENDATION?

With the lingering effects of 2020 still among us, it seems almost too soon to fully recommend any of the drastic measures taken during the COVID-19 pandemic. Although the numbers seem to indicate stability in crime rates, there are many other factors to consider. As we know, 2020 was not an average year by any means with mandated quarantines and record business closures, all the while raging war against an unrelenting virus.

While the statistics discussed above in "Changes in Crime" seem to indicate that overall property crime was down for the year 2020, there are studies that suggest business closures and mandatory quarantines are at least partly responsible for the decrease. While we see the numbers alone, it is too soon to understand to what extent the measures implemented to keep people safe during the pandemic either eliminated or created opportunities for offenders. As one study suggested, some of COVID-19's consequences may have either eliminated or created opportunities for property crime in some areas.

While there are many factors to consider when reviewing crime rates for 2020, the COVID-19 pandemic did highlight the problems associated

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[160] *See* Lopez, *supra* note 156.
[161] *Id.*; *see* Abrams, *supra* note 143.
[162] *See* Abrams, *supra* note 143.
[163] *Id.*
[164] *Id.*
[165] *See* Lopez, *supra* note 156.

with pretrial detention. Although we must tread carefully in assessing any potential lessons from the pandemic, there may be some small improvements we can make while we wait to further understand how these factors played into the crime rates during the pandemic.

As it relates to the costs associated with incarceration, one thing to consider in the future is informing the public of the cost of incarcerating individuals for low-level offenses. Referring back to the comments made by President Johnson[166] and Lonnie Brewer,[167] poor defendants may be unable to pay an amount that seems quite attainable to the average citizen. The reality is that there are many individuals spending an extended amount of time in jail because they cannot afford bail.

As discussed, counties pay per inmate per day incarcerated. When we remember Bath County, Kentucky's exponential savings during COVID-19,[168] how important is it to keep a low-level offender in jail? With the average cost on counties at twenty-five dollars per day per inmate, if a defendant is incarcerated for a low-level offense but cannot afford to pay a relatively low bail amount, how many nights in jail will satisfy this debt in society's eyes?

During the COVID-19 pandemic, many jurisdictions substantially increased their use of cite and release procedures. Although it is too early to suggest that cite and release procedures be used at this magnitude, gradually increasing use of this procedure may prove beneficial. Allowing law enforcement greater discretion when it comes to nonviolent offenses may play a key role in combatting jail overcrowding across our country.

Research tells us that there is an alarming number of people arrested on drug charges and misdemeanor charges each year. When an individual is suspected of one of these offenses, allowing law enforcement officers greater discretion with how to handle these violations could alleviate some of the strain that comes with mass incarceration. For example, if a person is suspected of simple marijuana possession or a minor traffic violation, the appropriate answer may very well be to issue a citation rather than arrest depending on the circumstances surrounding the encounter.

While there are many, very real, concerns surrounding pretrial detention, this is not to say that pretrial detention is unnecessary or that it is no longer important for our society. To the contrary, pretrial detention serves to protect crime victims, ensure court appearance to answer for the alleged crime, and stop further crime from being committed by the defendant. In some instances, pretrial detention is the only reasonable way to ensure the defendant appears for trial and any potential victims receive protection and justice.

Certainly, violent and sexual crimes, as indicated by Kentucky's decision not to include those inmates in the state's COVID-19 release

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[166] *See* Johnson, *supra* note 2.
[167] *See* Norton & Schept, *supra* note 29.
[168] *See* Financial Statement, *supra* note 104.

procedures,[169] should be looked at seriously and carefully when considering release eligibility. We would not, and should not, classify a sexual or violent offender in the same category as a person who is charged with drug possession. No matter what we plan to do to combat the problems associated with pretrial detention, we must be careful not to jeopardize a system that is designed to protect crime victims and their families.

## CONCLUSION

While 2020 was a trying year for all, and one we will not soon forget, the criminal justice community received a very unique opportunity during the COVID-19 pandemic. For decades, advocates have pressed for dramatic pretrial release reform. Practically overnight, the entire country had a front row seat to view some of these proposed practices in action.

During COVID-19, a record number of individuals were released from jails and prisons, police were not making as many arrests for non-violent offenses, and some jails were not accepting new inmates in fear of further spreading the virus. While these practices were viewed as a win for advocates, we recognize that there are many factors to consider before fully supporting and implementing these practices. Even though Illinois decided to make drastic changes to its criminal justice policies this year, we will have to wait until 2023 to see if and how the elimination of cash bail benefits their state as a whole.

One of the most important things we must remember when reviewing crime rates and contemplating possible criminal justice reforms is that 2020 was simply a year like no other. Comparing crime rates from previous years seems almost pointless when considering the drastic changes to everyday life for all United States citizens; therefore, when deciding how to combat the problems that arise with pretrial detention, we must tread lightly while keeping the public and the accused in mind.

[169] *See* Kamper, *supra* note 106.

# GOVERNING THE WILD WEST: DIAGNOSING & TREATING THE LACK OF REGULATIONS SURROUNDING ASSISTED REPRODUCTIVE TECHNOLOGIES

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## INTRODUCTION

According to the Centers for Disease Control and Prevention (CDC), infertility is defined as "not being able to get pregnant (conceive) after one year (or longer) of unprotected sex."[1] Approximately 12% of American women aged 14 to 44 have difficulty getting pregnant or carrying a pregnancy to term.[2] As infertility is such a common problem, the medical field has gone to great lengths over the last half-century to alleviate the burden of reproductive challenges on individuals and families. Assisted Reproductive Technologies (ARTs) are one means to this end. This article will explore the nature of the governing regulatory scheme—or lack thereof—surrounding ARTs in the United States and the consequences that follow from an underregulated legal climate. More pointedly, I aim to expose how the absence of ART specific language from the regulatory scheme impacts the consumers of the infertility industry in America.

First, I will briefly outline the biological process of human conception and establish a working definition of infertility. Second, I will explicate potential medical treatments for the condition of infertility with a special emphasis on in vitro fertilization (IVF). From there, I will provide a brief overview of the history of IVF and its regulation at both the federal and state level. Fourth, I will highlight some gaps in the oversight of IVF practice and insurance coverage; I will also delineate some of the negative consequences that follow from these gaps. Fifth, I will provide possible alternative causes for the shortcomings in regulation. Finally, I posit that the current failures of the ART and IVF regulatory scheme can be boiled down to a lack of communication between the medical sciences and the law. Specifically, this manifests through an issue called the law-science lag in which science advances at a pace faster than the law or regulation can maintain. This lag leads to significant deference to the sciences, regulatory gaps, and piecemeal governance over the application of scientific development. In this note, I argue that the lack of a medically informed regulatory scheme significantly

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[1] DIV. REPROD. HEALTH, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, *Infertility: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 16, 2019), https://www.cdc.gov/reproductivehealth/infertility/index.htm.

[2] *Id.*

diminishes the effectiveness of any oversight of the IVF industry. Ineffective oversight, in turn, creates a hotbed for detrimental consequences to ART market consumers and American society as a whole.

## I. THE SCIENCE ITSELF

### *A. Reproduction & The Need for ARTs*

Pregnancy is a precarious occurrence.[3] A woman's body releases an egg from one of her ovaries during ovulation; a man's sperm joins with the egg through the process of fertilization; the fertilized egg moves through the fallopian tube toward the uterus, or the womb, where it attaches to the inside of the uterus in the final stage of the process, called implantation.[4] Infertility can result from a failure of one, more than one, or none of these steps.[5]

According to the CDC, infertility affects approximately 12% of American women aged 15 to 44.[6] When a couple has difficulty conceiving, there is approximately a 50% chance that the male partner is the cause of the infertility.[7] All in all, recent developments in fertility studies have shown that "[g]etting pregnant, if at all possible, is a lot harder than most people think."[8] In fact, one in every eight couples struggles with fertility issues.[9]

Identifiable causes of male-factor infertility, or when the male partner is the cause of the infertility, include problems in the testes, a blockage in the pathway that allows sperm to exit the testes during ejaculation, or problems in the pituitary or hypothalamus.[10] This can result in the semen containing too few sperm, no sperm at all, abnormally shaped sperm, and/or sperm with poor motility.[11] Factors contributing to infertility for the female partner can include "ovulation dysfunction, anatomical problems, endometriosis, uterine defects, infection, immunological problems, or

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[3] *Id.* (emphasizing that pregnancy only happens when a range of factors align within a process that has many steps).

[4] *Id.*

[5] *Id.* (arguing that not only is the reproductive process sensitive, but there are outside factors–like age of the parties–that can impact the potential outcome of the procreative process).

[6] *Id.*

[7] AM. SOC'Y FOR REPROD. MED., *Diagnostic Testing for Male Factor Infertility*, REPRODUCTIVEFACTS.ORG, https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/diagnostic-testing-for-male-factor-infertility/ (last visited Nov. 6, 2020). Male factor infertility may come in the form of producing too few sperm to fertilize an egg, making sperm that are not shaped properly or that do not move the way they should, or having a blockage in the reproductive tract that prevents proper movement of sperm.

[8] Sahaj Kohli, *12 Mind-Blowing Stats Everyone Should Know About Infertility: It Affects Men and Women Equally*, HUFFINGTON POST (Oct. 11, 2017), https://www.huffpost.com/entry/infertility-statistics-stats-about-infertility_n_571f8c0ce4b0f309baee9bde.

[9] *Id.*

[10] *Male Factor Infertility*, COLUMBIA UNIV. IRVING MED. CTR., https://www.columbiadoctors.org/treatments-conditions/male-factor-infertility (last visited Jan. 6, 2022) [hereinafter *Male Factor Infertility*].

[11] *Id*.

unknown causes."[12] Different treatments may be used depending on the cause of the infertility.

### *B. Infertility Treatments & Technologies*

As infertility is such a common problem, the medical field has gone to great lengths over the last half-century to alleviate the burden of reproductive challenges on individuals and families. ARTs are one means to this end. According to the CDC, ARTs "includes all fertility treatments in which both eggs and embryos are handled."[13]

There are a range of fertility treatments available that vary in invasiveness.[14] While many of the different ARTs are controversial, couples resorting to medical intervention to become pregnant has become increasingly more common over the last fifty years.[15] As of April 2017, over one million babies born in the United States (and abroad) were conceived via some kind of ART.[16] It is becoming more and more common for people to seek medical intervention to have children over the last fifty years. The increase in ART sought has been met with pushback and controversy in various forms. On the one hand, there is an argument that ARTs present moral bioethical issues because they involve the "instrumental manipulation

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[12] *Female Infertility*, COLUMBIA UNIV. FERTILITY CTR., https://www.columbiaobgyn.org/patient-care/our-centers/columbia-university-fertility-center/conditions-and-treatments/female-infertility (last visited Jan. 6, 2022). Ovulation dysfunction means that a woman's reproductive system does not produce the "proper amounts of hormones necessary to develop, mature, and release a healthy egg." *Id*. Blocked fallopian tubes—caused by previous surgery, pelvic infections, or endometriosis—are the most common reason sperm is unable to reach the egg. Endometriosis is a condition where the tissue that lines the uterus develops outside the uterus; consequently, the menstrual cycle results in internal bleeding which can cause scar tissue and inflammation that affects how the reproductive organs function.

[13] *Assisted Reproductive Technology (ART): What is Assisted Reproductive Technology?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 8, 2019), https://www.cdc.gov/art/whatis.html (last visited Sept. 9, 2020).

[14] *Types of Assisted Reproductive Treatment*, VICTORIAN ASSISTED REPROD. TREATMENT AUTH., https://www.varta.org.au/information-support/assisted-reproductive-treatment/types-assisted-reproductive-treatment [hereinafter VARTA].

[15] *See generally* John Collins Harvey, *Ethical Issues and Controversies in Assisted Reproductive Technologies*, 4 CURRENT OP. OBSTETRICS & GYNECOLOGY 750 (1992); World Health Organization [WHO] Report by Effy Vayena et. al., Practices and Controversies in Assisted Reproduction (2001): Report of a meeting on Medical, Ethical and Social Aspects of Assisted Reproduction, WHO Doc. WQ 208 (Sept. 17–21, 2001) http://apps.who.int/iris/bitstream/handle/10665/42576/9241590300.pdf;jsessionid=494FA41FE751CCD30AB866928C483C70?sequence=1; Gerardo Vela et al., *Advances and Controversies in Assisted Reproductive Technology*, 76 MOUNT SINAI J. MED. 506 (2009); Rebecca Buckwalter-Poza, *The Frozen Children: The Rise—And Complications—of Embryo Adoption in the U.S.*, PAC. STANDARD (May 3, 2017), https://psmag.com/news/frozen-children-rise-complications-embryo-adoption-u-s-80754; Wes Judd, *The Messy, Complicated Nature of Assisted Reproductive Technology*, PAC. STANDARD (May 3, 2017) https://psmag.com/news/the-messy-complicated-nature-of-assisted-reproductive-technology; Michael White, *Designer Babies Aren't Coming Anytime Soon*, PAC. STANDARD (June 14, 2017), https://psmag.com/environment/designer-babies-arent-coming-anytime-soon; Michael Morrison & Stevienna de Saille, *CRISPR in Context: Towards a Socially Responsible Debate on Embryo Editing*, 5 PALGRAVE COMMC'NS 1 (Sept. 24, 2019).

[16] Maggie Fox, *A Million Babies Have Been Born in the U.S. with Fertility Help*, NBC NEWS: HEALTH (Apr. 28, 2017, 12:08 PM), https://www.nbcnews.com/health/health-news/million-babies-have-been-born-u-s-fertility-help-n752506.

of fertilization, disregarding its natural environment, the sexual act, and the implications that arise from this."[17] There is also a position that ARTs pose ethical problems related to the specific medical aspects of the techniques used, including—but not limited to—the loss of embryos, embryo selection, the right to privacy during gamete donation, and the misuse of techniques for social purposes.[18] These moral and ethical controversies are combatted by the desire of individuals and couples to have children—an objective good.[19]

ARTs include ovulation induction (OI), ratification insemination or intrauterine insemination (IUI), intracytoplasmic sperm injection (ICSI), intracytoplasmic morphologically selected sperm injection (IMSI), donor conception, preimplantation genetic test (PGT), surrogacy, and in vitro fertilization (IVF).[20] IVF, intrauterine insemination,[21] and testicular extraction of sperm (TESE) are used to address male-factor infertility.[22] For female-factor infertility, there are a wider range of treatment options because there are a larger set of possible causes. Various fertility drugs are available for women who are infertile due to ovulation disorders.[23] Surgeries—though rare because of the success of other treatments—are used to correct problems or improve female infertility.[24] The most common forms of reproductive assistance for female-factor infertility include IUI and IVF.[25] Since the delivery of the first American IVF baby in 1981, there has been extensive development in medical technology surrounding reproduction in the United States.[26] IVF will be the main focus of this paper.

At its most basic level, IVF refers to the process whereby doctors retrieve one or more ova from a woman's body, fertilized in a lab, and then implanted back in the uterus in hopes of resulting in a pregnancy. In detail the process is as follows: the woman has hormone injections to stimulate her

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[17] Justo Aznar & Julio Tudela, *Bioethics of Assisted Reproductive Technology*, *in* INNOVATIONS IN ASSISTED REPRODUCTION TECHNOLOGY 2 (Nidhi Sharma et al. eds., 2020).

[18] *Id.*

[19] *Id. See generally* Harvey, *supra* note 15; Vayena et. al., *supra* note 15; Paul R. Brezina & Yulian Zhao, *The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies*, 2012 OBSTETRICS & GYNECOLOGY INT'L 1 (2012); Adrienne Asch & Rebecca Marmor, *Assisted Reproduction*, HASTINGS CTR. BIOETHICS BRIEFINGS (Sept. 17, 2015), https://www.thehastingscenter.org/briefingbook/assisted-reproduction/; Fiona C. Ross & Tessa Moll, *Assisted Reproduction: Politics, Ethics, and Anthropological Futures*, 39 MED. ANTHROPOLOGY: CROSS-CULTURE STUDS. HEALTH & ILLNESS 553 (2020).

[20] VARTA, *supra* note 14.

[21] This is the best treatment for sperm motility or concentration issues; intrauterine insemination can be combined with or used without treatment for the female partner. *Male Factor Infertility*, *supra* note 10.

[22] *Id.*

[23] Fertility drugs generally work like natural hormones—follicle-stimulating hormone and luteinizing hormone—to trigger ovulation. *Female Infertility*, MAYO CLINIC (Aug. 27, 2021), https://www.mayoclinic.org/diseases-conditions/female-infertility/diagnosis-treatment/drc-20354313.

