CONNECTICUT PUBLIC INTEREST LAW JOURNAL

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The Connecticut Public Interest Law Journal (ISSN 1932-2038) is published in the fall and spring of each year by the Connecticut Public Interest Law Journal, University of Connecticut School of Law, 55 Elizabeth Street, Hartford, Connecticut 06105, and printed by Joe Christensen, Inc., 1540 Adams Street, Lincoln, NE 68521. Periodical's postage paid at Hartford, Connecticut, and additional mailing offices.

Postmaster: Send address changes to the Connecticut Public Interest Law Journal, 55 Elizabeth Street, Hartford, Connecticut 06105.

The subscription price is $20.00 per year. Absent timely notice of termination, subscriptions are renewed annually. Please address all subscriptions and inquiries to the Administrative Editor at the Journal's office. Advertising rates available upon request.

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VOLUME 22 FALL – WINTER 2022 NUMBER 1

Weaponized Anonymity: The Continuing Marginalization of Communities of Color through Racially-Biased Anonymous Processes in U.S. Society

BY WILLIAM Y. CHIN*

ARTICLE CONTENTS

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I. INTRODUCTION

Solving America's race problems first requires seeing them, to "really *see* them,"[1] especially as racial bias shifts from overt to opaque forms in the modern era.[2] Anonymity is one opaque form where anonymous processes are effectively weaponized, intentionally or implicitly, against

[1] RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 163 (2000).

[2] *See generally*, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 105 (5th ed. 2018).

communities of color. Anonymity enables hidden spaces that harbor racial bias. In anonymous venues, bias thrives and harms people of color.[3]

Anonymity can be a shield[4] or sword.[5] This article focuses on anonymity as a sword thrust against communities of color. An example is the anonymous caller who lodged a building complaint against an elderly Puerto Rican widow in the Bronx.[6] She and her husband in the 1960s converted their basement into an apartment, but their contractor failed to file documents with the Department of Buildings. For fifty years, she rented out what she thought was a legal unit until an anonymous complaint. The basement apartment is structurally safe and habitable, but there are no permits on file showing that the contractor installed the stove and bathroom fixtures in compliance with 1960s code. The widow lacks the funds to retain an architect, contractor, and lawyer to remedy the violations. The government issues failure-to-correct violations every sixty days, violations that she cannot pay. A lien will be placed on her house, and she could ultimately lose her home and end up homeless. Several properties on her block have been redeveloped recently and sell for over a million dollars each, and long-time residents believe that these recent neighborhood changes account for long-time homeowners being displaced.[7]

The building complaint example above involves weaponized anonymity in the residential arena, but anonymity is weaponized across other societal arenas. The rest of the Article below explicates non-exhaustive examples of biased anonymity in myriad arenas, along with arena-specific remedies. Part II addresses racial bias in the 911 emergency system within the criminal justice arena. Part III discusses racial bias in non-emergency nuisance complaints within the residential arena. Part IV elucidates racial bias in reporting immigration violations within the immigration arena. Part V illuminates racial bias in child welfare services within the family and parenting arena. Part VI examines racial bias in customer feedback within the workplace arena. Part VII explores racial bias in student evaluations within the education arena. Part VIII reveals racial bias in algorithms within

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[3] *See* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 65–66 (2009) (discussing how online anonymous mobs target people of color, religious minorities, and other traditionally subordinated groups).

[4] An example is the *Nat'l Ass'n* Court holding that the constitutional right to associate prohibited Alabama from requiring the NAACP to disclose the names of its rank-and-file members in part because the NAACP showed that prior disclosures of NAACP members exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." Nat'l Ass'n for Advancement of Colored People v. Ala. ex rel. Patterson, 357 U.S. 449, 462 (1958).

[5] Melody Patry, *Online Anonymity Isn't Driving Abuse of Black Sports Stars. Systemic Racism Is*, TIME (July 21, 2021, 2:25 PM), https://time.com/6082318/social-media-abuse-online-anonymity/.

[6] *Equitable Enforcement: Balancing Risk, Resources, and Policy Goals*, CITIZENS HOUS. & PLAN. COUNCIL N.Y. C. 2 (Feb. 2021), https://chpcny.org/wp-content/uploads/2021/02/EE-Issue-Brief_08-1.pdf.

[7] *See id.*

the technology arena. Part IX synthesizes the prior parts to distill efforts that can mitigate anonymity-enabled harms to communities of color.

II. WEAPONIZING ANONYMITY IN THE CRIMINAL JUSTICE SECTOR

A. Racially-Biased Anonymous Emergency 911 Reports

An estimated 240 million calls are made to 911 annually in the United States,[8] but the anonymous 911 system contains a dark side wherein those who believe they are hidden are emboldened to act destructively.[9] Thus, anonymous callers weaponize the 911 system by engaging in "racialized police communications"[10] to harm people of color.[11] A Grand Rapids Police Department sergeant stated, "[t]here's no question, unfortunately, that people will [call the police using 911 to] use us as an implement for their own prejudice or bias."[12] A former police chief stated that bias-motivated 911 calls are "real" and "common."[13]

Anonymous 911 calls can constitute another means of controlling marginalized communities.[14] In 2018, Black candidate Shelia Stubbs was canvassing Wisconsin voters while her elderly mother and young daughter were in the car when a caller anonymously reported[15] them for "waiting for drugs at the local drug house" and wanted "them moved along."[16] Candidate

[8] 9-1-1 Statistics, NAT'L EMERGENCY NO. ASS'N, https://www.nena.org/page/911Statistics (last visited May 3, 2022).

[9] Citron, *supra* note 3, at 124.

[10] Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 342 (2019).

[11] Francesca Laguardia, *Weaponizing 911: #LivingWhileBlack, 911, and Swatting*, 57 No. 5 CRIM. L. BULL. (Fall 2021).

[12] Nate Belt, *Grand Rapids Police fighting false, racially biased 911 calls*, 13 ON YOUR SIDE NEWS, (May 26, 2020, 10:59 PM), https://www.wzzm13.com/article/news/local/grand-rapids-central/grpd-fighting-false-racially-biased-911-calls/69-b38ca70d-cbf0-418a-8d20-354c43b2eee8.

[13] Cedric L. Alexander, *Racially Biased 911 Calls are a Huge Problem. This Isn't a Solution*, CNN (June 5, 2019, 5:47 AM), https://www.cnn.com/2019/06/05/opinions/racially-biased-911-calls-living-while-black-alexander/index.html.

[14] *See* Chanelle N. Jones, Comment, *#LivingWhileBlack: Racially Motivated 911 Calls as a Form of Private Racial Profiling*, 92 TEMP. L. REV. ONLINE 55, 55 (2020).

[15] Candidate Stubbs later received from a local news station an anonymous letter purportedly written by the anonymous caller asserting that he only called the non-emergency number and called the police on the car, not on candidate Stubbs. Dan Plutchak, *Person who Called Police on Dane County Candidate: 'So, so very sorry,'* WKOW (Sept. 24, 2018), https://www.wkow.com/news/person-who-called-police-on-dane-county-candidate-so-so-very-sorry/article_ce0354f9-5ed2-5b05-b44c-c2f65b1bbb5c.html.

[16] Jessie Opoien, *Constituent Called 911, Suspecting Drug Deal, on Dane County Supervisor Shelia Stubbs While she Canvassed for Assembly Seat*, THE CAP TIMES (Sept. 19, 2018), https://captimes.com/news/local/govt-and-politics/election-matters/constituent-called-911-suspecting-drug-deal-on-dane-county-supervisor-shelia-stubbs-while-she-canvassed/article_85c7f295-f818-546f-97b6-2bf8a8fc3e27.html.

Stubbs was eventually elected to the Wisconsin State Assembly, but the experience of being anonymously targeted left her and her family scarred.[17]

Further, researchers examining unfounded 911 calls found that "the proportion of suspicious 911 calls and unfounded suspicious calls increase as more Non-Black residents move into a neighborhood."[18] Such is the prevalence of suspicious or aggrieved individuals calling 911 on Black victims that it has been termed "existing while Black" or "Living While Black."[19] Other terms include "racial hoaxes" and "'frivolous race-based police calls' (FRBPCs)."[20] Unsurprisingly, a Department of Justice publication characterizes the abuse and misuse of 911 as an "urgent problem."[21]

B. Remedying Racially-Biased Anonymous Emergency 911 Reports

Removing anonymity from 911 calls may reduce racial bias because the ability to locate and punish 911 abusers can help deter their bad acts.[22] Although the Supreme Court in *Navarette* viewed anonymous 911 calls as reliable,[23] this view is incorrect.[24] Anonymous callers are unreliable because they lack accountability and "can lie with impunity."[25] Known sources are more reliable than anonymous sources because a known source can be (1) assessed for "credibility and reputation for honesty" and (2) held "accountable for false reporting," explained the Second Circuit in a pre-*Navarette* case.[26] A post-*Navarette* Massachusetts court correctly decided to "decline to endorse the Supreme Court's reliance on the use of the 911 system as an independent indicium of reliability for an anonymous tip."[27] Similarly, in another post-*Navarette* case, the *K.H.* court in Florida stated that anonymous 911 calls are "inherently unreliable."[28] The *K.H.* case dealt with an anonymous call alleging trespass at a gas station by two Hispanic females who were panhandling.[29] The *K.H.* Court reasoned that an unreliable anonymous call combined with only the defendant's mere presence at the

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[17] Melissa Gomez, *Black Candidate Wants to Know Who Called 911 as She Talked to Voters*, N.Y. TIMES (Sept. 21, 2018), https://www.nytimes.com/2018/09/21/us/politics/shelia-stubbs-wisconsin-police.html.

[18] Uttara Ananthakrishnan et al., *"I feel Threatened": Measuring Racial Distrust in America from 911 Calls* 2 (Feb. 5, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4014937.

[19] SHAWN E. FIELDS, NEIGHBORHOOD WATCH: POLICING WHITE SPACES IN AMERICA 2 (2022).

[20] Yazmine C'Bona Levonna Nichols, Note, *Race Has Everything to Do with It: A Remedy for Frivolous Race-Based Police Calls*, 47 FORDHAM URB. L.J. 153, 155 (2019).

[21] Rana Sampson, *Misuse and Abuse of 911*, U.S. DEP'T JUSTICE 1 (Aug. 2004), https://popcenter.asu.edu/sites/default/files/misuse_abuse_of_911.pdf.

[22] Citron, *supra* note 3, at 124.

[23] Navarette v. California, 572 U.S. 393, 400 (2014).

[24] FIELDS, *supra* note 19, at 64–65.

[25] Florida v. J.L., 529 U.S. 266, 275 (2000) (Kennedy, J., concurring).

[26] United States v. Freeman, 735 F.3d 92, 97 (2d Cir. 2013).

[27] Commonwealth v. Depiero, 42 N.E.3d 1123, 1126 (Mass. 2016).

[28] K.H. v. State, 265 So. 3d 684, 688 (Fla. Dist. Ct. App. 2019).

[29] *Id.* at 686.

gas station failed to constitute reasonable suspicion to stop the defendant for trespass.[30] Courts act properly when they recognize the perils of anonymous tips.[31]

Likewise, local government should recognize the perils of anonymous 911 calls and require callers to provide their name and contact information.[32] Admittedly, laws already exist that penalize false 911 reporting.[33] For example, South Carolina law makes it a misdemeanor "for a person anonymously or otherwise to . . . contact the emergency 911 number and intentionally make a false report."[34] Iowa makes it a misdemeanor for a person to report false information to law enforcement knowing that the information is false.[35] But the further step of removing anonymity in 911 calls is needed to better protect communities of color.[36] For instance, the Somerset County Prosecutor's Office states, "You will need to give your name, where you are and the type of assistance you will need (police, ambulance, fire, etc.)."[37]

Providing name and other information is not a radical departure from what already occurs when landline users call in to "enhanced" 911 (i.e., E911) systems that automatically display their billing name, address, and telephone number to the dispatcher.[38] For example, the City of Xenia, Ohio, uses an enhanced 911 system that automatically displays the landline caller's information; then the dispatcher requests the same information from the caller to confirm the displayed information is correct.[39] Those calling from a wireless phone that displays less contact information to the dispatcher are instructed to give the dispatcher their name and verify their phone number.[40]

If the caller fails to provide a name and contact information, the dispatcher should inform the caller that the call will be documented, but that

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[30] *Id.* at 688.

[31] Miles v. United States, 181 A.3d 633, 638 (D.C. Cir. 2018).

[32] *See* Laguardia, *supra* note 11 (advocating for increased responses to this threat of required reporting of information for anonymous 911 calls).

[33] Zuberi B. Williams, *"If Only We're Brave Enough to Be It": How Judges, Law Enforcement, and Legislators Can Be the Light Against #LWB Incidents*, 70 AM. U. L. REV. F. 135, 149 (2021).

[34] S.C. CODE ANN. § 23-47-80(4) (2019).

[35] IOWA CODE ANN. § 718.6(1) (West 1978).

[36] *See* Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 1001 (2019) (proposing model legislation stating that any dispatcher who reasonably believes a caller is abusing the 911 system will log the call in the statewide 911 abuse database and "shall record all reasonably pertinent information, including the identity and phone number of the Caller").

[37] Somerset Cnty. Prosecutor's Off., *Personal Safety Guide* (2010), https://www.co.somerset.nj.us/home/showpublisheddocument/30412/636682158391870000.

[38] *911 Communications*, CITY TURLOCK, https://www.cityofturlock.org/policedepartment/aboutus/911communications.asp (last visited June 3, 2022).

[39] *When to Call 911*, EXPLORE XENIA, https://www.ci.xenia.oh.us/268/When-to-Call-911 (last visited June 3, 2022).

[40] *Id.*

officers will not be dispatched.[41] This is the proper response to unreliable anonymous calls potentially motivated by racial bias.[42] Officers should not respond based on calls that lack a legitimate basis for law enforcement involvement.[43] This requires training dispatchers to not reflexively send officers to respond to questionable calls that lack sufficient information.[44] Ultimately, the criminal justice system including the 911 system should curtail oft-abused anonymous reporting against people of color because being of a particular race is neither a criminal act nor indicative of criminal activity.[45] As stated by New Jersey's governor, those who weaponize 911 through biased reporting against people of color engage in an "abhorrent form of discrimination" and "should be held accountable to the fullest extent of the law.[46]

III. WEAPONIZING ANONYMITY IN THE RESIDENTIAL SECTOR OF SOCIETY

A. Racially-Biased Anonymous Non-Emergency Nuisance Complaints

Anonymity enables residents to unleash their racial bias.[47] In one Brooklyn neighborhood, anonymous flyers with the heading "CHINESE ARE DESTORYING [sic] BAY RIDGE" were posted on lampposts.[48] The racist flyer stated the Chinese were engaging in illegal home conversions that were "ruining housing stock of Bay Ridge resulting in a flight of middle class homeowners," opening up "massage parlors (prostitution)" and "dirty Chinese restaurants," creating "[t]rashed up streets," and "scavanging [sic]."[49] The flyer also furthered Covid fears by stating, "Corona Virus spread by Chinese immigration."[50]

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[41] *See* Carl Takei, *How Police Can Stop Being Weaponized by Bias-Motivated 911 Calls*, AM. C.L. UNION (June 18, 2018), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-police-can-stop-being-weaponized-bias-motivated.

[42] *See id.*

[43] *Id.*; Jones, *supra* note 14 at 87–88.

[44] Takei, *supra* note 41.

[45] As stated by the *Romero* court, "[a] person of a particular race standing in a parking lot where a crime occurred is not enough to create reasonable suspicion." Romero v. Story, 672 F.3d 880, 888 (10th Cir. 2012).

[46] Evan Simko-Bednarski, *A False 911 Call in New Jersey Could Lead to More Jail Time if There's Bias*, CNN (Sept. 2, 2020), https://www.cnn.com/2020/09/02/us/new-jersey-racial-bias-911-trnd/index.html.

[47] *See* David Cruz, *Racist Anti-Chinese Flyers in Bay Ridge are Countered with Messages of Inclusivity*, GOTHAMIST (June 7, 2020), https://gothamist.com/news/racist-anti-chinese-flyers-bay-ridge-are-countered-messages-inclusivity.

[48] *Id.*

[49] *Id.*

[50] *Id.*

Yet local jurisdictions often address problems by relying on anonymous complaints[51] to react to caller-identified issues.[52] But this anonymous complaint-driven system is problematic for marginalized communities.[53] First, the complaint-driven system is one that "privileges those who are comfortable making complaints and navigating the system."[54] A study of 311 complaints referred to the New York Police Department found a "significantly higher" increase in the number of "quality of life" complaints in "those lower-income, majority person-of-color tracts with large influxes of white residents than those without large influxes of white residents."[55] In effect, residents in neighborhoods with White influxes make more quality-of-life complaints that are referred to the police.[56] In a study of gentrifying West Harlem, new White residents said they called 311 because they were not comfortable directly approaching long-time residents.[57]

Second, the complaint-driven system disadvantages those who are unknowledgeable of or unable to complain such as renters fearful of retribution from their landlords.[58] In another example, in Queens in New York City, a caller weaponized the 311 complaint system against the undocumented community when the caller complained that construction at a shelter was carried on without permits and by undocumented workers.[59] Additionally, residents of color living in heavily-policed communities feel unsafe in their encounters with police and are thus less likely to call for assistance.[60]

Third, the complaint-driven system concentrates government resources in areas that may not require it.[61] A caller may complain simply

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[51] "Anonymous complaint" means a complaint lacking information such as name and address to identify the source. TEX. OCC. CODE ANN. § 154.0535(a)(1) (West 2011).

[52] CITIES FOR RESPONSIBLE INV. & STRATEGIC ENF'T POWER & PROXIMITY CODE ENF'T: A TOOL FOR EQUITABLE NEIGHBORHOODS 4 (June 2019), https://hesterstreet.org/wp-content/uploads/2019/07/CR_-Phase-I-_Equitable-Code-Enforcement-report_FINAL-JUNE-2019.pdf.

[53] *Id.*; CITY'S RELIANCE ON COMPLAINTS FOR PROPERTY MAINTENANCE ENFORCEMENT DISPROPORTIONATELY AFFECTS DIVERSE AND GENTRIFYING NEIGHBORHOODS, PORTLAND CITY AUDITOR (Nov. 3, 2021), https://www.portland.gov/sites/default/files/2021/report-and-responses.pdf.

[54] CITIES FOR RESPONSIBLE INV. & STRATEGIC ENF'T, *supra* note 52, at 4.

[55] Harold Stolper, *New Neighbors and the Over-Policing of Communities of Color: An Analysis of NYPD-Referred 311 Complaints in New York City*, CMTY. SERV. SOC'Y (Jan. 6, 2019) https://www.cssny.org/news/entry/New-Neighbors.

[56] *Id.*

[57] *Id.*

[58] Cities for Responsible Inv. & Strategic Enf't, supra note 52, at 4.

[59] CITIZENS HOUS. & PLAN. COUNCIL N.Y.C., *supra* note 6, at 3.

[60] Stolper, *supra* note 55.

[61] CITIES FOR RESPONSIBLE INV. AND STRATEGIC ENF'T, *supra* note 52, at 4.

because the complainant[62] does not like or feel comfortable with the new neighbors.[63]

Finally, a complaint system weaponized by the dominant culture "sets up an adversarial relationship between government and the communities they serve" including communities of color.[64] For example, long-time Harlem resident Ramon Hernandez had for decades enjoyed sitting in a fold-up chair on his Harlem block every summer or playing an evening dominoes game with neighbors as music played from a nearby parked car.[65] This was a tradition in the historically Latinx neighborhood.[66] But conditions changed with the arrival of an increased police presence due to officers responding to complaint calls.[67] This coincided with gentrification and more white people moving into the neighborhood.[68]

Business owners of color, like residents of color, also endure biased 311 reporting.[69] One Black restaurant owner selling snowballs (similar to snow cones) in Baltimore was subjected to racist comments and unfounded 311 complaints.[70] One white neighbor asked the Black owner whether she had properly researched the neighborhood before opening and stated her type of business was "unwanted" in that neighborhood.[71] Another Black restaurant owner providing food, liquor, and live music in Baltimore was subjected to constant harassment including unfounded 311 complaints and weekly anonymous letters demeaning restaurant patrons as "Black racists" who were "loud, obnoxious, mean, nasty and ignorant."[72]

B. Remedying Racially-Biased Anonymous Nuisance Complaints

A solution is to restrict anonymity in 311 complaints.[73] Florida prohibits code enforcement officers from investigating alleged code

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[62] Such a caller might be called a "vexatious complainant," one who "contentiously raises a complaint, without grounds, in order to cause annoyance or disruption." *Policy and Procedure for Persistent and Vexatious Complainants* 2, CROYDON (Apr. 4, 2011), https://www.croydon.gov.uk/sites/default/files/articles/downloads/vexatious-persistent-complaints-policy-procedure.pdf.

[63] CITIES FOR RESPONSIBLE INV. AND STRATEGIC ENF'T, *supra* note 52, at 4.

[64] *Id.*

[65] Lam Thuy Vo, *They Played Dominoes Outside Their Apartment for Decades. Then the White People Moved in and Police Started Showing Up*, BUZZFEED NEWS (June 29, 2018), https://www.buzzfeednews.com/article/lamvo/gentrification-complaints-311-new-york.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] John-John Williams IV & Stephanie García, *"Overenforcement": Black Baltimore Restaurant Owners Say They're Harassed and Subject to Spurious 311 Complaints*, BALT. SUN (Mar. 9, 2022), https://www.baltimoresun.com/food-drink/bs-fe-restaurants-aggression-20220309-pxxloamyq5akfatagrometvmx4-story.html.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *See* FLA. STAT. ANN. § 162.21(3)(b) (West 2021).

violations based on anonymous calls.[74] Instead, a caller must provide name and address information before an investigation may occur.[75] The exception is if there is reason to believe the alleged violation presents an "imminent threat to public health, safety, or welfare or imminent destruction of habitat or sensitive resources."[76] Also, the City of Riverside states that "some departments will not accept anonymous requests" for those using the city's online 311 complaint form, which requires the complainant's full name, phone number, and email.[77]

Disallowing anonymous 311 complaints will likely not undermine the 311 system.[78] As one city spokesperson stated regarding the city moving to non-anonymous 311 complaints, "[s]ome changes will be necessary, but we don't expect it to significantly affect our operating procedures for initiating and investigating code complaints or ways the public can report non-emergency code issues."[79] The spokesperson further noted, "311 has also been notified and they agree it will not negatively impact their function either."[80]

At most, implementing a non-anonymous 311 system will require only minor adjustments such as providing notice to 311 users.[81] The City of Cape Coral provides the following notice to a person submitting an online 311 report: "For Code Enforcement complaints, you must provide your name and address pursuant to Florida [law] . . . unless the complaint is an emergency that immediately threatens public health, safety, or welfare, or imminent destruction of habitat or sensitive resources."[82]

A potential downside to moving to a non-anonymous 311 system is the cost of the move, but any expense would be a mere "minor cost." [83] Another potential downside is fewer 311 calls, but officials could track the number of calls before and after the move to determine if there are actually fewer calls afterward. [84] Even if that turned out to be true, it could be due to the new non-anonymous system weeding out frivolous and unfounded 311 complaints.[85]

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Request Non-Emergency City Services Online*, CITY RIVERSIDE, https://crmweb.riversideca.gov/ (last visited May 25, 2022).

[78] *See Anonymous Code Complaints Curtailed*, CAPE CORAL BREEZE (July 22, 2021), https://www.capecoralbreeze.com/news/local-news/2021/07/22/anonymous-code-complaints-curtailed/.

[79] *Id.*

[80] *Id.*

[81] *See id.*

[82] *Id.*

[83] CAPE CORAL BREEZE, *supra* note 78.

[84] *Id.*

[85] *See* Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS (Dec. 18, 2017), https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/ (stating that "people will engage in worse behavior if they believe their actions are anonymous and not likely to be made public").

Alternatively, if anonymous complaints are permitted, then more protections should be conferred on potential victims of 311 abuse.[86] For example, a New York City bill would protect victims of repeat anonymous 311 calls by categorizing as "harassed" any property receiving three or more baseless 311 calls within six months.[87] Further, for any non-emergency anonymous complaint against a "harassed" property, the 311 customer service center will merely document the call instead of referring the call to an enforcement agency.[88]

IV. WEAPONIZING ANONYMITY IN THE IMMIGRATION SECTOR

A. Racially-Biased Anonymous Reporting Against Immigrants

Individuals or law enforcement agencies may provide anonymous tips involving suspected immigration violations to Immigration and Customs Enforcement (ICE) through its online Tip Form or toll-free Tip Line.[89] But this anonymous tip system further marginalizes disadvantaged communities[90] because anonymous reporters can exploit the anonymous reporting system in various ways.[91] First, human traffickers, employers, or landlords can subjugate their undocumented immigrant victims and prevent them from seeking help by threatening to anonymously report them to government officials to have them deported.[92] Second, if immigrant victims do seek help or are perceived as troublesome, their oppressors can use anonymous reporting to retaliate.[93] A trafficker could anonymously report an undocumented immigrant victim who seeks to escape;[94] an employer could anonymously report an undocumented worker who demands fair compensation or the right to unionize;[95] a landlord could anonymously report undocumented tenants who fail to vacate the apartment quickly

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[86] *See* A Local Law to Amend the Administrative Code of the City of New York, in Relation to Procedures to Be Adopted by the 311 Call Center for Responding to Certain Repeat Anonymous Complaints Against the Same Property, N.Y.C. Council B. Int. No. 221 (2022), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5570436&GUID=78E8B67E-E28E-426F-A03D-6002806A21C1.

[87] *Id.*

[88] *Id.*

[89] *ICE Tip Form*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/webform/ice-tip-form (last visited May 4, 2022).

[90] Letter from Elizabeth Taufa, Pol'y Att'y & Strategist, to Scott Elmore, PRA Clearance Officer, ICE 3 (Dec. 21, 2021) (on file with ILRC), https://www.ilrc.org/sites/default/files/resources/ilrc_ice_tip_form_comment_-_final_-_12.21.21.pdf.

[91] *Id.* at 2–3.

[92] *Id.* at 2.

[93] *Id.* at 3.

[94] *See id.*

[95] Roshani M. Gunewardene, *Criminalization of Employer Fraud Against Alien Employees? A National Priority*, 25 NEW ENG. L. REV. 795, 797 (1991).

enough.[96] In such instances, government officials become tools of those using anonymous reporting to exploit undocumented immigrants.[97]

B. Remedying Racially-Biased Anonymous Reports Against Immigrants

States should proscribe threats to report a person's immigration status.[98] New York law deems it coercion for a person to "[r]eport [a victim's] immigration status or suspected immigration status" to force the victim to comply with the perpetrator's demands.[99] Colorado law deems it criminal extortion if a person "threatens to report to law enforcement officials" the immigration status of the victim.[100] Virginia law deems it extortion if a person "threatens to report [the victim] as being illegally present in the United States."[101] California law deems it extortion to threaten to "report [the victim's] immigration status or suspected immigration status."[102] Maryland law declares it unlawful for a person to extort a victim through threatened or actual reporting to law enforcement officials "about [the victim's] undocumented or illegal immigration status."[103]

The laws above help protect vulnerable undocumented immigrants.[104] By contrast, Arizona law prohibits employers from knowingly employing unauthorized immigrants and permits anonymous complaints of such violations.[105] Arizona law then seeks to ameliorate anonymous reporting abuse by directing officials to not investigate complaints that are "based solely on race, color or national origin."[106] But this provision fails to protect immigrants because, first, allowing reporting to be anonymous eliminates all accountability and prevents determination of whether a complaint is based on race, color, or national origin.[107] Second, Arizona's provision is inherently contradictory because although it purports to proscribe racially-biased complaints, it is fundamentally racially biased

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[96] *See* Massarah Mikati, *In New York It's Now Illegal to Threaten to Report Someone to ICE*, TIMES UNION (Oct. 14, 2021, 11:41 AM), https://www.timesunion.com/news/article/In-New-York-it-s-now-illegal-to-threaten-to-16530713.php?IPID=Times-Union-HP-CP-Spotlight.

[97] *See* Taufa, *supra* note 90.

[98] *See, e.g.*, N.Y. PENAL LAW § 135.60(10) (McKinney 2021).

[99] *Id.*

[100] COLO. REV. STAT. ANN. § 18-3-207(1.5) (West 2018).

[101] VA. CODE ANN. § 18.2-59 (2010).

[102] CAL. PENAL CODE § 519(5) (2015).

[103] MD. CODE ANN., CRIM. LAW § 3-701(b)(4) (West 2020).

[104] *See, e.g.*, N.Y. PENAL LAW § 135.60(10) (McKinney 2021).

[105] ARIZ. REV. STAT. ANN. § 23-212(A)–(B) (West 2021). Indeed, one corporate counsel for a large corporation advises employers to establish an anonymous workplace hotline to report potential immigration violations. Tyler D. Bolden, *Business Interruption & Employer Liability in the Age of Ice Raids*, 5 S.C. J. INT'L L. & BUS. 113, 135 (2009).

[106] ARIZ. REV. STAT. ANN. § 23-212(B) (2021).

[107] Patrick S. Cunningham, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy over Immigration?*, 42 ARIZ. ST. L.J. 411, 420 n.65 (2010).

because the statute is crafted to control a community defined by race, color, and national origin, specifically male, working-age Latinos.[108]

Thus, states should follow the example of New York and other states discussed above to better protect immigrants against abusive reporting.[109] As stated by a New York State senator, the law must protect vulnerable immigrants from extortion, especially when an undocumented immigrant fleeing danger in the home country faces a potential death sentence if reported to immigration officials and deported.[110]

V. WEAPONIZING ANONYMITY IN THE FAMILY AND PARENTING SECTOR OF SOCIETY

A. Racially-Biased Anonymous Reporting in Child Welfare Services

Racial disparities exist at nearly every major decision-making stage in the child welfare system[111] including the initial reporting stage.[112] Many report anonymously to the child welfare system.[113] For example, of the 150,000 calls annually to New York State's hotline, over 10,000 are anonymous,[114] and only 3.5% of these anonymous reports are deemed credible.[115] The problems with anonymous reporting in the child welfare system include it being unregulated, susceptible to abuse, and lacking effective penalties for false reporting.[116] Nonetheless, the numerous anonymous reports, many motived by spite and malice, launch numerous investigations, many targeting families of color.[117]

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[108] Abigail E. Langer, Note, *"Men Made It, but They Can't Control It": Immigration Policy During the Great Depression, Its Parallels to Policy Today, and the Future Implications of the Supreme Court's Decision in* Chamber of Commerce v. Whiting, 43 CONN. L. REV. 1645, 1665 (2011).

[109] *See, e.g.*, N.Y. PENAL LAW § 135.60(10) (McKinney 2021).