[24] *Id.*

[25] *Id.*

[26] Craig Niederberger & Antonio Pellicer, *40 Years of IVF*, 110 FERTILITY & STERILITY 185, 188 (2018); Fox, *supra* note 16. This is not just a development in the United States, ARTs have been developed worldwide.

ovaries to produce multiple eggs.[27] Once the eggs have matured, they are retrieved from the woman's body.[28] The egg extraction procedure takes place while the woman is under a light anesthetic with the guidance of an ultrasound.[29] If the woman's own eggs are not viable for use in the IVF process, she can use eggs from a donor.[30] The eggs and sperm—from the male partner or a donor—are then placed into a culture dish in a laboratory to allow the eggs to fertilize, and develop into embryos.[31] Three to five days later, if embryos have formed, one or more is placed into the woman's uterus during the embryo transfer procedure.[32] If there are embryos remaining after the embryo transfer procedure, they can be frozen and used later if the first transfer is not successful or if the couple so desires.[33] Approximately six to seven weeks after the embryo transfer, a pregnancy can be verified using ultrasound technology.[34]

In the early years of IVF, it was performed with sperm and egg from members of a heterosexual marriage; but IVF evolved to include more options that make use of donor gametes. Current options for IVF include the following: traditional IVF, donor IVF (i.e., egg and sperm donation for transfer into another woman), IVF through the use of a surrogate, and egg donation to a laboratory for research, destruction, or cryopreservation (freezing).[35] IVF is a common treatment for male tubal blockage and unexplained infertility.[36] Other techniques, like intrauterine insemination and testicular extraction of sperm, are frequently used for other types of male-factor infertility.[37]

## II. A BRIEF HISTORY OF THE LAW SURROUNDING IVF

The first IVF baby was born in the United States in the early 1980s. Since that time, both the regulatory scheme and medical innovations have continued to evolve. This section will briefly explore the historical trajectory of ART development leading to the current state of the law.

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[27] VARTA, *supra* note 14.

[28] *Id.*

[29] *Id.*

[30] Rachel Gurevich, *Having a Child with Egg Donor IVF: The Egg Donor IVF Process, Costs, and Success Rates*, VERYWELL FAM. (Sept. 12, 2020), https://www.verywellfamily.com/egg-donor-ivf-basics-4114768.

[31] VARTA, *supra* note 14.

[32] *Id.*

[33] *Id.*

[34] *Id.* "Couple" is the language most often used by the field; however, it is becoming increasingly common that more than just couples are involved in the ART process.

[35] Phyllis Griffin Epps, *The Entwined Destinies of Roe v. Wade and Assisted Reproductive Technology*, UNIV. HOUS. L. CTR. (Sept. 6, 2000), https://www.law.uh.edu/healthlaw/perspectives/Reproductive/000906Entwined.html.

[36] Male Factor Infertility, supra note 10.

[37] *Id*.

### *A. Federalism & Federal Laws*

#### *1. Early IVF Research and Development*

Early on in IVF research, the Institutional Review Board (IRB) system, which is used to regulate research on human subjects, did not exist.[38] The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (The Committee) was founded in 1973.[39] It endeavored to create ethical guidelines and rules for all biomedical research. In the ART specific environment, it governed "for research projects on embryos or fetuses submitted for consideration for federal funding."[40] The Committee recommended an Ethics Advisory Board oversee project approval regarding laboratory conception to receive federal funding;[41] however, the Ethics Advisory Board was not established until 1977 by which time IVF research was well under way, though no live births had yet been achieved anywhere.[42] At this time, the Ethics Advisory Board weighed in on IVF and asserted that, "the procedure was 'ethically defensible, though still legitimately controverted' and that 'there were compelling reasons to proceed with it under limited circumstances.'"[43] This publicized response by the Ethics Advisory Board postponed any funding decisions because of the legitimacy the publicity gave the controversy.[44] There was an initial move toward—not regulation—but internal governance; however, it ultimately did not manifest that way.

In the same decade, the 1970s, the decade of *Roe v. Wade* and the championing of women's reproductive freedom in relation to the pro-life-pro-choice debate,[45] IVF faced many regulatory challenges that mirrored the early development of abortion practices.[46] The medical practices involved

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[38] Milana Bochkur Dratver, *Comparative Study of IVF Policy and Practice in the United States and Israel*, THE SCOPE: BLOG YALE SCI. MAG. (Feb. 16, 2017), https://medium.com/the-scope-yale-scientific-magazines-online-blog/comparative-study-of-ivf-policy-and-practice-in-the-united-states-and-israel-b3f4da2e9695.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id*.

[45] Roe v. Wade, 410 U.S. 113 (1973) (holding that abortion was within the scope of the personal liberty guaranteed by the Due Process Clause, though the right was not absolute).

[46] Epps, *supra* note 35; Dratver, *supra* note 38. For a compelling account of the early development of IVF regulation parrallels the evolution abortion regulation, *see* Stephanie K. Boys & Evan M. Harris, *IVF and the Anti-Abortion Movement: Considerations for Advocacy Against Overturning* Roe v. Wade, 19 ADVANCES IN SOCIAL WORK 518 (2019); Jennifer Wright, *Why Anti-Choice People Are Okay With IVF*, HARPER'S BAZAAR (June 14, 2019), https://www.harpersbazaar.com/culture/politics/a27888471/why-anti-choice-people-against-abortion-are-okay-with-ivf/; Margaret Marsh & Wanda Ronner, *Why new anti-abortion laws may make it harder to conceive*, WASH. POST (Aug. 15, 2019), https://www.washingtonpost.com/outlook/2019/08/15/why-new-anti-abortion-laws-may-make-it-harder-conceive/; Alexandra Hutzler, *Anti-Abortion Groups Take On IVF, Fertility Clinics Over Unused Embryos: 'They Are Still Alive'*, NEWSWEEK (Oct. 8, 2019 9:56 AM), https://www.newsweek.com/anti-abortion-groups-take-ivf-1463839.

in IVF and ARTs themselves are regulated individually, and with much variation, state-by-state.[47] At the federal level, ARTs are governed by the Fertility Clinic Success Rate and Certification Act 1992 (the Wyden Law), Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the Centers for Medicare and Medicaid Services.[48] These federal laws and agency laws govern reporting practices, diagnoses, and human tissues; however, they do not go into most ART issues. A prime example of this is the Wyden Law.

*2. The Wyden Law*

The Wyden Law was designed to create transparency around the clinical success rates of fertility treatments in the United States.[49] The Wyden Law places requirements on the CDC that mandate annual reporting of ART data from all facilities providing ART services, including success rates, number of cycles, number of singleton live births, etc.[50] The Wyden Law also provides States with a model embryology laboratory certification process;[51] however, these model processes are not accompanied by any implementation requirements at the state level.[52] In other words, while the Wyden Law offers an example of the ideal conditions for an embryology lab, there are no enforcement mechanisms to insure those standards are being met. Additionally, because the procedures at embryology labs are not deemed "diagnostic," they fall outside the confines of the Clinical Laboratory Improvement Act (CLIA) under which compliance is mandatory.[53]

*3. CLIA*

CLIA applies where the clinical practice of ART is deemed diagnostic.[54] In these circumstances, CLIA mandates certain standards for the condition of andrology laboratories and the practices involved in providing ART services.[55] There have been very few changes in federal legislation since the Wyden Law's enactment in 1992.[56]

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[47] Lucy Frith & Eric Blyth, *Assisted Reproductive Technology in the USA: Is More Regulation Needed?*, 29 REPROD. BIOMED. ONLINE 516, 517 (2014).

[48] *Id.*

[49] *Id.*

[50] Frith & Blyth, *supra* note 47, at 517; *Assisted Reproductive Technology (ART): Policy Documents*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 8, 2018), https://www.cdc.gov/art/nass/policy.html [hereinafter *ART Policy Docs*].

[51] Frith & Blyth, *supra* note 47, at 518; *ART Policy Docs*, *supra* note 50.

[52] Frith & Blyth, *supra* note 47, at 518.

[53] *Id.*

[54] David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, 78 FERTILITY & STERILITY 932, 932 (2002).

[55] *Id.*

[56] Dratver, *supra* note 38.

All in all, there is little oversight from the federal government or internal professional agencies over ARTs. In fact, no federal organization oversees the number of children conceived by a single patient, the types of medical information or updates supplied by donors, which genetic tests may be performed on embryos, how many fertilized eggs may be placed into a woman, or age limitations on donors.[57]

*4. The FDA*

The little, non-ART specific regulation that is in place can most aptly be said to derive from the FDA. The FDA oversees the standards set for screening and testing donors for human tissue and tissue-based products.[58] The regulations requiring the FDA to conduct this oversight were not designed with ARTs in mind and, consequently, do not incorporate language specific to genetic testing of prospective donors and other concerns unique to ARTs.[59] Moreover, only "small sections of the Good Tissue Practice regulations apply to most reproductive establishments."[60] In other words, the FDA has little governing power in the arena of ARTs.

*B. Agency Regulation*

*1. ASRM*

Regarding the implementation of federal laws in the ART context, there have been federal agency regulations—outside the FDA—governing IVF practices. Most guidance for the practices of IVF related procedures and ARTs is provided by the American Society of Reproductive Medicine (ASRM).[61] ASRM and the Society for Assisted Reproductive Technology (SART) supply guidelines and codes of conduct for fertility clinics and their staffs at a national level.[62] Much like the model embryology laboratory certification process outlined by the Wyden Law, the guidelines provided by the ASRM are not mandatory and the ASRM does not punish clinics, banks, or other institutions who deviate from the guidelines.[63] There is a lack of consistency in the practices and standards between clinics providing ART

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[57] *Id.*

[58] *Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products*, U.S. FOOD & DRUG ADMIN. (2007), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/eligibility-determination-donors-human-cells-tissues-and-cellular-and-tissue-based-products.

[59] Frith & Blyth, *supra* note 47, at 518.

[60] *Id.* (quoting Brooks A. Keel & Tammie K. Schalue, *Reproductive Laboratory Regulations, Certifications and Reporting Systems*, *in* REPRODUCTIVE ENDOCRINOLOGY & INFERTILITY: INTEGRATING MODERN CLINICAL & LABORATORY PRACTICE 55, 56 (Douglas T. Carrell & C. Matthew Peterson eds., 2010)).

[61] Dratver, *supra* note 38.

[62] Frith & Blyth, *supra* note 47, at 517. There is a significant difference in the oversight between academic clinics and private practice; academic clinics are governed by the institution's regulations and policies, while private practice is a standalone for-profit institution.

[63] Dratver, *supra* note 38.

services (like IVF).[64] This dramatic variation in practices and standards from one clinic to the next is a direct result of the absence of ARSM—or other governing body—enforcement mechanisms.[65]

### *C. State Regulation*

Outside of the limited federal regulatory structure of ARTs, states have the ability to pass legislation governing this area; however, many have failed to do so.[66] At the state level, a license to practice medicine is required to offer IVF and other ART services.[67] It is important to note that certification through the American Board of Obstetrics and Gynecology or the Reproductive Endocrinology Subspecialty Board are not required to offer IVF or other ART services.[68] There are additional state licensing and inspection standards that must be met for facilities in which IVF and ARTs are offered.[69] The aforementioned state standards and requirements do not regulate the practice of administering ARTs or IVF itself; rather, they govern the physicians and facilities that conduct the practice. With the advent of IVF came the potential for left over embryos and other gametes, so there was a need for legislative response. By 2007, legislation on embryo and gamete disposition was enacted in sixteen states.[70] Now, at least one state has banned embryo destruction, and others have limited disposition choices through judicial determinations.[71] The actual state regulation of the practice of IVF and IVF related techniques vary drastically from state to state[72] if it is present at all.[73]

The regulation of insurance coverage of IVF and IVF related care is another issue. Like ARTs and the administration of IVF services, federal legislation has not set requirements for coverage of these infertility treatments; therefore, States are responsible to govern any standards related to insurance coverage in this area. As of 2017, only five states instituted

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[64] Frith & Blyth, *supra* note 47, at 518.

[65] *Id.*

[66] *Id.*

[67] Adamson, *supra* note 54, at 933.

[68] *Id.*

[69] *Id.*

[70] Frith & Blyth, *supra* note 47, at 518.

[71] Lisa A. Rinehart, *Storage, Transport, and Disposition of Gametes and Embryos: Legal Issues and Practical Considerations*, 115 FERTILITY & STERILITY 274, 278 (2021).

[72] As of August 2020, nineteen states have passed infertility insurance laws, thirteen of those include IVF coverage, and ten states have fertility preservation laws for iatrogenic (medically-induced) infertility—including Connecticut. *Infertility Coverage by State*, RESOLVE: THE NAT'L INFERTILITY ASS'N, https://resolve.org/what-are-my-options/insurance-coverage/infertility-coverage-state/ (last visited Dec. 14, 2020); CONN. GEN. STAT. § 52-190a (2019).

[73] Dratver, *supra* note 38. *See generally* NAT'L INFERTILITY ASS'N, *How Does Your State Do When It Comes to Access to Care and Support for Infertility?*, STATE FERTILITY SCORECARD: RESOLVE, http://familybuilding.resolve.org/fertility-scorecard/ (last visited Dec. 14, 2020) [hereinafter NAT'L INFERTILITY ASS'N]. There are no regulations in any state that determine a legal time limit on the storage of frozen eggs or embryos. Richard Vaughn, *Uniform Laws Needed to Regulate Abandoned Embryos*, INT'L FERTILITY L. GROUP (Aug. 26, 2019), https://www.iflg.net/laws-needed-abandoned-embryos/.

unique insurance policies that increase access to IVF procedures by requiring mandatory insurance coverage.[74] In other words, insurance companies in all but five states could refuse to provide IVF health insurance coverage.

There is limited federal oversight, directed more toward reporting; patchwork of state laws focusing on general medical care and insurance. This account of the law governing ARTs and IVF related technologies does not fully explore all the language, expectations, or idiosyncrasies of state and individual institutional oversight. Given the variation between jurisdictions and between stand-alone facilities administering ART services, it is impossible to offer an exhaustive discussion of the current regulations in every nook and cranny of the infertility industry. This patchwork regulatory structure is illustrative of the discontinuity and inconsistency that exists in the policies governing ARTs.

## III. CONSEQUENCES OF LACK OF GOVERNING LAW

The loose legal oversight creates a market for ARTs where there are significant variations between the availability of insurance coverage and the administration of infertility treatments not only from state to state and clinic to clinic, but sometimes from one physician to another within individual clinics.[75] Some observable consequences for American society and individuals that result from this variation include: the commodification of reproductive markets, a trend toward medical tourism, and increased frequency of disputes over embryos and parental rights.

### *A. Commodification of Reproductive Markets*

Without universalized standards in place for the insurance coverage of IVF and IVF related treatments, the lack of federal funding has created a burgeoning for-profit infertility market. Individuals facing infertility, who choose to enter the ART market, can purchase lawful reproductive services from willing providers.[76] By 2019, the last year for which there is preliminary ART national summary data reported by the CDC, there were over 440 ART clinics in the United States.[77] That year, there were 293,672 total cycles of ART treatments performed.[78] They resulted in over 28,000

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[74] NAT'L INFERTILITY ASS'N, *supra* note 73 (describing insurance requirements in Connecticut, Illinois, Massachusetts, New Jersey, and Rhode Island).

[75] Claudia Geib, *Advanced Reproductive Technology is Here. But Who Decides Who Gets Access?*, FUTURISM (Feb. 2, 2018), https://futurism.com/gatekeepers-future-reproductive-technology.

[76] Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 35 (2008).

[77] *Assisted Reproductive Technology (ART): National ART Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 7, 2019), https://www.cdc.gov/art/nass/index.html.

[78] *Final National Summary Report for 2019*, SOC'Y FOR ASSISTED REPROD. TECH.'S NAT'L SUMMARY REP. (2021), https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?reportingYear=2018# (last visited Jan. 8, 2022) (contributing to the summary are the following cycle types: minimal stimulation, natural cycle,

singleton live births.[79] In the United States in 2019, there were 3,745,540 live births;[80] therefore, between .75-1% of children born in the United States in 2019 were born via ART.[81] These numbers illustrate the significant demand for very expensive infertility treatments in the United States.[82]

One of the two most prominent barriers posed by the ART market to potential consumers is the high cost of services.[83] In 2012, the average cost per IVF cycle in the United States was $9,266.[84] As of March 2020, the average cost per IVF cycle in the United States rose to over $12,000 excluding the cost of medications, which can be upwards of $3,000 per cycle.[85] What this translates to, in terms of accessibility to IVF as a treatment option with limited-to-no insurance coverage,[86] is an exacerbation of the already established healthcare disparity in the United States.[87] In a 2016

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conventional stimulation, in vitro maturation; also contributing to the data summary are the following technologies: First IVF, Elective single-embryo transfer (eSET), Preimplantation genetic testing (PGT), Day 5/6 transfer, Frozen egg, Frozen embryo, Gestational carriers, intracytoplasmic sperm injection (ICSI), Intravaginal culture (IVC). From these categories, the only ART not considered to be IVF related technology is IVC) [hereinafter SART]. The Society for Assisted Reproductive Technologies noted that the COVID-19 pandemic caused some embryo transfers to be delayed, thus a higher number of cycles occurred without a transfer during the twelve months after the retrieval cycle. This impacted the overall live birth success rates per cycle by making them statistically significantly lower than the previous reporting year in 2018.

[79] *Id.*

[80] Brady E. Hamilton et al., *Births: Provisional Data for 2019*, CTRS. FOR DISEASE CONTROL & PREVENTION (2020), https://www.cdc.gov/nchs/data/vsrr/vsrr-8-508.pdf.

[81] SART, *supra* note 78 (noting that this figure is lower than in previous years due to the COVID-19 pandemic, for example live singleton births resulting from ARTs made up 1.5-2% of all live births in the United States in 2018).

[82] Charis Thompson, *IVF Global Histories, USA: Between Rock and a Marketplace*, 2 REPROD. BIOMED. & SOC'Y ONLINE 128, 132 (2016).

[83] Daar, *supra* note 76, at 35.

[84] Brezina & Zhao, *supra* note 19, at 3.

[85] Rachel Gurevich, *How Much Does IVF Really Cost?*, VERYWELL FAM. (Mar. 5, 2020), https://www.verywellfamily.com/how-much-does-ivf-cost-1960212. Beyond economic status impacting only accessibility to infertility treatments, studies have shown that the socioeconomic divide amongst IVF consumers can also affect the likelihood of the success of their IVF; women with a household income of $100,000 are twice as likely to achieve success when undergoing IVF than women from households making under $100,000 ($p < .05$), even after accounting for variables such as cycle volume, age, race, level of education, and geography. *Money, Occupation and IVF Success Rates*, FERTILITY IQ, https://www.fertilityiq.com/topics/ivf/money-occupation-and-ivf-success-rates (last visited Dec. 14, 2020). In 2019 the fertility clinics and infertility services industry in the United States was worth $6 billion. John LaRosa, *Steady Growth of U.S. Fertility Clinics Industry Halted by COVID-19*, MKT. RSCH. BLOG (May 13, 2020), https://blog.marketresearch.com/steady-growth-of-u.s.-fertility-clinics-industry-halted-by-covid-19#:~:text=The%20%246%20billion%20fertility%20clinics,rates%2C%20a%20strong%20economy%2C%20and. More pointedly, the average salary of a fertility specialist in 2020 in the United States was $273,602. *Fertility Specialist Salary*, ECON. RES. INST. (Dec. 14, 2020), https://www.erieri.com/salary/job/fertility-specialist/united-states.

[86] Thompson, *supra* note 82, at 132 (describing the context where some fertility procedures are covered if you have "the right health insurance and have opted into the right benefits" in fifteen states: Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, Montana, and West Virginia).

[87] *Id.* at 130. The median household income was $68,703 in the United States in 2019. Jessica Semega et al., *Income and Poverty in the United States: 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/publications/2020/demo/p60-270.html. According to a study that spanned from 2013 to 2016, "[j]ust a third of those making less than $25,000 a year sought treatment for

article, Thompson argues that United States residents' "access to IVF has been stratified from the start by ability to pay" deriving from the lack of funding for embryonic research that followed the ruling of *Roe v. Wade*.[88]

The second barrier that consumers seeking to enter the fertility treatment market face, according to Daar's 2008 article, is the providers' discretion in deciding whom to treat.[89] As one scholar argued, in the United States there is a "paradoxical nexus: Pretty much any fertility treatment is available if you can pay for it, yet you can still be refused if a clinician does not agree with your lifestyle."[90] In addition to the socioeconomic and racial barriers that all individuals seeking access to the ART market face, single women and same-sex couples encounter "reduced access from at least two additional sources: provider discrimination against single and lesbian women [and gay men], and legislative efforts to ban access to unmarried individuals."[91] Most disturbingly, it has been argued that even if providers are not explicit in their discriminatory motivations for refusal of treatment, because medical ethics allows providers to refuse treatment based on their own "clinical discretion"—physicians can refuse treatment for any or no reason at all.[92] While some states have medical antidiscrimination laws with respect to marital status or sexual orientation, states without protection for these individuals may pose insurmountable barriers to local access to ARTs and IVF related technology.[93]

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infertility, compared with two thirds of those making $100,000 or more." Lisa Rapaport, *U.S. Women with Less Income, Education Often Lack Access to Infertility Care*, REUTERS: HEALTHCARE & PHARMA (July 17, 2019, 3:19 PM), https://www.reuters.com/article/us-health-infertility-disparities/u-s-women-with-less-income-education-often-lack-access-to-infertility-care-idUSKCN1UC2GB; *see* Adrienne L. Riegle, *Income Disparities in Medical Helpseeking for Infertility*, POPULATION ASS'N AM. 2012 ANN. MEETING (2012), https://paa2012.princeton.edu/papers/122270. Health disparities are "preventable circumstances relating to individuals' health status based on social factors such as income, ethnicity, education, age and gender. These factors can result in circumstances such as a lack of access to proper health care resources (including insurance) or decreased life expectancy rates." *6 Examples of Health Disparities and Solutions*, USCPRICE SOL PRICE SCH. OF PUB. POL'Y: EXEC. MENTAL HEALTH ADMIN. BLOG, https://healthadministrationdegree.usc.edu/blog/examples-of-health-disparities/ (last visited Jan. 6, 2022). There is a well-established health care disparity in the United States on racial, ethnic, geographical, and socioeconomic grounds. *See Reducing disparities in health care*, AM. MED. ASS'N: PATIENT SUPPORT & ADVOC., https://www.ama-assn.org/delivering-care/patient-support-advocacy/reducing-disparities-health-care (last visited Jan. 6, 2022); Nambi Ndugga & Samantha Artiga, *Disparities in Health and Health Care: 5 Key Questions and Answers*, KAISER FAM. FOUND. (May 11, 2021), https://www.kff.org/racial-equity-and-health-policy/issue-brief/disparities-in-health-and-health-care-5-key-question-and-answers/; Sofia Carratala & Connor Maxwell, *Health Disparities by Race and Ethnicity*, CTR. FOR AM. PROGRESS (May 7, 2020), https://www.americanprogress.org/article/health-disparities-race-ethnicity/; U.S. DEP'T OF HEALTH & HUM. SERVS., *CDC Health Disparities and Inequalities Report – United States, 2013*, 62 MORBIDITY & MORTALITY WKLY. REP. (Nov. 22, 2013), cdc.gov/mmwr/pdf/other/su6203.pdf.

[88] Thompson, *supra* note 82, at 130.

[89] Daar, *supra* note 76, at 35–36.

[90] Geib, *supra* note 75.

[91] Daar, *supra* note 76, at 43; *see also* Geib, *supra* note 75.

[92] Daar, *supra* note 76, at 65 ("Proponents of physician autonomy in the provision of ART services might look to a companion area of the law, which permits doctors to refuse to provide certain types of health care services on moral or ethical grounds.").

[93] *Id.* at 44. This topic has gained additional attention since the Trump administration's attempt to expand the so-called conscience rule for health care workers that was overturned in late 2019; there has

Even in the states in which medical anti-discrimination legislation does exist, the consensus among the courts is that infertility is a "'medical illness' but it does not necessarily follow that its treatment will always be considered a medical service."[94] Due to this, "a person's chance of accessing IVF as a form of reproductive assistance in the United States correlates with their race, class, disability, and citizenship status, as well as with where they live and their age."[95]

### *B. Cross-Border Reproduction & Medical Tourism*

Diminished access to reproductive assistance is not the only consequence of a commodified reproductive field. In a market whose "growth of IVF in the USA [is] marked as much by exclusion as by its inclusivity,"[96] another downstream effect of the cost prohibitive nature of IVF technology is the push towards finding more cost-effective alternatives.[97] One method is the practice of medical tourism which is defined as the growing number of United States and other Western citizens who travel abroad to less developed countries such as India, Thailand, Malaysia with the primary purpose of receiving medical treatment, like ARTs.[98] Medical tourism promises *significant* cost savings for United States patients.[99] This is the case because the funding structure for IVF technologies and ARTs is "highly variable" between different nations.[100]

Beyond the international dimension of medical tourism, domestic medical tourism exists within the United States. Unlike international medical tourism, domestic medical tourism is often motivated by the inaccessibility to local IVF technology and ARTs because consumers are denied treatment for one reason or another (e.g., marital status, sexual orientation, race, etc.).[101] Domestic medical tourism may also be motivated by financial concerns over the exorbitant cost of ART services. Conversely, domestic medical tourism may create even more harmful consequences than

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been a reinvigoration of the view that religious refusal of treatment by physicians is unethical. Sarah C. Hull, *Not So Conscientious Objection: When Can Doctors Refuse to Treat?*, STAT NEWS (Nov. 8, 2019), https://www.statnews.com/2019/11/08/conscientious-objection-doctors-refuse-treatment/.

[94] Daar, *supra* note 76, at 44, n.40. *Compare* Egert v. Conn. Gen. Life Ins. Co., 900 F.2d 1032 (7th Cir. 1990) (rejecting insurance company claim that it does not consider infertility to be an illness where internal company memoranda refer expressly to the "illness of infertility," company ordered to reimburse for infertility treatments) *with* Kinzie v. Physician's Liab. Ins. Co., 750 P.2d 1140 (Okla. Civ. App. 1987) (while plaintiff's infertility was considered a medical condition, she was still denied insurance coverage for treatment because conceiving a child was not considered medically necessary to her physical health).

[95] Thompson, *supra* note 82, at 130.

[96] *Id.* at 134.

[97] I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1471–72 (2010).

[98] *Id.* at 1471, 1476–77 (noting that this is distinguishable from incidental medical tourism where travels received care from foreign providers that is "ancillary to another reason for travel, such as pleasure tourism or business travel, as well as care for expatriates living abroad full-time.").

[99] *Id.* at 1472.

[100] Brezina & Zhao, *supra* note 19, at 3.

[101] Daar, *supra* note 76, at 55.

mere economic burden—including psychological and emotional costs results from leaving one's home, job, partner, and family in pursuit of access to infertility treatments.[102] Barriers to local access can place additional obstacles in peoples' way giving rise to particular psychological and emotional costs.

### *C. Disputes over Embryos*

Overcoming the discrimination, financial barriers, and successfully completing the IVF process does not indicate the exhaustion of possible legal issues. What happens if all the embryos are not used at the time of embryo transfer? They can be discarded or frozen.[103] Freezing embryos, however, can lead to other legal complications. Due to the lack of regulation surrounding freezing embryos, conflict can ensue about the plans for frozen embryos if they are abandoned, if the couple can no longer pay for their storage, if a partner dies, or if the couple decides to separate.[104] There are a few options for the fate of the embryo in these situations: the embryo is stored indefinitely, the embryo is thawed and disposed of, the embryo is given to one party or the other, the embryo is donated to another individual or couple, donated to research, or the embryo is disposed of using a method that is clearly stated in an agreement between the parties and the storage facility.[105] The problem exposes itself when the involved parties disagree on the desired outcome.

This is another area that is left up to the states to regulate.[106] Few states have any statutes regarding the disposition of embryos, but those that do are generally "vague and, therefore, do nothing to prevent litigation."[107] Since most state statutes are unhelpful, if they exist at all, there is a large potential for litigation over these matters. Different jurisdictions have asserted different approaches to deal with these disputes.[108] Nonetheless, no matter

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[102] *Id.* Infertility has been reported to cause various psychological-emotional disorders including "turmoil, frustration, depression, anxiety, hopelessness, guilt, and feelings of worthlessness in life. . . . The overall prevalence of psychological problems of the infertile couples is estimated to be 25-60%, which is caused by a complexity of factors such as gender, the cause and duration of infertility, treatment methods, and culture." Seyede Batool Hasanpoor-Azghdy et al., *The Emotional-Psychological Consequences of Infertility Among Infertile Women Seeking Treatment: Results of a Qualitative Study*, 12 IRAN J. REPROD. MED. 131, 132 (2014).

[103] VARTA, *supra* note 14.

[104] Melanie J. Wender, *Embryo Disputes Becoming More Common in Family Law Practice*, THE LEGAL INTELLIGENCER (July 10, 2020, 4:15 PM), https://www.law.com/thelegalintelligencer/2020/07/10/embryo-disputes-becoming-more-common-in-family-law-practice/?slreturn=20201111110334.

[105] *Id.*; Brezina & Zhao, *supra* note 19, at 4.

[106] Wender, *supra* note 104.

[107] *Id.* (contrasting the state legislation in California, Florida, and North Dakota with the only state that has explicit legislation related to the condition of embryos: Louisiana).

[108] *Id.* (describing the different approaches to embryo disputes used in different jurisdictions, namely: (1) the contracts-based approach, *see* Kass v. Kass, 91 N.Y.2d 554 (N.Y. 1998), (2) the balancing approach, *see* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000), (3) the contemporaneous mutual assent approach); *see also* ALL. FOR FERTILITY PRES., *Supreme Court Refuses to Hear Illinois Disputed Embryos Case*, THE ALL. BLOG (Mar. 8, 2016),

the approach utilized, the litigation and conflicts that occur are economically demanding from all parties, the legal system, and emotionally taxing. Beyond that, the cost is high for the fertility industry to store and maintain frozen embryos. A 2012 article asserted that, "In the United States alone, it is estimated that over 400,000 embryos are currently cryopreserved, many of which will not be used by their genetic parents."[109] By 2020, the number of cryopreserved embryos in the United States reached 620,000.[110]

### *D. Parental Disputes*

In addition to the potential for discrimination and the disputes over embryos, lack of clear regulation in this area can—and has—led to confusion and conflicts over parental roles after the birth of the child. The loose legal environment can lead to disputes over who is the legal parent of children produced from gamete donation, embryo donation, or both.[111] This has created particular uncertainty for same-sex couples and single women regarding parental rights over children.[112] This matter is complicated further when gestational surrogates and gamete donors are used in IVF practices. Gamete donors, the men and women who donate sperm and eggs, "are now an integral part of the ART world."[113] In 2008, donor eggs were routinely used in almost one of every eight ART cycles.[114]

Beyond the complications within the relationships among the parties involved in conception, the potential for human error via the clinics renders the lack of universal legal definitions—like "parenthood," "biological," etc.—deeply concerning. For example, the case of a young couple who gave birth to twins in New York in 2019.[115] The catch? Due to the error by the clinic of mixing up the embryos, the twins were not related to the couple that carried the children, nor to each other.[116] The twisted saga only got more convoluted when one set of the genetic parents were notified, in Los Angeles, that their son had just been born 3,000 miles away.[117] It suffices to say that a custody battle followed where the court was put in the position, without guidance from statute, to decide who was entitled the presumption of parental rights.[118] While this particular instance is unique, it is illustrative

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https://www.allianceforfertilitypreservation.org/blog/supreme-court-refuses-to-hear-illinois-disputed-embryos-case.

[109] Brezina & Zhao, *supra* note 19, at 4.

[110] Anna Hecker, *What Should I Do with my Unused Embryos?*, N.Y. TIMES (Apr. 15, 2020), https://www.nytimes.com/2020/04/15/parenting/fertility/ivf-unused-frozen-eggs.html.

[111] Frith & Blyth, *supra* note 47, at 519.

[112] *Id.*

[113] Daar, *supra* note 76, at 33.

[114] *Id.* at 34, n.55.

[115] Sarah Zhang, *IVF Mix-Ups Have Broken the Definition of Parenthood*, THE ATLANTIC (July 11, 2019, 2:23 PM), https://www.theatlantic.com/science/archive/2019/07/ivf-embryo-mix-up-parenthood/593725/.

[116] *Id.*

[117] *Id.*

[118] *Id.*

of some of the complications and conflict that follow from a lack of structure, clarity, and consistency in a regulatory scheme governing IVF and ARTs.

## IV. POSSIBLE ALTERNATIVE CAUSES

The present regulatory structure surrounding ARTs has resulted in additional complications: the commodification of reproductive markets, a trend toward medical tourism, and increased frequency of disputes over embryos and parental rights. The task of the following section will be to explore possible forces that could explain the policy's evolutionary trajectory that resulted in this irregular and gap-ridden regulatory system.

### *A. It is "a business, not a research enterprise"*[119]

One argument for the piecemeal regulation scheme governing ARTs and IVF is that state and local governments should be able to legislate for themselves and "in accordance with local values."[120] Beyond that, it is argued that the ART industry has "grown up" beyond the auspices of medical research.[121] Instead, ARTs and IVF have evolved as a business and the market has been commodified.[122] According to Sean Tipton, the chief lobbyist for the ASRM in 2015, the business orientation of the ART market does not mean that the market is "un-regulated."[123] There are the loose regulations and guidelines provided by the FDA and ASRM which are sufficiently supplemented by extensive "professional self-regulation"[124] that make up the difference from the absence of universal standards within the practices and administering of ART services.[125]

I posit that this business-minded alternative explanation for the current regulatory regime governing ARTs and IVF technologies fails to address, or even acknowledge, the gaps in the oversight that do exist. Moreover, the negative consequences that follow from the piecemeal regulatory structure seem to be written off as an acceptable result of the capitalist practices involved.[126] Beyond these problems, this approach also removes the fertility

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[119] Michael Ollove, *Lightly Regulated In Vitro Fertilization Yields Thousands of Babies Annually*, WASH. POST (Apr. 13, 2015), https://www.washingtonpost.com/national/health-science/lightly-regulated-in-vitro-fertilization-yields-thousands-of-babies-annually/2015/04/13/f1f3fa36-d8a2-11e4-8103-fa84725dbf9d_story.html (quoting Arthur Caplan, director of the division of medical ethics at New York University's School of Medicine).

[120] Frith & Blyth, *supra* note 47, at 519.

[121] Ollove, *supra* note 119 (quoting Debra Mathews of the Johns Hopkins Berman Institute of Bioethics).

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] These capitalist practices—which are excessively intertwined with profit—are not limited to the fertility industry; this is a critique that has been made more broadly of the biosciences and medicine in general. *See generally* Martin McKee & David Stuckler, *The Crisis of Capitalism and the Marketisation of Health Care: the Implications for Public Health Professionals*, 1 J PUB. HEALTH RES. 236 (2012);

industry from the realm of medical sciences. By commodifying the industry and transplanting it into the capitalist market, it further obfuscates the deeply personal essence of ARTs and IVF practices.