[110] *See* Nick Reisman, *New Law Criminalizes Threats to Undocumented Immigrants*, SPECTRUM NEWS (Oct. 11, 2021, 5:10 AM), https://nystateofpolitics.com/state-of-politics/new-york/ny-state-of-politics/2021/10/11/new-law-criminalizes-threats-to-undocumented-immigrants?s=03.

[111] CHILD'S. BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., BULL. FOR PROFS., *Child Welfare Practice to Address Racial Disproportionality and Disparity* (Apr. 2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

[112] An example of racial disparities in other stages is seen in the foster-home-placement stage where 2017 data for Washington state showed that "African American children were 2.2 times and Native American children were 2.9 times more likely to be placed in out-of-home care [e.g., foster homes] compared to white children." *Child Welfare Data at a Glance*, PARTNERS FOR OUR CHILD., https://partnersforourchildren.org/data/quickfacts (last visited May 9, 2022).

[113] *See* Madelyn Freundlich, *Commentary: Anonymous Child Abuse Allegations Do More Harm Than Good*, TIMES UNION (May 1, 2022), https://www.timesunion.com/opinion/article/Commentary-Anonymous-child-abuse-allegations-do-17140519.php.

[114] *Id.*

[115] *Id.*

[116] Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 52 (2014).

[117] Freundlich, *supra* note 113.

Throughout its history, the child welfare system has oppressed First Nations, immigrants, and communities of color.[118] It is a system typically most visible in poor and nonwhite communities.[119] For the Black community, the child welfare system is a government-run program that "disrupts, restructures, and polices Black families."[120] It disrupted and policed the family of Malcolm X.[121] After White people murdered his father when Malcolm X was a child, state welfare workers began to intrude on his family's life.[122] They asked his mother "a thousand questions" while looking around the house and seeing him, his siblings, and their mother not as people, but as "just *things*."[123] His mother, Louise Little, "hated" the state welfare people and wanted them out of her house, but they "kept after" her and her family.[124] They called her crazy for refusing donated pork even though she explained eating pork went against her religion.[125] The welfare people eventually broke apart his family, but Malcolm X believed that despite his family's impoverished situation, "we could have made it, we could have stayed together" if the state welfare workers had stopped hounding his family.[126]

The child welfare system continues to disrupt and police marginalized communities.[127] This family policing system targets Black and Brown families, especially low-income families living in impoverished communities neglected by society.[128] It subjects families of color to disparate treatment;[129] for example, Black youth are overrepresented in the child welfare system.[130] Fifty-six of every one thousand black children are reported to child services, twice the rate of white children.[131] In New York

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[118] DON LASH, WHEN THE WELFARE PEOPLE COME: RACE AND CLASS IN THE US CHILD PROTECTION SYSTEM 10–11 (2017).

[119] *Id.* at 6.

[120] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE viii (2002).

[121] MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X AS TOLD TO ALEX HALEY 12 (Ballantine Books ed., 2015).

[122] *Id.* at 2, 12.

[123] *Id.* at 12.

[124] *Id.* at 17.

[125] *Id.* at 18.

[126] Malcolm X, *supra* note 121.

[127] *See* Halimah Washington et al., *An Unavoidable System: The Harms of Family Policing and Parents' Vision for Investing in Community Care*, RISE, TAKEROOT JUST. 5 (Fall 2021), https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf.

[128] *Id.*

[129] Cecka, *supra* note 116, at 59.

[130] Yolanda Anyon, *Reducing Racial Disparities & Disproportionalities in the Child Welfare System: Policy Perspectives about How to Serve the Best Interests of African American Youth*, 33 CHILD. & YOUTH SERVS. REV. 242, 242 (2011), https://www.academia.edu/16482453/Reducing_Racial_Disparities_and_Disproportionalities_in_the_Child_Welfare_System_Policy_Perspectives_about_How_to_Serve_the_Best_Interests_of_African_American_Youth.

[131] Cecka, *supra* note 116, at 59–60.

City, "[o]ver 40% of Black children" risk being subjected to a child maltreatment investigation by age 18.[132]

This policing system allows for anonymous reports where contact with the child welfare system can be triggered by vengeful neighbors or racially-biased individuals.[133] Further, this system effectively deputizes citizens to be "mandatory reporters"[134] despite strong evidence showing mandatory reporters such as teachers and doctors are influenced by race regarding what they label and report as child abuse.[135] One study involving a hospital to investigate potential racial differences in the medical evaluation and reporting of children hospitalized for fractures concluded that children of color were "more likely to be evaluated and reported for suspected child abuse," indicating that "racial differences do exist in the evaluation and reporting of pediatric fractures for child abuse."[136]

Despite well-intentioned individual child service workers, the child welfare system oppresses communities of color.[137] As shared by one parent of color after her family was ensnared and traumatized by New York City's Administration for Children's Services (ACS): "Was it harmful? Most certainly. Because now my family is traumatized. We will never be the same."[138] One African American woman also ensnared by ACS, echoing Malcolm X's critique of child welfare services, regarded ACS as a system that perpetuated slavery and observed that for women of color, "it's us against them."[139]

B. Remedying Racially-Biased Anonymous Reporting in Child Welfare Services

One step in ameliorating biased reporting is requiring reporters to provide their name and contact information.[140] Instead, many states allow for anonymous reporting to child welfare services.[141] These states, though, should follow the lead of states requiring name and contact information.[142]

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[132] Washington et al., *supra* note 127.

[133] *See* LASH, *supra* note 118, at 6.

[134] Elizabeth J. Stevens, Comment, *Deputy-Doctors: The Medical Treatment Exception After* Davis v. Washington, 43 CAL. W. L. REV. 451, 479 (2007).

[135] ROBERTS, *supra* note 120, at 49.

[136] Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1603 (Oct. 2, 2002), https://jamanetwork.com/journals/jama/fullarticle/195342.

[137] LASH, *supra* note 118, at 11–12.

[138] Washington et al, *supra* note 127, at 13.

[139] *Id.* at 12.

[140] *See* Alexa Irene Pearson, *Eulogies, Effigies, & (and) Erroneous Interpretations: Comparing Missouri's Child Protection System to Federal Law*, 69 MO. L. REV. 589, 605 n.75 (2004). This article's limited scope focuses on remedying the problem of anonymous reporting by abolishing anonymity, but others have proposed the more comprehensive remedy of abolishing the current child welfare system. ROBERTS, *supra* note 120, at ix–x; *All children deserve to be with their families*, UPEND MOVEMENT, https://upendmovement.org/ (last visited June 28, 2022).

[141] Stevens, *supra* note 134, at 477.

[142] *See* Pearson, *supra* note 140, at 605 n. 75.

For example, Pennsylvania requires a reporter, after making an immediate oral report, to later make a written report that "shall" include the reporter's name, telephone number, and e-mail address.[143] Similarly, North Carolina states that the reporter "shall" provide the reporter's name, address, and telephone number.[144]

A state may attempt to compromise by proscribing anonymity for mandated reporters and permitting it for non-mandatory reporters.[145] For instance, Florida requires mandated reporters to provide their names to the central abuse hotline worker whereas non-mandated reporters may report anonymously.[146] But the better practice is to require all reporters including non-mandated reporters to provide their names to enhance accountability.[147]

A further beneficial step is requiring child service workers receiving reports to screen for biased reports.[148] For example, a New York bill states that a caller will be asked for "name and contact information"[149] and that no investigation commences unless the information is provided,[150] and the bill then goes further to require child service workers receiving calls to "utiliz[e] protocols that would reduce implicit bias from the decision-making process."[151]

Finally, those making false reports should be penalized.[152] For example, Oklahoma law states that a person making a false report regarding alleged child maltreatment may be criminally investigated and is guilty of a misdemeanor if convicted.[153]

VI. WEAPONIZING ANONYMITY IN THE WORKPLACE SECTOR OF SOCIETY

A. Racially-Biased Anonymous Customer Feedback

Employers use customer feedback to make decisions in a variety of workplace situations including hiring, promotions, discipline, termination, pay rates, bonuses, and job duties.[154] But customer feedback is problematic because it is often brief, narrow in scope, based on limited interactions, and provided by customers not trained on how to properly evaluate

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[143] 23 PA. STAT. & CONS. STAT. § 6313(b)(8) (West 2014).
[144] N.C. GEN. STAT. § 110–105.4(a) (2016).
[145] *See* FLA. STAT. ANN. § 39.201(1)(b)1–2 (LexisNexis 2022).
[146] *Id.*
[147] *See* Pearson, *supra* note 140, at 605 n.75.
[148] *See, e.g.*, S. Res. 7879A, 244th Gen. Assemb., Reg. Sess. (N.Y. 2021).
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *See, e.g.*, OKLA. ADMIN. CODE § 340:2-3-33(i)(1) (2015).
[153] *Id.*
[154] Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2177 (2018).

employees.[155] Added to these problems is the anonymity that encourages non-accountable customers to provide discriminatory feedback.[156] Thus, a customer's anonymous rating of an employee of color could be biased by the customer's racial stereotypes.[157]

One study of gender and racial biases in customer satisfaction ratings found that customers were less satisfied with the services provided by nonwhite employees versus white employees, even when controlling for objective indicators of performance.[158] This study consisted of three sub-studies. The first sub-study examined patient satisfaction ratings of primary care physicians working at a large health maintenance organization (HMO).[159] The second sub-study involved student participants providing customer evaluations after watching videos of a customer-employee interaction in a university bookstore.[160] The third sub-study examined satisfaction surveys from customers of a large national country club organization.[161] The study found evidence of racial bias regardless of whether the nonwhite employees were predominantly Asian (HMO sub-study), Black (bookstore sub-study), or Latinx (country club organization sub-study).[162] Thus, customer feedback is unreliable because it consists of subjective judgments easily skewed by various biases including racial bias.[163]

B. Remedying Racially-Biased Anonymous Customer Feedback

One solution is restricting anonymous feedback in assessing employee performance because anonymous customers "have no need to feel accountable for their evaluations."[164] Eliminating anonymity will make customers more accountable and incentivize them to do the hard work of overcoming their bias.[165] Ending anonymity can be simply achieved by employers requiring customers to provide their contact information on the feedback form.[166] Additionally, employers could solicit customer feedback

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[155] Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1212–13 (2017).

[156] *Id.*

[157] Flake, *supra* note 154, at 2182.

[158] David R. Hekman et al., *An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction*, 53 ACAD. MGMT. J. 238, 256 (2010).

[159] *Id.* at 243.

[160] *Id.* at 249.

[161] *Id.* at 253.

[162] *Id.* at 256.

[163] Flake, *supra* note 154, at 2182.

[164] Lu-in Wang, *When the Customer Is King: Employment Discrimination As Customer Service*, 23 VA. J. SOC. POL'Y & L. 249, 282 (2016).

[165] *Id.*; Hekman, *supra* note 158, at 240, 257.

[166] Flake, *supra* note 155, at 1220.

through face-to-face interactions and focus groups rather than through anonymous forms.[167]

Employers who continue to rely on anonymous feedback could be sued by their employees for customer feedback discrimination.[168] In such cases, courts should determine employer liability under a "negligence" standard.[169] A court would ask only two questions: (1) whether the employer knew, or should it have reasonably known, that the customer feedback was biased, and if so, (2) whether the employer responded reasonably through proper preventive or corrective measures.[170] But the better option for the employer is to pre-empt the potential employee lawsuit by discontinuing anonymous evaluations, and in doing so, eliminate rather than perpetuate racial inequities.[171]

VII. WEAPONIZING ANONYMITY IN THE EDUCATION SECTOR OF SOCIETY

A. Racially-Biased Anonymous Student Evaluations

Student evaluations are biased.[172] Student evaluations favor male white faculty and disfavor perceived "outsiders" including faculty of color, faculty viewed as having an accent, faculty regarded as immigrants, and female faculty.[173] Student evaluations are affected by chocolates provided during evaluations, an entertaining teaching style, the perceived physical attractiveness of the teacher, the teacher's clothing, the timing of the class, class size, and more.[174] In short, they measure everything except effective teaching.[175] Moreover, student evaluations not only fail to measure teaching effectiveness,[176] they in fact promote poor teaching and grade inflation.[177] These problems including the problems of race and gender biases in student evaluations harm faculty of color.[178]

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[167] *Id.*
[168] *See* Flake, *supra* note 154, at 2172.
[169] *Id.*
[170] *Id.*
[171] *See* Hekman, *supra* note 158, at 259.
[172] Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7, 15 (2015); Wolfgang Stroebe, *Student Evaluations of Teaching Encourages Poor Teaching and Contributes to Grade Inflation: A Theoretical and Empirical Analysis*, 42 BASIC & APPLIED SOC. PSYCH. 276, 283 (2020).
[173] Deo, *supra* note 172.
[174] *Id.* at 15–17.
[175] *Id.* at 16.
[176] Stroebe, *supra* note 172.
[177] *Id.*
[178] *See* Deo, *supra* note 172, at 41.

Student evaluations are especially dangerous for professors of color and female professors because students' racial biases and stereotypes[179] in student evaluations affect hiring, promotion, tenure, and termination decisions.[180] A study involving undergraduates and graduate student evaluations in a public university found that "[w]hite teachers tend to get rated higher than minority teachers."[181] One Black female law professor who experienced racially-biased evaluations described bias that included student evaluations criticizing her hair, clothing, accent, and her "very existence."[182] Many students added notes to their evaluations of this professor of color expressing racial or sexist stereotypes or both.[183] Some personally blamed this professor for ruining their chances of grading onto law review although her class was merely one of their multiple classes.[184]

Similarly, an instructor of color from Shanghai, China, who began her Ph.D. studies and teaching as a teaching assistant at a U.S. university regularly received biased negative remarks on her student evaluations criticizing her English language abilities despite receiving the maximum score on a test measuring her proficiency in spoken English.[185] The student evaluations complained that she was difficult to understand and did not speak English well enough to teach.[186] But as stated by Professor Rubin, a professor of education and speech communication who administered the English proficiency test to the instructor, the instructor's native Chinese language background did "not interfere with her [English language] intelligibility."[187] Further, Professor Rubin regarded the instructor's English vocabulary in both speaking and listening as "sophisticated and probably more fluent than my own."[188] The problem is one of student preconceptions rather than instructor English proficiency because research reveals that students who expect a nonnative instructor to be a poor instructor and unintelligible speaker will experience comprehension difficulties despite hearing standard English spoken by a nonnative speaker during a well-formed lecture.[189]

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[179] SYLVIA R. LAZOS, *Are Student Teaching Evaluations Holding Back Women and Minorities?: The Perils of "Doing" Gender and Race in the Classroom*, *in* PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 164, 173 (Gabriella Gutiérrez y Muhs et al. eds., 2012).

[180] Gregory S. Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 U.C. DAVIS L. REV. 1039, 1041 (2018).

[181] Alan Socha, *A Hierarchical Approach to Students' Assessments of Instruction*, 38 ASSESSMENT & EVALUATION HIGHER EDUC. 94, 107 (2013).

[182] Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 167 (1999).

[183] *Id.*

[184] *Id.*

[185] John Gravois, *Teach Impediment*, CHRON. HIGHER EDUC. (Apr. 8, 2005).

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.*

Further, student evaluations go beyond being biased to being potentially useless.[190] A 2021 meta-study of over ninety articles on student evaluations stated, "[t]eaching evaluations are only weakly correlated or entirely uncorrelated with teaching effectiveness."[191] The study noted the lack of research on faculty of color because of their severe underrepresentation in academia, but the available research indicates that professors of color are evaluated worse than White professors, "especially Black and Asian professors, with Black men faring particularly poorly."[192] Also, "[f]aculty with accents and Asian last names receive lower ratings."[193] Further, professors of color may be punished more for intersectional stereotype nonconformity such that "Latina women are perceived less warmly than Anglo women with similarly strict teaching style . . . and women of color are evaluated more harshly than white men . . . ."[194]

In addition to individual bias within student evaluations, teachers of color also face institutionalized bias as educational institutions continue to use biased evaluations.[195] One study of undergraduate student evaluations at a college of education found race was a factor in student ratings of teaching effectiveness.[196] The evaluations included *multidimensional* items (measuring a single aspect of teaching such as organization or preparation) and *global* items (measuring "general impressions such as overall value of the course and overall teaching ability").[197] The study found that of the three faculty groups (Black, White, and other), Black faculty were rated by students the lowest both on a majority of the multidimensional parts and also lowest on the global parts.[198] The lower global ratings were especially problematic because the college of education used the global parts to make personnel decisions involving promotion, tenure, pay increases, and awards.[199]

The use of student evaluations in hiring, salary increases, and promotions furthers inequalities and is potentially illegal.[200] In one arbitration case involving a Canadian university, the arbitrator ruled that student evaluations may not be used to "measure teaching effectiveness for promotion or tenure."[201] Educational institutions use student evaluations

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[190] Deo, *supra* note 172, at 41.

[191] Rebecca J. Kreitzer & Jennie Sweet-Cushman, *Evaluating Student Evaluations of Teaching: A Review of Measurement and Equity Bias in SETs and Recommendations for Ethical Reform*, J. ACAD. ETHICS 2, 3 (2021).

[192] *Id.* at 5.

[193] *Id.*

[194] *Id.*

[195] *See* Smith, *supra* note 182, at 86.

[196] Bettye P. Smith & Billy Hawkins, *Examining Student Evaluations of Black College Faculty: Does Race Matter?*, 80 J. NEGRO EDUC. 149, 159 (2011).

[197] *Id.* at 153.

[198] *Id.* at 159.

[199] *Id.*

[200] Stroebe, *supra* note 172.

[201] Ryerson U. v. Ryerson Fac. Ass'n, 2018 CanLII 58446 (ON LA).

because they are easy to administer, make it easy to compare professors, appear objective, and seem scientifically sound.[202] But as stated by the arbitrator, student evaluations are "imperfect at best and downright biased and unreliable at worst."[203]

Student evaluations that are widely and uncritically used to determine pay and promotion opportunities will harm faculty of color and lead to non-white faculty receiving more benefits and moving further up the organizational ladder.[204] As one professor of color stated regarding bias and anonymity in educational institutions, "[p]eople would like to be able to control how black people are perceived, but they want to do so costlessly. Don't worry, be happy, they say to black people in the academy."[205]

B. Remedying Racially-Biased Anonymous Student Evaluations

One solution is making student evaluations anonymous to professors, but not to the administration.[206] This allows the administration to determine who misuses student evaluations to harass and intimidate, and further, could protect the university against future hostile work environment claims.[207]

A more comprehensive remedy is to replace student evaluations with a more effective evaluation process.[208] An alternative proffered by a physics professor and Nobel laureate is termed the Teaching Practices Inventory that encourages teachers to adopt effective research-based teaching practices.[209] A sample excerpt of the inventory of teaching practices for STEM (science, technology, engineering, and mathematics) courses is below:[210]

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[202] *Id.* at 4.

[203] *Id.*

[204] *See* Hekman, *supra* note 158, at 257.

[205] Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 222 (1993) (discussing an anonymous law student writing to a local campus publication a letter containing racist commentary about Prof. Culp, a professor of color).

[206] LawProfBlawg, *Weaponizing Student Evaluations (Part III)*, ABOVE L. (Oct. 9, 2018), https://abovethelaw.com/2018/10/weaponizing-student-evaluations-part-iii/.

[207] *Id.*

[208] *See, e.g.*, Carl Wieman, *A Better Way to Evaluate Undergraduate Teaching*, 47 CHANGE: MAG. HIGHER LEARNING 6, 10 (2015).

[209] *Id.*

[210] Carl Wieman & Sarah Gilbert, *The Teaching Practices Inventory: A New Tool for Characterizing College and University Teaching in Mathematics and Science*, 13 LIFE SCIENCES EDUC. 552, 563 (2014).

Appendix 1. Inventory showing formatting, with scoring and footnotes to references that justify the scoring. We did not insert the references directly in the document to allow the format to be shown. The formatting improves the user-friendliness of the inventory. A clean copy of the inventory is available at www.cwsei.ubc.ca/resources/TeachingPracticesInventory.htm.

Teaching Practices Inventory

(Scoring rubric points are the numbers in bold to right of each item.)

I. Course information provided to students via hard copy or course webpage. (check all that occurred in your course)[b]

- ❑ List of topics to be covered **1**
- ❑ List of topic-specific competencies (skills, expertise, …) students should achieve (what students should be able to *do*) **3**
- ❑ List of competencies that are not topic related (critical thinking, problem solving, …) **1**
- ❑ Affective goals – changing students' attitudes and beliefs (interest, motivation, relevance, beliefs about their competencies, how to master the material) **1**
- ❑ Other (please specify)

  If you selected other, please specify_____

II. Supporting materials provided to students (check all that occurred in your course)

- ❑ Student wikis or discussion boards with little or no contribution from you **0**
- ❑ Student wikis or discussion boards with significant contribution from you or TA[b] **1**
- ❑ Solutions to homework assignments[c] **1**
- ❑ Worked examples (text, pencast, or other format) **1**
- ❑ Practice or previous year's exams **1**
- ❑ Animations, video clips, or simulations related to course material **1**
- ❑ Lecture notes or course PowerPoint presentations (partial/skeletal or complete)[d] **1**
- ❑ Other instructor selected notes or supporting materials, pencasts, etc. **0**
- ❑ Articles from scientific literature[e] **1**
- ❑ Other (please specify)

  If you selected other, please specify_____

III. In-class features and activities

A. Various

Give approximate average number:

Average number of times per class: pause to ask for questions _____ (**1** if >3)

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[a] Promising Practice No. 1: Prepare a Set of Learning Outcomes in Froyd (2008); chap. 5 in Ambrose et al. (2010).
[b] (Black & Wiliam, 1998; Hattie & Timperley, 2007); Promising Practice No. 5: Providing Students Feedback through Systematic Formative Assessment in Froyd (2008); chap. 5 in Ambrose et al. (2010).
[c] (Atkinson et al., 2000).
[d] (Kiewra, 1985).
[e] (Pintrich, 2003); chap. 3 in Ambrose et al. (2010).

Points called ETP (extent of use of research-based teaching practices) points are assigned for each teaching practice that is supported by research showing it improves learning.[211] For example, one point is assigned to the practice of providing students with course information such as a list of topics covered in the course; in another example, one point is assigned to the practice of providing student with supporting material such as lecture notes or PowerPoint presentations.[212] The professor teaching the class fills out the inventory and an ETF number is generated that corresponds with that professor's extent in using effective research-based teaching practices for that class.[213] The benefits include allowing faculty to see the range of teaching practices in use, identify which practices increase student learning, and understand how they can improve their teaching and document that

[211] Wieman, *supra* note 208, at 12.
[212] Wieman & Gilbert, *supra* note 210.
[213] Wieman, *supra* note 208, at 12.

improvement.[214] With slight modifications, the STEM inventory can be tailored to law school use.[215]

VIII. WEAPONIZING ANONYMITY IN THE TECHNOLOGY SECTOR OF SOCIETY

A. Racially-Biased Anonymous Algorithms

The internal opacity of an algorithm is a form of anonymity that can harm communities of color.[216] Government use of privately designed algorithmic systems is increasing with their deployment in varied settings including Medicaid and disability benefits, public teacher employment evaluations, unemployment benefits, and criminal risk assessments.[217] But these algorithmic systems may be racially biased.[218] For example, a criminal-risk-assessment algorithm might rely on factors that are proxies for race.[219] One oft-used factor is "parental criminality" (e.g., the parent's criminal behavior),[220] which can serve as a race proxy to help create a skewed "high risk" score because of the over-policing of communities of color.[221] Another problematic factor is "community disorganization" (e.g., deteriorated housing),[222] which can also help create a skewed "high risk" score because of the history of public and private housing discrimination.[223]

Another example of algorithm bias is found in facial recognition software.[224] A press release for a paper titled *A Deep Neural Network Model to Predict Criminality Using Image Processing* stated, "[w]ith 80 percent accuracy and with no racial bias, the software can predict if someone is a criminal based solely on a picture of their face."[225] But there is "no distinctive feature of facial appearance that predestines a person to become a criminal . . . ."[226] Racial biases have already been found to exist in current

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[214] *Id.* at 14.

[215] *See id.* at 10.

[216] *See* Press Release, Sen. Ron Wyden, Wyden, Booker and Clarke Introduce Algorithmic Accountability Act of 2022 to Require New Transparency and Accountability for Automated Decision Systems (Feb. 3, 2022) (on file with author).

[217] Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941, 1948 (2019).

[218] *See id.* at 1942–43.

[219] AI NOW INST., LITIGATING ALGORITHMS: CHALLENGING GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS 13 (2018), https://ainowinstitute.org/litigatingalgorithms.pdf.

[220] JOSEPH MURRAY ET AL., EFFECTS OF PARENTAL IMPRISONMENT ON CHILD ANTISOCIAL BEHAVIOUR AND MENTAL HEALTH: A SYSTEMATIC REVIEW, CAMPBELL SYSTEMATIC REVS. 10 (2009).

[221] AI NOW INST., *supra* note 219.

[222] Damian J. Martinez, *Felony Disenfranchisement and Voting Participation: Considerations in Latino Ex-Prisoner Reentry*, 36 COLUM. HUM. RTS. L. REV. 217, 233 (2004).

[223] AI NOW INST., *supra* note 219.

[224] Kevin W. Bowyer et al., *The "Criminality from Face" Illusion*, ARXIV 1, 7 (2020), https://arxiv.org/ftp/arxiv/papers/2006/2006.03895.pdf.

[225] *Id.* at 1.

[226] *Id.* at 2.

facial recognition algorithms that connect surveillance photos to mugshots.[227] These racial biases will be reproduced if future facial criminality algorithms merely use the same bias-infected databases.[228]

The racial bias problem is compounded by the opacity problem, wherein government actors are ignorant of the inner workings of these algorithmic systems and the algorithmic systems companies oppose sharing insights into the internal workings of their algorithmic technology, arguing they constitute trade secrets and confidential information.[229]

B. Remedying Racially-Biased Anonymous Algorithms

The digital opacity of biased anonymous algorithms can be remedied by requiring software companies to reveal the computation processes within their algorithms.[230] As stated by Senator Ron Wyden, legislation is needed to "pull back the curtain on the secret algorithms that can decide whether Americans get to see a doctor, rent a house or get into a school."[231] A step in the right direction is the Algorithmic Accountability Act of 2022.[232] This federal bill would require a company that developed or deployed algorithms to provide an "impact assessment" to determine the algorithms' impact on consumers.[233] When creating its impact assessment, the company must meaningfully consult with relevant stakeholders such as advocates for "impacted groups," which could include communities of color.[234] Also, the impact assessment must evaluate the algorithm's present and past performance to include information on any "differential performance associated with consumers' race, color," or other characteristics.[235] Further, the impact assessment would provide information on whether any "subpopulations" (e.g., communities of color) were used to test and evaluate the algorithm including identifying how and why they were relevant for the algorithm testing and evaluation.[236]

Another helpful bill is the Algorithmic Justice and Online Platform Transparency Act that also seeks to reduce algorithm anonymity.[237] This Act requires online platforms such as social media sites to use plain language in disclosing to users relevant algorithm information including the "method by which the type of algorithmic process prioritizes, assigns weight to, or ranks

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[227] *Id.* at 7.
[228] *Id.*
[229] Crawford & Schultz, *supra* note 217, at 1941–42, 1944.
[230] *See* Wyden, *supra* note 216.
[231] *Id.*
[232] *Id.*
[233] Algorithmic Accountability Act of 2022, S. 3572, 117th Cong. § 2(7)(A)(i)–(ii), (12) (2022).
[234] *Id.* at § 3(b)(1)(G).
[235] *Id.* at § 4(a)(4)(E).
[236] *Id.* at § 4(a)(4)(F).
[237] Algorithmic Justice and Online Platform Transparency Act, H.R. 3611, 117th Cong. § 4(a)(1)(A)(iv) (2021).

different categories of personal information to withhold, amplify, recommend, or promote content . . . ."[238] Representative Doris Matsui, who introduced the bill, stated it was necessary to "root out prejudiced practices wherever they occur" including prejudice hiding in anonymous algorithms.[239]

IX. MITIGATING ANONYMITY'S HARM TO COMMUNITIES OF COLOR

The examples above of ubiquitous societal anonymity biases align with what communities of color already know about racial bias in U.S. society.[240] A survey of Black Americans found that a majority said racism would "get worse" and only a small percentage said it would "improve" in their lifetimes.[241] This negative assessment reflects the reality of continuing racial bias in society evidenced in anonymous means and methods that further marginalize communities of color.[242]

But the use of anonymity as a sword against communities of color may be countered.[243] First, anonymity should not supersede every other interest.[244] Harmful anonymity should be prohibited and subordinated to racial equality, a fundamental constitutional value.[245] For example, Judge Barkett, dissenting in part in a case involving an anonymous jury, stated that equal protection considerations[246] entitled defendant Ochoa to a new trial by an impartial jury.[247] The defendant argued that the prosecution engaged in a pattern of racially-discriminatory strikes against five Hispanic venire members, and to support this argument, the defendant needed information about the racial and ethnic identity of the anonymous jurors.[248] But the district court prevented the defendant from gaining this information by, among other actions, prohibiting the defendant from questioning the jurors directly about their ethnicity.[249] As Judge Barkett averred, "[a]s important as juror anonymity measures may be, they cannot be permitted to defeat . . .

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[238] *Id.*

[239] Press Release, Sen. Ed Markey, Senator Markey, Rep. Matsui Introduce Legislation to Combat Harmful Algorithms and Create New Online Transparency Regime (May 27, 2021) (on file with author).

[240] *See* Silvia Foster-Frau et al., *Poll: Black Americans Fear More Racist Attacks After Buffalo Shooting*, WASH. POST (May 21, 2022, 10:00 AM), https://www.washingtonpost.com/nation/2022/05/21/post-poll-black-americans/.

[241] *Id.*

[242] *See, e.g.*, McNamarah, *supra* note 10.

[243] *See* Wang, *supra* note 164; Hekman et al., *supra* note 158, at 240, 257.

[244] *See* Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 NW. U. L. REV. COLLOQUY 191, 206 (2011).

[245] *See id.*

[246] U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[247] United States v. Ochoa-Vasquez, 428 F.3d 1015, 1048 (11th Cir. 2005) (Barkett, J., dissenting in part).

[248] *Id.* at 1051–52.

[249] *Id.* at 1055.

rights under the Equal Protection Clause."[250] Thus, anonymity considerations should not supersede racial equality rights that protect communities of color.[251]

A different situation that also counters the primacy of anonymity is the *Davis* Court stating that the government's interest in protecting a prosecution witness by preserving the confidentiality of the witness's juvenile offender record had to yield to the defendant's constitutional right to cross-examine the juvenile prosecution witness for bias.[252] *Davis* involved the defendant being prosecuted for stealing a safe containing cash and checks.[253] The prosecution witness was a juvenile on probation after burglarizing two cabins.[254] The prosecution successfully moved for a protective order preventing the defense from cross-examining the prosecution witness about his juvenile record.[255] At trial, the prosecution witness provided testimony that helped convict the defendant.[256] The government argued it had an important interest in protecting the anonymity of juvenile offenders that outweighed any competing interest by the defense to cross-examine the prosecution witness for bias.[257] The Court disagreed and concluded that the "right of confrontation is paramount to the State's policy of protecting a juvenile offender."[258]

Second, prohibiting anonymity already occurs in numerous states.[259] Texas states that a complaining party such as an insurance agent filing a complaint against a physician must include the complainant's name and address [260] and that the Texas medical board may not accept anonymous complaints.[261] Arizona prohibits anonymous complaints against process servers and requires the complainant's name, telephone number, and address.[262] California prohibits state officials from relying on anonymous complaints to investigate or audit grape processors.[263] Delaware prohibits the Department of Education from investigating anonymous complaints against licensed educators.[264] Ohio prohibits the Probate Court from considering or addressing anonymous complaints against guardians for

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[250] *Id.* at 1055–56.
[251] *See id.*
[252] Davis v. Alaska, 415 U.S. 308, 320 (1974).
[253] *Id.* at 309–10.
[254] *Id.* at 311.
[255] *Id.* at 310–11.
[256] *See id.* at 310.
[257] *Davis*, 415 U.S. at 319.
[258] *Id.*
[259] *See, e.g.*, TEX. OCC. CODE ANN. § 154.0535(c) (West 2011).
[260] *Id.*
[261] *Id.* at § 154.0535(b).
[262] ARIZ. REV. STAT. ANN. § 7-204H1(a), (c) (2021).
[263] CAL. FOOD & AGRIC. CODE § 55601.5(h)(5) (West 2000).
[264] DEL. CODE ANN. tit. 14, § 121(b)(5)g (West 2022).

minors.[265] Utah prohibits the Standards of Professionalism and Civility Board from considering anonymous complaints about lawyers.[266]

Third, penalizing those who misuse anonymity to harass or harm others is allowed because various laws already provide this protection. Wyoming law makes it a misdemeanor for a person to (1) telephone another anonymously while using obscene, lewd or profane language intending to terrify, intimidate, threaten, harass, annoy or offend or (2) make repeated anonymous telephone calls that disturbs the peace, quiet or privacy of the person called.[267]

Fourth, curbing anonymity can occur despite free speech concerns.[268] Prohibiting anonymous speech does not necessarily violate the First Amendment.[269] Florida law makes it a misdemeanor for a person to make an anonymous telephone call with the intent to annoy, abuse, threaten, or harass the person called.[270] A Florida court held this law did not impermissibly restrict legitimate free speech rights in part because anonymity creating fear and discomfort in the person called was a factor countering any legitimate free speech communicative function in the call.[271]

Similarly, Georgia's anti-Klan law makes it a misdemeanor for a person to wear a mask, hood, or device concealing the wearer's face in public with the intent to conceal the wearer's identity.[272] A Georgia court held the law did not infringe on protected symbolic speech because the law furthered the state's substantial interest in protecting its citizens from intimidation, violence, and threats, and in assisting law enforcement in apprehending criminals through unmasking would-be intimidators.[273] Indeed, the court declared safeguarding the right of citizens to exercise their civil rights free from violence was not only a compelling interest, but the state's affirmative constitutional duty.[274] Also, the law was not broader than necessary to further the state's compelling interest because the law restricted only unprotected expression (the communication of a threat) and regulated only the noncommunicative function of the mask (the concealment of the wearer's identity).[275]

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[265] OHIO ALLEN CNTY. COMMON PLEAS, PROB. DIV., RULE 66.03(B)(1).
[266] UTAH RULES APP. PROC. ORD. 7.
[267] WYO. STAT. ANN. § 6-6-103(a)–(b)(i) (West 2022).
[268] *See* State v. Miller, 398 S.E.2d 547, 550 (Ga. 1990).
[269] *See id.*
[270] FLA. STAT. ANN. § 365.16(1)(b), (d) (West 2022).
[271] State v. Elder, 382 So. 2d 687, 691 (Fla. 1980).
[272] GA. CODE ANN. § 16-11-38(a)(1)–(3) (West 2021).
[273] *Miller*, 398 S.E.2d at 550.
[274] *Id.* at 551.
[275] *Id.*

X. CONCLUSION

Anonymity enables inequality. Where anonymity resides, racial bias follows and nests within the dark corners of anonymous spaces in all sectors of society. People of color must contend with racial bias as they move through these anonymous spaces from the justice system to homes and neighborhoods to the workplace and more. Morphing from conspicuous to obscured, racial bias persists through time, and the advancement of technology from past to present has created not only modern wonders, but additional spaces in algorithms for anonymous bias to lodge. Anonymity creates veiled venues hiding inequitable means and methods. But the veil can be lifted so that we see racial bias, really *see* it, to then overcome it so that people of color can work, live, and exist equally in society.

DON'T BE AFRAID OF TRIAL: Making the Teaching of Trial Practice Accessible and Yes, Less Aspirational

GEORGE BACH*

ABSTRACT

Trial practice courses can leave students feeling overwhelmed and intimidated. The pressure to perform at an exceptional level is so great that students can leave the course uninspired and lacking in confidence. What results is a fear of trial in practice, which is bad both for the clients as well as the lawyer.

Increasingly, trials are seen as a complex, expensive, almost insurmountable endeavors. Too often civil cases may settle because a party's attorney is afraid of the trial procedure (regardless of how a factfinder may react to certain facts or witnesses). One response to trial has been to funnel disputes into compelled mediation or arbitration. Indeed, arbitration has become the more common method of conflict resolution for consumer and corporate disputes.

By teaching trial practice in a more student-friendly and less intimidating manner, students will gain confidence in the trial process and be more willing to "take cases to trial" and to trust the system to do its job. One of my favorite things about teaching trial practice is that I see students begin to become lawyers in a way not seen in their first-year courses. They learn to mine facts out of documents and depositions and to put the pieces of a case together. The key, for me, is making that experience accessible and supportive, while turning the students into lawyers. For many, this is the first exposure to experiential learning and to what exactly lawyers do.

By turning the trial practice course into a more welcoming exercise, hopefully the "tent" will be broadened as well. Students of diverse backgrounds can grow in an environment in which their voices are heard.

The main goal of this article is to provide practical tips for how law professors can make trial practice less intimidating for students. This article outlines my approach to teaching trial practice and offers ways to make it

* Professor of Law, University of New Mexico School of Law. Many thanks to my research assistants Annika Cleveland, Daniel Jaynes, Michael Hart, and Khan Muhammad for their remarkable input and support. Many of the thoughts in this article are gleaned from my experience with dozens of remarkable trial attorneys. I am indebted to and credit Professor Barbara Bergman (who taught our trial practice course for decades before she hired me), my colleague David Stout for his constant support and guidance, attorneys K. Lee Peifer, Maureen Sanders, Bill Slease, Matt Garcia, Glenn Smith-Valdez, and the late Phil Davis, among many others in our legal community. Finally, credit to Distinguished Professor Thomas A. Mauet for the excellent trial practice books over the years, which I used as a student, practitioner, and teacher.

more approachable and accessible to students of a wide variety of backgrounds.

ARTICLE CONTENTS

I. INTRODUCTION

"Because American law is very confused, you can't avoid mistakes. I'm sure I've made plenty of mistakes, but if one is bothered by that, you can't do the job. If you take it too seriously and are too concerned that you're making mistakes, then it just becomes unbearable."[1]

- JUDGE RICHARD POSNER

[1] Kristin Samuelson, *Office Space: Judge Richard Posner*, CHI. TRIB. (Oct. 24, 2011, 12:00 AM), https://www.chicagotribune.com/business/ct-xpm-2011-10-24-ct-biz-1024-office-space-posner-20111024-story.html.

Trial practice courses can leave students feeling overwhelmed and intimidated. The pressure to perform at an exceptional level is so great that students can leave the course uninspired and lacking in confidence. What results is a fear of trial in practice, which is bad both for the clients as well as the lawyer.

Increasingly, trials are seen as a complex, expensive, almost insurmountable endeavors. Too often civil cases may settle because a party's attorney is afraid of the trial procedure (regardless of how a factfinder may react to certain facts or witnesses). One response to trial has been to funnel disputes into compelled mediation or arbitration. Indeed, arbitration has become the more common method of conflict resolution for consumer and corporate disputes.[2]

By teaching trial practice in a more student-friendly and less intimidating manner, students will gain confidence in the trial process and be more willing to "take cases to trial" and to trust the system to do its job.[3] I teach a long-established six-hour Evidence/Trial Practice course, split roughly between the learning of the Rules of Evidence and trial practices exercises culminating in a mock trial held at the county courthouse before state and federal judges, with volunteer jurors from the community.[4] The trial practice exercises are conducted by local, well-respected and carefully chosen judges and attorneys. One of my favorite things about the course is that I see students begin to become lawyers in a way not seen in their first-year courses. They learn to mine facts out of documents and depositions and

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[2] *See* Graham K. Bryant & Kristopher R. McClellan, *The Disappearing Civil Trial: Implications for the Future of Law Practice*, 30 REGENT UNIV. L. REV. 287, 308–09 (2017); Stephen D. Easton, *Why Teach Trial Practice, When There Are "No" Trials?*, 50 UNIV. S.F. L. REV. 1, 20 (2016).

[3] Other scholars have looked at the issue of accessibility in the broader context of legal education. *See, e.g.*, Denitsa R. Mavrova Heinrich, *Cultivating Grit in Law Students: Grit, Deliberate Practice, and the First-Year Law School Curriculum*, 47 CAP. UNIV. L. REV. 341, 349–50 (2019); Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience*, 70 ARK. L. REV. 959, 1005–06 (2018); Marybeth Herald, *Getting Students Psyched: Using Psychology to Encourage Classroom Participation*, 15 NEV. L. J. 744, 753 (2015); Palma Joy Strand, *We Are All on the Journey: Transforming Antagonistic Spaces in Law School Classrooms*, 67 J. LEGAL EDUC. 176, 184 (2017).

Others have, in the past, critiqued the way trial advocacy is taught. *See* Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687, 694 (1990) (critiquing aspects of the NITA model: "the law schools and NITA have so far failed to take the next step which they advocated systematic and careful planning of trial advocacy curricula and the encouragement of critical thinking about the litigation and trial process"); Edward J. Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 GA. L. REV. 663, 664–65 (1989) (Professor Imwinkelried's article describes the tension between trial practice courses and the substantive courses and works to reconcile the two approaches.); Gilda Tuoni, *Two Models for Trial Advocacy Skills Training in Law School—A Critique*, 25 LOY. L. A. L. REV. 111, 121 (1991) (Professor Tuoni compares the semester with the intensive approach.); J. Alexander Tanford, *What We Don't Teach in Trial Advocacy: A Proposed Course in Trial Law*, 41 J. LEGAL EDUC. 251, 255 (1991) (criticizing the omission of "trial law" course).

[4] Typically, there are 64 to 86 students enrolled, so at least sixteen simultaneous trials are held on the Saturday before Thanksgiving.

to put the pieces of a case together. The key to helping the students grow is making that experience accessible and supportive.

An additional benefit to a more accessible approach is addressing the lack of diversity among lawyers doing trial work.[5] By turning the trial practice into a more welcoming environment, hopefully the "tent" will be broadened as well. Students of diverse backgrounds can grow in an environment in which their voices are heard. Trial practice can be a place where that happens.

In this article, I start with a discussion of the problem described by Dr. Carol Dweck and later, Professor Kaci Bishop, as a "fixed mindset"[6] and how I believe it arises in teaching trial practice. I then address the need for thoughtful diversity, equity, and inclusion training. Then I proceed with an overview of what I teach on Day One. I then discuss trial techniques and style choices with examples of how to relay them in a welcoming manner. I then walk through the trial practice course (Openings, Voir Dire, etc.), describing the manner in which I approach each topic in the hope of instilling confidence in the students. Finally, I address the weeks leading up to trial, trial preparation, verdict, and feedback.

II. EMPHASIZING A GROWTH MINDSET AND AVOIDING A FIXED MINDSET WHEN TEACHING TRIAL PRACTICE

In her book Mindset, Dr. Carol Dweck addressed the important distinction between a "fixed mindset" and a "growth mindset." A "fixed mindset" is the belief "that your qualities are carved in stone . . . ."[7] That mindset confirms that your traits are "simply a hand you're dealt and have to live with . . . ."[8] In contrast, a growth mindset "is based on the belief that qualities are things you can cultivate through your efforts."[9]

Building on the work of Dweck, Angela Duckworth, and K. Anders Ericsson,[10] Professor Kaci Bishop has explained that, generally in legal education, "the fixed mindset" is an unproductive, even dangerous approach to pedagogy.

Regardless of the impetus, once students are feeling that they have failed, they are susceptible to getting caught in the negative cycle of guilt, shame, and blame or stalling out in a fixed-mindset. Such a mindset affects and hampers students' motivation to engage in their studies or put forth

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[5] *See, e.g.*, *Diversity in the Plaintiff Bar*, 48 JUL. TRIAL 16, 19–22 (2012); *Household Data Annual Averages*, AM. BAR ASS'N. 210 (2008), https://www.americanbar.org/content/dam/aba/administrative/market_research/cpsaat11.pdf.

[6] Bishop, *supra* note 3, at 979–80.

[7] CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 6 (2nd ed. 2006).

[8] *Id.* at 6–7.

[9] *Id.* at 7.

[10] *Id.* at 6–7.

effort; it also contributes to a rise in mental health issues. More and more frequently law students "manifest learned helplessness, depression, substance abuse," and other interpersonal problems, and those issues . . . carry forward into the profession.[11]

Similarly, Professor Marybeth Herald has commented that, "The easily discouraged, fixed mindsets often do not respond well to setbacks and feedback and often give up. A smart but fixed-mindset person may be passed by the less gifted but gritty believer in the growth mindset."[12]

This problem is all the more striking in the trial practice context, where students are, at times, taught to seek perfection in their performance.[13] As Professor Bishop has noted, "our striving for perfectionism largely contributes to failure being seen as a bad word-or as something final, from which we cannot recover."[14]

As Professor Lubet argued some time ago, presentation can actually be de-emphasized: "Students will be more successful not because they can speak well or argue more persuasively,
but rather because they can structure facts and law into a compelling
and theoretically sound case."[15] Too often students are urged to be someone they are not – a modern day Clarence Darrow or Johnnie Cochran. It is not attainable for most, resulting in the pressures that drive students – soon to be lawyers – to fear trial.

My approach to trial practice is to instill in each student that "aspirational" trial practice is *not* the goal – that is, they need not aspire to be the modern Clarence Darrow. Instead, the goal, as Lubet indicates, is to get the necessary information out to the jury, and for the student to grow resilient by being themselves (and not some aspirational version of someone else). As my colleague Ted Occhialino once said, "There's only one version of you – and you should be that."[16]

III. DIVERSITY, EQUITY, AND INCLUSION TRAINING

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[11] Bishop, *supra* note 3, at 979–80 (quoting Carie Rosen, *The Method and the Message*, 12 NEV. L. J. 160, 170, 175–76 (2011)).

[12] Herald, *supra* note 3, at 748.

[13] Bishop, *supra* note 3, at 971 n. 63 ("Perhaps we would have a healthier relationship with failure (and with perfectionism) if instead of saying 'practice makes perfect,' we said 'practice makes permanent' or 'progress not perfection.'")

[14] *Id.* at 968. My colleague David Stout emphasizes Samuel Becket in Worstward Ho: "Ever tried. Ever failed. No matter. Try again. Fail again. *Fail better*."

[15] Steven Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 NOTRE DAME L. REV. 721, 734 (1991), *quoted in* Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687, 697 (1990).

[16] Professor Occhialino's comment came in a discussion about forthcoming interviews I was to have when in the job market as a new professor. I went to a conference for new professors where we were told to be "slightly better versions of yourselves." I related that to Occhialino and appreciated his wise response.

In all aspects of the trial practice course, the environment must be a safe, supportive one. This includes recruitment of adjunct faculty who assist the students. Our program has long-utilized trial practice adjuncts to critique the students' performances in trial practice exercises. State Supreme Court justices, local state and federal judges, and practicing attorneys work with the students weekly to hone their trial practice skills. There are typically upwards of sixty-four students in a course, and they are divided into evening sessions of eight students each. The adjuncts rotate so that the students are ultimately exposed to all of them. One critical part of providing a safe environment for students to grow is to ensure that the adjunct instructors receive proper training on diversity, equity, and inclusion. Incidents have arisen where instructors – particularly those born in a different era – have not been sensitive to issues of sex, gender[17], race, or ethnicity. These incidents may regrettably be typical of higher education as a whole.

Other scholars have explained that "social science suggests that pedagogy and the classroom environment can either depress or improve the performance of students of color."[18]

Indigenous students may feel as though they are less privy to the implicit normativity of the law faculty, as though they are, as Calder *et al.* note, "'landing' into a whole new world with special rules that seem obtuse and inaccessible; not knowing how to go about learning those rules and sensing that the rules are tied to privilege."[19]

It is important to pick a diverse group of adjuncts. Professor Bouclin defines the role of a mentor in part as "provid[ing] psychosocial assistance through role modeling, confirming the validity of life choices, and counseling."[20]

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[17] *See generally* Todd A. Berger, *Male Legal Educators Cannot Teach Women How to Practice "Gender Judo": The Need to Critically Re-Assess Current Pedagogical Approaches for Teaching Trial Advocacy*, 45 J. LEGAL PROF. 1, 28 (2020) ("[U]sing the dominant NITA method of teaching trial advocacy employed at most law schools, male professors cannot meaningfully address, or likely will not want to address, how women advocates can combat courtroom gender bias.").

[18] Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 24 NAT'L BLACK L. J. 1, 14 (2015).

[19] Suzanne Bouclin, *Marginalized Law Students and Mentorship*, 48 OTTAWA L. REV. 355, 364 (2016) (quoting SUZANNE BOUCLIN, ET AL., PLAYING GAMES WITH LAW, THE ARTS AND THE LEGAL ACADEMY: BEYOND TEXT IN LEGAL EDUCATION 76 (Zenon Bańkowski et al., eds., 2013). "Unsurprisingly then, research has shown that shared experiences based on race, cultural background, sexual orientation, gender expression, first language, and gender, and their subsequent shared understanding of systemic racism, homophobia, linguistic hierarchies, and sexism can be relevant in forming mutually enriching mentoring relationships with people with whom they identify." *Id.* at 365, citing Richard J. Reddick, *Intersecting Identities: Mentoring Contributions and Challenges for Black Faculty Mentoring Black Undergraduates*, 19 MENTORING & TUTORING: PARTNERSHIP IN LEARNING 319, 319 (2011); Jolyn Dahlvig, *Mentoring of African American Students at a Predominantly White Institution (PWI)*, 9 CHRISTIAN HIGHER EDUC. 369, 372–73.

[20] Suzanne Bouclin, *Marginalized Law Students and Mentorship*, 48 OTTAWA L. REV. 355, 360.

Some specific issues that have come up in my experience included commenting on the appearance of a student. Beyond ensuring that the student is dressed in court attire, such comments are inappropriate. Equally offensive is a negative comment about the natural pitch of a student's voice. Some people have naturally high-pitched voices – that is who they are and urging them to somehow conform that to an unidentifiable baritone norm is unacceptable.

"Poise." Too often, female students are told they "have great poise" while male students receive specific, constructive feedback. Indeed, "poise" has unfortunately been used as a euphemism for attractiveness – particularly with regard to students presenting as female. All students should receive supportive, specific feedback that helps them hone their style in a way that does not rely solely on stereotypes about them.[21] "Awareness of the stereotype creates anxiety, which hampers performance."[22] As Professor Palma Joy Strand has explained,

It may well be that faculty and administration are not intentionally confirming stereotypes or generating negative messages about students of color or women. But lack of intent does not mean that stereotypes are not confirmed and negative messages sent. If students experience the environment as antagonistic, it is antagonistic. Perception here is reality.[23]

Confirming stereotypes can include microaggressions that are antithetical to development of a growth mindset. Professor Strand breaks down microaggressions into several categories.[24] In my experience in teaching trial practice, her third category is the most prominent: microinvalidation that may be unconscious.[25] An example arose in my course when an adjunct was reading names of students in the evening session and stopped at one name to ask about the student's heritage. The student responded that they did not know, to which the adjunct responded, "Well you must have been here for a while, given your lack of accent." Professor Strand is correct that such a remark can weaken the student by isolating them and appearing to confirm stereotypes.[26]

Proper amelioration includes training instructors to be more thoughtful in their language and ensuring that no student is made to feel uncomfortable because of their protected status or their identity. To address this in our course, the University's Director of the Office of Equal Opportunity teamed up with the State Supreme Court's Disciplinary Board counsel to create a diversity/sensitivity training. The training is mandatory for all adjuncts. While the training has been extremely helpful, there is a

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[21] *Id.* at 355.
[22] Strand, *supra* note 3, at 199.
[23] *Id.*
[24] *Id.* at 201–02 (discussing "microassaults," "microinsults," and "microinvalidations").
[25] *Id.*
[26] *Id.* at 203.

need to update it continually. New issues arise every year and while prophylactic training helps avoid more serious incidents, it is impossible to foresee every situation that runs afoul of new and better norms in teaching.

Thus, a critical component of every trial practice experience is ensuring that faculty and all other participants are given Diversity, Equity, and Inclusion training. Doing so will further respect for the individual students and make the entire experience more accessible—and engaging—for all.

IV. DAY ONE: BE YOURSELF

To ensure accessibility, I try to set the tone from the first day of class. First, I tell students not to be afraid of trial practice,[27] that if they want to fear something they should fear the Rules of Evidence, which are clunky beyond belief.[28] Indeed, the "hard" part of my course is mastering the Rules in all their complexities. The students should *enjoy* trial practice—it is the reason many of them chose to go to law school. The goal of the course is to provide a safe, comfortable (and challenging) environment for them to learn basic trial skills. In that environment, the students will develop resiliency and grit.[29]

Next, I tell students to take it seriously, but have fun. To keep it simple. I encourage them to experiment with the trial practice sessions and to take the feedback for what it helps within their preferred style. "You be you."

"You be you" is the core principle to emphasize in trying to make students comfortable in trial practice. We must demythologize the trial lawyer. Not everyone is "Clarence Darrow" or one of the highly respected present-day trial attorneys. A student who is pushed to be someone they are not (a) will hate trial practice, and (b) will come across as fake. If the jury perceives an attorney as disingenuous, it is bad news for the party they represent. Are you folksy? Then be folksy! Are you nerdy? Then be nerdy and not folksy. If you act "folksy"[30] and are not folksy, it will not seem genuine.

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[27] *See id.* ("Communicating high expectations along with a 'you can do this' message effectively imparts a growth mindset to students.").

[28] FED. R. EVID. 803(3), for example, contains an exception to an exception to the exception to the hearsay rule. *See also* Michelson v. U.S., 335 U.S. 469, 486 (1948) ("We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other. But somehow it has proved a workable even if clumsy . . . .") (discussing character evidence).

[29] *See generally* Heinrich, *supra* note 3, at 362.

[30] References to how "You can put lipstick on a hog and call it Monique, but it is still a pig," fit Ann Richards, but it may not fit you. *See* Ben Zimmer, *Who First Put "Lipstick on a Pig"?*, SLATE (Sept. 10, 2008, 5:37 PM) https://slate.com/news-and-politics/2008/09/where-does-the-expression-lipstick-on-a-pig-come-from.html.

Typically, I will show two clips from the O.J. Simpson trial, one of Johnnie Cochran talking about the identification of Simpson, and another of Barry Scheck discussing the LAPD handling of the evidence.[31] Both presentations have excellent themes but are delivered in the styles specific to the two lawyers. There was only one Johnnie Cochran; there is only one Barry Scheck. They each have their own effective style and if one of them tried to be the other, it would not work.[32]

My first jury trial was a First Amendment retaliation trial.[33] One of the law partners at the firm where I worked and I tried the case—winning the case on liability but only $1.00 in damages. A week or so after the trial, I bumped into one of the jurors at a local store. They said to me, "You really seemed to believe in what you were doing." It was a compliment that has stayed with me and that I cherish; if I had tried to be *someone else* – someone other than my nerdy self, I would not have had the same effect.

On Day One, I also tell the students, "It's good to be nervous." My friend and colleague Maureen Sanders has always said that the nervous energy helps you perform. Professor Herald has discussed the "Illusion of Transparency"—the idea that an audience can see your anxiety, when they cannot.[34] "Telling the students explicitly about the illusion of transparency removed some of its ill effects."[35] A recent example I give my students is a telephonic appearance I made in a bankruptcy case for a client. The matter was already resolved, the Trustee and I simply needed to inform the judge for the Court's approval. Despite practicing for twenty years in federal and state courts at the trial and appellate levels, I was nervous. That was a good thing.

The other example I share with the students—on day one—is that I am nervous to be in front of them (also true). As the semester gets underway, teaching in front of sixty to eighty students is just plain fun. But on the first day, when first impressions may matter a good deal, my nerves are on edge.

Indications of the instructor's own nervousness or anxiety can be helpful to the students in easing their own mind. When I am nervous (or on a day when I am tired for some reason), my diction lapses. I jumble my words. To paraphrase another friend and former colleague, Dave Sidhu:

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[31] CNN, (RAW) O.J. Simpson Defense: 'If it doesn't fit you must acquit', YOUTUBE (June 14, 2014), https://www.youtube.com/watch?v=NH-VuP_5cA4; Seb Menard, O.J. Simpson Murder Trial (Closing Arguments - Part 4) at 1:24:30, YOUTUBE, https://www.youtube.com/watch?v=x0m0fGpmwm0.

[32] Being authentic is also a critical aspect of dealing with sex and gender inequality in the courtroom. *See* Berger, *supra* note 17, at 33 ("[W]hile concrete instruction regarding specific 'gender judo' skills is important, this new pedagogical method of teaching trial practice should also leave room for female advocates to figure out how practicing 'gender judo' feels most authentic to them.").

[33] Sanchez v. Matta, 229 F.R.D. 649 (D.N.M. 2004).

[34] Herald, *supra* note 3, at 750, discussing Kenneth Savitsky & Thomas Gilovich, *The Illusion of Transparency and the Alleviation of Speech Anxiety*, 39 J. EXPERIMENTAL SOC. PSYCH. 618, 621 (2003).

[35] Herald, *supra* note 3, at 751.

"Sometimes the words leave my mouth and I have no idea where they are going," and that is fine. The students must know that "perfect is the enemy of the good."[36] As Bishop notes, "Finally, we can create a safe space for and lower the stakes of failure by sharing failure. Sharing quotes or stories about others' journeys, missteps, and failures is the easiest way to share failure."[37]

Also on the first day, I talk to the students about the feedback they may receive. In order to be useful, "[t]he feedback must be prompt, meaningful, and frequent."[38] We use lawyers and judges from the community to provide feedback to students during their trial practice exercises. I assure the students that the feedback will vary, and at times even be contradictory – that adjuncts will contradict other adjuncts or me. Adjuncts are people just like judges and juries and each adjunct reacts differently. The varying comments are useful to alert students to the various perceptions of what they are presenting and how they are presenting it. No one reaction is right, but they are all real.

The potential for contradiction in feedback is perhaps the clearest example of why the students should feel empowered to learn their own style. While the evidence rules have correct and incorrect applications, much of trial practice is stylistic and discretionary. Of course, there are actions within trial practice that can violate the Rules of Evidence (take the "Golden Rule,"[39] for example). But whether to refer to notes, or not, during an opening statement is not a rule—it is a style choice.

Finally, and it is a small but meaningful thing: I tell the students to call me by my first name. I tell them to call me "George," and if they can't stand that to call me "Bach," but "Professor" is not my preferred label. I would say a majority go with "Bach." The point is to make clear that we are in the arena together, working through the challenging problems of trial. I am not sitting "on high" – but I am approachable and accessible, which will hopefully increase the feedback and build their confidence.

V. DAY TWO: IT'S NOT ABOUT WINNING

On the second day of teaching trial practice, I run through what the day of trial will look like—from going to the courthouse[40] to receiving the final feedback. The following are points I emphasize on the second day of trial practice.

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[36] *See, e.g.*, LISA J. DECARO AND LEONARD MATHEO, THE LAWYER'S WINNING EDGE 216–17 (Bradford Pub. Co. 2004).

[37] *See* Bishop, *supra* note 3, at 991.

[38] Heinrich, *supra* note 3, at 373; K. Anders Ericsson, *Expert Performance in Medicine*, 79 ACAD. MED. 1472, 1474 (2004).

[39] THOMAS A. MAUET & STEPHEN EASTON, TRIAL TECHNIQUES AND TRIALS 439 (11th ed. 2021).

[40] Pandemic permitting.

I tell the students up front that their verdict in the mock trial "*does not matter*." I don't even collect or track the verdicts. While I do collect written feedback and recommended grades from the judge and critiquer evaluating the trial, the verdicts—pedagogically speaking—do not matter.

In our win/lose culture, it is so hard to convince students that "winning" is not the goal of the mock trial. I suppose that saying the verdicts do not matter is different than making them not matter to the students, who want a result. I had a situation in which two students "lost" the bench trial verdict—although they received full points for their performance. The students asked me how it was possible that they lost the verdict, since they did everything correct. What a great teachable moment about the practice of law! My friend, the late Phil Davis used to say, "I've lost cases I should have won; I've won cases I should have lost." Phil once told me about a hard loss where he spent a month afterwards staring at the wall. One of my first bosses once told me that the law is a profession in which you have to be okay failing (i.e., losing a trial) from time to time. My colleague David Stout says it this way:

Lawyers who try cases will not win every case. If we want to eradicate fear of trial, we need to develop a healthy attitude toward the process. We try the best case we can and leave the results to the jury – results ultimately (win or lose) are not in our control and that is a valuable lesson. As a friend once said, "Lawyers who claim never to have lost a case haven't tried the hard cases."[41]

Giving the students space to voice their concerns is important to ensuring growth from the "loss." At the same time, cautioning them that trial means someone must lose is an equally critical aspect of their learning.

More important than winning, of course, is learning resilience and gaining confidence. I used to work at Philmont Scout Ranch and the department I worked in had a motto: "Humble Pride." Be confident in your work, but humble toward others – the court, the jury, and opponents. I teach the students to "fake it 'til you make it" with confidence. When the judge asks you to enter your appearance, stand up immediately. Do not exchange weak glances with opposing counsel about who will go first. Stand and deliver. Move around the courtroom like a "respectful" owner. Do all of this even if you do not feel like it.

Part of ownership is maintaining the landscape. Keep counsel's table organized. I once tried a case with a lawyer who had documents everywhere, sliding off the podium into disarray. Nothing says lack of confidence like a mess.[42]

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[41] June 7, 2022, note from Professor David Stout to author, quoting the late Bill Carpenter (on file with author).