### *B. Religious and Moral Concerns*

Another alternative explanation emerges from the extensive scholarly work addressing the parallels between the abortion debate and IVF evolution in the United States.[127] Social and religious ideologies have influenced the debates around related practices in similar ways.[128] Despite the secularity of many patients and practitioners, religion is commonly evident in IVF clinics in the United States through "its shaping of the abortion debate, but also in the values and practices patients and physicians bring to their treatment."[129] The influence of religion in this context can be reduced down to the dispute over when life begins.[130] The exact point of the beginning of life varies depending on the religious—and sometimes political—affiliation.[131] This dispute over the start of life is also what makes the abortion debate controversial: at what point in the pregnancy is aborting the fetus considered murder? One aspect of why this start-of-life dispute is so influential is because, for abortion as well as some practices and procedures related to IVF and its research, embryos can be discarded and destroyed which has been vocally opposed by Protestant Evangelicals and some Republican politicians over the years.[132]

I assert that this alternative argument for the current regulatory structure is also insufficient. There is, undoubtedly, a deep and intrinsic connection between the debate over abortion and ART; however, this theory alone cannot explain the lack of universal regulation surrounding ARTs because abortion practices are more highly regulated with clearly defined state requirements than ART services, including IVF.[133]

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John Launer, *Medicine Under Capitalism*, 32 POSTGRADUATE MED. J. (2015); Anthony Oakland, *Why capitalism is stunting science*, SOCIALIST APPEAL (July 23, 2019), https://www.socialist.net/why-capitalism-is-stunting-science.htm; Christy Ford Chapin, *What Historians of Medicine Can Learn from Historians of Capitalism*, 94 BULLETIN HIST. MED. 319 (2020).

[127] *See, e.g.*, Brezina & Zhao, *supra* note 19, at 5; Judith Daar & Kimberly Mutcherson, *Intersections in Reproduction: Perspectives on Abortion and Assisted Reproductive Technologies*, 43 J.L., MED. & ETHICS 174 (2015); Thompson, *supra* note 82, at 131; Epps, *supra* note 35.

[128] Thompson, *supra* note 82, at 130.

[129] *Id.*

[130] *Id.* (describing the relationship of various religious sects to beliefs about the moment when life begins; specifically, Catholics and Evangelical Protestants are associated with the belief that life begins at conception while many Anglicans, Muslims, Mormons, Jews, and secular Americans are affiliated with life beginning post-conception based on various things like implantation, fetal ability to suffer, viability, the development of the primitive streak, quickening, survival out of the womb, etc.).

[131] *Id.*

[132] *Id.* at 131.

[133] *An Overview of Abortion Laws*, GUTTMACHER INST. (Oct. 1, 2021), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

### *C. Lack of Scientific Consensus*

A final alternative argument for the piecemeal, or absence of, regulation over ARTs and IVF is two-fold: there is a perception that science and medicine do not have a clear consensus on some of the chief issues facing the ART industry.[134] Without a clear consensus agreed upon within the medical community—the community that is supposed to be providing information to the law regarding its practices—it could be asked, how could the law create a reasonable set of standards? While this is a reasonable question, I pose that this lack of clear consensus is not unique to the medical area of ARTs.[135] This lack of consensus has not limited other areas of medicine from being regulated; thus, to argue that a lack of consensus among ART physicians and researchers should reduce the amount of oversight is contrary to this theory's core assumption of the parallels between ARTs and other areas of medicine.

## V. SCIENCE VS. THE LAW

None of the three alternative explanations for the absence of, or piecemeal compilation of, ART regulation has proven to be sufficiently vindicatory in nature to account for both the current state of regulation as well as the downstream side effects. I propose a final, two-part theory as an explanation the present situation. I contend that the interplay of a phenomenon called "the science lag" combined with a lack of communication between the medical sciences and the law is to blame for the current regulatory scheme.

It has been acknowledged by legal scholars for nearly a century that there is an extensive delay in the legal community's acknowledgement of any shift in understanding following scientific innovation.[136] In the years since the *Daubert* decision,[137] the thought that "[l]aw lags science; it does

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[134] *See* Richard J. Paulson, *The Unscientific Nature of the Concept that "Human Life Begins at Fertilization," and Why It Matters*, 107 FERTILITY & STERILITY 566 (2017), https://www.fertstert.org/article/S0015-0282(17)30036-5/fulltext; *but see Life Begins at Fertilization*, PRINCETON PROFILES, https://www.princeton.edu/~prolife/articles/embryoquotes2.html (last visited Dec. 12, 2020).

[135] *See, e.g.*, UNIV. PA. SCH. MED., *Lack of Consensus Among Health Care Providers in Identifying Sepsis Poses Threat to Treatment*, SCI. DAILY (Apr. 16, 2013), https://www.sciencedaily.com/releases/2013/04/130416102325.htm; Monika Hermann et al., *Lack of Consensus in the Choice of Termination of Pregnancy for Turner Syndrome in France*, 19 BMC HEALTH SERVS. RSCH. 1 (2019); Pamela S. Roberts et al., *The Lack of a Consensus Definition for Mild Stroke Impacts Health Services for Patients*, NEURODIEM (Feb. 12, 2020), https://www.neurodiem.ca/news/the-lack-of-a-consensus-definition-for-mild-stroke-impacts-health-services-3NXTOHGEMzvCZ93pa6boHP.

[136] Frederick K. Beutel, *The Lag Between Scientific Discoveries and Legal Procedures*, 33 NEB. L. REV. 1 (1953), https://digitalcommons.unl.edu/nlr/vol33/iss1/3/ ("It is a generally recognized fact that law and legal procedures lag far behind any type of social change. This is true even in matters of change in social custom, religion, and habits of the people. But it seems to be far more marked when one approaches the problem of picking up scientific developments and transposing them to be used as tools in legal and governmental procedures.").

[137] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); *see Law Lags Science? Not in The Ninth Circuit*, APP. STRATEGIST DRUG & DEVICE BLOG (May 15, 2014),

not lead it,"[138] as well as the subsequent academic acknowledgement of the law's failure to abandon "junk science" in criminal cases have been hot button issues.[139] In a field of medical science that is moving as fast as ARTs, it is not difficult to conclude that even if the law was receptive to the sciences, the law would be behind the times.

I contend that a lack of communication between the medical sciences and the law is an equal contributor to inefficient and ineffective regulation. Clark C. Havighurst gained prominence by promoting these ideas; I draw from his work in the creation of a forum. In an article from 2020, Havighurst argues that the American health care industry resides in a "legal environment featuring irrational rules and doctrines, conflicting paradigms, multiple policy-making authorities, and inconsistent public policies."[140] This has evolved historically, over the last fifty years, through several significant events involving legal change, where some "important implications of the legal changes were not recognized by the observant public, industry insiders, or even decisionmakers themselves."[141] Contrary to the idea that health care law has developed on a streamline or logical path, Havighurst argues that the health care industry has evolved due to a surprising degree of chance.[142] A similar underlying conclusion, that there is a "substantial gulf between the scientific and legal disciplines," was articulated by Harold Green almost thirty years ago.[143]

## VI. HOW SHOULD WE REGULATE?

My suggestions for the path forward in ART regulation informed my theory of why ART regulation evolved to its current state: the dual problem of the science lag and the lack of communication between science and the law. By ameliorating these two problems, I assert that a path towards better regulation of ARTs is possible.

Two scholars' works have inspired my suggested reform: Steven Goldberg and Clark C. Havighurst. First, in the early 1990s, Goldberg emerged as a leading scholar in the law-science field.[144] He identified that

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https://www.appellatestrategist.com/2014/05/articles/drug-device/law-lags-science-not-in-the-ninth-circuit/.

[138] Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996).

[139] Jim Hilbert, *The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of "Junk Science" in Criminal Trials*, 71 OKLA. L. REV. 759 (2019).

[140] Clark C. Havighurst, *American Health Care and The Law — We Need to Talk!*, 19 HEALTH AFFS. 84, 84 (2020).

[141] *Id.* at 86.

[142] *Id.* While this argument poses broad sweeping conclusions about the American health care system as a whole, one underlying conclusion that can reasonably be extracted from this argument is that the regulation currently in place is not a function of successful dialogue between the medical and legal fields.

[143] Harold P. Green, *The Law-Science Interface in Public Policy Decision making*, 51 OH. ST. L.J. 375, 405 (1990); Micah L. Berman & Annice E. Kim, *Bridging the Gap Between Science and Law: The Example of Tobacco Regulatory Science*, 43 J.L. MED. ETHICS 95, 95 (2015).

[144] Green, *supra* note 143, at 376.

the point where tensions between law and science increase is when scientific research advances from basic research to its technological applications.[145] At the basic research level, the law has a "remarkable degree of deference to the scientific community" because research, alone, has little direct potential to cause injury.[146] When research evolves into technology, legal control takes over which results in a "'regulatory gap' between research and application with 'enormous practical consequences.'"[147] One way to narrow the regulatory gap, Goldberg argues, is by having scientists step into the role of "science counselor" who would help "shape science to meet regulatory constraints."[148]

Second, Havighurst has called for the creation of a permanent, professionally staffed Forum on Legal Issues in Health Care within the Institute of Medicine (IOM).[149] Havighurst's Forum would focus on the legal issues in health care, like the financing, delivery, and quality of personal health services rather than the general law affecting individual or public health or regulating biomedical research or biotechnology as such.[150]

My proposition would be a Goldberg-Havighurst hybrid approach at the micro-level—in the singular area of ART services. This would be in the form of a National Forum of individuals on both sides of the law-science gulf.

I assert that these initial regulatory reform Forum meetings should occur on a regular and frequent basis to catalyze policy change.[151] After initial regulatory reform is established, the Forum will transition to an upkeep or maintenance mission. The dialogue of information would be a permanent staple of the Forum, integral to the maintenance of the policy surrounding the ever-evolving field of ARTs.

From the medical arena would be science counselors: obstetricians, reproductive endocrinologists, psychologists, public health officials, PhD researchers specializing in fertility, ART directors and clinic directors, etc. From the legal field: public representatives or legislators, staffers, attorneys, etc. This Forum would, ideally, address the federal "regulatory gap" that currently exists by initially identifying the failures of the current regulatory scheme at both the state and federal level.[152] This evaluation would practically resemble the exchange and translation of information. The

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[145] *Id.* at 377; Steven Goldberg, *The Reluctant Embrace: Law and Science in America*, 75 GEO. L.J. 1341, 1352 (1987).

[146] Green, *supra* note 143, at 377; Goldberg, *supra* note 127, at 1352.

[147] Green, *supra* note 143, at 378; Goldberg, *supra* note 127, at 1368.

[148] Green, *supra* note 143, at 378; Goldberg, *supra* note 127, at 1379.

[149] Havighurst, *supra* note 140, at 103.

[150] *Id.*

[151] Perhaps these meetings need to be held as frequently as multiple times a month over the duration of a year, or more.

[152] The exact process of appointment or selection for Forum representatives is not outlined in this note. This topic would require more extensive discussion than is possible in this context, as any appointment like this would be inherently politicized leading to the potential for bias and disruption of the objectivity of the Forum.

scientific representatives would present information regarding the current state of the ART itself, upcoming technological advancements, and areas of concern—from the medical and public health perspective—for increased likelihood of litigation resulting from practices or methodologies within the fertility industry. Next, the legal representatives could explore the condition state of the law and observable legal consequences that result from the present legal framework (including ongoing disputes in court, concerns raised by constituents, and interpretational challenges that triers of fact face in litigation when addressing issues pertinent to ART legislation and regulation). In the initial attempts to understand the need for reform, there would ideally be an opportunity for public comment so that constituents and general members of the public could express existing concerns related to ART services and the fertility industry.[153]

The establishment of the Goldberg-Havighurst hybrid forum would increase the communication between the law and this specialized area of medical sciences through the occurrence of the Forum meetings, alone. The nature of the informational exchange allows both sides of the law-science divide to acquire information possessed by the other. This informational exchange is vital to mitigate the science lag. In the long term, the ongoing meetings of the Forum ensure the ART policies continue to accurately address the needs and concerns of the fertility industry. By continuing the channel of communication between the science counselors and the policy makers, the legal representatives in the Forum will have first-hand access to scientific innovation, thus significantly diminishing the temporal delay that creates the scientific lag.

The forum would have the potential to greatly mitigate the negative downstream consequences that accompany the loose legal climate that governs ARTs. After initial regulatory reform is made, this would—ideally—establish a universal set of standards and practices to govern the fertility industry. The creation of uniform national standards alone would significantly the potential for domestic medical tourism because the regulations would not vary geographically. Beyond resolving the jurisdictional inconsistencies, a set of uniform national standards from an initial regulatory reform would allow for better understanding of the need for subsequent reform that would best alleviate the occurrence of gaps in insurance coverage that make IVF cost prohibitive. Beyond these effects, by establishing clear and definitive expectations of the physicians and the outcomes of the ART procedures, it could: (1) reduce the leeway affording providers discretion that allows for discrimination, (2) establish explicit standards for pre-ART consent and contracting to curtail disputes over embryos, and (3) positively delimit the boundaries of parenthood and rights of the various parties involved in ARTs.

[153] Perhaps this could even take the form of something like an amicus brief.

According to Berman and Kim, regulatory reform that only focuses on increased communication between the sciences and the law does not go far enough to actually effect the regulatory scheme.[154] They posit that, to actually facilitate the development of policy-relevant research to impact the regulatory structure there must be funding mechanisms and professional incentives for scientists and policy decisionmakers that encourage collaboration.[155] While these concerns about the extent of progress achievable through merely "increased communication" are valid, my approach is a slight variation on the criticized regulatory reform. Instead of having reform that only focuses on increased communication (meaning increased communication is the product of reform), I propose that increased communication inform and instruct the trajectory of policy change (using the increased communication as the means to the ends of regulatory reform). While the exact progress possible at the hands of the Forum is not entirely clear, there is significant potential for improving multiple areas of administering ARTs and patient care. Specifically, the Forum could guide policy reform in a direction to insure better access, provide more equitable patient care, and even establish fertility services an essential health service under the Affordable Care Act—diminishing the economic impact on individuals. In this way, my proposed Forum circumvents the concerns of this objection and, without further concerns, poses to be a viable method of establishing a new regulatory structure in this niche medical field.

## CONCLUSION

Over the last forty years, the popularity of seeking ART treatments has continued to burgeon. To be frank, the science has grown beyond its britches. Since the infertility industry grew so rapidly, individual scientists and institutions have turned their focus to the immediate issues at hand as opposed to maintaining an eye for the big picture and its long-term efficiencies. A medical procedure that has a strong foothold in the capitalist market is not new or uncharted territory. What makes infertility different from other capitalist medical subspecialities, such as cosmetic surgery, is the inherent ethical treatment and recognition of an additional "life."

My proposed Forum provides a pathway toward efficiency and unification through a marriage of science and the law. By diminishing the science lag and increasing communication between science and the law, the regulatory reform has the potential to greatly improve consumption of fertility treatments across a wide socioeconomic and cultural community in the United States.

The current self-regulation of the infertility industry has shown to be insufficient. Yet, any reform will invariably be met with resistance. Neoclassicism assumes that individuals will act in ways that maximize

[154] Berman & Kim, *supra* note 143, at 98.
[155] *Id.*

utility and in accordance with rationally upholding their long-term best interests.[156] Many philosophers and legal scholars have shown that these neoclassical assumptions fail in the setting of economics.[157] The failure of the ART industry to self-regulate in accordance with its best interest is another example of neoclassical assumptions falling short. The evolution of ART has been over several decades and the solution will not be instantaneous; yet every attempt to create a more comprehensive and universal set of guidelines will be progress in the right direction.

[156] Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1997).

[157] *Id.*

# Defending Healthcare Workers Requires More Than 3M Can Give

AIDAN ELY[†*]

## INTRODUCTION

In 1922 after World War I, Russia transitioned into the Union of Soviet Socialist Republics (USSR), a federal socialist state. After World War II, in which the USSR and the Western powers were relative allies, public concerns about communism began to spread due to international events.[1] In particular, events in 1949 and 1950 prompted this concern such as the USSR's successful testing of a nuclear bomb, Communist Mao Zedong's takeover of China, and the start of the Korean War.[2] Observing this scene on the world stage, Congress realized that any arising conflict would likely present itself as "total war," meaning that the entire nation would need to be mobilized to equal (or ideally, exceed) the production power of a socialist state.[3] The Soviet economy was designed for an age of mass production and mass armies,[4] and the United States needed to be able to match the communist production capability if war became a reality. For this reason, the Defense Production Act of 1950 (DPA) was born. The DPA confers upon the President a broad set of authorities to influence domestic industry in the interest of national defense[5] so that, when called upon, the industries of the United States can produce essential materials and products.[6] "Though initially passed in response to the Korean War, the DPA is historically based on the War Powers Acts of World War II."[7] Congress has since expanded the term *national defense* within the DPA. The scope of DPA authorities now extends beyond shaping United States military preparedness and capabilities to also encompass enhancing and supporting domestic

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[1] History.com Editors, *Red Scare*, HISTORY (Feb. 28, 2020), https://www.history.com/topics/cold-war/red-scare.