[42] The late Professor Ann Scales used to teach "straight backs and neat stacks." June 29, 2022, note from Maureen Sanders (on file with author).

Master the poker face! A student can project confidence (even by faking it) by maintaining the poker face. Professor George Fisher has provided videos with his casebook on evidence[43] that includes a clip from a San Diego infanticide trial. After the prosecutor loses a motion in limine, he stands wide-eyed and mouth agape. The clip is the classic example of how important it is (especially in front of a jury) for an advocate to control their facial expressions. The "deer in headlights" look is bad advocacy. I tell students that, if anything (e.g. after a side bar in which they may have lost the argument) they should put a slight smile on their face as if they won. Eventually, even if they do not always win, the feigned confidence will start to feel real.

As Professor Herald notes, "The goal of participation is not perfection, but rather it is learning through practice and feedback."[44] What students need to do for trial is get the information across well and in a compelling format. Some people excel at this, but as odd as it sounds, excelling is not necessary to win at trial. The goal of the lessons of the second day is to plant the seed that trial is attainable and that they can grow to have confidence in their own resilience.

VI. CIVILITY AND PROFESSIONALISM

Recently, a State Supreme Court Justice remarked at a dinner I attended that zealous advocacy does not include being rude and obstructive, rather "it's the opposite of that." To address proactively the tendency of student teams to get into "tit for tat" battles before their mock trial, I score ten points of their final grade for Civility and Professionalism. One way for students to feel that trial practice (or for that matter, the practice of law more broadly) is accessible is to keep the vitriol and antagonism out of it.

To cultivate good professionalism habits, I urge the students to speak with opposing counsel early and often. To try to work things out. Indeed, in other courses (such as Clinic) I have told students that they should reach for the phone when working with opposing counsel. Too often, knee-jerk responses are sent by email that only inflame the situation.[45]

In trial practice, I urge students to collaborate and work through issues with opposing counsel. I tell them to be good to each other and themselves.[46] One year, I was horrified to learn that the students had started a "pool" on which teams would win or lose each mock trial. I addressed it

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[43] GEORGE FISHER, EVIDENCE (3d ed. 2012).

[44] Herald, *supra* note 3, at 748.

[45] When it comes to written communications, I encourage students to write *letters* (so 20th century) and attach them to emails, after they've tried the phone.

[46] It is possible for this collaborative approach to be taken too far. One year, a judge and critiquer told me that their mock trial was very, very scripted. Too scripted. I think it's fine for opposing teams to practice with each other, but when it becomes a boring scripted performance, too much is lost.

immediately at the beginning of a class—in a mock hearsay review problem: "I *heard* that there was a pool set up for the mock trial . . . That statement hopefully is not offered for the truth . . . ." The concern, of course, is that some students might feel alienated as unwilling participants in the pool, students might feel added pressure, students might focus too much on the verdict instead of the process, etc. The more students practice civility and professionalism, the more likely it is that they will find trial practice— and indeed, their careers—more accessible.

The example I give on this point is the friendship I built with attorney Bill Slease over the course of half a dozen cases as opposing counsel. I first met Bill when I was a lawyer for the ACLU of New Mexico, and he defended counties throughout the state. Over the course of many lawsuits (some that were very contentious between the parties), a friendship grew to the point where we were able to fly and rent cars together to other states to take depositions. We later taught a course on Employment Law together. One of the eventual assets of the collegiality was that we could do joint presentations to law students about a number of civil rights cases from the perspectives of plaintiff and defendant.

I know Bill joins me in letting our example communicate an important message about civility: Don't be a bully. There is nothing inconsistent with civility and zealous representation. And there is the added advantage of making trial, and trial practice, palatable.

VII. EVENING TRIAL PRACTICE SESSIONS

As noted, in addition to the weekly lectures on a trial practice technique, the students practice two hours in the evening, once a week, with practitioners from the community, including state Supreme Court Justices, trial court judges, and local attorneys. These sessions are invaluable in that, with proper feedback, the students gain confidence and resilience. (And some receive job offers!)

I have the students wear court attire. This has always been a part of the trial practice component at UNM Law. Although there is always the usual discourse on what exactly to wear and what level of formality is required, I recommend that, when wearing a suit, the students just make sure their suit jackets and pants match.[47] While one could argue that requiring court attire cuts against my approachable/accessible theory, I argue it helps the students to take practice more seriously and prepares them for the real world. The point of making trial practice approachable/accessible is not to make it easy or unrealistic, it is to find the best way to grow the students' confidence in their work and to cultivate grit. As Professor Denitsa Manrova Heinrich has noted, "The type of practice required is deliberate practice—a

[47]Another story from real-life: I finished my first appellate argument only to realize that in my 4:00 a.m. anxiety, I mismatched my suit jacket and pants.

concentrated and effortful practice aimed at learning or improving a particular skill or aspect of performance."[48] Deliberate practice contains four elements: "a well-defined goal aimed at improving a specific aspect of performance, disciplined concentration, informative feedback, and corrected repetition . . . ."[49] Professor Heinrich's recommendations that "deliberate practice" cultivating grit be included in the 1L curriculum apply equally well to the upper level trial practice course.[50] "[G]rit grows through practice."[51]

Professor Bishop notes that, "[f]or students to truly learn from their mistakes and to improve, they need not only to acknowledge failures, but also to study them."[52] Video review of evening trial practice performances has always been a critical part of our program. The students are encouraged to watch their own performances and to meet with me twice a semester to review them and obtain additional feedback.[53] This additional feedback from me—in addition to the feedback they received from the evening adjuncts on the spot—again emphasizes the positive while including constructive criticism. It ideally results in what some students have called a "shot of self-esteem" when coming by the office and reviewing their performance.

VIII. OPENING STATEMENTS

Within each trial practice exercise, I try to instill in the students an approach that allows them to develop a growth mindset and one that ensures they are not beaten down by the experience. It starts with one of the first parts of trial: opening statements.[54]

Let the students use their notes! This is my great heresy. No, students should not read their openings statements. But too many times when I see students pushed to go without notes,[55] they stumble by getting stuck (with the look I used to manifest in community theatre when I feared dropping a line—looking up at the ceiling in the hope that it would appear).

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[48] Heinrich, *supra* note 3, at 362, citing Angela L. Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOC. PSYCH. 1087, 1087 (2007).

[49] Heinrich, *supra* note 3, at 365, citing ANDERS ERICSSON & ROBERT POOL, PEAK: SECRETS FROM THE NEW SCIENCE ON EXPERTISE 25, 85, 98–100 (2016).

[50] Indeed, Heinrich recommends that law schools model business school's case-method problem solving approach, which is very similar to trial practice simulations. Heinrich, *supra* note 3, at 375, citing Todd D. Rakoff & Marta Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 603–04 (2007).

[51] Heinrich, *supra* note 3, at 377.

[52] Bishop, *supra* note 3, at 1001.

[53] *See* Darling-Hammond & Holmquist, *supra* note 18, at 47 ("A number of professors explained that it is important to connect with students on an individual level because, without the connection, students often slip through the cracks.").

[54] Although voir dire naturally comes first, we start with openings to help students start to develop the story of their case. Voir dire follows in the second week of trial practice.

[55] *See, e.g.*, J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS 174 (2009) ("With practice, you will quickly learn that if you know the facts well, you can give an effective opening statement without notes.").

Even if everyone had the same memorization powers (they don't), the nervousness of speaking to a jury of strangers can throw a student.

I agree with the approach that encourages the use of bullet points[56] that can be glanced at during delivery. This provides a crutch (and crutches are OK!) and empowers students who simply do not have photographic memories[57] and are not masters of the extemporaneous speaking.

In addition to showing video clips of some strong opening statements, I usually demonstrate themes by using one from one of my previous cases from practice. I try to do it cold—and with notes—to demonstrate that it can be effective without being perfect.

There is also an opportunity to emphasize the fun nature of opening statements. I have fun with the "grabber"[58]: the first minute of opening that gets the jury's attention. (The students are expected to practice the grabber as a part of their practice opening statements.) I borrow from the Blues Brothers to emphasize pacing and tone:

> It's 106 miles to Chicago.
> We got a full tank of gas.
> Half a pack of cigarettes.
> It's dark, and we're wearing sunglasses.[59]

Opening is an important place to emphasize that the students should be themselves and think about the *language* that they are using.[60] They need to avoid legalese. For some reason, the first year of law school seems to have trained students to be as "articulate" and "fancy" with their vocabulary as possible. The result is not only usually disingenuous, but it fails to connect with most jurors.[61]

Finally, I ask them how they get to Carnegie Hall? Practice![62] They should practice in front of their friends, spouses, kids, or their dogs. Dogs are best.

IX. VOIR DIRE

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[56] MAUET & EASTON, *supra* note 39, at 97; DECARO & MATHEO, *supra* note 36, at 207–08 (urging that lawyers only memorize the introduction); ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS AND ARBITRATORS 258 (3rd ed. 2004) (recommending a key word outline).

[57] I recall attending ACLU conferences and watching the brilliant Erwin Chemerinsky talk about cases and relay their citations from memory.

[58] MAUET & EASTON, *supra* note 39, at 78; TANFORD, *supra* note 55, at 164; HAYDOCK & SONSTENG, *supra* note 56, at 263.

[59] THE BLUES BROTHERS (Universal Pictures June 18, 1980).

[60] MAUET & EASTON, *supra* note 39, at 97; MARILYN J. BERGER ET AL., TRIAL ADVOCACY PLANNING, ANALYSIS, AND STRATEGY 259 (2nd ed. 2008).

[61] MAUET & EASTON, *supra* note 39, at 97.

[62] Michael Pollak, *The Origins of that Famous Carnegie Hall Joke*, N.Y. TIMES (Nov. 27, 2009), https://www.nytimes.com/2009/11/29/nyregion/29fyi.html.

In my opinion, voir dire is the toughest part of trial and the part that takes the most courage. What an opportunity to build resilience and to make the process accessible. Standing in front of a [potentially large] group of strangers and getting them to talk about themselves is a real challenge, particularly if the student-lawyer has any sort of stage fright. It is probably the one part of trial that is least "accessible" in that the advocate has the least control. Many students—and practitioners—struggle with voir dire.

I tell the students that I liken it to my social anxiety at social gatherings, cocktail parties, back-to-school barbecues, and similar scenarios where small talk is expected. Those sorts of events make me so anxious – I worry about asking the right questions and saying the right things. What is the best way to relate to people in those contexts? Ask them about themselves. So, for example, my go-to question at such events is, "Are you doing any travel/taking any trips?" The key is not to talk about oneself,[63] except briefly in order to facilitate connection with the other person. Rather, the point is to find out what one can about the prospective jurors.

Particularly these days when voir dire may be limited,[64] I do not recommend that lawyers start with asking the jurors about their vacations.[65] Rather, they should adopt that feeling, that sense of comfort. The goal is to get people talking about *themselves*. The real problem with voir dire, of course, is when lawyers talk too much and do not listen.[66] That is a serious cocktail party faux pas, and a serious error when it comes to trial practice. Of course, if successful, it is very empowering to the advocate to be the one who can then steer the conversation in a manner to get the information that one needs from the jurors to prepare for jury selection.

The other idea I encourage students to remember is that of the inchworm. They need to go slow. Do not start by asking, "Who here hates insurance companies?" *Inch* up to it. They can get a juror to open up, but not if they are too direct. Not if they are Clarence Darrow cross-examining the juror. Instead, they should be themselves, and calmly inch up to the difficult question.

> "This case involves an insurance claim."
> "Has anyone ever had to file a claim with an insurance company?"
> "Did anyone ever experience any problems doing that?"
> "What kind of problems?"
> "How did you feel about that?"
> "How do you feel about that now?"

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[63] MAUET & EASTON, *supra* note 39, at 71.

[64] *See, e.g.*, Ratliff v. Schiber Truck Co., 150 F.3d 949, 955 (8th Cir. 1998) (recounting that the district court limited counsel to only twenty minutes for voir dire).

[65] Although, when stuck, it's not the worst voir dire question.

[66] DECARO & MATHEO, *supra* note 36, at 197 ("*Listen* to the jurors.").

"Given that, how do you feel about sitting on this trial?"
"Do you think it's the right trial for you?

Voir dire is another great opportunity to remind them to keep their language simple.[67] To talk like a human, not a lawyer. As an aside, I've always disliked the adage "learn to think like a lawyer." I prefer to tell students not to forget to think like a *human*; the lawyer stuff will come.

X. DIRECT EXAMINATIONS

The primary suggestion I have for making direct examinations accessible is to keep a conversational tone (but remember it's not a conversation).[68] If it's approached as a demonstration of the lawyer's prowess and skill, not only will the more anxious advocate become intimidated, it will become more about the lawyer than the witness.[69] The nice thing about making trial practice accessible is that it generally parallels better practice—that is, keeping the focus where it should be. And in direct examinations, that focus should be on the witness.

Direct examinations—which many people are surprised to learn involve less control than cross examinations—can be challenging for students and lawyers. As with openings, I have seen students pushed to practice directing an expert witness without notes. Taken to its logical extreme, that strikes me as malpractice, at least for those without photographic memories. The students should use their notes. Particularly with complicated testimony such as expert witnesses, it is critical that the lawyer have thought through the examination in detail. Yes, the lawyer should be prepared to listen to the witness and follow up as necessary, instead of just following a script. But in my opinion, there should be a script – even if it is reduced to bullet-point form.[70] Preparation reduces the anxiety of having to "wing it."

XI. CROSS EXAMINATIONS AND IMPEACHMENT

Cross examination is where so many misplaced pre-conceptions are found. Television and movies have instilled the expectations of an "AHA!" moment. Skillful cross is effective without that overreach. Overcoming the pre-conception makes it accessible and achievable. The fears students have regarding cross and impeachment can be addressed by simplifying the process using the following suggestions.

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[67] *See, e.g.*, MAUET & EASTON, *supra* note 39, at 135.

[68] TANFORD, *supra* note 55, at 256.

[69] *Id*. at 242 ("Conducting direct examination is like conducting an orchestra. You are in charge, but others must produce the sounds."); MAUET & EASTON, *supra* note 39, at 137 ("Direct examination requires that you take a back seat and let the witness be the center of attention.").

[70] TANFORD, *supra* note 55, at 242–44; HAYDOCK & SONSTENG, *supra* note 56, at 301–02.

After a trial with my law partner, Matt Garcia, the judge told a colleague of ours that "Matt and George put on exactly the amount of evidence they needed to win, and nothing more." In my view, that is one key to trial. No overreach. Keep it moving and, to the extent possible, keep the jury from becoming bored.

This is particularly true with cross examination. I tell the students to "Get up there. Get the good stuff. Take your shots. And sit down."[71] Students try too hard to hit homeruns. Rarely is there a "A Few Good Men" Jack Nicholson moment where the witness turns under pressure.[72] Less is more.

The other critical component with cross is that advocates peg their questions to source impeachment material and that they have it handy.[73] Without that, they can flounder and panic. If they peg their questions to the source (depositions, police reports, etc.) and have it ready to go if impeachment becomes necessary, then they can be effective. Our program has long required that students show where they have cross-referenced their source material in their cross-examination outlines in their trial notebooks.[74] They must have the source material handy (at the podium) to engage in proper impeachment.[75] Witness folders are ideal for this. Otherwise, there is delay and waste of time.

The next important technique is knowing when to stop.[76] "Just stop!", I tell my students. "If you find yourself feeling the tendency to say, "Soooooo . . ." or "And THEREFORE . . .", it is one question too many. Less is more. By avoiding overreach and the pitfalls that come with, the students can grow their resilience in this area.

As with exhibits, students must get the impeachment formula down and down well. The best way to gain confidence in this area is, as with exhibits, simple repetition. In addition to the impeachment formula, which is described well in numerous authorities,[77] what I teach is to not give up too easily. Yes, it is important to use judgment when impeaching – is it trivial or worth impeaching? But, when it is important, students who are afraid of the technique may go with a gut feeling to just move on. If it is important, fight for it. The students should not worry if they flounder at first. If they give up without pushing themselves, they will not be resilient. But if they

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[71] MAUET & EASTON, *supra* note 39, at 223.

[72] HAYDOCK & SONSTENG, *supra* note 56, at 479 ("Some cases may involve dramatic moments, but many do not.")

[73] BERGER ET AL., *supra* note 60, at 406.

[74] Again, credit here goes to my predecessor and mentor Barbara Bergman for this established approach.

[75] A running bit of trial humor between my law partner and me was the need to unseal the depositions when impeaching at trial. While not technically necessary, I love the effect of unsealing the depositions at trial in front of the jury. Trial is theatre, after all, and this is an easy way to make it dramatic.

[76] MAUET & EASTON, *supra* note 39, at 211.

[77] *Id.* at 227–40; TANFORD, *supra* note 55, at 242–44; HAYDOCK & SONSTENG, *supra* note 56, at 532–39.

are given simple impeachment problems to practice, they will grow the confidence to complete a successful impeachment.

XII. EXHIBITS

This is an area where I think trial practice teachers generally get it right. Exhibits can be very accessible once the basic formula is down. In my experience, most teachers focus on that – just get the formula down, then apply it to different kinds of exhibits. It is interesting that something about the physical nature of it makes this area one where, historically, even the traditional pedagogy works: keep it simple. Lay the foundation. Move it in. Repeat. The formula for admitting anything is written down and is easily obtainable.[78] If anything, trial practice teachers can learn about making other areas more accessible by reminding themselves of the simple, straightforward way exhibits are usually taught.

The one possibility for overcomplicating exhibits is by confusing students on the "Best Evidence" rule when they are struggling with the formula. The "Best Evidence" rule gets so little traction these days anyway,[79] that it is better to cover it separate from admitting exhibits. I've seen students fall into the "*better* evidence" trap because of this confusion.

XIII. EXPERTS

The key to making examinations of expert witnesses accessible is to remind the students that they are not experts in [fill in the blank – damages, accident reconstruction, etc.],[80] but they also do not have to be to be effective. The second thing is to convince them (because it's true) that expert witnesses are the most fun that can be had in a case.

First, one of the cool things about the practice of law is that you learn in great detail about things you never may have expected to know.[81] Second, experts are fun, because they may like to talk – a lot. Getting them to talk during discovery is so much fun. Third, one can get ahold of what they have written in the past,[82] what they testified to, and any successful

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[78] MAUET & EASTON, *supra* note 39, at 272–73.

[79] *See e.g.*, State v. Hanson, 348 P.3d 1070, 1072 (N.M. Ct. App. 2015) ("As a practical matter, the best evidence rule infrequently applies, since a witness can typically testify based on independent firsthand knowledge of an event, even though a writing recording facts related to the event may also be available."), citing KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 234, at 135 (7th ed. 2013).

[80] MAUET & EASTON, *supra* note 39, at 415 ("Experts know more about the subject matter than you do."); FRANK D. ROTHSCHILD, *Top Ten Screw-Ups in Direct and Cross-Examination of Experts*, *in* 2000 WILEY EXPERT WITNESS UPDATE, NEW DEVELOPMENTS IN PERSONAL INJURY LITIGATION 143 (Eric Pierson, ed., 2000) (advising lawyers not to battle on the expert's turf).

[81] One of the most interesting expert issues for me was a case I did with the late Phil Davis. It involved a Navajo employee who was allegedly terminated because his Navajo supervisors believed he practiced witchcraft. Complaint at 3, Blackwater v. Process Equipment & Service Co., 1:10-cv-00382-RB-LFG (D.N.M. 2010).

[82] MAUET & EASTON, *supra* note 39, at 415. "Obtain copies of every book and article the expert has ever written and read them." *Id.*

motions to exclude or limit their testimony – or to impeach them at trial. I always show my students a well-worn copy of a book by an opposing expert.[83]

On directs, the main thing to emphasize is for the students to *help* keep it simple.[84] Rather than attempting to demonstrate the lawyer's mastery of the information in the expert's field, of course have the expert do it – but break it down.[85] The expert is the expert and should do the talking when it is your witness. Make sure that the expert *simplifies* and explains what it is they are saying.[86] In this sense, the expert is a small example of what the student should be doing the entire trial—making it easy to understand and making it make sense—far more important than talking well and giving a great closing speech.

XIV. CLOSINGS

If everything else is done with confidence, closing should be the fun part. As with openings, the key is to be oneself. But I typically tell students, "Closing is why you came to law school." They can have fun with it as long as they reiterate the theme. They can say the stuff they could not say in opening.[87]

I like the students to experiment with closings—as always within their comfort level. With fewer (although some) limits and with ten weeks of trial practice behind them, they can push themselves out of their zone. They can play with drama or flair that may not seem natural to them. It may not work, and by now they should know that is okay.

One other caveat is reasonableness. My law partner once described the key to closings this way: "Be the most reasonable person in the room." When it comes to the *way* you close your case, the *way* you argue the evidence, and the *way* you ask for damages, focus on being the most reasonable person in the room. This is particularly true in close cases (and many cases that go to trial these days are "close" cases).

And being "reasonable" should fit well with the earlier work the student has done in demonstrating conviction and being genuine.[88] If the jury trusts you, they will view you as reasonable, even with a big ask.

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[83] I also tell the students that, although he was an opposing expert, I really liked him and respected him. Again, the adversarial practice does not have to be antagonistic.

[84] BERGER ET AL., *supra* note 60, at 469–70.

[85] ROTHSCHILD, *supra* note 80, at 134.

[86] TANFORD, *supra* note 55, at 363. "Many experts do not speak naturally in lay terms." *Id.*

[87] *See* MAUET & EASTON, *supra* note 39, at 75–76.

[88] *See* United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) ("Cases are to be decided by a dispassionate review of the evidence admitted in court."); State v. Banks, 215 S.W.3d 118, 122 (Mo. 2007) (The prosecutor called the defendant "the devil himself." "In so doing, the State failed to distinguish proper and legitimate argument from personal and inflammatory attack.").

XV. LEADING UP TO THE MOCK TRIAL

No matter how much cheerleading and soothing one does, the weeks leading up to the mock trial will be busy and stressful for the students. I recall one year where I taught Constitutional Rights the same semester as the Evidence/Trial Practice course. The students in my Constitutional Rights section actually worked on their mock trial demonstrative exhibits during the Constitutional Rights lectures.

The weeks leading up to the mock trial are a good time to remind the students that trial practice is also a course in stress-management.[89] I encourage them to pace themselves and to develop pacing and stress and time-management skills now, before they have actual clients, actual cases, and actual trials.

Breathing: my friend Maureen Sanders reminds students to breathe. Sometimes I'll ask the students two weeks before their trial, "Are you breathing?" I had the good fortune of taking "Voice" as a part of my Dramatic Arts program in college.[90] Although I never perfected it, my Voice instructor insisted we sing/speak through our diaphragm, not our upper chest. She would make us lie on our backs to practice in class. A student recently told me that she was having trouble projecting. I relayed to her what I was taught—breathe through your stomach. I told her to lie on her back and practice. After trial, she came up to me and said, "I breathed through my stomach like you said, and I could project!" Sometimes something as simple as breathing can make trial practice more accessible.

"Trials are a rough and ready business."[91] My common refrain in advance of the mock trial is: "Don't forget, the stakes are low here; no one is going to jail, and no one is paying any money." The hope is that they have at least one trial experience in a safe, supportive environment. The hope is that they get to try one case in front of judges and critiquers who *want* them to succeed, who are giving up the Saturday before Thanksgiving to help them succeed. If these hopes are realized, the mock trial will strengthen their confidence and make them more resilient.

I remind the students that mistakes happen. As Bishop says, "Merely letting students know explicitly that we have high expectations for them and their work *and* that we expect them to make mistakes helps students engage in their learning process."[92] They will flub something up. But most mistakes in the law are fixable.[93] I then share with the students my failed effort to lay the foundation for a witness in an employment discrimination trial. It was my first or second trial. No matter what I asked, I was unable to lay the

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[89] For them *and* me (particularly running in-person trials during the pandemic).

[90] A nice preparation for trial practice, by the way.

[91] Bandera v. City of Quincy, 344 F.3d 47, 54 (1st Cir. 2003).

[92] Bishop, *supra* note 3, at 987. "Finally, we can create a safe space for and lower the stakes of failure by sharing failure." *Id.* at 991.

[93] As my colleague April Land reminds me, with the exception of statute of limitations!

foundation for the testimony. The judge—a great federal judge—seeing I was struggling, ended the day, leaving me with an opportunity to try to figure it out that evening. The partner I worked for and I were not able to find a way, but in the end, it did not matter –we won the trial.

The point of the story is to show the students that errors are not usually fatal, and that all lawyers make mistakes.[94] "Mistakes are accepted and even encouraged as part of the learning process."[95] Hopefully that knowledge helps put them at ease.

I hope it has been made clear by my approach to writing this article that I make every effort to model humility – what Professor Stout describes as "one of the most important attributes and is the key to a growth mindset."[96]

You are not entirely in control.

One aspect of trial—good and bad—is the spontaneous nature of it. Although surprises are fewer these days, particularly in civil cases, one still never knows what may happen. A door that was shut by a judge's pretrial ruling may suddenly open because of something a witness says.[97] If a witness gives you something, use it![98]

I also urge the students to realize that some witnesses are great while others are a "living travesty" – even in a mock trial. (This is often true in practice as well.) Witnesses get nervous, have a bad day, memories fail them etc.). If students can learn to expect the unexpected and appreciate that they are not entirely in control,[99] they will have more confidence and more flexibility in the courtroom.

XVI. TRIAL FEEDBACK

Of course, the whole effort to build grit and resilience through attainable goals is for naught if the feedback is not helpful. After the mock

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[94] *See also* Bishop, *supra* note 3, at 993 ("Vulnerability helps to build trust, which is important in creating a safe space for failure."); Darling-Hammond & Holmquist, *supra* note 18, at 64 ("Professors established this environment by admitting their own fallibility . . . .).

[95] *See* Darling-Hammond & Holmquist, *supra* note 18, at 64.

[96] Professor David Stout (on file with author).

[97] A recent example from the headlines was when the door was opened for Kate Moss's testimony on the Johnny Depp/Amber Heard trial. Julia Jacobs, *Kate Moss Denies Johnny Depp Pushed Her Down Stairs in Testimony*, N.Y. TIMES (May 25, 2022), https://www.nytimes.com/2022/05/25/arts/kate-moss-johnny-depp-trial.html.

My favorite—and the credit went entirely to my law partner Matthew Garcia for catching it—was when a defendant testified to the effect of, "I'd never experienced anything like that." Never is a strong word! The door was opened.

[98] The "glove does not fit" from the O.J. Simpson trial being the best example of this.

[99] In my twenties, I once sat behind an older couple in a movie theater. I heard one say to the other, "Young people think they have so much control over life. If takes forever to figure out little control you actually have."

trial, we have the trial judge and the critiquer provide feedback on the trial. The "Goldilocks" rule matters here. Too little feedback leaves students frustrated that their efforts were wasted. The feedback should be constructive and specific. Use the "sandwich" method:[100] start positive, put criticism in the middle, end positive.[101] Specificity is important. As discussed above regarding diversity, equity and inclusion, the feedback must be substantive and constructive.

Conversely, I remember stepping into a courtroom where the judge and critiquer were going into their third hour of feedback after a mock trial. (I played the "court security needs us to go home" card.) The students were exhausted and deflated. The feedback should be helpful, on point, and specific, but not so great in detail that the students are worn down.

XVII. A QUICK WORD ON VISUAL AIDS

This may be an area where I am just wrong and perhaps I make the exercise *too* accessible. With visual aids, I let students know that the technology is there and that they are welcome to try it. But I caution that I have seen even the best trial lawyers struggle with PowerPoints. (And if you are going to use PowerPoints, have a backup!)[102] Instead I encourage the use of a flipchart. Print off a diagram! Draw on a whiteboard! Until the students feel confident at the basic techniques of trial, I worry less about how nimble they are with certain forms of technology.

XVIII. CONCLUSION

Whether or not trials are the best format for dispute resolution is a discussion for another day. However, as long as they stand as a part of our legal infrastructure, students—and later, lawyers—should not be afraid of going to trial. Over time, with so much emphasis being placed on perfection and performance, trials have become too daunting. By changing the emphasis and making each aspect of the trial accessible (and yes, even fun), the students will develop the resilience and confidence they need to succeed on practice. Will they all be outstanding performers as trial attorneys? No. Do they need to be? Absolutely not. They need to be confident and diligent and to get the information across. They can successfully represent their

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[100] Anne Dohrenwend, *Serving Up the Feedback Sandwich*, FAM. PRAC. MGMT. 43 (2002).

[101] Bishop, *supra* note 3, at 994 ("For students to feel safe trying new skills, arguments, or ways of thinking, even when those skills, arguments, and thinking are imperfect, we have a duty to help them see that these trials and errors are indeed praiseworthy.").

[102] I use PowerPoints to teach, although I've never used them at trial. I started teaching by using a chalkboard and large poster sheets. Then, on a student's suggestion, I moved to PowerPoints. Occasionally they fail, and in class I always have a backup ready. The worst experience I ever had was a lecture to a group of trial lawyers when, inexplicably, the words began disappearing off my slides. Literally, there were a few letters where there should have been lines of words. I had a back-up.

clients by tapping into who they are, rather than aspiring to be someone they are not.

By breaking down this increasingly cumbersome process into accessible parts, we also make it more available to those who might find it too intimidating. By ensuring that we consider diversity, equity, and inclusion, in the trial practice arena, we will increase the likelihood that we address the access to justice issues that plague our system. By enabling advocates from all communities to embrace their particular model of zealous advocacy, we will empower them and, in turn, their clients.

I personally hope jury trials last and that they are not eradicated by arbitration or other dispute resolution mechanisms. The genius of having members of the community gather to consider the charges or claims before them has been blurred by the labyrinth that is now the legal process. I hope that this article takes some of the myth and mystifying aspects out of teaching trial practice, with an eye towards making the whole exercise accessible.

Implementing the RTF in America

WENDY HEIPT[†*]

Implementation of human rights principles are generally within the purview of national governments, who sign on to and ratify international treaties that provide for their obligations and responsibilities. As the United States has adopted few international human rights treaties, increasing numbers of state and local governments have decided not to wait for national action and have adopted human rights principles on their own. Most recently, this has occurred in the Right to Food realm, where the past year has seen several U.S. states seeking to adopt this particular human right through both legislative and constitutional avenues. This essay explains the Right to Food and what it means. It then illustrates how this right has been adopted and litigated internationally and describes the phenomenon of subnational human rights implementation in the United States. The essay then describes the recent push for constitutional adoption of the Right to Food in several U.S. states and suggests examples of how this right can best be implemented and then practically utilized by advocates.

I. THE RIGHT TO FOOD

The Right to Food ("RTF") movement holds that hunger is a human rights violation and not an inevitable systematic by-product.[1] Although

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[*] This article, like all else, is dedicated to Bettyann.