[2] *Id.*

[3] Mark Harrison, *The Soviet Economy, 1917-1991: Its Life and Afterlife*, VOX CEPR POLICY PORTAL (Nov. 7, 2017), https://voxeu.org/print/62263 (based on "a standard measure developed by political scientists to capture 'the ability of a nation to exercise and resist influence' in the world. By the 1970s … the Soviet Union became the world's leading power.").

[4] *Id.*

[5] Defense Production Act of 1950, ch. 774, 64 Stat. 798 (1950) (codified as amended at 50 U.S.C. §§ 450–4568).

[6] *Id.*

[7] MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS (2020).

preparedness, response, and recovery from natural hazards, terrorist attacks, and other national emergencies.[8] This note argues that the DPA can—and should—be used to address infectious disease epidemics and pandemics as a type of national emergency.

This proposal will explore the need for language to be added to the DPA. The proposed expansion would include additional executive powers to compel, or if need be, force private companies to share proprietary information related to the production of materials during national emergencies. The precedent of this sort of executive power begins with a case examination of the themes of the Justices' opinions in *Youngstown Sheet & Tube Co. v. Sawyer*.[9] This note will proceed through an examination of the current language of the DPA, its enforceability, and what the government *could do right now* with the DPA's current language to help with the COVID-19 pandemic. This note will then highlight why the current language is not enough to keep the American people safe. Additionally, this analysis will also include and address actions taken by both former President Trump and current President Biden to combat the pandemic. The actions taken by both Presidents will be followed by a brief discussion of the impediments to enacting the language proposed in this note and other alternatives such as consensual licensure by companies, expansion of other laws, and increasing efficiency and utilization of the national stockpiles. Finally, this note proposes language to be added to the DPA as well as the potential impact of such additions.

> The number and diversity of epidemic events has been increasing over the past [thirty] years, a trend that is only expected to intensify . . . Potentially catastrophic outbreaks may only occur every few decades, but highly disruptive regional and local outbreaks, such as the 2014 Ebola virus crisis in West Africa, are becoming more common and pose a major threat to lives and livelihoods . . . despite considerable progress, the world remains ill-prepared to detect and respond to outbreaks and is not prepared to respond to a significant pandemic threat.[10]

The threat of nuclear war during the Cold War conflict incentivized the United States to increase its national productivity capabilities to compete with the USSR. Historical precedent and the current geopolitical (and socioeconomic) climate illustrate that the primary threat facing our nation—and the world population—stems from a global pandemic. As each new

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[8] *Id.*

[9] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[10] *Outbreak Readiness and Business Impact: Protecting Lives and Livelihoods Across the Global Economy*, WORLD ECON. FOR. 5, 6 (2019), http://www3.weforum.org/docs/WEF%20HGHI_Outbreak_Readiness_Business_Impact.pdf [hereinafter *Outbreak Readiness and Business Impact*].

epidemic hits the population, our ability as a nation to support and protect not only our own citizens, but those around the world from a global pandemic, must shift to one of "total war" against disease rather than against other nations.[11]

"On the 100th anniversary of the 1918 influenza pandemic, it is tempting to believe the world has seen the worst epidemics."[12] A mere two years later, another deadly pandemic has swept the world. This virus, Severe Acute Respiratory Syndrome coronavirus 2 (SARS-CoV-2), commonly referred to as "COVID-19," has infected and killed people belonging to every age group, wealth class, race, ethnicity, and geographic location. The Centers for Disease Control and Prevention (CDC) has established January 21, 2020, as the beginning of the outbreak. As of March 18th, 2021, there have been a total of 29,431,658 cases and 535,217 deaths caused by COVID-19 and related complications in the United States.[13] In the seven days prior to March 18th, there were 376,410 confirmed new cases in the United States.[14] By the same date, there had been over 122 million cases and almost 2.7 million deaths worldwide.[15] COVID-19 has been difficult to contain even with precautions (e.g., closing borders, quarantining the sick or symptomatic, etc.) because of the high number of contagious, asymptomatic individuals.[16] Prior to the development of several vaccines, the spread of COVID-19 was hampered by social distancing, use of personal protective equipment (PPE), and frequent testing.[17] While nations have enforced general guidelines to implement all three of these aforementioned measures (*i.e.*, social distancing, the use of PPE, and frequent testing), the United States has been obstructed by a lack of supplies,[18] particularly affordable and effective PPE. This is especially true for healthcare providers. Unfortunately, 3M, which is the current patent owner of the N95 respirator mask, can only produce a limited number of masks. 3M recently announced their *intended* response to the vastly-increased need incurred by the

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[11] ERICH LUDENDORFF, DER TOTALE KRIEG (1935) (translated to "The Total War") (expanding on the idea that war in the modern era requires total mobilization of manpower and resources. Global pandemics infect all aspects of life—like the German army in WWI and WWII, by attacking civilian-associated resources and infrastructure. The United States must also adapt appropriately in response.).

[12] *Outbreak Readiness and Business Impact*, *supra* note 10.

[13] *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days (last visited Mar. 18, 2021) [hereinafter CTRS. FOR DISEASE CONTROL & PREVENTION].

[14] *Id*.

[15] *COVID-19 Coronavirus Pandemic*, WORLDOMETER, https://www.worldometers.info/coronavirus/ (last visited Feb. 14, 2021).

[16] Katie Kerwin McCrimmon, *The Truth About COVID-19 and Asymptomatic Spread: It's Common, so Wear a Mask and Avoid Large Gatherings*, UCHEALTH (Nov. 5, 2020), https://www.uchealth.org/today/the-truth-about-asymptomatic-spread-of-covid-19/ (a recent study found that nearly 40% of children who tested positive for COVID-19 were asymptomatic. People of all ages can be asymptomatic and can still spread the virus to others.).

[17] *Id*.

[18] *Medical Device Shortages During the COVID-19 Public Health Emergency*, FOOD & DRUG ADMIN. (Mar. 19, 2021), https://www.fda.gov/medical-devices/coronavirus-covid-19-and-medical-devices/medical-device-shortages-during-covid-19-public-health-emergency.

pandemic, which includes plants running on a twenty-four hour per day, seven day per week basis.[19] This intended response would triple the production rate to over 95 million respirators per month in the United States.[20] It would maximize production of other solutions in response to COVID-19, including biopharma filtration systems, hand sanitizers, and disinfectants.[21] The increased production of these other COVID-19 response tools would have saved—and could still save—a significant number of lives.[22] This note advocates that the United States may achieve efficient and rapid production through compulsory licensing, therefore allowing more than one company to produce the PPE. Mass production of this kind is necessary to combat the pandemic more successfully when it is a particular good or material that is not being freely produced on the market in sufficient supply.

> N95 respirators and surgical masks are examples of personal protective equipment that are used to protect the wearer from airborne particles and liquid contaminating the face. The CDC and Prevention National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Administration (OSHA) regulate N95 respirators.[23]

While PPE alone does not prevent airborne transmission, N95 respirators are labeled as "critical supplies" used by essential workers.[24] To produce N95 respirators at a rate necessary for an effective pandemic response, compulsory licensing initiated by the DPA is required.

Since the declaration of COVID-19 as a global pandemic, the threat facing individuals in the United States has become even more complex as new variants have arisen. There are more noteworthy strains of COVID-19 originating from mutations developed or accumulated as the disease passed through the populations of South Africa and the United Kingdom.[25] The

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[19] *Helping the World Respond to COVID-19*, 3M, https://www.3m.com/3M/en_US/company-us/coronavirus/ (last visited Sept. 11, 2021) [hereinafter 3M].

[20] *Id*.

[21] *Id.*

[22] Peter Coy, *Mandatory Mask Use Could Have Saved 40,000 Lives, Study Says*, BLOOMBERG BUSINESSWEEK (July 2020, 6:00 AM), https://www.bloomberg.com/news/articles/2020-07-16/mandatory-mask-use-could-have-saved-40-000-lives-study-says ("Using statistical analysis, [a new study] concludes that 40,000 lives would have been saved in two months if a national mask mandate for employees of public-facing businesses had gone into effect on April 1 [2020] and had been strictly obeyed.").

[23] *N95 Respirators, Surgical Masks, and Face Masks*, FOOD & DRUG ADMIN. (Aug. 20, 2020), https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/n95-respirators-surgical-masks-and-face-masks.

[24] *Id*. (essential workers include—but are not limited to—healthcare workers, medical doctors, nurses, and first responders.).

[25] *See* Houriiyah Tegally et al., *Sixteen Novel Lineages of SARS-CoV-2 in South Africa*, 27 NATURE MED. 440 (2021); *see also*, Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the*

World Health Organization stated that, as of January 2, 2022, "[sixty] countries across all six WHO regions have reported either imported cases or community transmission of [the United Kingdom] variant"[26] The fear is that as infection rates increase across countries, particularly concerning variants will continue to arise and may make the vaccinations less impactful. "These mutations could render the current [COVID]-19 vaccines less effective. Or they could mean the virus eventually 'escapes' them all together. That's why doctors, virologists, and other health researchers are calling on officials to 'vaccinate 24/7 like it's an emergency.'"[27] As the omicron variant currently makes its way through the United States three full years after the declaration of a global pandemic, the need for measures to be taken has not lessened.

This note's proposed expansion to the DPA, which would create additional executive powers to compel, or if need be, force, private companies to share proprietary information has been contested in front of the courts before. Relevant analysis on the extent of the executive branch wielding this power begins with the precedent United States Supreme Court case of *Youngstown Sheet & Tube Co. v. Sawyer*,[28] and a discussion of the opinions' themes.

## I. *YOUNGSTOWN*

By the late 1940s, labor organizations had become a powerful force in America, and worker strikes caused large-scale fear in both the executive and legislative branches of the government.[29] A prime example of the power of labor organizations during that time emerged in the Supreme Court case *Youngstown Sheet & Tube Co. v. Sawyer*.[30] *Youngstown* stems from a dispute in the late 1950s between steel mill owners and their employees concerning their collective bargaining agreement.[31] President Truman believed that if a strike came to pass, it would threaten steel supplies during the Korean War and compromise national defense.[32] Facing potential steel

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*Coronavirus Variants*, YALE MED., https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron (last visited Dec. 20, 2021).

[26] *COVID-19 Weekly Epidemiological Update*, WORLD HEALTH ORG., https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19---6-january-2022 (data received by WHO from national authorities, as of January 17, 2021, 10:00 AM) (last visited Feb. 7, 2021).

[27] Julia Belluz & Umair Irfan, *How the New Covid-19 Variants Could Pose a Threat to Vaccination*, VOX MEDIA (Jan. 20, 2021, 9:15 AM), https://www.vox.com/22213033/covid-19-mutation-variant-vaccine-uk-south-africa.

[28] 343 U.S. 579 (1952).

[29] Cross Currents, *U.S. Labor Unions in the 1940s*, CULCON (2003), http://www.crosscurrents.hawaii.edu/content.aspx?lang=eng&site=us&theme=work&subtheme=UNION&unit=USWORK010#.

[30] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[31] *Id.* at 582.

[32] *Id.* at 583 ("The President [believed] that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.").

shortages, a necessary component in weapons and war materials,[33] President Truman issued Executive Order 10340, directing the Secretary of Commerce Sawyer (the named defendant in *Youngstown*) to take control of and continue operating most of the nation's steel mills to prevent the strike.[34] This action was contested by the Youngstown Sheet & Tube Co. (the named plaintiff) and other steel mill operators.[35] This legal challenge climbed through the courts before the Supreme Court granted certiorari.[36] The steel mills argued that the President, under his constitutional executive powers, did not have the authority to issue the lawmaking order that directed the Secretary of Commerce to take possession of and operate the nation's steel mills without *Congressional or Constitutional authority to act*.[37] The Court was divided six to three, with the majority opinion written by Justice Black.[38] The Court came down in favor of the steel mills, and stated that the President's seizure order could not stand without the lawmaking power of Congress.[39] War powers granted to the Executive by the Constitution did not apply because there had been no declaration of war.[40]

The three concurrences—by justices Frankfurter, Jackson, and Clark—focused on one central point: Congress's silence on the issue of Executive power to seize industries when there is threat of strike.[41] Where Congress has explicitly or impliedly granted power to the Executive, the President may rely upon their own powers and those delegated by Congress; however, where Congress is silent, the President may only rely on his own independent powers.[42] These justices all stated that there is a proverbial "grey area" where Congressional and Presidential powers can collide in the absence of clear Congressional legislation or constitutional delegation to the executive branch.[43] When "the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb . . . [The Supreme Court] can sustain exclusive presidential control in such case only by disabling the Congress from acting upon the subject."[44] If Congress intended to intervene or offer a stance, they would have done so; therefore,

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[33] *Id.* ("The President, a few hours before the strike was to begin, issued Executive Order 10340.").

[34] *Id.*; *see also id.* at 590 ("Steel is an indispensable component of substantially all of such weapons and materials.").

[35] *Id.* at 583.

[36] *Id*. at 583–84.

[37] *Id*. at 588.

[38] *Id*. at 582.

[39] *Id.* at 589.

[40] *Id.* at 642 (Jackson, J., concurring).

[41] *See id*. at 602–03 (Frankfurter, J., concurring); *Cf. id.* at 635–40 (Jackson, J., concurring); *Cf. id.* at 662 (Clark, J., concurring).

[42] *Id*. at 635–38 (Jackson, J., concurring).

[43] *Id*. at 597 (Frankfurter, J. concurring) (citations omitted) (the great ordinances of the Constitution do not establish and divide fields of black and white); *see also id*. at 637 (Jackson, J. concurring); *see also id.* at 662 (Clark, J. concurring) (stating in a slightly different manner that where Congressional procedures are lacking, "the President's independent power to act depends upon the gravity of the situation confronting the nation.").

[44] *Id*. at 637–38 (Jackson, J., concurring).

an important aspect of this note's proposal is the idea that editing the DPA to grant the President a power to act must come through *legislative* action.

The reason that Congressional ratification is important to this note's proposal is also based upon a secondary argument in *Youngstown.* The second argument is in Justice Douglas' concurring opinion:[45] although the federal government could seize the steel mills, it could only do so through the power of eminent domain and with subsequent Congressional ratification of the seizure.[46] The power to seize private property rests squarely with Congress because only Congress could appropriate money to compensate owners for a seizure of property.[47] "The President might seize and the Congress by subsequent action might ratify the seizure . . . ,"[48] but no seizure would be lawful under the precedent of *Youngstown* until after such ratification occurred and payment is accounted for by Congress; complying with the theory of checks and balances.[49] Due to the essential nature of compensation, this note's proposed language for the DPA makes certain that companies complying with compulsory licenses would be compensated with due and just royalties for their products' use. Compulsory licenses "are authorizations given to a third-party by the Government to make, use, or sell a particular product or use a particular process which has been patented, without the need of the permission of the patent owner."[50]

Justice Vinson wrote the only dissent in *Youngstown* joined by justices Reed and Minton.[51] He argued that the President acted in a necessary way to prevent a crisis of national defense resulting from a likely steel shortage that would be brought on by a strike.[52] Vinson argued that the President is uniquely qualified to implement this program, as he is authorized to exert *the power of the United States* when he finds it necessary for the protection of the United States.[53] The President's power and independence are fully within the powers conferred to the executive branch by the Constitution,[54] as the Framers intended the executive branch to be robust enough to serve as an effective check and balance to the other branches of government.[55] Similar to Justice Vinson's dissent,[56] this note argues that the Executive is

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[45] *Cf.* at 629–34 (Douglas, J., concurring).

[46] *Id*. at 631.

[47] *Id*.

[48] *Id.* at 631.

[49] *Id.* at 631–32.

[50] Rebecca Furtado, *What Is the Concept of 'Compulsory License' Under the Patents Act, 1970*, IPLEADERS (Sept. 26, 2016), https://blog.ipleaders.in/concept-compulsory-license-patents-act-1970/.

[51] *Youngstown*, 343 U.S. at 667–710 (Vinson, J. dissenting).

[52] *Id*. at 667.

[53] *Id*. at 691.

[54] *Id*. at 681–82.

[55] *Id*. at 682 (the Framers created a system in which no autocrat would be capable of arrogating power onto himself at any time. Nor did the Framers create an automaton unable to exercise the powers of the Government at a time when the survival of the Republic itself may be at stake.).

[56] *Id*. at 703–04 (citations omitted) (while emergency does not create power, emergency may furnish the occasion for the exercise of power. The Framers knew that there is real danger in executive weakness.).

the only branch capable of quick and decisive action when a national emergency strikes; therefore, additional language is needed in the DPA.

*Youngstown* applies to the proposal at hand because it is a demonstration that the President's seizure will likely only pass through a judicial review if it is first approved by the legislature. This approval can come in the form of passing legislation or through the legislature's approval to pay for eminent domain costs or fair compensation to property owners. Such a seizure may have been unconstitutional at the time; however, the Court's holding identified that the seizure managed to prevent a steel shortage during wartime. Today, as during *Youngstown*, the President could utilize the DPA, but would be hamstrung by the law's inability to be enacted quickly and constitutionally outside of cases following a declaration of war. The Executive could respond to national crises faster and more efficiently if it could license patent ownership to contractors to increase production of needed goods. Currently, an issue with being dependent on an Executive Order—like in *Youngstown*—is that the Order could be stayed by the judicial branch. This issue could result in a costly loss of time while a deadly virus spreads unfettered. If congress enacts legislation, there does not need to be an application of *Youngstown* because the legislation would solve the *Youngstown* majority's negative treatment of President Truman's Executive Order. In other words, Congressional legislation expanding the DPA would remove the majority's argument in *Youngstown* by preauthorizing the type of action taken by President Truman, removing the need for later ratification, and therefore making the executive branch more efficient when crisis arise.

Legislation must be adjusted to fit new challenges. The Founding Fathers did not have to react to rapidly spreading viruses.[57] There was no expectation of the government to protect the people from germs, enact national healthcare standards, or to protect emergency responders from falling ill. Now that there is such an expectation placed on the government,[58] that standard can only be achieved if we grant the Executive that authority.

*Youngstown* is also distinguishable from the current crisis in that a steel shortage, while hypothetically catastrophic to the war effort, did not materialize to the point of necessitating intervention. President Truman was acting in a preventative manner.[59] Unlike the hypothetical steel shortage during the Truman administration, there is a documented and realized

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[57] Disease has affected populations on large scales before, including during the time of the Founding Fathers. Nonetheless, the modern era of efficient travel, mass migration, and population growth has proportionally increased the degree of diseases affect and thus there is a growing need for government intervention.

[58] Mary Gerisch, *Health Care as a Human Right*, AM. BAR ASS'N ("[T]he UN's Universal Declaration of Human Rights (UDHR) … codified our human rights, including, at Article 25, the essential right to health. The United States, together with all other nations of the UN, adopted these international standards."), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/health-care-as-a-human-right/ (last visited Feb. 21, 2021).

[59] *Youngstown*, 343 U.S. at 709 (Vinson, J. dissenting) (the President informed Congress that even a temporary Government operation of plaintiffs' properties was … necessary to prevent immediate paralysis of the mobilization program.).

shortage of PPE today.[60] Using the logic of the *Youngstown* Court, compulsory licensing of patented intellectual property and the seizure of factories that produce PPE would be justified; however, new Congressional legislation to remove the "silence" issue[61] is needed if this executive action is to survive a constitutional challenge.

## II. CURRENT LANGUAGE OF THE DPA AND OTHER EXECUTIVE POWERS

### *A. Defense Production Act*

The DPA confers powers upon the executive branch of the United States government to influence, shape, or control domestic industries in the interest of national defense.[62] While the DPA was passed during the Korean War, the justification stems from the War Powers Acts of the second World War.[63] It was reauthorized, most recently, in the John S. McCain National Defense Authorization Act for Fiscal Year 2019.[64] That Act extended the current powers through September 30, 2025, at which point all DPA authorities will cease unless reauthorized by Congress.[65]

The DPA has expanded since its original enactment. It now provides that, "the authorities may also be used to enhance and support domestic preparedness, response, and recovery from natural hazards, terrorist attacks, and other national emergencies."[66] Currently, the statute defines "national defense" as:

> [P]rograms for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5195 et seq.][67] and critical infrastructure protection and restoration.[68]

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[60] Tim Darnell, *U.S. Faces Another Shortage of PPE, Including Masks, as Virus Surges*, ATLANTA J. - CONST. (Nov. 6, 2020), https://www.ajc.com/news/nation-world/us-faces-another-shortage-of-ppe-including-masks-as-virus-surges/GOZYMR3GTRAWTMYLBZCEVCLNAU/.

[61] *Youngstown*, 343 U.S. at 589.

[62] Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C. §§ 4501 et seq.) (current through P.L. 116-193).

[63] CECIRE & PETERS, *supra* note 7.

[64] John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018).

[65] *Id*.

[66] CECIRE & PETERS, *supra* note 7.

[67] *See* 42 U.S.C. § 5195(a)(3) (Title VI of the Stafford Act is the location of a further definition of "emergency preparedness" activities. ". . . means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.").

[68] *Defense Production Act*, FED. EMERGENCY MGMT. AGENCY (July 24, 2020), https://www.fema.gov/disaster/defense-production-act/dpa-definitions.

The other categories of qualifying circumstances, including national emergencies, are not clearly defined by the statute.

There are three remaining Titles, of the original seven, in the DPA that Congress has repeatedly reauthorized.[69] Title I details priorities and allocations that allow the President to require persons to concentrate on and accept contracts for materials and services in the name of national defense.[70] Title III allows the President to incentivize domestic industries to increase production and supplies of needed goods through loans, loan guarantees, and direct purchases.[71] It also includes the power to procure and install federal equipment into privately-held factories.[72] Title VII is mostly definitions and includes a list of powers and limitations for the Executive and the Act in general.[73] Examples include executive authority to direct special preference to small businesses, to order assessments of the current state of the domestic industry, and others. [74]

The executive power to delegate priorities and allocations is the bedrock of the Presidential power to form and accept contracts for materials and services in the name of national defense.[75] Despite this fact, Title I has (in part) been delegated to particular cabinet secretaries. The President acts by delegating authority to various departments within the executive branch. The purpose of this delegation of power is to spread out the administrative burden of soliciting, reviewing, and overseeing the contracts. For example, the Secretary of Health and Human Services has been assigned a set of priorities and allocation authorities for "health resources" under Title I of the DPA.[76] These "health resources," would include drugs, biological products, medical devices, materials, and other services and equipment required to diagnose, mitigate, prevent impairment, improve, treat, cure, or restore the physical or mental health conditions of the population.[77] The N95 mask and its patent would certainly qualify as either a medical device or health supply used to mitigate or prevent a health condition. As such, while the President would be responsible for seizing the patent under the proposed DPA powers, it would likely be the responsibility of the Secretary of Health and Human Services to grant that patent to the appropriate businesses that could produce the N95. It would also be the responsibility of the Secretary of Health and Human Services to allocate where the PPE would be

[69] *See* Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C. §§ 4501 et seq.) (current through P.L. 115-232, enacted Aug. 13, 2018); *see also* CONG. RSCH. SERV., *Defense Production Act: Purpose and Scope* (May 14, 2009), https://sgp.fas.org/crs/natsec/RS20587.pdf.

[70] 50 U.S.C. §§ 4511–4518.

[71] 50 U.S.C. §§ 4531–4534.

[72] 50 U.S.C. § 4533(e).

[73] 50 U.S.C. §§ 4552–4568.

[74] 50 U.S.C. § 4551(e).

[75] 50 U.S.C. § 4511(a).

[76] *See* Exec. Order No. 13,603, 77 Fed. Reg. 16,651 (Mar. 22, 2012).

[77] *Id*. at § 201(3).

distributed (e.g., to market, to specifically assigned hospitals, or to other necessary businesses).

### *B. Executive Orders to Combat SARS-CoV-2*

On March 13, 2020, President Trump issued Proclamation 9994.[78] The proclamation declared a national emergency concerning the novel COVID-19 pandemic and suspended entry of persons into the country who would pose a risk of transmitting the virus.[79] This was the first executive action that recognized the threat to the national healthcare system and the citizens at risk of COVID-19-related health-complications; however, this action did not occur until fifty-two days after what the CDC classifies as the inaugural day of the COVID-19 outbreak on January 21, 2020.[80]

It was not until March 27th, 2020 that President Trump made mention of the DPA.[81] To respond to the spread of COVID-19, Executive Order 13909 delegated the powers given under the DPA to prioritize and allocate health and medical resources to the Secretary of Health and Human Services.[82] This Executive Order was insufficient and a simple lack of production of needed materials and resources quickly became an issue.[83] The Executive Order was largely limited to assessment and controlling distribution of materials because of the material failings of the DPA. 3M is one of the largest producers of PPE, yet it is the only N95 respirator producer in the United States.[84] 3M produces about 35 million N95 masks per month and exports large quantities from that supply to Canada and Latin America.[85] The exportation of needed materials lowers the availability to satisfy the domestic demand; to stop the exportation would require government intervention. An expansion of production to other entities—rather than relying on one entity—can increase supply without relying on nationalization or policing corporations to first serve domestic needs. This is another way that an expansion of the DPA could prevent corporate discontent.

President Trump released a second Executive Order on March 23, 2020.[86] Executive Order 13910 was intended to prevent the hoarding of health and medical resources by private citizens to better distribute resources

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[78] Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

[79] *Id*.

[80] *CDC's Response*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/index.html.

[81] Exec. Order No. 13,909, 85 Fed. Reg. 16,227 (Mar. 18, 2020).

[82] *Id*.

[83] Darnell, s*upra* note 60.

[84] Morgan Watkins, *Kentucky Gov. Andy Beshear Calls on 3M to Release Patent for N95 Respirator Amid Pandemic*, LOUISVILLE COURIER J. (Apr. 3, 2020, 12:01 PM), https://www.courier-journal.com/story/news/2020/04/03/beshear-calls-3-m-release-patent-n-95-respirator-amid-pandemic/5112729002/.

[85] *Id*.

[86] Exec. Order No. 13,910, 85 Fed. Reg. 17,001 (Mar. 23, 2020).

in response to COVID-19.[87] This Order also delegated the presidential "authority under the Act to implement any restrictions on hoarding, including [the President's] authority under section 705 of the Act (50 U.S.C. 4555) to gather information, such as information about how supplies of such resources are distributed throughout the Nation" to the Secretary of Health and Human Services.[88] Similar to Executive Order 13911, Executive Order 13910 failed to meet the need for N95s during the global pandemic. Neither of these Executive Orders directed the domestic industry to produce N95s—or any PPE. They merely permit the Secretary to assess the PPE stockpiles and to determine prioritization for allocation. Even if all the N95s produced by 3M in the United States were retained and distributed solely to domestic healthcare workers, there would not even be enough for every healthcare worker to have two masks per month.[89] N95s are reusable to an extent,[90] but with approximately 18 million healthcare workers in the United States, we need to increase production of N95 masks rapidly.[91]

President Trump signed several other Executive Orders during his presidency in relation to COVID-19. On April 28th, 2020, Executive Order 13917 delegated authority to the Secretary of Agriculture to protect and prioritize food supplies by nationalizing the meat and poultry safe operations guidelines.[92] On May 14th, 2020, Executive Order 13922 delegated authority to the Chief Executive Officer of the United States International Development Finance Corporation (DFC) to create, maintain, protect, expand, and restore the domestic industrial base capabilities.[93] Along with others, President Trump also signed Executive Orders to prevent or at least slow evictions,[94] and one ensuring essential medicines, medical

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[87] *Id*.

[88] *Id.*

[89] Larry Levitt et al., *Estimates of the Initial Priority Population for COVID-19 Vaccination by State*, KAISER FAM. FOUND. (Dec. 10, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/estimates-of-the-initial-priority-population-for-covid-19-vaccination-by-state/ (nationwide, there are 19.7 million adults working in healthcare settings, of which roughly 15.5 million are estimated to have direct patient contact) (with 3M producing an estimated 35 million N95 masks per month, and around 15.5 million healthcare works the math is simply 35 divided by 15.5 equaling roughly 2 masks per healthcare worker.).

[90] Paulina Firozi & Allyson Chiu, *How often can you safely reuse your KN95 or N95 mask?* THE WASH. POST (Jan. 14, 2022, 2:28 PM), https://www.washingtonpost.com/health/2022/01/13/kn95-n95-mask-reuse-omicron/ (stating that there are no hard and fast rules but that when there are visible signs of soiling the mask is no longer reusable, with normal use you can wear a mask for a few hours a day for four to five days.).

[91] THE NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH (NIOSH), *Healthcare Workers*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/niosh/topics/healthcare/default.html (last visited Nov. 22, 2020).

[92] Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020) (this delegation was in part due to outbreaks of COVID-19 among workers at some processing facilities that led to a reduction in some of those facilities' production capacity, the Secretary was assigned and given power to circumvent State(s) authority to recommend closure of these plants for safety reasons to continue functioning of the national meat and poultry supply chain.).

[93] Exec. Order No. 13,922, 85 Fed. Reg. 30,583 (May 14, 2020).

[94] Exec. Order No. 13,945, 85 Fed. Reg. 49,935 (Aug. 8, 2020) (the CDC had observed that homelessness poses multiple challenges that can exacerbate and amplify the spread of COVID-19).

countermeasures, and critical inputs are made in the United States.[95] President Biden likewise attempted to tackle the pandemic with a series of Executive Orders,[96] but neither of the Presidents addressed the fact that 3M was not producing enough N95 masks in order to protect domestic healthcare workers.

The severe need for N95 respirators was exasperated by a depletion of the Strategic National Stockpile (SNS).[97] An investigative documentary revealed that—due to unheeded warnings and congressional failure—the SNS warehouses that were supposed to contain necessary PPE were never refilled after being depleted during the Obama administration's handling of the 2009 H1N1 pandemic.[98] Greg Burel, the former head of the SNS, stated that during the H1N1 pandemic, the SNS "showed [that they] could get that material out rapidly, and it could be made available."[99] Executive Orders regarding PPE distribution during a pandemic cannot be impactful without plentiful stockpiles for the Secretary of Health and Human Services to distribute. The existence of the SNS allows the executive branch or congress to distribute resources as needed without having to purchase or seize materials from distributors or manufacturers. It in part shortens the process because the materials are ready to be distributed as needed. Without supplies and materials in the SNS, the executive branch during COVID has been left attempting to find supplies that may have already been purchased on the market by other parties including private citizens, other corporations, or even foreign nations.

The demand for PPE during a pandemic—where masks are needed in massive quantities over an extended period—will never be matched by the executive branch merely preventing hoarding of resources. To meet the demand of a pandemic, production must be increased; moreover, augmented production needs to be directed under the President's current DPA Title I power so that supplies can be prioritized for healthcare facilities, emergency first responders, and other essential workers. "In Italy, health care workers experienced high rates of infection and death partly because of inadequate access to PPE. And recent estimates here in the United States suggest that we will need far more respirators and surgical masks than are currently

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[95] Exec. Order No. 13,944, 85 Fed. Reg. 49,934 (Aug. 6, 2020) (policy was based on a desire to have domestic supply chains capable of meeting national security requirements for responding to threats arising from public health emergencies such as COVID-19 and to reduce our reliance on foreign imports for essential medicines, medical countermeasures, and critical inputs.).

[96] *See* Federal Register, *2020 Donald Trump Executive Orders*, NAT'L ARCHIVES, https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2020 (last visited Mar. 26, 2021); *see also* Federal Register, *2021 Joe Biden Executive Orders*, NAT'L ARCHIVES, https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021 (last visited Mar. 26, 2021).

[97] Patrice Taddonio, *Depleted National Stockpile Contributed to COVID PPE Shortage: 'You Can't Be Prepared If You're Not Funded to Be Prepared'*, FRONTLINE (Oct. 6, 2020), https://www.pbs.org/wgbh/frontline/article/depleted-national-stockpile-contributed-to-covid-ppe-shortage/.

[98] *Id*.

[99] *Id*.

available."[100] Before the COVID-19 pandemic, China produced roughly half of the world's face masks.[101] Now China is largely withholding exports of its own masks and PPE due to domestic need for its own population and healthcare workers.[102] Without increased domestic production, the United States will fail to meet its own needs.

## III. IMPEDIMENTS TO LEGISLATIVE ACTION

### *A. Bayh-Dole Act as a Form of Patent Seizure*

The proposed added powers to the DPA are not novel in all respects. In some cases, the executive powers of compulsory licensing and seizure of proprietary information or technology are already allowable. Under the Bayh-Dole Act, the federal government retains certain rights to inventions, patents, and proprietary information produced with its *financial assistance*.[103] The Bayh-Dole Act may have allowed the government to obtain several rights in federally funded subject inventions, but it did not displace the norm that rights in an invention belonged to the inventor. This has been upheld by courts, and the Act is interpreted in a manner that "contractors may 'elect to retain title to any subject invention.'"[104] The Bayh-Dole Act was passed by Congress with the intention of leveraging the patent system to promote the utilization of inventions that arise from federally funded research and development;[105] however, the federal government could take action as "necessary to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee, or their licensees."[106] In other words, if 3M or any other company had received federal funding for the development of its N95 masks and the company failed to meet the health needs of the nation—specifically in the context of the COVID-19 pandemic—the patent could have been seized and distributed by the government. While the Bayh-Dole federal funding is useful for small businesses, universities, and other nonprofit institutions, private companies frequently pay for their own research and development and do not qualify for this kind of "patent taking."

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[100] Megan Ranney et al., *Critical Supply Shortages, The Need for Ventilators and Personal Protective Equipment During the Covid-19 Pandemic*, 382 NEW ENG. J. MED. e41(1), e4(1) (Apr. 30, 2020).

[101] *Id.*

[102] *Id.*

[103] JOHN R. THOMAS, CONG. RSCH. SERV., R44597, MARCH-IN RIGHTS UNDER THE BAYH-DOLE ACT (Aug. 22, 2016), https://sgp.fas.org/crs/misc/R44597.pdf.

[104] Bd. of Tr. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., 563 U.S. 776, 777, 786–87 (2011).

[105] *Id.* at 782.

[106] March-in Rights, 35 U.S.C. § 203(a)(2) (2011).

### *B. Compulsory Licensing of Federal Contract Holders*

Compulsory licensing is a growing form of intellectual property and capital growth in many countries.[107] The Indian Patents Act of 1970 and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) establish the provisions and rights of compulsory licenses.[108] "Such compulsory licenses are commonly used by satellite television providers, cable providers, webcasters, and music companies . . . allowing them to distribute and utilize content in an efficient and legal manner."[109] These licenses are used every day to increase the number of companies producing generic medicines which in turn increases supply and lowers costs to patients around the world.