[1] While the term 'right to food' most correctly describes the state constitutional push this article focuses on, 'food sovereignty' is an aligned movement whose definition often overlaps with RTF principles. The term 'food sovereignty' was introduced at the 1996 World Food Summit by Via Campesina, an international movement founded in 1993 working on behalf of peasant agriculture. Although the term is now in wide-spread use with numerous definitions, as forwarded by Via Campesina it includes free access to seeds and the rights of consumers to be able to decide what they consume and by whom it is produced. LA VIA CAMPESINA INT'L PEASANTS' MOVEMENT, https://viacampesina.org/en (last visited Oct. 10, 2021); Tina D. Beuchelt & Detlef Virchow, *Food Sovereignty or the Human Right to Adequate Food: Which Concept Serves Better as International Development Policy for Global Hunger and Poverty Reduction?*, 29 AGRIC. & HUM. VALUES 259, 260–61 (2012); *Declaration of Nyéléni*, NYÉLÉNI: INT'L MOVEMENT FOR FOOD SOVEREIGNTY (Feb. 27, 2007) https://nyeleni.org/en/declaration-of-nyeleni; Jessica Clendenning et al., *Food Justice or Food Sovereignty? Understanding the Rise of Urban Food Movements in the USA*, 33 AGRIC. & HUM. VALUES 165, 167–69 (2016). The term 'food security' is also distinguishable from the RTF, as it is not a legal concept and does not confer legal obligations.

many people assume the RTF confers an affirmative obligation on the government to provide sufficient food directly to each person, rarely is this the case.[2] The RTF movement looks at food determination as a human right dependent on economic and political inclusion, and seeks to ensure that conditions allow for citizens to access adequate amounts of appropriate and available food themselves.[3] In other words, the RTF is a person's right to feed themself, through their own efforts, with dignity. This right speaks to more than just the right to an adequate number of calories to sustain life: it is the right to enough of the types of food that ensure good health, dignity and well-being in a sustainable fashion. In order to fulfill this mandate, governments must afford the conditions that allow full realization of the RTF and ensure that this support does not interfere with the realization of other basic human rights.[4]

There is no internationally agreed upon model language for the RTF,[5] and assorted treaties, constitutions and international bodies have used different definitions in explaining the right.[6] I employ what I have termed

[2] Certain events and subpopulations do confer such an obligation. For example, as the state is the only source of food for people who are incarcerated, prisoners have a right to safely receive nutritionally adequate food that must comport with the Eighth Amendment to the Constitution. U.S. CONST. amend. VIII. Lawsuits over prison food have focused on religious dietary needs, food safety and food discipline, most notoriously over 'nutraloaf,' a composite food made up of rotating ingredients fed to inmates as punishment. Complaint at 14, Thomas v. Clarke, No. 2:17-cv-01128 (E.D. Wis. Aug. 14, 2019) (alleging that the nutraloaf served at the Milwaukee County Jail was so dry that the dust from the loaf set off the fire alarm); Prude v. Clarke, 675 F.3d 732, 733, 735 (7th Cir. 2012) *reh'g denied* (Apr. 19, 2012); *See also* the Free Exercise Clause to the First Amendment, U.S. CONST. amend. I; Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-c-5 (2012); Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-bb-4 (2012); MASS. CONST. art. XLVII ("The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food … are public functions[.]").

[3] While the RTF gives people the right to meet their own needs as expanded more fully below, the government must provide the context in which food can be grown or procured, such as access to land, seeds, a sustainable environment, clean water, economic stability, transportation and purchasing choices. THE FOOD & AGRIC. ORG. U.N. & U.N. HIGH COMM'R FOR HUM. RTS., THE RIGHT TO ADEQUATE FOOD 3–5, https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf.

[4] This expression of the RTF as a human right comports with a particularly well-articulated definition of human rights in general: that they "express deep ethical and moral values, which are similar to principles held by many religions concerning the way that people should treat one another. What distinguishes human rights from ethical and moral principles, however, is that they are entitlements, and as such, they consist of enforceable claims against governments." ROLF KÜNNEMAN & SANDRA EPAL-RATJEN, THE RIGHT TO FOOD: A RESOURCE MANUAL FOR NGOS 23 (2004).

[5] *See* THE FOOD & AGRIC. ORG. U.N., GUIDE TO CONDUCTING A RIGHT TO FOOD ASSESSMENT, RIGHT TO FOOD METHODOLOGICAL TOOLBOX Book 1 (2009) (noting no model can account for each state's context, history, or systems, but discussing key elements).

[6] For example, the U.N. Special Rapporteur on the RTF defines it as the "right to have regular, permanent and unrestricted access — either directly or by means of financial purchases — to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear." U.N. Special Rapporteur on the Right to Food, *About the Right to Food and Human Rights* (2022), https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights. "The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its

the '4As' to most clearly define the RTF. The '4As' are: (1) Availability, (2) Accessibility, (3) Adequacy, and (4) Appropriateness.[7] Availability means that individuals are able to produce, procure, and/or purchase the amount and types of food they need and want. Accessibility means that there is sufficient infrastructure, physical and economic, to allow individuals physical proximity to the food both required and desired, and the resources to purchase that food without sacrificing other basic needs. Adequacy means that each person is getting, and will continue to get, enough calories, nutrients, and micronutrients to lead healthy and safe lives. This means that available and accessible food must do more than look good and cost little. Appropriateness means that individuals are able to access food relating to their cultural preferences in a dignified manner and that food systems are environmentally sustainable over time.

The 4As emphasize that the RTF is one part of a human rights framework—an interdependent element whose achievement rests on the realization of other rights.[8] This is because human rights are so integrally intertwined that the full realization of any one of them depends on the progress of others.[9] The RTF asks that the government refrain from actions that stymie realization of the RTF and act in a manner that will facilitate realization of the right. It also means that the government will step in to ensure that third party actors are not permitted to undermine the right.[10] RTF

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procurement." Comm. on Econ., Soc. & Cultural Rts., CESCR General Comment 12: The Right to Adequate Food, U.N., ¶ 6, Doc. E/C.12/1999/5 (1999) (general comments do not have the same force as the ICESCR itself, but they are an authoritative guide for treaty understanding and implementation).

[7] Much of this section appears in my case study looking at the RTF and Maine's path to legislative passage of its RTF constitutional amendment. Wendy Heipt, *The Right to Food Comes to America*, 17 J. FOOD. L. & POL'Y 111, 112 (2021).

[8] Many international instruments recognize that using a human rights framework when discussing the RTF implicates multiple other rights. For example, the ART recognizes the RTF is connected to the rights to health, housing, and social security. *See generally* G.A. Res. 2200A (XXI) at art. 11, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966). The Association for Cooperation and Development has written on the connections between the RTF and governance of land, fisheries and forests. ASS'N FOR COOP. & DEV. (ACTUAR), INTERCONNECTIONS AND RECIPROCITY BETWEEN THE RIGHT TO FOOD AND LAND TENURE RIGHTS 4–5 (2012). The U.N. 2030 Agenda for Sustainable Development is built around seventeen Sustainable Development Goals (SDGs) which recognize that ending hunger is inextricably linked with ending other deprivations and with strategies promoting economic growth and justice. LIU ZHENMIN, UNDER-SECRETARY-GENERAL FOR ECONOMIC AND SOCIAL AFFAIRS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2018, INTERLINKED NATURE OF THE SUSTAINABLE DEVELOPMENT GOALS (2018), https://unstats.un.org/sdgs/report/2018/interlinkages/.

[9] To illustrate at its extreme, starvation will essentially nullify the fulfillment of all other rights. Less dramatically, a lack of sufficient food hinders the full realization of other rights. K. Heather Devine, *Vermont Food Access and the "Right to Food": Using the Human Right to Food to Address Hunger in Vermont*, 41 VT. L. REV. 177, 178–79, 181, 183–84 (2016).

[10] In order to ensure realization of a human right, states must respect, protect, and fulfill it. U.N., *Global Issues: Human Rights, What Are Human Rights*, https://www.un.org/en/global-issues/human-rights (last visited Oct. 1, 2021). The ICESCR addresses this specifically in regard to the RTF ("The right to adequate food, like any other human right, imposes three … levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*."). U.N., Econ. & Soc. Council, Comm. on Econ., Soc. &

constitutional amendments including the 4As provide future courts with a structure for interpretation and encourage recognition of the fact that hunger is a human rights and social access issue that affects marginalized communities most acutely.[11] Most fundamentally, using a human rights framework changes a conversation about rights from one about marginalized individuals seeking special handouts to one about empowered communities demanding accountability.

While the RTF is recognized under international law and by governments around the globe, the United States has no such right in its federal constitution and has not signed any documents that would give that right to its citizens.[12] Until the recent movement by American subnational entities to adopt a RTF (discussed more fully below), concerns over food regulations, availability and equity in the United States focused on two areas: the food regulatory system and programs to feed the hungry. Efforts to challenge the food regulatory system have resulted in 'cottage food' or 'food freedom' laws, both of which provide small scale producers with the ability to sell or donate certain food products. Efforts to address issues of food availability and equity have resulted in anti-hunger efforts such as federal nutrition programs and charitable food banks,[13] both of which

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Cultural Rts., *General Comment 12* (Twentieth Session), 5, U.N. Doc. E/C.12/1999/5 (Mar. 12, 1999). As one example, this is thought to include proactive measures to eliminate harmful pesticides and the adoption of policies addressing climate change. *Rep. of the Special Rapporteur on the Right to Food*, 4, 9, 22, U.N. Doc. A/HRC/34/48 (2017); *Interim Rep. of the Special Rapporteur on the Right to Food*, 3, 11, 20, 23–24, U.N. Doc. A/70/287 (2015).

[11] In accordance with the 4As framework, the RTF should, ideally not contain limiting language, but should contain both an aspirational sentence and enough guidance for implementation while remaining concise. That said, not every nation with an explicit or implicit right to food incorporates the 4As. This is not only because this is an evolving right, but also because incorporating all of the 4As makes it more difficult to pass amendments when there is opposition. This holds true for the experience in Maine, where drafters had to hone their original proposed language to garner the votes necessary for passage.

[12] Food and Agric. Org. of the U.N., *The Right to Food Around the Globe*, *United States Constitutional Recognitions of the Right to Adequate Food*,

http://www.fao.org/right-to-food-around-the-globe/constitutional-level-of-recognition/en/ (last visited Oct. 9, 2021). The most comprehensive RTF language is found in the ICESCR. In fact, the RTF was the first right contained in the ICESCR that the U.N. commissioned a study on, a work undertaken by Asbjørn Eide in 1983. Asbjørn Eide (Special Rapporteur, U.N. Econ. & Soc. Council Comm. Of Hum. Rts.) *Report on the Right to Adequate Food as a Human Right*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987). Other relevant international and regional documents include the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women, the UN Convention on the Rights of the Child (UNCRC), the 1996 World Food Summit, the American Convention on Human Rights, and the Convention on the Rights of Persons with Disabilities. *See generally* Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 405, 408, 411 (2006) (discussing state behavior and international human rights).

[13] The largest food nutrition entitlement program in the U.S. is the Supplemental Nutrition Assistance Program (SNAP), which actually provides significantly more food than food banks. In order to qualify for SNAP in Maine, a family of four must have a before-tax annual household income below $49,025. *Maine Supplemental Nutrition Assistance Program (SNAP), Annual Household Income Limits (before taxes)*, BENEFITS.GOV, https://www.benefits.gov/benefit/1272 (last visited Oct. 10, 2021).

received increased attention during the Covid-19 pandemic.[14] All of these efforts to address problems with the food system actually further entrench the current structure, allow the monetization of food waste, and depend upon the populace embracing temporary charity as a solution to the structural problem of hunger.[15] Unlike the RTF, none of these endeavors use a human rights lens, and none provide whole-scale transformation of a system where hungry people exist while there is sufficient food to feed everyone.[16] But the realization that there are issues with the current system and the efforts to address these problems provided a foundation of food-rights work that the U.S. RTF movement is built on.[17]

This RTF movement, although bubbling about for years, became a bigger issue for people worldwide as the Covid-19 pandemic turned food insecurity into a public issue.[18] As the pandemic exposed the depth of food

[14] Covid-19 exposed the depths of food insecurity in the country. The term 'food insecurity,' as officially monitored by the United States Department of Agriculture (USDA), describes households that do not have sufficient access at all times to enough food for an active, healthy life. *Food Security Overview*, U.S. DEP'T AGRIC. (USDA) ECON. RSCH. SERV. (2021), https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us. Many others have written about the exposure of food insecurity during the pandemic. Lauren Bauer, *The Covid-19 Crisis has Already Left Too Many Children Hungry in Amer*ica, BROOKINGS (May 6, 2020), https://www.brookings.edu/blog/up-front/2020/05/06/the-covid-19-crisis-has-already-left-too-many-children-hungry-in-america/ (noting an April 2020 survey finding a 6000% increase in hunger rates for mothers with children); John Burnett, *Thousands of Cars Line Up at One Texas Food Bank as Job Losses Hit Hard*, NPR (Apr. 17, 2020), https://www.npr.org/2020/04/17/837141457/thousands-of-cars-line-up-at-one-texas-food-bank-as-job-losses-hit-hard. (showing aerial footage of Texans lining up outside a San Antonio food bank); Helena Bottemiller Evich, *'There's Only So Much We Can Do': Food Banks Plead for* Help, POLITICO (June 8, 2020) https://www.politico.com/news/2020/06/08/food-banks-plead-for-help-306492 (discussing the choice to increase public food dispersal rather than increase benefits).

[15] One way the current system has monetized waste is by reframing it as "charity" and distributing it to marginalized communities via programs such as the government's pandemic Farmers to Families Food Box Program. Jocelyn Meyer, *Burdening Food Banks with the Charity of Waste*, ME. J. CONSERVATION & SUSTAINABILITY (Apr. 8, 2021), https://umaine.edu/spire/2021/04/08/meyer/; Andrew Coe, *Free Produce, with a Side of Shaming*, N.Y. TIMES, June 25, 2020, at A27. Food is even rejected after reaching grocery stores and it is often easier for stores to discard and write-off what they do not want, even if hungry people are geographically close.

[16] Eric Holt-Giménez et al., *We Already Grow Enough Food for 10 Billion People . . . and Still Can't End Hunger*, 36 J. SUSTAINABLE AGRIC., 595, 595 (2012); AMARTAYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 1–8 (1981); *See also*, *How to Feed Ten Billion People*, U.N. ENV'T PROGRAMME (July 13, 2020), https://www.unep.org/news-and-stories/story/how-feed-10-billion-people;

Bridget Shirvell, *Should Emergency Food be the Long-Term Solution to Hunger?*, HUNTER COLL. N.Y.C. FOOD POL'Y CTR. (Oct. 29, 2019), https://www.nycfoodpolicy.org/should-emergency-food-be-the-long-term-solution-to-hunger/; Olivier de Schutter, *Food Banks Are No Solution to Poverty*, THE GUARDIAN (Mar. 24, 2019), https://www.guardian.com/society/2019/mar/24/food-banks-are-no-solution-to-poverty.

[17] While food freedom laws seek independence and food charity seeks to feed the hungry, the RTF seeks to use context-supported independence to curtail hunger in the first place.

[18] For a recent review of efforts globally, *see* Devon Sampson et al., *Food Sovereignty and Rights-Based Approaches Strengthen Food Security and Nutrition Across the Globe: A Systematic Review*, 5 FRONTIERS SUSTAINABLE FOOD SYS. 1, 2–3 (2021).

insecurity, municipalities across the globe started to advocate for a RTF.[19] In America, states began to investigate and seek to incorporate a RTF at the constitutional and legislative levels. Addressing the RTF at the state level makes sense, for state governments have often proven to be the preferred mechanism for achieving social and economic rights, particularly through constitutional amendments.[20] States provide a flexible forum for evolving standards that go beyond federal constitutional mandates, and this flexibility provides an opportunity to more accurately represent human rights values that reflect community standards particular to a single state.[21] Like international human rights instruments, state constitutions seek to establish rights beyond the reach of changing legislatures or a fickle judiciary and ensconce fundamental truths in language that will last for generations.[22] Additionally, even though the federal system provides the benefit of commonality, individual states are more accustomed to experimentation and can try fifty different avenues of achieving a particular human right. Each state can consider its own issues, such as agricultural land and type, rates of food insecurity, and rural and urban demographics. Importantly, subnational implementation of the RTF also forwards the prospect of eventual national acceptance.[23]

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[19] For example, leaders in both Great Manchester and Newcastle in the U.K. have begun calling for a right to food. Nigel Barlow, *Greater Manchester Becomes First City-Region to Support 'Right to Food' Campaign,* ABOUT MANCHESTER (Feb. 16, 2021), https://aboutmanchester.co.uk/greater-manchester-becomes-first-city-region-to-support-right-to-food-campaign/; Josh Sandiford, *Newcastle Backs Right to Food Campaign to 'End the Scandal' of Poverty*, THE BIG ISSUE (Mar. 10, 2021), https://www.bigissue.com/news/activism/newcastle-backs-right-to-food-campaign-to-end-the-scandal-of-poverty/.

[20] Of course, states can also seek to incorporate the RTF legislatively. For example, California introduced the State Healthy Food Access Bill in its 2021-22 legislative session. The bill, relying on a 2010 United Nations publication, defines the RTF as encompassing availability, adequacy and accessibility and specifically notes that the "COVID-19 pandemic began as a health crisis and quickly became a hunger crisis as well . . . . Racial and ethnic health disparities became even more apparent, with Latinx, Black, and other households from communities of color facing higher rates of food insecurity than white Californians." *State Healthy Food Access Policy: Hearing on SB108 Before the Cal. Assemb. Comm. on Hum. Servs.* 3 (Ca. 2021). The bill passed the state House and Senate in June 2021 and was referred to Appropriations. This bill sought two avenues of effect – to recognize the RTF and declare it to be a state policy, and to "protect the agricultural industry of the state." *Id.* at 2; The law would require reports to the Legislature recommending courses of action on, among other things, barriers to utilizing food assistance programs, evolving water needs for state residents, and the effects of climate change on food availability. *Id.* at 1.

[21] *See* State v. Caouette, 446 A.2d 1120, 1122 (Me. 1982) (citing State v. Collins, 297 A.2d 620, 626 (Me. 1972)).

[22] For this reason, human rights based constitutional amendments at the state level address one of the reasons many are reluctant to amend the federal constitution or sign on to international treaties, even when they reflect social and economic rights most Americans want—a fear of involving the judiciary in interpreting or enforcing these rights. *See* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 13–14 (2005).

[23] For example, in the case of Roper v. Simmons, 543 U.S. 551, 568 (2005), the Court stated that "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment." The Court also relied on Article 37 of the UNCRC and referenced the ICCPR, the American Convention on Human Rights and the African Charter

Most significantly for purposes of this essay, in 2021 the state of Maine introduced, and passed through both houses of its legislature, a proposal seeking to add a RTF amendment to its state constitution.[24] In November of 2021 a majority of the electorate approved the resolution,[25] and Maine now has the first constitutionally enshrined RTF in this country.[26] Now that the RTF is part of the state constitution in Maine, RTF proponents have the highest state level tool at their disposal. As this right is new to American shores; advocates will have to look abroad for any guidance they may want on adoption, framework laws or implementation.

II. THE RTF AROUND THE GLOBE

Most countries come to a RTF by becoming a state party to one of the international treaties that seek to guarantee this right, the most significant of which is the International Covenant on Economic, Social and Cultural Rights (ICESCR).[27] Under the ICESCR, which has been ratified by over 150

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on the Rights and Welfare of the Child. *Id.* at 576–77. There are also other cases where the Supreme Court has tallied state law or constitutional amendments in order to assess evolving contemporary thought. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the death penalty for the mentally impaired constituted cruel and unusual punishment). As discussed *infra* municipal human rights implementation has also been the harbinger of state acceptance.

[24] The only other state to introduce legislation seeking to establish a constitutional RTF is West Virginia. On March 15, 2021, Delegate Danielle Walker introduced House Joint Resolution 30, the "Right to food, food sovereignty and freedom from hunger," a proposed addition to article three, section twenty-three of the West Virginia Constitution. H.R.J. Res. 30, 2021 Leg., Reg. Sess. (W. Va. 2021). The state of Washington has also begun the process, inaugurating an advisory council in 2021 with the intention of introducing RTF legislation by 2023.

[25] Question 3 on the November 2, 2021, Maine ballot read: Do you favor amending the Constitution of Maine to declare that all individuals have a natural, inherent and unalienable right to "grow, raise, harvest, produce and consume the food of their own choosing" for their own nourishment, sustenance, bodily health and well-being? Taylor Telford, *Maine just voted to become the nation's first 'right to food' state. What does that mean?*, WASH. POST (Nov. 3, 2021), https://www.washingtonpost.com/business/2021/11/03/maine-right-to-food/.

[26] While Maine is the first state in the United States to have a constitutional RTF, note that other states have constitutional rights to aspects of the RTF, such as the right to farm, the right to hunt and the right to fish. Later in this Essay I look at some of these amendments and their value in implementation of a RTF.

[27] Article 11 of the ICESCR states:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

nations, the RTF is expected to be realized progressively,[28] and while no nation has of yet fully realized this right, as a first step many nations have added a RTF to their national constitutions.[29] The language of constitutional guarantees found across the globe, and of other legislative measures, vary significantly as nations attempt to implement diverse strategies in their efforts to account for individual circumstances while pursuing an identical goal.[30] Regardless of individual strategy, the RTF is a goal reached progressively through the three basic steps used in achieving any human right: respect, protect and fulfill, each of which requires significant support.[31]

The first obligation—to respect the RTF—asks the government at issue to not interfere with anyone's access to adequate food. In other words, the government must respect the RTF by not passing any laws that interfere with the right and by addressing or amending any current laws that do interfere with the right. This tier helps construct a legal framework for individuals to safeguard their rights and for the state to begin meeting its RTF commitment by reviewing statues, rules, and regulations to ensure their compatibility with this new constitutional amendment. [32] Comprehensive assessments done at this stage ideally consider a wide variety of factors, including any disparities in community resources, issues of supply and

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 11, at 4 (Dec. 16, 1966).

[28] Each state must implement steps for the realization of all rights in the ICESCR "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." *Id.* art. 2 at 1–2.

[29] See discussion *infra* and: KANSTYTUCYJA RESPUBLIKI BIELARUŚ [CONSTITUTION 2004, § 2, art. 21 (Belr.);

CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [Constitution] Oct. 20, 2008, arts. 3, 13, 32, 66, 281(Ecuador); DUSTŪR JUMHŪRĪYAT MIṢR AL-'ARABĪYAH [CONSTITUTION] 2019, art. 79 (Egypt); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [CONSTITUTION] 1993, art. 51 (Guat.); CONSTITUTION OF THE REPUBLIC OF MALDIVES 2008, art. 23; CONSTITUTION OF NEPAL 2016, art. 36; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ [CONSTITUTION] 2004, arts. 110, 118 (Pan.); CONSTITUTION OF SEYCHELLES 2017, (Sey.). While the United States has not ratified the ICESCR, there is an argument to be made that the right to adequate food (and the right to be free from hunger) have become customary international norms to which it is bound. Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 795–96 (2006).

[30] The ICESCR was adopted by the United Nations General Assembly in 1966 and came into force in 1976. It was followed by a number of other international instruments addressing the rights of specific populations to food and further interpreting and confirming the RTF. THE FOOD & AGRIC. ORG. OF THE U.N., FIFTEEN YEARS IMPLEMENTING THE RIGHT TO FOOD GUIDELINES (2019).

[31] While the terminology has evolved, this three-tiered system originated with Henry Shue, a philosopher active in human rights. *See* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY: 40TH ANNIVERSARY EDITION (2020).

[32] As an example, the Maine legislature can supply definitions for any terms in the amendment that need explanatory language.

demand, worker protections, and utility provisions, among others.[33] This can lead to repeals, amendments, clarifications, or additional legal promulgations in order to ensure respect for the RTF.[34] The second obligation—to protect the RTF—calls on state actors to ensure that no third parties are interfering with the RTF. When a third party attempts or continues an action that interferes with a citizen's RTF, the government must step in to stop that action and to address any harms it has caused. This tier ensures that there is accountability from all relevant parties, so that the right in question is not at risk from the actions of outside actors. The third obligation—to fulfill the RTF—is the final step in full achievement of the RTF and the one that most squarely addresses a situation in which rights holders do not have food. This calls for direct action to ensure a governments own behavior forwards full achievement of the right through actually facilitating and providing. For the RTF, this requires a structure that ensures that the full citizenry has access to food or to sufficient income. This tier safeguards the right in question for every citizen, particularly those most marginalized.

While this essay provides specific examples below, some of the general situations that threaten the RTF and call for government action include: destruction or desecration of food producing natural resources (such as bodies of water for fishing or hunting grounds) or of farms or gardens, denial of indigenous rights (most notably to land), biopiracy (situations in which resources or knowledge are appropriated and patented without agreement or compensation for commercial use), and food chain manipulation (which arguably includes food assistance programs).[35] Each of these general examples call for redress, which relies on the practicable employment of a RTF constitutional amendment. This means that the RTF must have effective implementation in order to ensure that citizens are able

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[33] THE FOOD & AGRIC. ORG. U.N., GUIDE TO CONDUCTING A RIGHT TO FOOD ASSESSMENT 11 (2009) (this guidebook includes a discussion of how and why to incorporate human rights principles in any RTF assessment).

[34] Although no U.S. locality has as of yet conducted a RTF assessment specifically, there are numerous examples of community food assessments. These include one piloted by the University of Virginia, one focusing on Jackson and Union counties in Southern Illinois, one for the city of Portland, Oregon, and one in Denver, Colorado. Jennifer O'Brien & Tanya Denckla Cobb, *The Food Policy Audit: A New Tool for Community Food System Planning*, 2 J. AGRIC. FOOD SYS. & CMTY. DEV. , 177 (2012); FOODWORKS, *Community Food Systems Project: A Report on the State of Local Food in Southern Illinois* (2012); *Food Policy and Zoning in Portland*, PORTLAND.GOV, https://www.portland.gov/bps/food-policy-and-zoning-portland (last visited Dec. 23, 2022); DENVER PUB. HEALTH & ENV'T, DENVER FOOD ACTION PLAN (2018), https://www.denvergov.org/content/dam/denvergov/Portals/771/documents/CH/Food%20Action%20Plan/DenverFoodActionPlan.pdf; The USDA also provides a number of assessment tools, including an assessment toolkit. BARBARA COHEN, U.S.D.A. ECON. RSCH. SERV., COMMUNITY FOOD SECURITY ASSESSMENT TOOLKIT (2002), https://www.ers.usda.gov/publications/pub-details/?pubid=43179.

[35] The RTF has particular import for indigenous peoples, whose claims to land, seeds, and farming have been disproportionally affected. THE FOOD & AGRIC. ORG. U.N., THE RIGHT TO FOOD AND INDIGENOUS PEOPLES: AN OPERATIONAL GUIDE 14 (2008); THE FOOD & AGRIC. ORG. U.N. & U.N. HIGH COMM'R FOR HUM. RTS., *supra* note 3, at 17–18.

to enjoy the right. The United Nations Food and Agricultural Organization (FAO) has provided specific guidance for implementation, beyond the general human rights principles of respect, protect, and fulfill.[36] This is known as the PANTHER framework, an acronym that represents the seven human rights principles to be observed during implementation: Participation,[37] Accountability,[38] Non-discrimination,[39] Transparency,[40] Human Dignity,[41] Empowerment,[42] and Rule of Law.[43] These seven principles originated in human rights treaties and can help guide governments through the progressive tiers of respecting, protecting, and fulfilling the RTF.[44] These guidelines also help provide the societal entrenchment that protects a human right when contextual conditions change. Such changes, whether due to environmental degradation, political changes, or a pandemic, can threaten rights and intensify vulnerabilities, especially among already marginalized populations.[45]

It is also notable that, while other nations are pursuing the benchmarks intrinsic to solidifying an affirmative human right (respect,

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[36] The Food and Agriculture Organization (FAO) is a United Nations agency that works on behalf of member states towards the eradication of hunger and the full realization of the right to food. The PANTHER approach is based on seven principles that should be integrated in RTF work. THE FOOD & AGRIC. ORG. U.N., THE RIGHT TO FOOD AND THE RESPONSIBLE GOVERNANCE OF TENURE: A DIALOGUE TOWARDS IMPLEMENTATION 67 (2014).

[37] This calls for both positive action and the limitation of negative actions. Positively, it calls for education and encouragement to voluntarily participate in a meaningful fashion. It also calls for the removal of barriers that would prevent individuals from participating in the process, such as overly onerous bureaucratic requirements, remote locations, and inadequate notice.

[38] This principle calls for governmental actors to be cognizant of their responsibilities and responsible towards those most affected by their decisions. Accountability intersects with transparency and also means preventing corruption and other third-party behavior that undermines the RTF.

[39] This principle forbids actors from acting on or permitting any discriminatory animus for any reason and calls on them to actively work on altering societal conditions that structurally permit discrimination. It calls for a balancing of laws, such as property, business rights and environmental justice.

[40] Transparency calls for actions, decisions, and processes to be available in a timely manner and in a manner that makes them easily accessible.

[41] Human dignity calls for implementation strategies that affirm that all people have equal worth at all times.

[42] Empowerment builds the capacity of people to act for themselves and have equitable opportunities in all sectors of society (including government, agricultural pursuits, non-profits, educational institutions, etc.).

[43] Rule of law calls for laws and consequences that are fair on their face and in implementation. This speaks not only to judicial power but also administrative and quasi-judicial mechanisms.

[44] THE FOOD & AGRIC. ORG. U.N., RIGHT TO FOOD: MAKING IT HAPPEN PROGRESS AND LESSONS LEARNED THROUGH IMPLEMENTATION 7 (2013). As one example, the Committee on World Food Security endorsed land tenure guidelines that sought to operationalize the PANTHER principles in their implementation. THE FOOD & AGRIC. ORG. U.N., *supra* note 36, at 7–12. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security ("VGGT") discusses the ten VGGT principles of implementation, how they relate to the PANTHER principles, and their inclusion of gender equality, sustainability and continuous improvement. THE FOOD & AGRIC. ORG. U.N., VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY 4 (2022).

[45] U.N. OFF. HIGH COMM'R ON HUM. RTS. ET.AL., COVID-19 AND NATIONAL HUMAN RIGHTS INSTITUTIONS 5 (2021).

protect, and fulfill), they have not discarded any already existing efforts to provide food, whether those are through government programs or from charitable sources. Progressive realization of a human rights goal always takes a complimentary track to current efforts and seeks to ensure that the process is as attentive to the positions of duty bearers as it is to rights holders. This means remaining mindful of issues such as equity and non-discrimination, interdependence with other human rights, and the 4As as detailed above. Similarly, when subnational entities in the U.S., such as Maine, adopt their own RTF amendment, existing efforts to provide food must also not be immediately abandoned.