Producing any form of patentable technology or process can be expensive. A study done by the Tufts University Center for the Study of Drug Development (CSDD) estimated the cost of introducing a new drug to be approximately $2.6 billion.[110] Compulsory licensing can be used to overcome access and/or price barriers related to developing new technology. It can also serve as a disincentive for companies to pay reduced-but-substantial investing prices for new innovative technologies or medicines. This is because royalties for compulsory licenses are determined by the government and are often less than the private market could provide.[111]

In 1995, the World Trade Organization (WTO) passed TRIPS to establish "minimum standards of protection and enforcement that each government adhere to for intellectual property held by [fellow member states]."[112] Under TRIPS, the "patent owner still has rights over the patent, including a right to be paid compensation for copies of the products made under the compulsory license."[113] A patent seizure under TRIPS, however, does not always require approval of the patent owner, particularly in cases of national emergencies or public noncommercial use.[114] Under circumstances of national emergency, extreme urgency, or public non-

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[107] Hilary Wong, *The Case for Compulsory Licensing During COVID-19*, 10 J. GLOB. HEALTH 1 (May 15, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7242884/ (approximately twenty countries have either issued or publicly entertained issuing a compulsory license for one or more pharmaceutical products since the founding of the WTO.).

[108] Furtado, *supra* note 50 (stating that compulsory licenses are authorizations given to a third-party by governments and can be found within provisions in both the Indian Patents Act of 1970 for United States authorization, and in the Trade-Related Aspects of Intellectual Property Rights Agreement for international authorization.)

[109] Richard Stim, *Copyright and Compulsory Licenses*, NOLO, https://www.nolo.com/legal-encyclopedia/copyright-compulsory-license.html (last visited Feb. 2, 2021).

[110] William Alan Reinsch et al., *Compulsory Licensing: A Cure for Distributing the Cure?* CTR. FOR STRATEGIC & INT'L STUD. (May 8, 2020), https://www.csis.org/analysis/compulsory-licensing-cure-distributing-cure.

[111] WORLD HEALTH ORG., *Remuneration Guidelines for Non-Voluntary Use of a Patent on Medical Technologies*, HEALTH ECON. & DRUGS TCM SERIES NO. 18, 45 (2005) (stating that United States royalties for government use have ranged around 6%; however, royalties can and have been far lower in some important cases. There is substantial variation in terms for individual licenses which can range from less than 1% to more than 50%.), https://www.who.int/hiv/amds/WHOTCM2005.1_OMS.pdf.

[112] Reinsch et al., *supra* note 110.

[113] *Compulsory licensing of pharmaceuticals and TRIPS*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm (last visited Jan. 20, 2022).

[114] *Id.*

commercial use, the process of voluntarily licensing can usually be bypassed provided that the exception is limited to predominantly domestic use.[115] The benefit to this form of intellectual property usage is that the government could provide N95s in one of three ways (all of which apply under compulsory licensing, with varying successes and drawbacks). First, third-party businesses and/or the federal government could attempt to negotiate a voluntary license from 3M with the understanding that the government could always force a compulsory license if negotiations break down. Second, the federal government could procure a contract that has a compulsory licensing clause as a condition. This change would allow other contractors to also produce the material and/or goods needed. The Department of Defense currently has a contract with 3M for N95 masks, but it is unknown if such a clause is within the contract or, if not, if it could be added.[116] Third, the federal government could declare a national emergency and stipulate that companies could produce the N95s for purely public non-commercial use, clarifying that the government would purchase the N95's at a "fair price" to distribute them based on need.

## IV. PROPOSED ADDITIONS

Title I of the DPA establishes that the President has the power to set national priorities as "he deems necessary or appropriate to promote the national defense… to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem . . . ."[117] There are two parts to Title I separated by the primary functions of the title itself that provide the critical basis for this notes' proposed amendments. First, the priority performance authority ensures the timely availability of critical materials, equipment, and services produced by domestic industries in the interest of national defense.[118] It also guarantees the ability of the President to receive those materials, equipment, and services through contracts without or before other competing interests.[119] The prioritization authority in Title I of the DPA is a broader authority than in other statutes.[120]

The second part involves the power of allocation given to the President to control the distribution of materials, services, and facilities.[121] It is based upon these powers vested in the executive branch that I propose to add the executive power to issue compulsory licenses of intellectual property.[122] The

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[115] Reinsch et al., *supra* note 110.

[116] *DOD Awards $126 Million Contract to 3M, Increasing Production of N95 Masks*, U.S. DEP'T OF DEF. (May 6, 2020), https://www.defense.gov/Newsroom/Releases/Release/Article/2178152/dod-awards-126-million-contract-to-3m-increasing-production-of-n95-masks/ [hereinafter U.S. DEP'T OF DEF.].

[117] Priority in Contracts and Orders, 50 U.S.C. § 4511(a) (2015).

[118] *Id.*

[119] *Id.*

[120] *See generally* Utilization of Industry, 50 U.S.C. § 3816 (2015).

[121] 50 U.S.C. § 4511(a).

[122] This is an authority already historically vested from Congressional legislation as a means of securing our national defense and handling national emergencies. *See* JOHN R. THOMAS, COMPULSORY

principle is already employed with "March-In Rights" existing under the Bayh-Dole Act;[123] however, it does not apply to the private businesses, such as 3M, which are not federally funded but produce most of our PPE.

I argue that my proposed language should be added directly to § 4517, titled "Strengthening Domestic Capability." This section states that:

> (a) **In general.** Utilizing the authority of title III of this Act [sections 4531 to 4534 of 50 U.S.C.] or any other provision of law, the President may provide appropriate incentives to develop, maintain, modernize, restore, and expand the productive capacities of domestic sources for critical components, critical technology items, materials and industrial resources essential for the execution of the national security strategy of the United States.[124]

I propose a new subsection within § 4517, titled "(c) Compulsory Licensing of Critical Patents and or Proprietary Information". It would contain the following:

> (1) **Maintenance of reliable sources of supply.** The President shall take appropriate actions to ensure that critical components, technologies, materials, products, and industrial resources are available from qualified and reliable sources to meet defense requirements during peacetime, graduated mobilization, and national emergency or conflict.
> (2) **Appropriate action.** For purposes of this subsection, "appropriate actions" may include but are not limited to:
>
> (a) Compulsory licensing of private party and/or industry patents as needed to produce goods necessary to meet defense requirements during peacetime, graduated mobilization, and national emergency or conflict.
>
> (b) Distribution of the intellectual property being licensed will be limited to qualified domestic private corporations and/or companies capable of producing the same critical components, technologies, materials, products, and industrial resources that the patent encompasses.
>
> (i) The Government will establish a contract with any parties who will receive

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LICENSING OF PATENTED INVENTIONS, CONG. RSCH. SERV., R43266 (Jan. 14, 2014), https://crsreports.congress.gov/product/pdf/R/R43266 (stating that the Atomic Energy Act, Clean Air Act, and Plant Variety Protection Act already provide for compulsory licensing.).

[123] Pub. L. 96-517.

[124] Strengthening Domestic Capability, 50 U.S.C. § 4517(a) (1950) (enacted Aug. 13, 2018, current through Pub. L. 115-232).

the intellectual property for the purpose of limiting the usage to as-needed provisions and to prevent commercial distribution or sales.

(ii) The compensation for the compulsory licensing would be determined at a reasonable royalty of fair market value to be paid throughout the duration of time that the contract remains unfulfilled.

(c) Restricting patent disbursement and contract solicitation to domestic sources pursuant to:

(i) § 2304(b)(1)(B) or § 2304(c)(3) of Title 10, U.S.C.;

(ii) § 303(b)(1)(B) or § 303(c)(3) of the Federal Property and Administrative Services Act of 1949 [41 U.S.C.S. § 3303(a)(1)(C) or 3304(a)(3)]; or

(ii) other statutory authority.

(3) **Refusal or willful prevention of compulsory licensing.**

(a) If the needed intellectual property is not provided in a voluntary or transactional manner and there exists a national emergency, other circumstances of extreme urgency, or in cases of non-commercial use, the government retains the right to bypass any need or process for voluntary licensing in favor of compulsory licensing.

(b) If the intellectual property shall be withheld during the statuses of crisis for a malicious, willful, or wanton purpose, the sought-after proprietary information of critical components, technologies, materials, and industrial resources shall be made public to the global market and fair market compensation for the use of said intellectual property will be forfeit.

(4) **Qualifying patents for licensing.** For purposes of this subsection, patents and/or proprietary information is limited to:

(a) A United States patent owned or licensed by either a domestic or foreign corporation.

(i) To be held subject to the authority of Title III of this Act [§§ 4531 – 4524 of U.S.C.], a domestic or foreign corporation must be subject to congressional and executive powers.

> (ii) For a domestic or foreign corporation to be subject to congressional and executive powers, it must have either (1) filed its articles of incorporation or (2) be able to satisfy the minimum contacts analysis within the nation's borders.
>
> (b) The corporation or business must be given a reasonable time frame to comply with a compulsory licensing order prior to having its intellectual property seized.
>
> (i) "Reasonable time" for purposes of this section is determined by executive discretion and the need to meet defense requirements during peacetime, graduated mobilization, and national emergency.
>
> (c) The patent must be a valid and qualifying patent under 35 U.S.C. 101, 102, 103, and 112.
>
> (i) For purposes of the subsection "valid and qualifying" mean:
>
> (1) The requirements for patentability include eligible subject matter, utility, novelty, non-obviousness, and enablement.

The purpose of this proposed language is to protect the public and corporations from having the executive branch seize (through compulsory licensing) any patent or intellectual property that can be reasonably justified as needed to meet defense requirements during peacetime, graduated mobilization, and national emergency. As previously established, cases of COVID-19 continue to climb, as does the death toll. Such a power could still save lives in the current national emergency brought on by the COVID-19 pandemic, especially given disease models based on new variant strain infections.[125]

[125] THOMAS MCANDREW ET AL., META AND CONSENSUS FORECAST OF COVID-19 TARGETS (2021), https://github.com/computationalUncertaintyLab/aggStatModelsAndHumanJudgment_PUBL/raw/main/summaryreports/summaryReport01/MetaandConsensusForecastOfCOVID-19Targets.pdf (stating that a consensus of subject matter experts and trained forecasters predicted that 87% of United States samples sent for genomic sequencing in the first two weeks of February 2021 that have an S-gene dropout … will be identified as the B.1.1.7 variant … forecasters expect this to have important implications for decisions about non-pharmaceutical interventions and changes in the pace of vaccinations.).

## VI. WHY TARGET 3M? WHY N95S SPECIFICALLY?

As of March 18, 2021, 535,217 people have died from COVID-19 within the United States.[126] Based on projected cases and infection rates, a study from the University of Washington's Institute for Health Metrics and Evaluation estimated that an additional 129,574 lives from September 22, 2020, through February 2021 could have been saved if 95% of the population wore face coverings and followed the recommended social restrictions.[127] There are simply *not enough* adequate PPE to protect the population. This problem is partially due to the convoluted combination of public perceptions regarding mask-wearing and early-on mixed messaging from public-health officials at the onset of the COVID-19 pandemic.[128] On February 29, 2020, the United States surgeon general, Dr. Jerome Adams, tweeted that masks do not offer any benefit to the average citizen, but concurrently stressed that "if healthcare providers can't get them to care for sick patients, it puts them and our communities at risk!"[129] The suggestion that healthcare providers are the only individuals that need PPE or other forms of virus protection is not widely supported;[130] however, it is important that they receive a steady and priority supply of more rigorous forms of PPE given their frequent and prolonged contact with infected individuals and their likelihood to spread the virus to others.

The Governor of Kentucky, Andy Beshear, called for 3M to release its patent for the N95 respirator on April 1, 2020, to help increase production to combat the needs presented by the pandemic.[131] While 3M did increase production,[132] the issue with a single company controlling a major PPE patent is that they often cannot rapidly expand their production to match an exponentially increased need. 3M has made statements that it intends to globally double its current capacity within twelve months of March 2020.[133] Increasing production takes time, however, time that can be saved by increasing the number of producers not just the capabilities of one

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[126] Jordan Allen et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last visited Feb. 14, 2021).

[127] Robert C. Reiner Jr. et al., *Modeling COVID-19 Scenarios for the United States*, NATURE MED. (Oct. 23, 2020), https://www.nature.com/articles/s41591-020-1132-9.

[128] Laura Hensley, *Why some people still refuse to wear masks*, GLOB. NEWS (July 21, 2020), https://globalnews.ca/news/7152424/psychology-behind-anti-masks/#:~:text=When%20people%20get%20mixed%20messaging%20or%20don%E2%80%99t%20understand,were%20a%20priority%20during%20fears%20over%20mask%20shortages.

[129] U.S. Surgeon General (@Surgeon_General), TWITTER (Feb. 29, 2020, 7:08 AM), https://twitter.com/Surgeon_General/status/1233725785283932160?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1233725785283932160&ref_url=https%3A%2F%2Fwww.inquirer.com%2Fhealth%2Fcoronavirus%2Fface-masks-hand-washing-coronavirus-protection-20200304.html.

[130] Joseph G. Allen, *Opinion: Everyone Should Be Wearing N95 Masks Now*, WASH. POST (Jan. 26, 2021, 11:18 AM), https://www.washingtonpost.com/opinions/2021/01/26/n95-masks-safest-next-best-options/.

[131] Watkins, *supra* note 84.

[132] 3M, *supra* note 19.

[133] *Id*.; *see also* Mike Roman, *3M CEO on COVID-19 response: We have a unique and critical responsibility*, 3M (Mar. 22, 2020) (posted by 3M Chairman and CEO Mike Roman on LinkedIn), https://news.3m.com/3M-CEO-on-COVID-19-response-We-have-a-unique-and-critical-responsibility.

manufacturer. This would lessen the burden for healthcare workers having to weather another year with insufficient masks.

3M currently has a government contract for production of N95 masks.[134] The "Department of Defense, in coordination with the Department of Health and Human Services, has signed a $126 million contract award with 3M for the increased production of 26 million N95 medical-grade masks per month, starting in October 2020."[135] Premier, a purchasing company that many hospitals rely on for supplies, conducted a survey in April 2020 and reported that 23% of respondent health systems are burning through N95s at a rate of more than 100 per day, with many holding an inventory of fewer than a 10 days' supply of masks.[136] In the survey, "hospitals ranked the supply of N95 respirators *as their top concern*."[137] Hospitals have attempted to conserve their supplies through several avenues, "including extending the wear of N95s (a measure followed by 60 percent of respondents), re-using N95s (40 percent), using expired N95s (33 percent), and using industrial N95s (20 percent)."[138] If hospitals cannot provide staff with sufficient protective equipment, the lives of frontline healthcare workers, and their families, are at risk. A study was published in The Lancet concerning the risk of being infected with COVID-19 among frontline workers.[139] The report described a significantly increased risk of reporting a positive test for COVID-19 among frontline healthcare workers.[140] The authors' solution was that "[h]ealth-care systems should ensure adequate availability of PPE and develop additional strategies to protect health-care workers from COVID-19, particularly those from Black, Asian, and minority ethnic backgrounds."[141] The study also found an even-further increased risk of positive COVID-19 test results from those healthcare workers reporting PPE reuse or inadequate PPE.[142]

Healthcare workers are often forced to resort to non-valved, multi-layer cloth masks in place of N95s to prevent transmission of COVID-19 from people coughing, sneezing, talking, or breathing while receiving treatment.[143] While multi-layer cloth masks can block up to 50-70% of the fine droplets and particles attributable to spreading COVID-19,[144] N95

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[134] U.S. DEP'T OF DEF., *supra* note 116.

[135] *Id*.

[136] *Premier Surveys Hospitals' Supply Levels in March*, PREMIER (Mar. 25, 2020), https://www.premierinc.com/newsroom/blog/premier-surveys-hospitals-supply-levels-in-march.

[137] *Id*. (emphasis added).

[138] *Id*.

[139] Long H. Nguyen et al., *Risk of COVID-19 Among Front-Line Health-Care Workers and the General Community: A Prospective Cohort Study*, THE LANCET (July 31, 2020), https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30164-X/fulltext (the COVID Symptom Study app is registered with ClinicalTrials.gov, NCT04331509).

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2,* CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html.

[144] *Id.*

masks can block significantly more. N95 masks had the highest tested protective efficacy of approximately 80-90% reduction in particulates and droplets reaching the wearer.[145] It is true that healthcare professionals are always at higher risk of exposing themselves and their families to disease.[146] Many individuals are asymptomatic carriers and the COVID-19 virus has a lengthy incubation time of up to fourteen days.[147] This makes the virus highly susceptible to transfer between unknowing individuals who display few or no symptoms, and the odds are even greater for healthcare workers and their families.

## VII. DRAWBACKS, DISINCENTIVES TO THIS POLICY

### *A. Private Patent Holders*

The cost of obtaining a patent for an invention generally ranges from $5,000 to over $16,000, taking into account the complexity of the invention.[148] A new kind of paperclip, for example, an extremely simple invention, will average between $5,000 to $7,000 in attorney and filing fees.[149] Alternatively, highly complex products, such as satellite technologies, MRI scanners, or software patents have a baseline of $14,000 but can easily cost more.[150] International patents, depending on the number of countries involved,[151] can cost over $100,000.[152] Pharmaceutical patents can cost upwards of millions or billions of dollars when considering Food and Drug Administration (FDA)-required research, development, and clinical trials.[153] Given the significant costs for patentable technology, it follows that many patent holders may become distressed at the idea of such patents being taken and licensed on a compulsory basis by the federal

[145] Hiroshi Ueki et al., *Effectiveness of Face Masks in Preventing Airborne Transmission of SARS-CoV-2*, 5 AM. SOC'Y MICROBIOLOGY 1, 3 (2020).