III. EXAMPLES OF RTF LITIGATION INTERNATIONALLY

While passage of the ICESCR, incorporation of a constitutional RTF guarantee and the establishment of framework laws should be enough to ensure the RTF for every country's citizenry, in reality the road to realization is generally paved with lawsuits. As it is likely that subnational implementation of the RTF in the United States will also eventually end up in a courtroom, it is instructive to see how RTF lawsuits have played out in other nations.[46] Each lawsuit reflects its' own country's legal structure and implementation path (and whether the 4As and the PANTHER framework noted above were incorporated) and implicates one or more of the three tiers of progressive implementation: respect, protect and fulfill.[47]

On the world RTF stage, India has loomed large. India was one of the first countries in the world to entertain a RTF lawsuit before its Supreme Court; that case became the longest running RTF case on earth, and it garnered attention from human right advocates across the globe.[48] The case began in 2001, when the People's Union for Civil Liberties (PUCL), relying,

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[46] THE FOOD & AGRIC. ORG. U.N., *supra* note 5, at 25–29, 66 (discussing RTF constitutional work, legislation, and lawsuits worldwide).

[47] There have been other RTF-based lawsuits in addition to the cases highlighted herein. In Nepal, two NGOs brought suit seeking to have the Nepalese government recognize a RTF. After four years of litigation the court held that the government was bound by international treaties to recognize the RTF. Four years after that, the RTF was added to the Nepalese Constitution. In Germany, the court found that the right to dignity (and the requirements of a welfare state) included the RTF and compelled the government to provide benefits sufficient enough to meet these needs. In Argentina, the Supreme Court determined a case involving access to food and safe drinking water for indigenous communities under the RTF.). A Brazilian court relied on both international and domestic law to find a municipality liable for depriving children and young people of their RTF (and other basic rights). In Canada, the Supreme Court held up the fishing rights of an indigenous community and struck down that part of a criminal case that had been brought based on the lack of a permit. *See* INT'L DEV. L. ORG. & IRISH AID, REALIZING THE RIGHT TO FOOD: LEGAL STRATEGIES AND APPROACHES 37–38, 40, 44 (2015)

[48] People's Union of Civil Liberties v. Union of India (2003) 2 SCR 1136 (India). The PUCL case was brought under India's Public Interest Litigation (PIL) scheme, which allows individuals to bring constitutional complaints in the public interest even if they themselves have not been affected. P.N. Bhagwati & C.J. Dias, *The Judiciary in India: A Hunger and Thirst for Justice*, 5 N.U.J.S. L. REV. 171, 176 (2012).

in part, on the Indian National Constitution and its right to life article,[49] alleged that the Indian government had abrogated its responsibilities by allowing starvation deaths to occur at the same time that it maintained excess grain stocks and that it was allowing subpar food distribution schemes to persist.[50] Respondents answered by referencing the eight programs they maintained to feed the hungry. The case persisted for sixteen years, over which time the Indian Supreme Court issued dozens of interim opinions and the issues under consideration continued to expand.[51] Most significantly, between the filing of the case and its conclusion in October 2017,[52] the Court held: that the constitutional right to life was, indeed, at risk due to governmental failure to provide food; that the government should be held liable for not fulfilling the mandates of its own food and nutrition related programs; that it was the responsibility of the states to prevent deaths due to starvation and malnutrition; that two Commissioners, aided by assistants and state-appointed Nodal officers, should be appointed and funded by the government to monitor implementation of the interim orders and report their findings to the Court; that starvation deaths would be taken as evidence that the Court's orders were not properly implemented and; that government programs to feed the hungry could not be diluted or ended and many had to be expanded, regardless of cost.[53]

In assessing the impact of the PUCL case, one can find many successes and a number of unanswered issues. Among the many achievements of the case were passage of the 2013 National Food Security Act, redeployment of state expenditures in favor of marginalized

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[49] Article 21 of the Indian Constitution reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law." BHĀRATĪYA SAṂVIDHĀNA [CONSTITUTION] Jan. 26, 1950, art 21 (India). Prior to the 2001 PUCL case the Indian Supreme Court, in *Shantistar Builders v. Narayan Khimalal Totame*, (1990) 1 SCC 520 (India), had held that the right to life implies sufficient food, stating, "The right to life is guaranteed in any civilized society. That would take within its sweep the right to food[.]" Note that the Constitution of India art. 47 is also relevant to a RTF discussion. Article 47 reads, "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health." BHĀRATĪYA SAṂVIDHĀNA [CONSTITUTION] Jan. 26, 1950, art. 47. (INDIA).

[50] PUCL's petition was initially filed against the Indian Government, the Food Corporation of India, and six State Governments, but was later enlarged to include all the country's state governments.

[51] The case has spawned literally dozens of interim orders over decades. Partial listings of those orders can be found at *Supreme Court Orders*, RIGHT TO FOOD CAMPAIGN INDIA, http://www.righttofoodcampaign.in/legal-action/supreme-court-orders (last accessed Oct. 30, 2022); Harsh Mander, *Food from the Courts: The Indian Experience*, 43 INST. OF DEV. STUD. BULL., 15 (2012); *Right to Food Case: PUCL vs. Union of India & Ors*, SOCIO-LEGAL INFO. CTR. (May 8, 2002), https://www.slic.org.in/litigation/2002-pucl-vs-union-of-india-and-others-civil-writ-petition-196-of-2001; *Interim Order of May 2, 2003, PUCL vs. UoI and Ors.*, GLOB. HEALTH RTS., https://www.globalhealthrights.org/wp-content/uploads/2013/10/Peoples-Union-India-2003-Interim-Order.pdf (last accessed Oct. 30, 2022).

[52] PUCL vs. Union of India & Ors, (2017) 53 SCR 196 (India).

[53] For explanations and documents related to this complex case, *see* Harsh Mander, *Food from the Courts: The Indian Experience*, 43 IDS BULL. 15, 16 (2012); YAMINI JAISHANKAR & JEAN DRÈZE, RIGHT TO FOOD CAMPAIGN, SUPREME COURT ORDERS ON THE RIGHT TO FOOD: A TOOL FOR ACTION (2005).

communities throughout the country, broad expansion of hot school meals and improvement of the food distribution system.[54] The case legitimized the justiciability of the RTF and the grassroots movement it set in motion continues to influence the discourse in India and around the globe.[55] In fact, the PUCL case illustrates how a legal case can spur social action that continues long after litigants have left the courtroom. In terms of a human rights framework, this case illustrates both the first and third tiers of human rights progressive implementation. The case demonstrates respect for the RTF by successfully guaranteeing entitlement schemes already in place and by instructing the government not to interfere in these schemes. The case demonstrates fulfillment of the RTF by codifying an existing benefit so that it became an entitlement and by guaranteeing minimum levels of subsistence and employment. In looking to the PUCL case for the lessons it can impart for work in U.S. subnational implementation, the most critical part of the case is how the court looked at a benefit and made it a right.[56] This transformation came via the court's November 28, 2001 interim order, and while questions remain, this decision essentially transformed beneficiaries into rights holders who no longer had to prove their requests, even if remedies and metrics remained to be worked out.[57]

Other international RTF cases have dealt with third party behavior, as opposed to direct acts (or inaction) by a home government. Most often these cases occur when a company or company subsidiary based in the global North seeks resources or land in the global South, and the results disenfranchise local communities and hinder their RTF. One such case that has garnered much attention began in 2001 when the Ugandan government agreed to lease a parcel of 'unencumbered' land to a wholly owned

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[54] RIGHT TO FOOD CAMPAIGN & CTR. FOR EQUITY STUD., HUNGER WATCH REP. 15–16 (2021).

[55] In 2021, as Covid-19 ravaged the country, RTF issues continued to be revisited throughout India. Press Trust of India, *Right to Food Needs to be Looked into With Human Rights Perspective Too*: *NHRC*, THE TIMES OF INDIA (Aug. 10, 2021, 11:30 PM), https://timesofindia.indiatimes.com/india/right-to-food-needs-to-be-looked-into-with-human-rights-perspective-too-nhrc/articleshow/85219142.cms; Press Trust of India, *Right to Life May be Interpreted to Include Right to Food: Supreme Court*, BUS. STANDARD (June 30, 2021 at 1:38 IST), https://www.business-standard.com/article/economy-policy/right-to-life-may-be-interpreted-to-include-right-to-food-supreme-court-121062901761_1.html.

[56] Still other cases across the globe illustrate additional aspects of respecting the RTF. For example, the South African case of *Minister Env't Affs. & Tourism v. George & Others* (437/05 , 437/05) [2006] ZASCA 57 (S. Afr.), dealt with a governments obligation to ensure that regulations already in place do not interfere with the RTF of vulnerable communities. In this case, a group of non-commercial fishermen, with international support, brought suit in Equality Court over that country's 1998 Marine Living Resources Act, which established quotas that resulted in the minor fishermen having no access to the sea. As with the *PUCL* case, the *Kenneth George* case had successes and failures, but the court did instruct the government to advance a new policy that would ensure the RTF for the claimants, contributing to a formal settlement and the 2012 Small-Scale Fisheries Policy. Olivier de Schutter (Special Rapporteur on the Right to Food), *Countries Tackling Hunger with a Right to Food Approach*, Briefing Note 01 (May 2010); Policy for the Small Scale Fisheries Sector in South Africa, GN 474 of GG 35455 (June 20, 2012).

[57] Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 699–701 (2010); Priya Shankar, *Hunger in a Land of Plenty: The Benefits of a Rights-Based Approach to India's Mid-Day Meal Scheme*, CUREJ: COLL. UNDERGRADUATE RSCH. ELEC. J. (2009); Jaishankar & Drèze, *supra* note 53, at 10.

subsidiary of Neumann Kaffee Gruppe (NKG), a German company.[58] In order to 'unencumber' the land the Ugandan army forcibly evicted several thousand tenants, causing increased poverty and a violation of the RTF. In August 2002 a court case was filed against the NKG's subsidiary and the Ugandan government.[59] The first part of the case took eleven years to wind its way through the court and in March 2013, the High Court in Kampala, Uganda, ordered compensation of approximately eleven million euros.[60] NKG appealed, in July 2015 the Court of Appeal in Kampala ordered a retrial, and in August 2019 the court ordered the parties to mediate.[61]

As in the PUCL case, the NKG case has spawned additional issues, taken numerous twists, had successes and has continuing unanswered questions.[62] As the case advanced, it drew increasing scrutiny and international human rights oversight bodies began to step in, demonstrating the interconnectedness of human rights and how violations in one area have a cascading effect on other areas. Reports have been filed noting how the actions of NKG (among others) effect international agreements such as the U.N. Convention on the Rights of the Child[63] and the continuing effects on the ICESCR.[64] The idea of having to pursue litigation across borders, be they international or state, is one that will continue until every person lives under

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[58] FIAN INTERNATIONAL, HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF KAWERI COFFEE PLANTATION IN MUBENDE/UGANDA 3 (1990).

[59] FIAN INTERNATIONAL, EXTRA-TERRITORIAL HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF SUPPORTING LARGE SCALE AGRARIAN INVESTMENTS: THE CASE OF KAWERI COFFEE PLANTATION LTD. IN MUBENDE/UGANDA 3 (2014).

[60] As the court case plodded forward, in June 2009 a case before the German National Contact Point (NCP) was also initiated. *Complaint Against Neumann Kaffee Group on Violations of the OECD Guidelines for Multinational Enterprises*, WAKE UP & FIGHT FOR YOUR RTS. (June 2009) https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/03/FIAN_vs_NKG_20090615_complaint.pdf. The NCP case issued a final declaration in March 2011, finding that the parties should work together more amicably. Final declaration by the National Contact Point for the OECD Guidelines for Multinational Enterprises regarding a complaint by Wake up and Fight for Your Rights Madudu Group and FIAN Deutschland against Neumann Gruppe GmbH, Berline (March 2011).

[61] *See FIAN International, Human Rights Violations in the Context of Kaweri Coffee Plantation/Neumann Kaffee Gruppe in Mubende/Uganda*, MISEREK (November 2019), https://www.fian.de/wp-content/uploads/2021/11/Layout_Uganda_Druckerei.pdf (last accessed October 31, 2022); NKG, Chronology of Events, Kaweri Coffee Plantation – 2000 to 2019 –, https://www.nkg.net/wp-content/uploads/2019/07/2019-07-19-Chronologie-ENG.pdf (last accessed October 31, 2022).

[62] For an interesting read, *see Annex to the Study Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing Outside the European Union - Exchange of Letters Between the Neumann Gruppe and the Authors of the Study*, PARL. EUR. DOCS DGEXPO/B/POLDEP/NOTE/2017-18 (Jan. 2017).

[63] U.N. Comm. on Rts. Child, International Commission of Jurists' (ICJ) Submission to the UN Committee on the Rights of the Child in Advance of the Examination of Germany's Third and Fourth State Party Reports in Accordance with Article 44 of the Convention on the Rights of the Child (Jan. 2014).

[64] U.N. Econ. and Soc. Council, Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Initial Report of Uganda*, U.N. Doc E/C.12/UGA/CO/1 (July 8, 2015).

a RTF.[65] Most importantly for U.S. RTF subnational implementation is how the NKG case demonstrates the protection tier of the RTF, and the principle that actions instigated by third parties with state acquiescence or aid remain the responsibility of the home government.

IV. SUBNATIONAL ADOPTION OF HUMAN RIGHTS PRINCIPLES ACROSS THE UNITED STATES

While formal adoption of international treaties fall squarely within the scope of the federal government, even before the RTF came to U.S. shores subnational entities across the country were increasingly embracing both the principles contained in many of those treaties and, on occasion, even the treaties themselves.[66] This has proven particularly true in the human rights arena, where the existence of an established right on the world stage provides advocates with conceptual social and legal frameworks for pursuing a particular right, as well as proof of an evolving standard to which they can aspire.[67] Cities and states, who would in fact help provide practical implementation of any international treaties, recognize that a human rights structure offers a dignified narrative and a common language outside of conventional legalese.[68] They also recognize that unlike litigation, which most often looks backwards to address wrongs already committed, human rights principles look forward. For example, the United States Conference

[65] Both the broad subject matter and the length and complexity of proceedings in the NKG case are commonplace. As another example, grassroots groups in Ghana, working with international support, accused a South African mining company of violating the RTF by displacing villagers. Samuel Awuah-Nyamekye, *Ecological Resistance Movements: A Case Study from Ghana*, 4 OGUAA J. RELIGION & HUM. VALUES, 71 (2018); Rolf Künnemann and Sandra Epal-Ratjen, *The Right to Food: A Resource Manual for NGOs*, *supra* note 4, at n.4.

[66] In addition to adoption of a treaty containing a RTF, the U.S. could, like numerous other nations, amend its national constitution to include a RTF. However, our federal constitution is commonly believed to be an exceptional and negative document. Because of this belief, the idea of amending it to include a positive social right is generally dismissed at the outset. Negative rights are constraints on the government to prevent it from intruding on citizens lives and positive rights obligate the government to provide something for its citizens. While not completely accurate, it is true that for the most part, and as compared to other countries, the U.S. Constitution is more a document of negative than positive rights. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 2 (Princeton Univ. Press 2013). The creation of both negative and positive rights attached to the RTF has been recognized even when those specific terms are not used. THE FOOD & AGRIC. ORG. U.N., VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY 5–7 (2004).

[67] While American courts have a long-standing reluctance to openly rely on international sources, courts often look abroad without express citation. Further, civil rights movements have long looked past U.S. shores for inspiration and scholarship. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry,* 115 YALE L. J. 1564, 1576 (2006); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 250 (2001).

[68] This builds on a state tradition of considering elements beyond those traditionally relied upon. *See* The Honorable Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1306, 1322–23 (2017) (noting an era in which state constitutional decisions relied on ideas "that transcended state-specific texts or understandings." (citation omitted)).

of Mayors has passed resolutions promoting human rights[69] and cities and towns have sought to embrace human rights principles on their own as a way to legitimize the changes they seek.[70]

This state level willingness to look abroad holds true within the courtroom as well. In fact, while many federal courts have shown a reluctance to heed international treaties or customary international law, despite the long standing principle that the U.S. should strive never to contradict such instruments,[71] state courts have some history of looking to international human rights standards when making their decisions, especially those standards contained in widely supported treaties and even if the United States is not a signatory to the treaty at issue.[72] This practice relies on a state court level history of using international documents for their value in proclaiming evolving norms and rights and in interpreting the meaning and reach of human rights principles.[73]

In America, the phenomenon of U.S. subnational entities adopting international human rights norms has recently intensified, a state of affairs that provided increased support for the RTF movement.[74] I believe that this trend rests on a number of factors, all of which are as applicable domestically as they are internationally.[75] First, advocates are increasingly seeking to codify rights once thought to be inherent.[76] Second, technology has provided not only a real-time window into human rights movements around the globe,

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[69] U.S. CONF. MAYORS, ADOPTED RESOLUTIONS https://www.usmayors.org/the-conference/adopted-policies/ (last visited Apr. 19, 2021).

[70] The World Human Rights Cities Forum is an annual meeting that takes place in South Korea and began in 2011. Co-sponsored by the U.N. High Commissioner on Human Rights, the Forum's mission is to discuss and forward the implementation of universal human rights by local governments. *See generally*, United Cities and Local Governments, *The World Human Rights Cities Forum (WHRCF) of Gwangju* (Feb. 28, 2021), https://www.uclg-cisdp.org/en/activities/human-rights-cities/international-meetings/World-Human-Rights-Cities-Forum-of-Gwangju.

[71] Justin Hughes, *The* Charming Betsy *Canon, American Legal Doctrine, and the Global Rule of Law*, 53 VAND. J. TRANSNAT'L L. 1147 (2020); Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 23 (1992).

[72] In Moore v. Ganim, 660 A.2d 742, 782 (Conn. 1995), (Peters, C.J., concurring) (in a case involving subsistence provision to indigents, the concurrence noted that even when the U.S. was not a party to the treaty at issue, broad international agreement was a significant point).

[73] This has been true since the time of the UDHR until now. For example, a mere two years after passage of the UDHR the court in Wilson v. Hacker, 101 N.Y.S.2d 461, 473 (N.Y. Sup. Ct. 1950), stated, "Indicative of the spirit of our times are the provisions of the Universal Declaration of Human Rights[.]" In Diatchenko v. District Att'y for the Suffolk Dist., 1 N.E.3d 270, 287 n.16 (2013), the court referenced the UNCRC and John Adams in saying, "we belong to an international community that tinkers toward a more perfect government by learning from the successes and failures of our own structures and those of other nations."

[74] Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013).

[75] Barbara Oomen & Moritz Baumgärtel, *Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law*, 29 EUROPEAN J. INT'L L. 607 (2018).

[76] Margaret H. Marshall, "*Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. Rev. 1633, 1639 (2004).

it has also provided increased information about the underpinnings of these movements to anyone with a computer.[77] Third, subnational entities are naturally at the vanguard of constitutional interpretation and change, as state governments have always been ultimately responsible for the day-to-day execution of any international treaty, providing them with increasing proficiency in implementing positive human rights tenets.[78] Fourth, state legislators are generally more accessible and more responsible to their constituents than their national counterparts and often have first-hand knowledge of the concerns at hand.[79] Fifth, as information, trade and travel flows have all increased, individuals and institutions at the local level have had the chance to educate themselves about human rights principles and to connect with one another on issues of mutual concern.[80] Sixth, international institutions have increasingly and favorably acknowledged the human rights work of subnational entities, further legitimizing their place.[81] Seventh, the growing awareness of environmental concerns, their interconnectedness with human rights issues and their effect on localities, has given an extra push to adoption of human rights principles.[82] Eighth, the growing consensus on a link between physical and mental health and a strong human rights structure has further pushed public health advocacy of human rights.[83] Finally, the ongoing Covid-19 pandemic has proven how challenging it can be to draw lines between purely provincial concerns and local concerns that have far wider repercussions and provided a substantial incentive for human rights work across the country.

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[77] Lisa Horner, *A Human Rights Approach to the Mobile Internet***,** ASS'N FOR PROGRESSIVE COMMC'NS (June 2011).

[78] This idea famously goes back to Justice William Brennan who, in a series of articles, argued that the states can, and should, expand protections for citizens. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also*, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

[79] State legislators may also be more responsive to constituents because local government functions sometimes need a legislative amendment to change a policy, or because state constitutions have restricted legislative powers and elected officials need popular support.

[80] *See e.g.*, this joint opinion essay on refugees: Bill De Blasio, Anne Hidalgo & Sadiq Khan, *Our Immigrants, Our Strength*, N.Y. TIMES, September 20, 2016.

[81] Michele Acuto, *Cities Are Gaining Power in Global Politics – Can the UN Keep Up?*, THE CONVERSATION (Sept. 14, 2017, 9:17 AM), https://theconversation.com/cities-are-gaining-power-in-global-politics-can-the-un-keep-up-83668. Additionally, San Francisco has been recognized by the U.N. Development Fund for Women (now UN Women) and by the Americas Fund for its work implementing CEDAW principles. Karen Knop, *International Law and the Disaggregated Democratic State: Two Case Studies on Women's Human Rights and the United States*, RAPOPORT CTR. FOR HUM. RTS. WORKING PAPER SERIES at 24–25 (2012).

[82] ORG. FOR ECON. CO-OPERATION & DEV. & BLOOMBERG PHILANTHROPIES, CITIES AND CLIMATE CHANGE (2014).

[83] W.H.O., LEADING THE REALIZATION OF HUMAN RIGHTS TO HEALTH AND THROUGH HEALTH: REPORT OF THE HIGH-LEVEL WORKING GROUP ON THE HEALTH AND HUMAN RIGHTS OF WOMEN, CHILDREN AND ADOLESCENTS 6 (2017); Wendy K. Mariner & George J. Annas, *A Culture of Health and Human Rights*, HEALTH AFFS. 35, no. 11 (2016).

Subnational entities across the United States have embraced human rights principles contained in international treaties and agreements in a wide variety of fields, including the environment, the treatment of prisoners, divestment, indigenous rights, the protection of children and the inherent value and dignity of human life. One particularly strong example of subnational human rights activity in the United States has been in the area of women's rights, with numerous localities embracing the principles and language contained in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[84] The State of California has been particularly active in this area: in 1998, the city of San Francisco was the first municipality to pass an ordinance adopting CEDAW,[85] Los Angeles passed a similar CEDAW ordinance in 2003,[86] Santa Cruz passed a CEDAW resolution in 2005,[87] Berkeley passed a CEDAW ordinance in 2010,[88] and Santa Clara passed a CEDAW resolution in 2017.[89] As human rights adoption can be a trickle up as well as a trickle down proposition, the state of California followed the lead of these more local examples and, in 2018, passed a Resolution to implement CEDAW principles and protect the human rights of women and girls by addressing violence and discrimination.[90] Outside of California, numerous other states, municipalities, cities and counties have also embraced CEDAW, such as Honolulu, Hawai'i,[91] Miami-Dade County,[92] Louisville, Kentucky,[93] and Pittsburgh,[94] and multiple others have CEDAW focused committees. In addition to these CEDAW-specific resolutions, ordinances and laws, other subnational bodies, including

[84] Interestingly, while the United States has not ratified CEDAW, the world's foremost treaty on women's rights, the nation did actively participate in its drafting. Similarly, while the United States has ratified only three of the nine core international human rights treaties (the International Convention on the Elimination of All forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT), the country has worked on and is in agreement with the content of numerous other international agreements. For a discussion on state behavior and international human rights law, *see generally* Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 403 (2006).

[85] CITY & CNTY. OF S.F. MUN. CODE, § 33A.1(e) (2018).

[86] L.A., CAL., ORDINANCE 175735, An Ordinance to Provide for the Local Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (2003).

[87] CNTY. SANTA CRUZ BD. SUPERVISORS, Resolution Supporting Ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (2005).

[88] CITY OF BERKELEY, CAL., ORDINANCE 7,224–N.S., Adding Chapter 13.20 to the Berkeley Municipal Code Adopting the Operative Principles of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (2010).

[89] CNTY. SANTA CLARA, CAL., ORDINANCE NS-300.919 ch. 24, An Ordinance of the Board of Supervisors of the County of Santa Clara Adding Chapter XXIV of Division A6 of the County of Santa Clara Ordinance Code Relating to the Establishment of a Task Force on the Convention on the Elimination of All Forms of Discrimination Against Women, (2017).

[90] S. Con. Res. 78, Ch. 16 (Cal. 2018).

[91] HAW. GEN. PROVISIONS § 1-11.3 (2018). Note that Hawaii was the first state to pass CEDAW legislation in every state county.

[92] Miami-Dade County, Fla., Ordinance 15-87, (amended Sept. 1, 2015).

[93] Louisville Metro Gov't, Res. No. R-193-14 (Ky. 2014).

[94] City of Pittsburgh, Pa., Ordinance § 177C.02 (Dec. 13, 2016).

Seattle,[95] and Eugene, Oregon,[96] have referenced CEDAW while adopting broad human rights principles.

Of course, localized implementation of human rights objectives presents its own obstacles.[97] Even though subnational bodies have often been responsible for the day to day implementation of human rights objectives, national bodies generally provide a framework and macro-level support.[98] Without the structure provided by a national government, subnational entities have to rely on their own resources while not running afoul of national laws.[99] This is as true for the RTF movement as it has been for other human rights principles.

V. IMPLEMENTING THE RTF IN THE UNITED STATES

Structural RTF implementation in the U.S. is built on both international RTF work and domestic subnational human rights implementation. These foundations, along with the food sovereignty movements in states like Maine, provided the groundwork for the progress of the RTF in the United States. While most states now have cottage food or food freedom laws and a variety of charitable food provisions, it is worth noting that Maine has a particularly strong background in food advocacy work. Maine's work in this area rests on state recognition of food insecurity, a foundation of local food advocacy, and independent local government action that has been particularly strong for the last three decades.[100] In fact,

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[95] *See* GENDER EQUITY IN PAY TASKFORCE, GENDER EQUITY IN PAY AT THE CITY OF SEATTLE 38 (2014).

[96] The city of Eugene, Oregon, under former three-term mayor Kitty Piercy, unanimously voted to make it a duty of its Human Rights Commission to embrace human rights as enumerated in the UDHR, including aligning the city budget with human rights principles. COLUM. L. SCH., HUM. RTS. INST., BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY 5, 12 (2012).

[97] Gaylynn Burroughs, *More Than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments*, 30 N.Y.U. REV. L. & SOC. CHANGE 411, 415, 427 (2001).

[98] *See* THE FOOD & AGRIC. ORG. OF THE U.N., *supra* note 47, at 12 (noting that most of the action needed in order to implement the RTF takes place at the national level).

[99] The federal government has generally taken no action against subnational entities for incorporating human rights social and economic standards, even though those actions communicate a locality's disagreement with national stances to the larger world. However, in certain instances the federal government's position vis à vis an international treaty standard has conflicted with that of a subnational entity. *See Medellin v. Texas*, 128 S. Ct. 1346, 1361 (2008); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) (state attempt to benefit Holocaust survivors preempted by federal authority); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (state divestment act created conflict supporting preemption). For a good discussion on why subnational entities should be encouraged to promote human rights absent explicit contrary federal legislative or executive action, *see* Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 416 (2008).

[100] Maine's work in this area can be traced back to the 1960s, when the state added a home rule amendment to its constitution that has been liberally interpreted and provides a presumption of authority to localities. Building on this, many localities in Maine have adopted local food and self-governance

Maine's passage of its RTF amendment took years of consensus building and local advocacy in order to achieve the bipartisan support that made its passage possible.[101]

Now that the RTF is a part of the constitution in Maine, the meaning it holds will be shaped by the way the state adapts this right to fit their local concerns.[102] At a minimum, the people of Maine will be able to rely on this amendment if they believe that an existing or proposed law, regulation, or ordinance infringes on their RTF.[103] As noted above, while litigants around the world have begun to turn towards courts in order to fully realize their RTF, even court cases rely on societal structures and acceptance of a right they are legally evaluating. Thus, before proceeding to examine possible legal challenges in Maine, it is worth discussing how implementation can proceed outside of the courtroom.

Both the human rights principle of respect and the PANTHER principles of education and empowerment stand for the notion that the government and the populace need to be informed about their right for it to be meaningful.[104] And while it might seem self-evident, it is all too true that when new human rights principles are adopted at any level there is an education process necessary for all parties.[105] Governments need guidance on how to make the RTF a reality, and those holding that right, the citizens of the subnational entity at issue, need to understand what the right does and does not entitle them to demand.[106] This is why subnational passage of a RTF should also include a fiscal note geared towards education of the

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ordinances, to exempt local producers from license and inspection regulations. In addition, Maine has a strong history of local food support, the largest number of farms in New England, and a fervent belief in autonomy. For a longer discussion on Maine's history of food advocacy independence, *see* Heipt, *supra* note 7, at 115.

[101] Douglas Rooks, *'Right to Food': Maine Ballot Question a Rare Example of Bipartisanship*, PORTLAND PHOENIX (October 13, 2021), https://portlandphoenix.me/right-to-food-maine-ballot-question-a-rare-example-of-bipartisanship/.

[102] The manner in which localities adopt human rights claims to their particular needs is termed 'vernacularization,' Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,* GLOB. NETWORKS 9, 441, 446, 448 (2009).

[103] Naomi Hossain & Dolf te Lintelo, *A Common Sense Approach to the Right to Food*, J. HUM. RTS. PRAC. 367, 367–68 (2019).

[104] This is because a human-rights based approach holds the right at issue as a governmental obligation and those citizens living underneath that government as individual rights holders, with the ability to hold the government accountable for not fulfilling its obligations. This structure seeks to empower all parties, particularly those most marginalized. THE FOOD & AGRIC. ORG. U.N., THE RIGHT TO FOOD IN PRACTICE, IMPLEMENTATION AT THE NATIONAL LEVEL 3 (2006).

[105] Gillian MacNaughton & Mariah McGill, *Economic and Social Rights in the United States: Implementation Without Ratification*, 4 NE. UNIV. L. J. 365, 397 (2012).

[106] Education can not only inform rights holders and duty bearers of their obligations and rights under the RTF: it can also head off uneducated and reactive responses. For example, numerous states have passed so called "anti-Sharia" measures seeking to forbid state courts from considering international or Islamic law when deciding cases. These unconstitutional blanket prohibitions on state courts' deliberative processes misunderstands both the court system and foreign policy, and can be best be countered by an informed electorate. Ross Johnson, *A Monolithic Threat: The Anti-Sharia Movement and America's Counter-Subversive Tradition*, 19 WASH. & LEE J. C.R. & SOC. JUST. 183, 193–94 (2012).

citizenry.[107] Other nations and international organizations have used a variety of methods to educate their citizenry about the RTF, including picture books and activity guides for children,[108] educational modules for older students,[109] posters, badges, songs, street theater,[110] and instruction guides for teachers.[111] The FAO has produced a methodological toolbox to aid in educational development[112] and civil society initiatives have been set up in regions around the world.[113] As an obvious example of an aspect of the RTF requiring education, both rights holders and duty bearers must understand that the RTF does not obligate governments to begin delivering food to every citizen.[114] This misconception has been one of the most common roadblocks whenever the RTF has been introduced.[115] All parties must understand that the RTF is not charity, it is empowerment. Analogizing the RTF to other rights that empower citizens, but do not immediately call on the government to provide the goods and services at issue, has been a helpful tool in explaining the RTF. As one example, RTF advocates in

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[107] THE FOOD & AGRIC. ORG. U.N., BUDGET WORK TO ADVANCE THE RIGHT TO FOOD, 'MANY A SLIP . . .' 2, 4 (2009) (discussing budgeting in regard to the policies and programs needed to advance a RTF).

[108] *See generally,* THE FOOD & AGRIC. ORG. U.N & WORLD ASS'N GIRL GUIDES & GIRL SCOUTS, THE RIGHT TO FOOD RESOURCE AND ACTIVITY GUIDE (2006). *See also,* THE FOOD & AGRIC. ORG. U.N & WORLD ASS'N GIRL GUIDES & GIRL SCOUTS, THE RIGHT TO FOOD: A WINDOW ON THE WORLD ILLUSTRATED BY YOUNG PEOPLE FOR YOUNG PEOPLE (2006).

[109] *Module 12: The Right to Adequate Food*, CIRCLE RTS.: ECON., CULTURAL & SOC. RTS. ACTIVISM: A TRAINING RES.,

http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module12.htm (last visited Oct. 12, 2021).

[110] In India the RTF campaign produced a variety of materials (including posters, badges, songs, and street theater) to explain the RTF. *See, e.g.*, Indian Right to Food Campaign Poster explaining the National Food Security Act (2013), Secretariat, *Right to Food Campaign Email, What are the National Food Security Act 2013 Entitlements?* (2013) https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxoYXFyb3ppcm90aXxneDphOWZjMDM2ZjkzNjJkMzU (last visited Oct. 12, 2021). In Spain the NGO Prosalus utilized puppet shows, posters and university discussion groups. In 2020 Prosalus entered a partnership with the FAO to monitor the Milan Urban Food Policy Pact. THE FOOD & AGRIC. ORG. U.N., *The Urban Food Policy in Spain Undergoes a Review* (Feb. 28, 2020), http://www.fao.org/right-to-food/news/news-detail/fr/c/1264022/.

[111] THE FOOD & AGRIC. ORG. U.N., FEEDING MINDS, FIGHTING HUNGER, A WORLD FREE FROM HUNGER 5 (2001).

[112] ROSALES ET AL., RIGHT TO FOOD CURRICULUM OUTLINE, (The Food & Agric. Org. of the U.N., 2009).

[113] As one example, the African Network on the Right to Food (ANORF) was established to promote the RTF across Africa. *See, Benin: Launch of the African Right to Food Network*, HABITAT INT'L COAL. (July 15, 2008), https://www.hic-net.org/benin-launch-of-the-african-right-to-food-network/ (last visited Oct. 12, 2021).

[114] The Maine RTF campaign has sought to educate state citizens about what the RTF does and does not mean and has employed social, print, and visual media in addition to setting up a website. *See Right to Food for Maine*, FACEBOOK, https://www.facebook.com/righttofoodforme (last visited Jan. 10, 2023); Administrator, *Food Freedom at Stake – Help Support Maine Right to Food (Nov. 2nd Referendum)*, WESTON A. PRICE FOUND. (Oct. 29, 2021), https://www.westonaprice.org/food-freedom-at-stake-help-support-maine-right-to-food-nov-2nd-referendum/#gsc.tab=0.

[115] As noted in my earlier article about Maine's path to a RTF, other common misconceptions about the RTF include erroneous assumptions about the effect on animal welfare, on private property, on the reach of state constitutional amendments and on the need for the amendment in the first place. Heipt, *supra* note 7, at 126, 129.

Maine have analogized the RTF by explaining that, even though there may be a right to bear arms, the government does not provide weapons to each citizen.[116]

A natural outgrowth of education is advocacy, and both the 4As and the PANTHER principles stand for the notion that a wide swath of rights bearers are needed to turn RTF education into practical action. Advocacy calls on various governmental agencies – the duty bearers of the rights – to begin to look at existing laws, rules, guidelines and practices to see whether they support or hinder the RTF. Because rights are ultimately held by and fulfilled by individuals, both duty bearers and rights holders with an educated understanding of the 4As within the RTF and working together in a system adhering to the PANTHER guidelines all have an obligation towards the creation and maintenance of a system in which the RTF is a reality.

A number of countries have also set up or committed to setting up oversight authorities to help monitor progress and ensure accountability to the RTF.[117] If an oversight body is charged with measuring success via human rights framework-based monitoring, they can go beyond statistical information to look at disaggregated data, embedded metric collection, and human rights benchmarks.[118] Of course, no human rights realization is a straight line. The ideal progressive implementation of a RTF founded upon the principles of respect, but in the real-world implementation often comes in fits and starts and is subject to many actors outside of government. But passing a constitutional amendment calls for educated and empowered duty bearers and rights holders, both inside and outside the courtroom.[119]

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[116] P*roposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 Before the J. Comm. on Agric., Conservation & Forestry*, 130th Leg. (Me. 2021) (testimony of Rep. Billy Bob Faulkingham); *Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 795 Before the J. Comm. on Agric., Conservation & Forestry*, 129th Leg. (Me. 2019) (testimony of Rep. Craig Hickman).

[117] THE FOOD & AGRIC. ORG. U.N., *Framework Laws on the Right to Adequate Food* (2020), http://www.fao.org/3/cb0447en/CB0447EN.pdf; *Framework Law on the Right to Food and Food Sovereignty*, LATIN AM. & CARIBBEAN PARLIAMENT (2018), http://parlatino.org/wp-content/uploads/2017/09/derecho-alimentacion-soberania-ing.pdf.

[118] THE FOOD & AGRIC. ORG. U.N., INTERGOVERNMENTAL WORKING GROUP FOR THE ELABORATION OF A SET OF VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY: IMPLEMENTING THE RIGHT TO ADEQUATE FOOD: THE OUTCOME OF SIX CASE STUDIES (2004); MAARTEN IMMINK ET AL., METHODS TO MONITOR THE HUMAN RIGHT TO ADEQUATE FOOD, RIGHT TO FOOD METHODOLOGICAL TOOLBOX BOOK 2, Volume I 13–14, Volume II 61–62, 123 (FAO 2009).

[119] Note that while implementation is not a straight line, it does call for non-retrogression, meaning that once the RTF amendment is in force, progress towards its realization must be advanced. THE FOOD & AGRIC. ORG. U.N., *supra* note 47, at 163.

VI. INTERPRETING THE RTF IN THE COURTROOM

Eventually, interpretation of the effect of a state constitutional RTF will likely wind up in court before a state court judge.[120] While no U.S. state court judge has experience in legally implementing a RTF, and most have little experience in applying international human rights norms,[121] as discussed above, human rights litigation at the state level still holds the most promise for American implementation. And while state court judges reference international human rights norms more often than their federal counterparts, even at the state level these references to human rights instruments have hardly reached the level of customary use. This is reflected in the fact that many of the references to international human rights norms show up in concurrences, dissents, dicta, and footnotes – as opposed to majority opinions.[122] Even when such references do show up in majority opinions, the reference is often couched in language seeking to reassure the reader that the opinion is not solely relying on such language.[123] Furthermore, to the extent that courts have been willing to incorporate customary international law or treaty principles, they have shown more willingness to do this in areas related to criminal justice than in the areas of economic or social rights, and even then caveats are generally attached to the references.[124] Regardless, a state constitutional principle should be able to avoid many of the reasons American courts have been averse to

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[120] While this essay focuses on state judicial activity around the RTF it is also possible that challenges to the RTF under a federal preemption theory could be brought in federal court. Any such challenges could be countered by recognition that the RTF does not affect U.S. foreign policy, that isolating states from participating in human rights campaigns is not feasible in today's interconnected world, and that federal preemption would undermine state democracy and the voice of the people at the most local level.

[121] A 2010 review found that state courts rarely cited international human rights treaties, but when they did, the most oft-cited instrument referenced was the UDHR. The author posited that this may be due to either the non-binding nature of the UDHR or its relatively older age. Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellin*, 115 PENN. STATE L. REV. 1051, 1056, 1063 (2011). Five years later, that same author found a large increase in the number of such citations, although the percentage of overall mentions relative to total cases remained small. Johanna Kalb, *Evaluating International State Constitutionalism*, 91 WASH. L. REV. ONLINE, 141, 148 (2016). Other authors have argued that the UDHR itself constitutes customary international law. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law,* 25 GA. J. INT'L & COMP. L. 287, 290 (1996). *See also* Servin v. State, 32 P.3d 1277 (Nev. 2001) (Rose, J., concurring).

[122] Diatchenko v. Dist. Att'y for the Suffolk Dist., 1 N.E.3d 270, n.16 (2013); King v. State, 818 N.W.2d 1, 50, 60 (Iowa 2012) (Appel, J., dissenting); *Ex parte* E.R.G., 73 So. 3d 634, 637 n.14 (Ala. 2011), *cert. denied*, 132 S. Ct. 1535 (U.S. 2012); Snetsinger v. Mont. Univ., 104 P.3d 445, 458–59 (Mont. 2004) (Nelson, J., concurring); Domingues v. Nevada, 961 P.2d 1279, 1280–81 (1998) (Springer, C.J., and Rose, J., dissenting); *Moore*, 660 A.2d at 780–82 (Peters, C.J., concurring); Pauley v. Kelly, 255 S.E.2d 859, 900 n.5 (1979); Bixby v. Pierno, 481 P.2d 242, 251 n.9 (Cal. 1971).

[123] *See Roper*, 543 U.S. at 578 ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.")

[124] Sterling v. Cupp, 625 P.2d. 123, 131 (Or. 1981) (en banc) ("The various formulations in these different sources in themselves are not constitutional law. We cite them here as contemporary expressions of the same concern . . . .") Note the majority opinion was authored by Hans Linde, *see* fn. 122.

incorporating international human rights language.[125] Additionally, state constitutions have arguably more similarities to foreign constitutions than to our federal document, notably when it comes to positive rights.[126] While the Maine Supreme Court in particular has not regularly relied on international jurisprudence,[127] passage of the RTF provides an opportunity to consider other state courts' reasoning when they reference the ICESCR[128] or other international instruments.[129] As Maine is the first of what may likely be numerous states with constitutional RTFs, Maine's experience will help build a foundation of RTF law that can be used elsewhere.[130]

Within the litigation sphere, the question for advocates is how to best forward a RTF.[131] As with any public interest lawsuit, choosing the correct issue, litigants, and timing are all critical components for success. While it is not always possible to be proactive, the advantage in taking the initiative is the increased ability to exert control and to ensure that the

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[125] Hans A. Linde, *Comments*, 18 INT'L L. 77, 77 (1984). Judge Linde was an Oregon Supreme Court Justice and a law professor and worked with the U.S. Delegation to the U.N. General Assembly.

[126] Jonathan L. Marshfield, *Foreign Precedent in State Constitutional Interpretation*, 53 DUQUESNE L. REV. 414, 416 (2015).

[127] THE OPPORTUNITY AGENDA AND THE PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECONOMY OF NORTHEASTERN UNIVERSITY SCHOOL OF LAW (PHRGE), *Human Rights in State Courts*, at 38 (2014).

[128] While the ICESCR has not been cited often in U.S. state courts, it has been positively referenced by the New Hampshire Supreme Court in a parental rights case, State v. Robert H., 393 A.2d 1387, 1389 (N.H. 1978), *overruled in part by In re* Craig T., 800 A.2d 819, 820 (N.H. 2002); *but see Moore*, 660 A.2d at 780. Other state courts have declined to consider the ICESCR despite invitations by litigants. Jordan v. State, 918 So. 2d 636, 656 (Miss. 2005).

[129] *In re Marriage* Cases were superseded by constitutional amendment as stated in *Perry v. Brown*, vacated and remanded sub nom. In *Hollingsworth v. Perry* the court found that the failure to designate the official relationship of same-sex couples as marriage violated the California Constitution and in a footnote referenced with approval article 16 of the UDHR, article 23 of the International Covenant on Civil and Political Rights, article twelve of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and article seventeen of the American Convention on Human Rights. *In re* Marriage Cases, 183 P.3d 384, 426 n.41 (Cal. 2008); Perry v. Brown, 671 F.3d 1052, 1065 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012); Hollingsworth v. Perry, 570 U.S. 693 (2013). In *City of Santa Barbara v. Adamson*, the same court, when determining the limits of the California Constitution in a case involving interpretation of a city ordinance, the court again used a footnote to reference articles twelve, sixteen, seventeen and twenty-nine of the UDHR. City of Santa Barbara v. Adamson, 610 P.2d 436, 439 n.2 (Cal. 1980). And in *Servin v. State* a Nevada State Supreme Court Justice, after examining the United States' reservations to the ICCPR, wrote that banning the execution of juveniles was a customary international norm that precluded the most extreme penalty for juvenile offenders and should be recognized as binding on the United States. Servin v. State, 32 P.3d 1277, 1291–92 (Nev. 2001) (Rose, J., concurring). The *Servin* Court vacated a death sentence and instead imposed two consecutive terms of life in prison without the possibility of parole. *See also Moor*e, 660 A.2d at 742; *Sterling*, 625 P.2d. at 123; *Pauley*, 255 S.E.2d at 859.

[130] Michael Fakhri, *The US Food System Creates Hunger and Debt – But there is Another Way*, THE GUARDIAN (Apr. 14, 2021); Anna M. Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139 (2006).

[131] Note that other state constitutional rights arguably in this broad topic area, such as the right to farm, fish and hunt, have not followed a human rights framework in adoption or implementation. Additionally, the rights of indigenous peoples to farm, fish and hunt are often based on long standing agreements or traditional rights. Still, as litigation over these rights may be instructive, they are briefly discussed below.

changes the RTF brings respect the intersectionality of human rights.[132] As there are many areas that can affect the RTF, there is no shortage of subject areas. Possibilities include food production, agricultural laws, hunting and fishing regulations, consumer protection, food safety, natural resources protection, and food entitlement programs. Advocates may bring new tools to an issue already in focus or they may proactively target existing situations they do not feel comport with the RTF. All of these areas have their own laws, regulations, history, and cultural adoption within the state, and the choice of where to send the first arrow depends on this multitude of factors. Below is a specific example of how the RTF can be utilized and an overview of other issues that a state level RTF constitutional amendment could affect.[133]

VII. THE RTF AND WASTE

The RTF is a broad umbrella that advocates in Maine can use to target a wide variety of behaviors, even those that on first blush might not appear to directly fall within the orbit of the right.[134] As an illustrative example, one can argue that the continuation of food waste within the state[135] is an abrogation of the RTF under Article 11 of the ICESCR, under a broad

[132] Some authors have critiqued Maine's local food sovereignty ordinances for not incorporating interrelated concerns, such as sustainability and environmental preservations. Mia Shirley, *Food Ordinances: Encouraging Eating Local*, 37 WM. & MARY ENV'L. L. & POL'Y REV. 511, 528–530 (2013).

[133] Of course, any of the issues expounded on below can be tackled within or outside of the courtroom. Ideally, behaviors not in comportment with the RTF would be identified and corrected without conflict or litigation. However, this section recognizes that there will likely be one or more lawsuits over RTF issues in the years to come, whether in Maine or elsewhere.

[134] While none of my examples should run afoul of the constraints of federalism, note that Maine has come up against issues of federal preemption in before in the area of food rights. In 2017, the state passed a law that gave Maine towns and cities the right to pass local ordinances allowing a broad array of food products to be exempt from state and federal regulation or inspection. LD 725, 128th Leg. (Me. 2017). In response, the U.S.D.A. questioned whether the state would be able to maintain sufficient food safety standards to enable it to continue sell meat processed at state facilities. Letter from Alfred V. Almanza, Acting Deputy Under Secretary, Office of Food Safety, to Maine Dept. of Agriculture Commissioner Walter Whitcomb (Jul. 6, 2017), (on file with author). Because the loss of this authority would mean fewer facilities for processing, increased and more expensive transportation for farmers, longer waits for products, and increased federal involvement, the state legislature held a special session and amended the bill so that the state inspected meat processing facilities would be able to continue operating.

[135] For purposes of this essay, the terms 'food loss' and 'food waste' are used interchangeably. Various publications define the distinctions between food loss and food waste differently, although in general they distinguish actions that happen at different points along the food chain. *Food Loss and Waste*, FOOD & AGRIC. ORG., (2021) http://www.fao.org/food-loss-and-food-waste/flw-data. While it is clear that food loss is extensive, specifically quantifying this loss is challenging. Janet Fleetwood, *Social Justice, Food Loss, and the Sustainable Development Goals in the Era of COVID-19*, 1 SUSTAINABILITY 2, 9 (2020).

reading of the 2021 proposed Maine Constitutional Amendment,[136] and under a full understanding of the RTF.

It is estimated that one third of all food worldwide is lost between production and consumption.[137] The extent of this waste means that the resources invested in producing the food—from the land and water and fossil fuels used to grow it to the energy used to move it to the money invested to the hours people worked – were unnecessary.[138] Food waste tightens the market of availability and has price and access effects for consumers, particularly those with limited ability to travel or to pay higher prices. There is a growing awareness, both internationally and domestically, of the harms this waste produces.[139] However, food waste is not just an economic inconvenience or an ethical failure – it is also a violation of the RTF.

The RTF is inextricably linked with sustainability, and food waste has staggering environmental consequences. Food waste disposed of in landfills – which is primarily where discarded food ends up – produces methane, a greenhouse gas that contributes to climate change. Food waste comprises such a large percentage of U.S. landfills, if it were a country, it "would come in third after the United States and China in terms of impact on global warming."[140] The link between food waste and climate change, as well as the connection between food waste and resource and supply chain conservation, have all been held to be linked to the RTF.[141] This link is

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[136] The proposed amendment that passed both houses of the Maine legislature this summer reads as follows:

All individuals have a natural, inherent and unalienable right to food, including the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.

L.D. 95, 130th Leg., 1st Reg. Sess. (Me. 2021).

[137] HIGH LEVEL PANEL OF EXPERTS ON FOOD SEC. & NUTRITION, *Food losses and waste in the context of sustainable food systems*, at 11 (June 2014). In higher income countries such as the United States, most food loss occurs early in the supply chain, at distribution points, within the service sector and at the consumption stage, and accounts for over 30% of the overall food supply. Pete Smith et al., *Agriculture, Forestry and Other Land Use*, 1 CLIMATE CHANGE 811, 838–39 (2014); FAO, *Global Food Losses and Food Waste – Extent, Causes and Prevention* (2011) (finding that in industrialized countries most food is lost at either the early food supply chain stage or at the consumption stage and that more food is wasted in the global North than in the global South); USDA, *USDA and EPA Join with Private Sector, Charitable Organizations to Set Nation's First Food Waste Reduction Goals*, News Release No.0257.15 (2015).

[138] Kevin D. Hall et al., *The Progressive Increase of Food Waste in America and Its Environmental Impact*, 4 PLOS ONE 1, 2 (2009).

[139] Beginning in 2020, September 29th has been the International Day of Awareness of Food Loss and Waste, as designated by the General Assembly of the United Nations. FAO, *International Day of Food Loss and Waste* (2021), http://www.fao.org/international-day-awareness-food-loss-waste/en/.

[140] Chad Frischmann, *Opinion: The climate impact of the food in the back of your fridge*, WASH. POST (2018).

[141] FAO, *Food Loss and Waste and the Right to Adequate Food*, (2018), http://www.fao.org/3/CA1397EN/ca1397en.pdf.

backed up by the RTF language found in many international documents.[142] The ICESCR's Article 11 tells state parties that they must take all measures to improve "conservation" of food and "achieve the most efficient development and utilization of natural resources." It is not a stretch to read these mandates as including both agricultural and systematic incidences of inefficiency and waste.[143] The U.N. Zero Hunger Challenge categorically states that in order to eliminate hunger all food systems need to adapt to "eliminate loss or waste of food."[144] The SDGs not only seek to end hunger, but also seek to ensure sustainable consumption.[145] ICESCR general comment 12 states that "sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations."[146] Commitment three of the World Food Summit Plan of Action holds that states must "pursue, through participatory means, sustainable, intensified and diversified food production, increasing productivity, efficiency, safety gains, pest control and reduced wastes and

[142] As with many human rights ideals, subnational entities unwilling to wait for movement from national entities have looked to international instruments and begun to act on their own. As one example, in 2015 a number of cities and metropolitan areas formed the Milan Urban Food Policy Pact in order to "to develop sustainable food systems . . . in a human rights-based framework, that minimize waste and conserve biodiversity while adapting to and mitigating impacts of climate change." FAO, *Milan Urban Food Policy Pact*, https://www.milanurbanfoodpolicypact.org/. The Pact has grown to over 200 signatories and recognizes members making progress in a number of areas. *Id.* As of the 2020 awards three signatories received recognition for their work in food waste: Guadalajara, Mexico; Bandung, Indonesia; and Almere, Netherlands. *Id.*; *see also* THERRY GEORGDANO ET AL., THE ROLE OF CITIES IN THE TRANSFORMATION OF FOOD SYSTEMS: SHARING LESSONS FROM MILAN PACT CITIES 4 (2018). Furthermore, as more governments at all levels start to address food loss, international bodies continue to produce guidance, much of which included instructions for those working at the subnational level. FAO, *Voluntary Code of Conduct for Food Loss and Waste Reduction* (2021), http://www.fao.org/3/nf393en/nf393en.pdf (addressing measures to be taken by all stakeholders in the food chain, including subnational entities).

[143] Anastasia Telesetsky, *Waste Not, Want Not: The Right to Food, Food Waste and the Sustainable Development Goals*, 42 DENV. J. INT'L L. & POL'Y 479, 483 (2014).

[144] U.N. Secretary-General's High-Level Task Force on Global Food & Nutrition Sec., Advisory Notes by the HLTF Working Groups to Respond to the 5 "Zero Hunger Challenge" Elements, at 3, 5, 35, 51–61 (Nov. 2015), https://www.un.org/en/issues/food/taskforce/pdf/HLTF%20-%20ZHC%20Advisory%20Notes.pdf.

[145] U.N. Dep't of Econ. & Soc. Affs., Sustainable Dev. Goals, Goal 12: Ensure sustainable consumption and production patterns, https://sdgs.un.org/goals/goal12 (last visited Nov. 19, 2022).

[146] Econ. & Soc. Council, Comm. Econ. Soc. & Cultural Rts., Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Gen. Comment No. 12, U.N. Doc. E/C.12/1999/5, ¶ 7 (May 12, 1999). The Committee went on to state, that "[t]he obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly." Econ. & Soc. Council, Comm. Econ. Soc. & Cultural Rts., *supra*, at 5; *Id.* at ¶ 15.

losses, taking fully into account the need to sustain natural resources."[147] These documents all understand that it is not appropriate—or sustainable—for a system to waste or lose food resources if it is fulfilling the RTF.[148]

Other nations seeking to fully realize the RTF have come to understand the connection between food waste and the RTF, and have sought to address waste through legislation and, more recently, through the courts.[149] In fact, the first ever case in the world holding that the waste of surplus food violates the RTF occurred in Pakistan in 2019.[150] In this case, a volunteer organization[151] brought a public interest petition alleging that food waste violated (among other things), Articles 4, 9, 14 and 38(d) of the Pakistan Constitution[152] as well as international treaties, most critically the

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[147] World Food Summit, Rome Declaration on World Food Security, (Nov. 13, 1996), https://www.fao.org/3/w3613e/w3613e00.htm; Objective 3.2(d) further discusses the obligation of state parties to reduce waste in fisheries. *See also* FAO, The Right to Food: Voluntary Guidelines to Support the Progressive Realization of the Right to Food in the Context of National Food Security (Nov. 2004), https://www.fao.org/3/y7937e/y7937e.pdf ("States should promote adequate and stable supplies of safe food through a combination of domestic production, trade, storage and distribution.").

[148] FAO, Food Wastage Footprint: Impact on Natural Resources 4 (FAO Nat. Res. & Mgmt. Dep't Working Paper, 2013), http://www.fao.org/3/i3347e/i3347e.pdf.

[149] One notable example of a nation trying to confront their food waste problem is France, where a 2016 law forbids grocery stores from throwing away edible food. Until that point, stores had been disposing of food nearing its expiration date or deemed unsellable, sometimes even dousing the food with chemicals or placing their refuse bins in locked warehouses to prevent people from going through their dumpsters. At the same time, the country's unemployment rate was rising, and food banks were reporting a spike in visits. Under the food waste law, stores must have systems in place to donate the food (for human or animal consumption) and can claim a tax break (up to 60% of inventory value). This has led to over 45,000 tons a year in additional food bank donations. Of course, the law is imperfect. Despite provisions for disobedience of the law no one has yet been held liable for noncompliance. Further, as there are no quality checks on donations stores can donate food and get tax breaks even if the donated food is not edible. Finally, there is still room to expand the law, so that other venues, such as agriculture or processing centers, are included. Pierre Condamine, *France's Law for Fighting Food Waste*, ZERO WASTE EUR. (2020), https://zerowasteeurope.eu/wp-content/uploads/2020/11/zwe_11_2020_factsheet_france_en.pdf; Melanie Saltzman et al., *Is France's Groundbreaking Food-Waste Law Working?*, PBS NEWSHOUR WEEKEND (Aug. 31, 2019), https://www.pbs.org/newshour/show/is-frances-groundbreaking-food-waste-law-working; *5 Countries Leading the Fight to End Food Waste*, FOODHERO (Sept. 2, 2019), https://foodhero.com/blogs/countries-fighting-food-waste. Other nations trying various legislative approaches to tackling food waste include Bangladesh, Britain, Denmark, France, India, Italy, Japan, Norway, Pakistan, the Philippines and South Korea.

[150] Muhammad Ahmad Pansota v. Federation of Pakistan, (2019) HCJ DA 38 (Lahore) Writ Petition No. 840 (Pak.).

[151] This organization is the Robin Hood Army, an NGO that operates in the global South to redistribute food. ROBIN HOOD ARMY, https://robinhoodarmy.com (last visited Oct. 13, 2021).

[152] PAKISTAN CONST. art. 4:

Right of individuals to be dealt with in accordance with law, etc.

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan.

(2) In particular — (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

PAKISTAN CONST. art. 9 ("Security of person. No person shall be deprived of life or liberty save in accordance with law"); PAKISTAN CONST. art. 14 ("Inviolability of dignity of man, etc. (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable"); PAKISTAN CONST. art. 38(d) ("Promotion of social and economic well-being of the people. The State shall— (d) provide basic necessities of life such as food . . . for all citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood[.]")

ICESCR, which Pakistan had ratified in 2008.[153] In rendering its final judgment,[154] the Lahore High Court explained that the right to life clearly includes the RTF, holding that, "[p]roviding its citizens with food, especially those who do not have access to it and/or cannot afford it is a primary obligation of the State, violation of which will not just breach the right to food but also the right to life, security and dignity."[155] The Court relied on Article 11 of the ICESCR, general comment 12, as well as environmental implications and the SDGs in finding that "[t]he Government bears a responsibility to ensure equitable distribution of food within its borders and has committed to preventing food wastage in all forms."[156] The recognition of the connection between food waste, equity and sustainability is a principle with global applicability.

In the United States, the environmental impact of food waste already has some U.S. officials,[157] as well as a number of states,[158] seeking solutions.[159] Maine is no exception. The State has evinced an understanding of the connection between food waste and environmental concerns and has tried a variety of avenues in an effort to reduce waste in general[160] and food

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[153] The court noted that "under international law the right to food is recognized as an intrinsic human right. The Universal Declaration of Human Rights of 1948 first recognized the right to food as a human right, it was then incorporated in the International Covenant on Economic, Social and Cultural Rights, 1966 (Article 11)." Muhammad Ahmad Pansota v. Federation of Pakistan, (2019) HCJ DA 38 (Lahore) at 5.

[154] Like the *PUCL* case in India (to which the Pakistani court referenced) the *Pansota* case was held under mandamus by the High Court, which issued a number of interim orders during the course of the proceedings. Under these interim orders regulations on the donation and disposal of excess food by the Punjab Food Authority were promulgated. *Id.*

[155] *Id.* at 17.

[156] *Id.* at 28.

[157] Press Release No. 0275.15, USDA, USDA and EPA Join with Private Sector, Charitable Organizations to Set Nation's First Food Waste Reduction Goals (Sept. 16, 2015), https://www.usda.gov/media/press-releases/2015/09/16/usda-and-epa-join-private-sector-charitable-organizations-set; *Food Loss and Waste*, USDA, https://www.usda.gov/foodlossandwaste (last visited Nov. 19, 2022); Cultivating Organic Matter through the Promotion of Sustainable Techniques (COMPOST) Act, H.R. 4443, 117th Cong. (1st Sess. 2021).

[158] Elaine Povich, *Waste Not? Some States Are Sending Less Food to Landfills*, STATELINE (July 8, 2021),

https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/08/waste-not-some-states-are-sending-less-food-to-landfills; *see also*, An Act to Amend the Environmental Conservation Law, in Relation to Requiring Supermarkets to Make Excess Food Available to Qualifying Entities, Assemb. Bill 4398-A, 2019-2020 Reg. Sess. (N.Y. 2019).

[159] Samantha Holloway, *Homeless, Hungry, and Targeted: A Look at the Validity of Food-Sharing Restrictions in the United States*, 46 HOFSTRA L. REV. 733, 736 (2017) (arguing in favor of a U.S. food waste law and ratification of the ICESCR).