[146] Robert H. Shmerling, *What's It Like to be a Healthcare Worker in a Pandemic?* HARVARD HEALTH PUBL'G (Apr. 8, 2020), https://www.health.harvard.edu/blog/whats-it-like-to-be-a-healthcare-worker-in-a-pandemic-2020040819485.

[147] HARVARD HEALTH PUBL'G, *If You've Been Exposed to the Coronavirus*, HARVARD MED. SCH. (Aug. 9, 2021) (the time from exposure to symptom onset, known as the incubation period, is thought to be two to fourteen days, tough symptoms typically appear within four or five days after exposure.).

[148] *How Much Does a Patent Cost?*, THERVO, https://thervo.com/costs/how-much-does-a-patent-cost (last visited Feb. 13, 2021).

[149] *Id*.

[150] *Id*.

[151] *Id*. This is because patents only go as far as the domestic borders of the country in which they are procured, unless filed through the Patent Cooperation Treaty.

[152] *Id*.

[153] *See* Joseph A. DiMasi et al., *Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs*, 47 J. HEALTH ECONS. 20 (2016) (study of 2013 data estimating that the average total R&D costs for new drug development was $42.6 billion); *see also* Aaron E. Carroll, *$2.6 Billion to Develop a Drug? New Estimate Makes Questionable Assumptions*, N.Y. TIMES (Nov. 18, 2014) (study that came to a different estimate but with 2009 data that said that the average drug development costs ranged from $161 million to $1.8 billion for R&D of new drugs), https://www.nytimes.com/2014/11/19/upshot/calculating-the-real-costs-of-developing-a-new-drug.html.

government. This is especially prevalent in such a developed nation with strict intellectual patent protections.[154]

Developing countries are concerned with protecting intellectual property rights due to the continuing debate on how best to balance encouraging innovation with generic utilization and price competition.[155] The patent system in developed countries "provides incentives to speed up their technological progress, enhance their productivity, and improve their world trade position by strengthening their economy."[156] For instance, once Italy approved a drug patent law in 1978, their pharmaceutical research and development increased by more than 600% in a decade.[157] Without exclusive rights to develop and sell the property, the property owner will likely struggle to recover the cost of their research and development causing a loss in monetary incentive to develop new technologies. "As the progress of advanced countries is mainly due to extensive inventive research, they are concerned about the protection of [intellectual property rights], and they oppose any interference in the exclusive rights of the patentee of the invention."[158] It is likely, therefore, that a proposal that would give the executive the power to threaten such rights would meet opposition.

Compulsory licensing threatens the prevalence of patent owners in developed nations, as the owners are primarily intellectual property exporters and are thus drawn to countries that will protect their exclusivity both domestically and abroad.[159] Compulsory licensing does offer compensation but the "amount of royalties set by the state granting a compulsory license cannot be considered as an incentive for further research; it is no way near the potential financial benefit which the patent owner would have enjoyed on an exclusive basis."[160] When compulsory licensing is issued, the calculation of adequate remuneration for payment to the patent's owner is complicated. This issue is not solved by TRIPS because TRIPS does not provide guidance to determine the meaning of the words "adequate" or "value" of the authorization.[161]

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[154] *Cf.* GLOBAL INTELL. PROP. CTR., *The Roots of Innovation*, U.S. CHAMBER OF COMMERCE, 111 (5th ed., 2017) (the United States was ranked first out of forty-five other nations in the United States Chamber's International IP Index with its key areas of strength including the governments deterrent civil and criminal remedies and being on par with the top five economies' average core on enforcement.) [hereinafter GLOB. INTELL. PROP. CTR.].

[155] *See generally* Henry G. Grabowski et al., *The Roles of Patents in Research and Development Incentives in Biopharmaceutical Innovation*, 34 HEALTH AFFS. 302 (2015) (arguing that, while biopharmaceutical R7D is a lengthy, costly, and risky process, government research and development contracting could fulfill a useful role in addressing unmet needs.), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2014.1047.

[156] Muhammad Z. Abbas, *Pros and Cons of Compulsory Licensing: An Analysis of Arguments*, 3 INT'L J. SOC. SCI. & HUMAN. 254, 254 (2013) (internal quotation omitted).

[157] Richard J. Hunter et al., *Compulsory licensing: a major IP issue in international business today?* 11 EUROPEAN J. SOC. SCI. 370, 376 (1993).

[158] Abbas, *supra* note 156.

[159] Dina Halajian, *Inadequacy of TRIPS & the Compulsory License: Why Broad Compulsory Licensing is Not a Viable Solution to the Access Medicine Problem*, 38 BROOK. J. INT'L L. 1191, 1193 (2013).

[160] Abbas, *supra* note 156, at 254–55.

[161] Halajian, *supra* note 159, at 1210.

*B. The Government(s), both Domestic and Foreign*

The Federal Government has gain and loss calculations to assess each transaction under the DPA.[162] This would be a safeguard to patent holders, before the government would decide if compulsory licensing would solve a given intellectual property hurdle, national emergency, or global pandemic.[163] The United States has the most stringent and rigid patent protection laws in the world;[164] however, the argument can be made that,

> [Since a] patent is a privilege granted to the patent holder by the state, government of the state can therefore limit that privilege … [this] concept came to the limelight after outbreak of pandemics like HIV/AIDS as the issue of access to necessary drugs emerged as an important global issue.[165]

The exercise of government authority over rights granted to citizens is sometimes necessary—similarly to the control exercised during the HIV/AIDS pandemic—to prevent further hardship upon the entire population. The government bestows upon its citizens certain rights; however, the rights are mere privileges that can be limited or removed particularly in times of great calamity or necessity.

Compulsory licensing is not an easy process. TRIPS requires that several procedural hurdles be overcome before this step can be taken.[166] For a developing country, obtaining a compulsory licensing right entails initial delays from judicial review.[167] The delays caused by judicial review discourage licensees from generic production in various ways, including decreasing time to recover startup costs and increasing the potential for failure.[168] Some of the procedural requirements a country must satisfy before obtaining compulsory licensing include: 1) the license use must be considered on its individual merit; 2) the limited scope and duration of the use must be reported; 3) review of the use authorization by either judicial or independent bodies; and 4) adequate remuneration to the owner must be settled (taking into account the economic value of the license), subject to further judicial or independent review.[169]

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[162] Authority to Review Certain Mergers, Acquisitions, and Takeovers 50 U.S.C. §4565(l).

[163] *Id.*

[164] GLOB. INTELL. PROP CTR., *supra* note 154.

[165] Abbas, *supra* note 156, at 255.

[166] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 31, Apr. 15, 1994, 33 ILM 1197 [hereinafter TRIPS].

[167] *See generally* Donald Harris, *TRIPS After Fifteen Years: Success or Failure, as Measured by Compulsory Licensing*, 18 J. INTELL. PROP. L. 367, 390–92 (2011).

[168] *See generally id*.

[169] *Id*. at 384; *see also* Cynthia M. Ho, *A New World Order for Addressing Patent Rights and Public Health*, 82 CHI. - KENT L. REV. 1469, 1488 (2007).

Compulsory licenses had an uptick in usage in 2005,[170] and have been discussed in the current COVID-19 global pandemic.[171] They were primarily utilized during the HIV/AIDS global pandemic to distribute a necessary drug.[172] Canada used a compulsory license to export a generic AIDS drug to Rwanda in 2008.[173] "[D]ue to the complicated process . . . lack of incentives, huge costs, time commitment, and challenges in recovery costs…,"[174] the ability to obtain a compulsory license through TRIPS is more difficult than intended by its writers, who sought to assist with patent limitations when health and human need outweighs intellectual property rights.[175] By the end of 2009, only 36% of the people who needed the antiretroviral had received it.[176] Working to clarify the "scope" of a legitimate compulsory licensing would help businesses become more accepting. For a government, this is difficult. There is a balance between better defining the scope and defining it too openly.[177] Better defining the scope would allow involved persons to have proper notice of the disruption of their patent holding.[178] Contrarily, defining it too broadly could open a floodgate and destroy a wide array of patents.[179]

The United States has improved distributions regarding national stockpile supplies as exemplified during the H1N1 epidemic distribution during the Obama administration; however, in developing nations, distribution is much more difficult due to a lack of infrastructure necessary for transporting supplies.[180] This is particularly true during a global pandemic or national emergency.[181] The human right to health has been recognized in the national constitutions of at least 135 states as of 2005.[182] Despite this fact, access to essential medicines—a prerequisite to the right of health—is only recognized as a right in five states.[183] This lack of recognition makes it harder for countries to justify compulsory licensing for

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[170] *See generally* James Packard Love, *Recent Examples of The Use of Compulsory Licenses on Patents*, 2007 KNOWLEDGE ECOLOGY INT'L 1 (May 6, 2007), http://www.keionline.org/misc-docs/recent_cls.pdf.

[171] Wong, *supra* note 107.

[172] Halajian, *supra* note 159, at 1206.

[173] *Id.* at 1203.

[174] *Id.*

[175] *Cf.* TRIPS, *supra* note 166 (arguing that the TRIPS Agreement was to promote effective and adequate protection of intellectual property rights but to also ensure that these measures of protection did not themselves bar legitimate trade of goods or development of intellectual property among the least-developed nations who needed to create a sound and viable technological base.).

[176] *Id.*

[177] *Id.* at 1222.

[178] *Id.*

[179] *Id.*

[180] UNION OF INT'L ASS'NS, *Inadequate transport infrastructure*, THE ENCYCLOPEDIA OF WORLD PROBS. & HUM. POTENTIAL (July 22, 2021, 8:27 PM), http://encyclopedia.uia.org/en/problem/135799.

[181] *Id.* (arguing that the aggravates of inadequate infrastructure and distribution would include inadequate disaster rescue and relief and ineffective means for goods supply and distribution which would only be exacerbated during a pandemic or national emergency.).

[182] Dilip K. Das, *Intellectual Property Rights and the Doha Round*, 8 J. WORLD INTELL. PROP. 33 (2005).

[183] *See generally* Rudolf V. Van Puymbroeck, *Basic Survival Needs and Access to Medicines-Coming to Grips with TRIPS: Conversion and Calculation*, 38 J. L. MED. & ETHICS 520, 523 (2010).

drugs to handle health-related needs. The government that relies solely on its ability to purchase goods and store them for use, as the SNS exemplifies, is left in a position of the proverbial between a rock and a hard place, when either that stockpile is not maintained properly or it simply lacks the required materials and goods because they were not anticipated as a need.

### *C. Private Citizens*

The purpose of compulsory licenses is to solve procurement issues related to costly drugs and technologies that people need access to for their daily lives, national emergencies, or global pandemics. Failing to protect intellectual property rights would adversely affect access to essential medicines due to the increased reluctance of pharmaceutical and technological firms to develop products in countries lacking patent protection,[184] especially if they were likely to be subject to a compulsory license. Additionally, private citizens face certain risks if the patent owner is no longer the sole producer of a developed good. Companies that are granted licenses may only have a brief time to prepare to produce. These companies may lack access to the same material supply chains, to adequate time to train their personnel, or to the financial gain of exclusively producing the good. These are all motives for a company to sacrifice quality of the product.

Compulsory licenses can raise safety concerns due to the possibility that situations may arise where unapproved generics become widely available.[185] In Thailand, unbranded clopidogrel, efavirenz, and lopinavir/ritonavir will continue to be imported from India until the Government Pharmaceutical Organization (GPO) develops the capacity to make a sufficient amount of the drugs;[186] however, the FDA has only tentatively approved the generic efavirenz made by Aurobindo Pharma Ltd and Cipla Ltd.[187] In contrast, the FDA has not recognized the remaining generic products as equivalent.[188] With unregulated drugs on the market, citizens' must put their health on the line and do a risk analysis between taking unverified compounds or fighting illness without drug intervention. The human right to health is paramount, and it deserves not just recognition, but active protection. This entails ensuring that compulsory licenses are only granted to manufacturers who can sufficiently produce the licensed products, which should also be validated by appropriate agencies to ensure they are generic equivalents to the original patent.

Private citizens also have a specific concern when it comes to the 3M patent since they are not required to wear this specific type of face covering.

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[184] Abbas, *supra* note 156, at 257.

[185] Ed Lamb, *Compulsory Licensing: A Necessary Evil?*, PHARMACY TIMES (June 1, 2007), https://www.pharmacytimes.com/view/2007-06-6564.

[186] *Id.*

[187] *Id.*

[188] Lamb, *supra* note 185.

If producers are contracted to mass-produce the N95 mask, cloth and other facial coverings may become less available or more expensive. "Two-thirds of Americans reported being in close contact (within less than [six] feet) with people outside their household in early December, but only about half of them said they mostly or always wore a mask while doing so."[189] The private citizens of countries will have to worry about generic masks that are potentially lower quality and less protective, and/or suffering from the market being flooded with a product not useful for everyday life. That is not to say that N95s should not be worn by as many individuals as possible. More private citizens would be protected if healthcare and frontline workers had sufficient N95s to limit exposure.

Debating and speculation on what the market may or may not do if compulsory licensing were granted for the right to produce N95 masks by non-3M manufacturers is purely that, speculation. Private intellectual property holders are unlikely to appreciate competitors (existing or new) benefiting from government contracts to produce their products under a compulsory license. The aforementioned market change on cloth masks being replaced by N95's as a readily available resource is only hypothetical and provides little in form for actual arguments for or against the proposed language of this note. The point that it does serve is that there is an incentive for other manufacturers to seek out an N95 contract with the government if it should take place. The government contract between the DOD and 3M for N95's offered a purchase price of approximately $4.80 per mask, while pre-COVID-19 N95s were sold on the private market for roughly between $0.50 and $1.00 per mask.[190] The increase in profit will likely draw many interested parties, including some that might normally be producing other goods for market, towards producing N95s.

## CONCLUSION

Among the many public health challenges faced in the first year of the COVID-19 pandemic, mask availability was a huge obstacle to protecting citizens.[191] The situation could have been improved if the executive branch had seized the N95 patent in February or March of 2020; however, due to a privately held patent for a single piece of personal protective equipment, the United States lost the ability to control N95 production as a nation. Notably, the United States lost this ability before the government or healthcare

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[189] Jim Key, *Half of U.S. Adults Don't Wear Masks When in Close Contact with Non-household Members*, UNIV. S. CALIF. DORNSIFE (Jan. 21, 2021), https://dornsife.usc.edu/news/stories/3388/understanding-coronavirus-in-america-mask-use-among-us-adults/.

[190] *Cf.* Jay Root & Shannon Najmabadi, *Someone Says They Have N95 Masks for Sale. The Asking Price is Six Times the Usual Cost*, THE TEX. TRIB. (Mar. 31, 2020), https://www.texastribune.org/2020/03/31/texas-company-offered-n95-masks-amid-coronavirus-6-times-usual-price/ (as healthcare professionals beg for supplies to protect themselves from COVID-19 infection, a Texas company found a seller with at least 2 million masks and quietly offered them for sale at $6 each. Before the pandemic, they cost around $1).

[191] Coy, *supra* note 22.

industry truly understood COVID-19 transmission and the preventative efficacy of cloth masks. Continuing to rely on 3M to increase production on their own for the next year is still a risk, especially as the fate of the pandemic is ever-changing in the battle between vaccine and variant.[192] The study conducted by the University of Washington's Institute for Health Metrics and Evaluation estimates that as of September 21, 2020, only 49% of Americans reported consistent mask use in public settings.[193] By February 14, 2021, the daily number of cases had risen to 7,689, with daily deaths up an average of 5% every week.[194] Given the infection rate and death toll, if estimated death projections are even somewhat accurate, we could save more than 100,000 lives just by having an estimated 95% or higher mask-wearing percentage.[195] It is impossible, with the current production level, to provide that kind of supply of N95 masks without the patent held by 3M being distributed to more companies than just its holder. Increased production of N95s could have at least limited the estimated "3,000 United States healthcare workers" that have died due to COVID-19 as of January 8, 2021.[196] This scenario has demonstrated that often a single piece of equipment or technology can turn the tide on deadly pandemic statistics, and in this crisis and those in the future, compulsory licensing could be key.

When great need arises, we must ask, incentivize, or—in extreme situations—take from the few (with every effort to rectify damages) for the good of the nation. In this case, and likely others in the future, the best option is to incentivize through compulsory licensing.

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[192] *Cf.* MCANDREW ET AL., *supra* note 125.

[193] Jason Slotkin, *Universal Mask Wearing Could Save Some 130,000 Lives in The U.S., Study Suggests*, NAT'L PUB. RADIO (Oct. 24, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/10/24/927472457/universal-mask-wearing-could-save-some-130-000-u-s-lives-study-suggests.

[194] CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 13.

[195] Slotkin, *supra* note 193.

[196] Niall McCarthy, *Where U.S. Healthcare Workers Have Died from Covid-19*, STATISTA (Jan. 8, 2021), https://www.statista.com/chart/23882/healthcare-worker-deaths-by-state/.