[160] Note that Maine has been a national leader in some areas of waste reduction. For example, Maine recently passed a first-in-the-nation packaging waste law to address the waste created by packaging sold or distributed within the state. An Act to Support and Improve Municipal Recycling Programs and Save Taxpayer Money, H.P. 1146, 130th Me. Legis. (2021). Over one hundred individuals testified at the public hearings on this legislation, the vast majority in favor of passage. Maine also has a positive history of using incentives, mandates and even bans in the environmental arena. Maine was an early bottle bill adopter, and the state has active stewardship programs for mercury, batteries, electronic waste, paint, and cellular phones. *Maine's Product Stewardship Programs*, ME. DEP'T ENVIRON. PROT.,

waste in particular.[161] Specifically, while the state had a commitment to reducing greenhouse gas emissions,[162] an expansive bill to address food waste and hunger was introduced in the 2017–18 legislative session, which would have investigated food waste in the state and provided incentives for waste reduction.[163] While the bill was eventually scaled back, its passage did create a food recovery database to track, and among other things, surplus food sharing.[164] A study released soon after this bill was introduced estimated that only approximately 5% of the state's food waste was finding its way to hunger relief.[165] It was also estimated that approximately one-third of edible crops on Maine farms were plowed under machinery annually.[166] The year after that, another study found that most food waste in Maine was burnt or sent to a landfill,[167] and that food waste in the state remained high.[168] This despite the fact that Maine has a hierarchy of solid waste management, under which the first priority is to reduce both the amount and toxicity of waste generated, the second priority is reuse, and the third priority is recycling—landfill disposal is the sixth (and last) option.[169]

In other words, it is clear that Maine understands the problem of food waste, particularly its connection to issues of hunger and sustainability. And yet, food waste in the state remains a problem. This is where a

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https://www.maine.gov/dep/waste/productstewardship/index.html (last visited Nov. 19, 2022); TRAVIS BLACKMER ET. AL., UNIV. ME. SEN. GEORGE J. MITCHELL CTR FOR SUSTAINABILITY SOLS., SOLID WASTE MANAGEMENT IN MAINE: PAST, PRESENT AND FUTURE (2015), https://umaine.edu/mitchellcenter/wp-content/uploads/sites/293/2015/02/FINALSolid-Waste-Whitepaper-2.pdf; The state was also the first in the nation to ban certain expanded polystyrene foam products. ME. STAT. tit. 38, §§ 1571–73.

[161] As one example, Maine is home to an anaerobic digestion facility. Anaerobic digestion is a method of handling food waste in a sealed container, where bacteria break down organic matter in the absence of oxygen. AGRI-CYCLE OF PORTLAND, ME., https://www.agricycleenergy.com (last visited Oct. 12, 2021). Maine's Climate Council has noted that food waste contributes to Maine's greenhouse gas emissions. MAINE WON'T WAIT: A FOUR-YEAR PLAN FOR CLIMATE ACTION, MAINE CLIMATE COUNCIL 69 (2020), https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/MaineWontWait_December2020.pdf.

[162] ME. STAT. tit. 38, § 577.

[163] The bill was An Act to Address Hunger, Support Maine Farms and Reduce Waste, H.P. 1054, 128th Leg., (Me. 2017). It would have, inter alia, set up a Commission, to "evaluate the economic, environmental and human costs of food waste in Maine," created a food producers donation tax credit. Note that LD 1534 was introduced by legislator Craig Hickman, who is also one of the long-term advocates for a RTF in the state of Maine.

[164] ME. STAT. tit. 38, § 2137-A.

[165] LD 1534 STAKEHOLDER WORKING GROUP, WASTE IS NOT THE MAINE WAY, SENATOR GEORGE J. MITCHELL CTR. FOR SUSTAINABILITY SOL. UNIV. OF ME. (2018), https://umaine.edu/mitchellcenter/wp-content/uploads/sites/293/2018/01/FINAL-FULL-REPORT.pdf.

[166] *Lee Advocates for Reducing Food Waste in Maine*, UNIV. ME. (Nov. 4, 2021), https://umaine.edu/portland/2021/11/04/lee-advocates-for-reducing-food-waste-in-maine/.

[167] Skyler Horton et al., *Circular Food Systems in Maine: Findings from an Interdisciplinary Study of Food Waste Management*, 28 ME. POL'Y REV. 59, 59–71 (2019).

[168] *Food Waste a No Go in Sebago*, NAT. RES. COUNCIL ME. (Nov. 13, 2017), https://www.nrcm.org/blog/spotlight-on-sustainability-in-maine/food-waste-no-go-sebago/.

[169] ME. STAT. tit. 38, § 2101. Maine's landfills are owned commercially, by municipalities, and by the state and have not met their recycling goals. Nomawethu Moyo et. al., *The State of Municipal Solid Waste in Maine*, STATE ME.'S ENV'T, COLBY COLL. (2014), https://web.colby.edu/stateofmaine2014/the-state-of-municipal-waste-in-maine/.

constitutional RTF can come in. Under the reasoning used by the *Pansota* court, Maine's RTF constitutional amendment signifies that the state is committed to realizing the human RTF and to an infrastructure that completely respects this right.[170] Such an infrastructure seeks to eliminate food waste.[171] The State has arguably abrogated its responsibilities by allowing hunger to occur at the same time that it permits food to be wasted and continues to allow subpar food distribution schemes.

Advocates can use the Maine RTF to address issues of food waste overall, as explained above, or to focus on aspects of food waste. For example, although uniform and clear labeling on food products can lower food waste, because there are no uniform food labeling laws in the U.S.,[172] the resulting array of labeling has led to unnecessary waste at the consumption end.[173] In an effort to correct this waste, bills were introduced to the Maine legislature in 2016 and 2019[174] aiming to standardize food labeling. Under a state constitutional RTF, Maine advocates can address food waste in as targeted an area as passage of standardized food labeling laws, using the RTF to establish the obligation of the state to reduce waste. Other areas in the realm of reducing food waste include tax incentives for food waste reduction, charging for food waste in landfills, investing in infrastructure to reduce transport related waste costs, managing landfills by asking the state to refuse out of state waste, and managing facilities waste in

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[170] The *Pansota* Court held:

> Pakistan has ratified international human rights treaties which enshrine the right to food. The language of these agreements signifies that Pakistan has agreed to work within an international human rights framework and has an obligation to take steps to respect and fulfill such rights. This creates moral, legal and ethical imperatives to bring this human right framework home by developing a domestic food policy infrastructure based on the right to food. As signatory to the above conventions and treaties, Pakistan is bound to honor its international commitments. Respondents are duty bound to adhere to their own policies under the doctrine of sovereignty in the light of case law[.]

Muhammad Ahmad Pansota v. Federation of Pakistan, (2019) HCJ DA 38 (Lahore) R 40.

[171] The Maine constitutional amendment states that, "[a]ll individuals have a . . . right to . . . consume the food of their own choosing." While this is narrower than the RTF found in some international documents, future advocates in the state can use the explanatory language found in official sources explaining the RTF, such as general comments of the ICESCR itself and those of international bodies. H.P. 61, 130th Me. Leg. 1st Reg. Sess. (Me. 2021).

[172] The exception to this is infant formula. FDA, LABELING OF INFANT FORMULA: GUIDANCE FOR INDUSTRY (2016), https://www.fda.gov/media/99701/download.

[173] Various states allow diverse labels on food. Some of these labels are directed at the retailer and some are directed at the consumer, some refer to the safety of the product and some to the quality. Examples include "Sell By," "Use By," Expires On," "Made On," "Best By," "Best Before," "Best if Used By," and "Better if Used by."

[174] In an effort to correct this, in 2016 and 2019 a Maine Congressional representative helped forward bills to standardize food labeling. The 2016 bill was "To establish requirements regarding quality dates and safety dates in food labeling, and for other purposes." H.R. 3981, 114th Cong. (2016). The 2019 bill was "To establish requirements for quality and discard dates that are, at the option of food labelers, included in food packaging, and for other purposes." H.R. 3981, 116th Cong. (2019). Both were introduced by Maine Representative Chellie Pingree.

schools, hospitals, and prisons.[175] Each of these ideas speaks to the resourceful ways in which a state RTF can be executed for practical implementation.

VIII. AN OVERVIEW OF THE RTF WITH GARDENS, SAFE GROWING AND LAND USE

In addition to areas arguably more peripheral, the RTF can be used to address a plethora of areas with a more obvious direct connection to an individual's ability to feed themselves. This article will provide a sampling of topics the RTF can affect, in Maine and in future states with a RTF. In addition to these examples, there are of course other areas of food availability, accessibility, adequacy, and appropriateness that merit consideration, and in order to fully understand the areas most necessitating action a needs assessment, as discussed earlier in the essay, can help. But while each subnational entity can determine how best to incorporate a RTF in their own locality, the commonalities of law and practice found in the subjects below can provide ideas and guidelines to assist in implementation.

The benefits of personal and community gardens are too obvious to need explanation—the connection with food, the environmental benefits of sourcing food nearby, the community building qualities, the increase in food security, the positive expenditure of time.[176] The connection with the RTF is also clear—a garden of ones' own is the epitome of the 4As.[177] Community

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[175] Right now, Maine is one of the states that does not offer a state level tax incentive (credit or deduction) for food donations, so donators receive only federal benefits. HARV. FOOD LAW & POL'Y CLINIC, *Legal Fact Sheet: Maine Food Donation: Tax Incentives for Businesses*, 1 (2018), https://www.nrcm.org/wp-content/uploads/2018/09/TaxIncentivesMEFactsHarvard.pdf. Other states offering tax incentives for food redirection include Arizona (ARIZ. REV. STAT. ANN. § 42-5074, § 43-1025 (LEXISNEXIS 2022)), California (CAL. REV. & TAX. CODE § 17053.88.5 (Deering 2022) (repealed effective Dec. 1, 2027) and CAL. REV. & TAX. CODE § 17053.12 (Deering 2022)), Colorado (COLO. REV. STAT. § 39-22-536 (2022) and COLO. REV. STAT. ANN. § 39-22-301 (2022)), Iowa (IOWA CODE §§§ 190B.101-.106, 422.11E, 422.33(30) (2022)), Kentucky (KY. REV. STAT. ANN. § 141.392), Maryland (MD CODE ANN., TAX–GEN. §§ 10-745, 10-746 (LexisNexis 2022), Missouri (MO. REV. STAT. § 135.647 (effective Aug. 28, 2018)), New York (N.Y. TAX LAW § 210-B (Consol. 2022)), Oregon (OR. REV. STAT. §§ 315.154, 315.156 (2022)), South Carolina (S.C. CODE ANN. § 12-6-3750 (2022)), and Virginia (VA. CODE ANN. § 58.1-439.12:12 (2022)). *See* RUTE PINHO, CONN. GEN. ASSEMB. OFF. LEGIS. RSCH., TAX INCENTIVES FOR FOOD DONATIONS, 2015-R-0201 at 1 (2015), https://www.cga.ct.gov/2015/rpt/2015-R-0201.htm; Sarah Nichols, *Why You Should Care About Landfills*, NAT. RES. COUNCIL ME. (Sept. 10, 2020), https://www.nrcm.org/blog/why-you-should-care-about-landfills.

[176] Jean C. Bikomeye et al., *Resilience and Equity in a Time of Crises: Investing in Public Urban Greenspace Is Now More Essential Than Ever in the US and Beyond*, 18 INT. J. ENVIRON. RES. PUB. HEALTH 1, 14 (2021); Jill S. Litt et al., *The Influences of Social Involvement, Neighborhood Aesthetics and Community Garden Participation on Fruit and Vegetable Consumption*, 101(8) J. AM. PUB. HEALTH 1466, 1466 (2011).

[177] In Maine, there is an understanding that local food production is not only personally beneficial, but also positively affects the environment. MAINE WON'T WAIT: A FOUR-YEAR PLAN FOR CLIMATE ACTION, MAINE CLIMATE COUNCIL 69 (2020), https://www.maine.gov/future/sites/maine.gov.future/files/inlinefiles/MaineWontWait_December2020.pdf.

and personal gardens are available, as they are providing food desired by individuals; they are accessible, as they are in immediate proximity; they are adequate, in that they provide wholesome options; and they are appropriate, as they are a dignified and sustainable method of acquiring food. The benefit of gardens to urban and marginalized communities who do not always have access to food meeting the 4As is even more profound, and there are numerous examples across the country of subnational governments, usually in partnership with nonprofits, seeking to bolster and support personal gardens, community gardens and urban farms, either through the legislative process or through the courts.[178] There is also increasing evidence that green spaces can positively affect the safety and mental health conditions of a community.[179]

These efforts have addressed garden and farm access for individuals in private homes, in rental units, those who are unhoused, and those in subsidized housing, where residents often have to travel for full-service markets. For example, New York's Housing Authority has a Garden and Greening Program that supports community gardens and urbans farms for the city's public housing.[180] In Colorado, Denver Urban Gardens operates the nations' largest garden network and has partnered with the Denver Housing Authority on community gardens in several low-income housing complexes. This partnership includes monies budgeted to plan and maintain the gardens.[181] In Seattle, the Housing Authority works with public housing residents to maintain community gardens on public housing property.[182] In Minnesota, the Land Stewardship Project, a nonprofit working towards

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[178] For example, California's 2014 Neighborhood Food Act voids language in leases or HOAs preventing tenants from growing food for personal consumption. This law holds that a landlord must allow most tenants to participate in personal agriculture in portable containers for growing in the tenant's private area. Assemb. B. 2561, 2013-2014 Leg. (Cal. 2014); *The Neighborhood Food Act (AB 2561): Frequently Asked Questions*, SUSTAINABLE ECONOMIES L. CTR, https://ucanr.edu/sites/UrbanAg/files/263834.pdf (last visited Nov. 18, 2022).

[179] Eugenia C. South, *To Combat Gun Violence, Clean Up the Neighborhood*, N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2021/10/08/opinion/gun-violence-biden-philadelphia.html (reporting a large-scale study co-led by the author, as well as other efforts across the country, where vacant parcels of land are 'greened' and the surrounding neighborhoods see benefits in crime statistics and mental health self-reporting).

[180] *Urban Growing and Gardening*, NYC FOOD POL'Y, https://www1.nyc.gov/site/foodpolicy/programs/urban-growing-and-gardening.page (last visited Nov. 18, 2022).

[181] *Tapiz Community Garden*, DENVER URB. GARDENS, https://dug.org/garden/tapiz/ (last visited Nov. 18, 2022); Projects, DENVER HOUS. AUTH., https://www.denverhousing.org/projects-highlights/ (last visited Nov. 18, 2022); Donna Bryson, *A Garden Grows in Sun Valley*, DENVERITE (Sept. 30, 2019, 5:00 AM), https://denverite.com/2019/09/30/a-garden-grows-in-sun-valley/; FOOD SYSTEM POLICIES AND POPULATION HEALTH: MOVING TOWARD COLLECTIVE IMPACT IN DENVER, DENVER DEPT. ENV'T. HEALTH 17 (2014), https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/Food%20System%20Policy%20Scan%20Report_FINAL_12.15.2014.pdf.

[182] COMMUNITY GARDENING: POLICY REFERENCE GUIDE, PUB. HEALTH L. CENT. MITCHELL HAMLINE SCH. L. 26 (2017), https://publichealthlawcenter.org/sites/default/files/resources/Community-Gardening-Guide-2017.pdf.

sustainable agriculture, partnered with the Hope Community, an intentional neighborhood with low- and moderate-income apartments, to create growing space for three gardens.[183] Maine, which has been first in the nation in a number of food related areas,[184] is generally a grower-friendly state. In fact, the state has seen considerable activity around community gardens, urban farms, and personal gardening. For example, the Auburn-Lewiston area is the second largest urban metropolis in the state and a center of food access work.[185] The area is also home to the Lots to Garden programs, which aims to bring community gardens to areas most in need of food access.[186] Additionally, a number of Maine housing authorities have developed regulations around growing food.[187]

Despite these successes, there are equally numerous instances across the country where trying to grow ones' own food is prohibited.[188] As the examples below illustrate, this has happened in parks, unused lots, rental units, privatized public housing complexes,[189] and even in private homes operating under HOAs.[190] These prohibitions range from outright bans on

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[183] Shannon Prather, *Community Gardens More Than Triple in Twin Cities*, STAR TRIB. (Sept. 3, 2016, 9:36 PM), https://www.startribune.com/community-gardens-more-than-triple-in-twin-cities/392254821/. *See also* LAND STEWARDSHIP PROJECT, https://landstewardshipproject.org (last visited Oct. 29, 2022); and HOPE COMMUNITY, https://hope-community.org/about/ (last visited Oct. 29, 2022).

[184] In addition to passing the country's first RTF constitutional amendment, Maine has one of the earliest cottage food laws in the country and the State has been a leader in forwarding local ordinances to exempt small local producers selling products for home consumption from state license and inspection regulations.

[185] The area is also one the largest per-capita centers of Somali refugees and Muslims in the country and well over half of downtown Lewiston and downtown Auburn residents live below 200% of the federal poverty level. CYNTHIA ANDERSON, HOME NOW: HOW 6000 REFUGEES TRANSFORMED AN AMERICAN TOWN, 5–6 (2019); U.S. EPA et al., COMMUNITY ACTION PLAN FOR LEWISTON-AUBURN 4 (2019), https://goodfood4la.org/wp-content/uploads/2020/01/LFLP-L-A-Community-Action-Plan-FINAL.pdf. According to this plan the area needs include a year-round farmers market, increased sustainable land access, passage of an urban agriculture ordinance and a low-cost local food store (in a neighborhood with high food insecurity, many residents without vehicles, and no full-service grocery stores within a mile).

[186] The Lots to Garden program was founded in 1999, sponsored by St. Mary's Health System. In 2006, St. Mary's founded their Nutrition Center to house the program and advance their belief that access to food is a fundamental right. *Nutrition Center*, ST. MARY'S HEALTH SYS., https://www.stmarysmaine.com/nutrition-center/ (last visited Nov. 18, 2022).

[187] As one example, the city of Bangor, Maine allows prior approved vegetable gardens up to a certain size. *Dwelling Lease (O)3-5*, HOUSING AUTH. CITY BANGOR (Jan. 2017), https://www.bangorhousing.org/wp-content/uploads/2018/09/PH-Lease-1-1-17.pdf.

[188] Kaitlyn Greenidge, Opinion, *My Mother's Garden,* N.Y. TIMES (Mar. 26, 2016), https://www.nytimes.com/2016/03/27/opinion/sunday/my-mothers-garden.html (relaying how her mother was told to get rid of her vegetable garden, planted in an unused section of lawn in the housing project where they lived, or be evicted).

[189] Public housing units are increasingly being run by private entities who contract to run these developments.

Jaime Alison Lee, *Rights at Risk in Privatized Public Housing*, 50 TULSA L. REV. 759, 767 (2015).

[190] HOAs are homeowner associations that govern certain communities. Very often their rules forbid or seriously curtail gardens. Nicole Schauder, *HOA Bans Vegetable Gardens*, PERMACULTURE GARDENS, https://growmyownfood.com/hoa-bans-vegetable-gardens/ (last visited Nov. 18, 2022);

gardening to specific proscriptions based on particular issues such as plant type or size, garden location, and water use. For example, it is currently illegal to grow particular plants in certain parts of Maine,[191] because of a concern that a fungus associated with plants in the genus Ribes would infect Eastern white pine trees.[192] Because white pine is such an economic asset to the state, timber and forestry advocates pushed back against a proposed lifting of the ban.[193] While Maine residents formed a petition to try and repeal this restriction, in other locales advocates have responded to various restrictions by bringing lawsuits, turning to their legislatures, giving up, or proceeding in defiance of the prohibition.[194]

Presently, states and localities across the country have a maze of often confusing regulations around personal gardens, community gardens, and urban farms. In Florida, homeowners had to go to court after they were told that the vegetables they had been growing in their front yard for years violated a new local ordinance.[195] After losing their six year court battle, the state passed a law prohibiting local governments from stopping residential homeowners from having vegetable gardens.[196] Note that because Florida does not have a RTF in their constitution, the homeowners had to rely on other, unsuccessful, legal arguments and eventually turn to the legislature. As another example, an Illinois city allows front yard vegetable gardens, but bans other gardening necessities. Here, homeowners constructed a high

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Joseph Barnes, *The 5 Most Common HOA Landscaping/Gardening Policies (And Why They Matter to Your Community)*, YELLOWSTONE LANDSCAPING (Dec. 28, 2020, 12:06 PM) https://www.yellowstonelandscape.com/blog/most-common-hoa-landscaping-gardening-policies-why-matter-your-community. For a response to HOA restrictions on edible gardening, *see* Coleman Alderson, *HOA Guidelines Rules and Workarounds for Growing Food*, GARDENS ALL, https://www.gardensall.com/gardens-not-allowed-hoa-homeowners-associations-and-yard- gardens/ (last visited Oct. 13, 2021).

[191] Me. Dep't of Agric., Conservation & Forestry, Bureau Forestry, White Pine Blister Rust, Quarantine on Currant and Gooseberry Bushes (re-adopted Dec. 28, 1979), https://www.maine.gov/dacf/mfs/forest_health/diseases/white_pine_blister_rust_rule.htm.

[192] Sam Schipani, *Growing Currants and Gooseberries is Illegal in Maine and There's a Good Reason for It*, BANGOR DAILY NEWS (Aug. 16, 2021), https://www.bangordailynews.com/2021/08/16/homestead/growing-currants-and-gooseberries-is-illegal-in-maine-and-theres-a-good-reason-for-it/#:~:text=Outside%20the%20areas%20with%20the,for%20white%20pine%20blister%20rust.; WILLIAM H. LIVINGSTON ET AL., FIELD MANUAL FOR MANAGING EASTERN WHITE PINE HEALTH IN NEW ENGLAND, MISCELLANEOUS PUB. 764, ME. AGRIC. & FOREST EXPERIMENT STATION 7 (2019).

[193] Tom Atwell, *Maine Gardener: Currant Events*, PORTLAND PRESS HERALD (Jan. 9, 2011), https://www.pressherald.com/2011/01/09/currant-events_2011-01-09/; David Spahr, Forum Post to *Maine Permaculture: Repeal the Ribes (Currants, Gooseberries, Jostaberries) Ban in Maine*, MEETUP (Dec. 14, 2010), https://www.meetup.com/maine-permaculture/messages/boards/thread/10166569#initialized.

[194] Sarah Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, and the Local Food Movement*, 2014 WIS. L. REV. 369, 369 (2014).

[195] Alisha Ebrahimji, *Six Years Later, Florida Couple Wins Right to Plant Veggies in Their Front-Yard*, CNN (July 3, 2019, 2:07 PM), https://edition.cnn.com/2019/07/03/us/florida-vegetable-gardens-trnd/index.html.

[196] Fla. S. CS/SB 82: Vegetable Gardens (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/82/?Tab=BillHistory.

tunnel hoop house (an impermanent greenhouse used to cover plants and extend the growing season) in their backyard and were told by city officials that this violated a prohibition on temporary structures.[197] In Minnesota, a homeowner was told not to proceed with his large front yard vegetable garden until city officials had time to study 'the problem.' The City Council then passed an interim ordinance banning front yard gardens, which they later made permanent, despite a petition (that garnered over 10,000 signatures) asking that the ordinance be rescinded.[198] Many would argue that for the most part these restrictions are in direct conflict with a RTF constitutional amendment and had these advocates had the benefit of residing in a RTF state such as Maine, they would have had a more powerful tool with which to contest these issues. In fact, many believe advocates in a RTF state can do more than just challenge restrictions – they can use the RTF to argue for support for community and personal gardens and for urban farms.

It is also worth noting that the bans detailed above generally use aesthetic concerns to ban home food cultivation and that the individuals targeted are usually people of color. Aesthetic concerns are a catch-all that have at least some connection with issues of equity, as in America prosperity has become connected with homes that have no evidence of the work that maintains life.[199] Many places differentiate between ornamental growth, which is generally permitted, and edible growth, which is prohibited, regulated, or denigrated. Even when advocates have removed anti-gardening laws or helped pass pro-gardening legislation, they have had to combat issues of inequity during the process. As one example, while San Francisco amended its zoning so that agricultural activity could proceed everywhere in the city, advocates had to overcome an effort to add an ornamental fencing requirement to the new legislation, a requirement that would have made participation price-prohibitive for many parties.[200] In other words, issues of

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[197] Nicole Virgil, Opinion, *Commentary: I'm Fighting for My Right to Garden*, CHI. TRIBUNE (Aug. 28, 2020), https://www.chicagotribune.com/opinion/commentary/ct-opinion-garden-hoop-property-rights-elmhurst-20200828-n64y47l345fb7hegkuce6c6e7m-story.html. Illinois had a Right to Garden Act that would have allowed for such structures introduced in the 2020-2021 legislative session. Right to Garden Act, S.B. 3329, 101st Gen. Assemb. (Ill. 2020), https://trackbill.com/bill/illinois-senate-bill-3329-right-to-garden-act/1896812/. *See also Our Mission*, ADVOCATES FOR URBAN AGRIC., https://www.auachicago.org/home/our-mission/ (last visited Oct. 29, 2022) (noting the group's support for policies supporting urban agriculture in the Chicago area).

[198] Joey Peters, *Not in His Front Yard: Falcon Heights Tells Would-be Vegetable Gardener to Hold the Lettuce, Hold the Tomato, While it Studies the Menu*, SAHAN J. (May 20, 2020), https://sahanjournal.com/culture-community/not-in-his-front-yard-falcon-heights-tells-would-be-vegetable-gardener-to-hold-the-lettuce-hold-the-tomato-while-it-studies-the-menu/; Falcon Heights, Ramsey County, Minn., An Interim Ordinance Prohibiting the Cultivation of Gardens in the Front Yard Ordinance No. 20-04 (May 13, 2020).

[199] Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 252–53, 257–59 (2012).

[200] Antonio Roman-Alcalá, *San Francisco Passes Progressive Urban Agriculture Policy*, CIV. EATS (Apr. 14, 2011), https://civileats.com/2011/04/14/san-francisco-passes-most-progressive-urban-agriculture-policy-in-u-s/.

bias within the arena of food justice reflect problems of inequity within our larger society, a connection that is as true in Maine as it is elsewhere.[201] One of the goals of the RTF is to identify and address these issues.[202]

Restrictions on urban farms, community gardens and personal gardens can prove good targets as advocates flex their new RTF muscles, as can related areas such as raising backyard chickens or keeping bees. [203] It is also worth noting that while access to natural resources may, at first glance, seem to demand a review identical to that utilized when evaluating issues such as personal and community gardens, the analysis here may in fact differ.[204] This is because, while access to these resources is also an important aspect of the RTF, it is one that is held for the collective good and requires assessment to ensure that all present and future interests are balanced.[205] The few court cases that have concluded in this realm either involve interests ancillary to the right to feed oneself[206] or challenge hunting or fishing restrictions[207] and merely illustrate the point that sustainability and the RTF

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[201] As an example, during the legislative debate over the RTF amendment in Maine, a legislator testifying in opposition asserted concerns about the amendment permitting inappropriate farm animal husbandry in urban areas such as Lewiston, Auburn and Portland. These are the areas that are the immigrant centers of Maine, and Lewiston has one of the highest per capita Muslim populations in the United States. Proposing an Amendment to the Constitution of Maine to Establish a Right to Food: Hearing on L.D. 95 before the House of Representatives, 130th Legis. (2021) (testimony of Kathleen Dillingham).

[202] Megan Horst et al., *The Intersection of Planning, Urban Agriculture, and Food Justice: A Review of the Literature*, 83 J. AM. PLAN. ASS'N 277, 277 (2017).

[203] *How Law & Policy Can Support Growing Food Where You Live*, HEALTHY FOOD POL'Y PROJECT, https://healthyfoodpolicyproject.org/growing-food-where-you-live/how-law-policy-can-support-growing-food-where-you-live (last visited Nov. 11, 2022).

[204] As noted *infra*, state constitutional rights to farm, hunt or fish are more the result of special interest advocates than they are of human rights proponents and litigation over these amendments provide little direct guidance. Young-Eun Park, *Life, Liberty, and the Pursuit of Hunting & Fishing: The Implications of Kentucky's "Right to Hunt" Constitutional Amendment*, 7 KY. J. EQUINE, AGRIC., & NAT. RES. L. 357, 357, 359. (2015) (arguing that state constitutional amendments on the right to fish and hunt are unnecessary, as these activities are already allowed and will still be subject to reasonable state restrictions.) Note that these rights are relatively new – until the mid 1990s only one state had a right to fish and hunt in their state constitution. CONG. SPORTSMEN'S FOUND., 2021 ISSUE BRIEFS,154–55 (2021).

[205] U.N. FAO, THE RIGHT TO FOOD AND ACCESS TO NATURAL RESOURCES 23 (2008) (explaining how access to natural resources is a means to an end).

[206] For example, a Virginia case dealt with clay shooting and the state constitutional right to hunt. The court held that "shooting sporting clays does not qualify as hunting under the Virginia constitutional right to hunt, fish, and harvest game." Orion Sporting Group, L.L.C. v. Nelson County Board of Supervisors, 68 Va. Cir. 195, 199 (2005).

[207] Courts generally find the challenged restrictions reasonable. For example, there was a case where the plaintiffs challenged the formation of a hunting season for mourning doves. Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep't Nat. Res., 677 N.W.2d 612, 616 (Wis. 2004). In denying their claim, the court discussed the "Right to Hunt" amendment in the Wisconsin Constitution and held that while Wisconsinites had the right to hunt, this right could be subject to reasonable regulations. *Id.* at 629. Similarly, in a Tennessee case challenging restrictions on catching paddlefish, the court held that while the state constitution guaranteed a personal right to fish and hunt, that right was subject to reasonable restrictions. Tom Humphrey, *Judge Dismisses Lawsuit Based on TN 'Right to Hunt and Fish,'* KNOXBLOGS: HUMPHREY ON THE HILL (May 29, 2015), http://knoxblogs.com/humphreyhill/2015/05/29/judge-dismisses-lawsuit-based-on-tn-right-to-hunt-and-fish/. *But see* Hunter Nation Inc. v. Wis. Dep't Nat. Res., No. 2021CV000031, *order issued* (Wis. Cir.

are intertwined rights that require a healthy environment.[208] Therefore, while state constitutional guarantees of the right to hunt, farm, and fish may provide some elucidation in the future,[209] in general litigation over these amendments may practically provide less guidance for RTF advocates than RTF cases from overseas.

In addition to ensuring availability, accessibility, adequacy and appropriateness of gardens and urban farms, the RTF can provide a means to challenge issues that impact growing food safely. For example, the issue of PFAS contamination garnered national attention because of the experiences of Maine farmers. PFAS are chemicals that were used in an array of products, and in fertilizers, do not break down easily, and have proven harmful to humans.[210] When PFAS contaminate fertilized land they can migrate into crops, animals, and water supplies. Since PFAS accumulate, it can be years before their impact is evident.[211] In Maine, Fred Stone was a third-generation farmer who had to halt selling his dairy products after he was told in 2016 that a test well and a milk tank on his property both registered PFAS high above levels recommended by the Environmental Protection Agency. Maine officials determined that the contamination originated from a state sponsored fertilizer sludge program that had run until 2004. In an effort to correct the situation, Stone purchased a filtration system, engaged in voluntary testing, and culled his herd, all at

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Ct., Jefferson Cnty. Nov. 18, 2021) (where plaintiffs sued to force the state to schedule a wolf hunt, which they claimed was mandated under Wisconsin law and by the state constitutional provision giving the people the right to fish, hunt, trap, and take game. The court held that the state had to hold such a hunt in February 2021). Danielle Kaeding, *Wolf Hunt Will Move Forward After Panel of Judges Dismisses DNR Appeal*, WIS. PUB. RADIO (Feb. 19, 2021, 6:25 PM), https://www.wpr.org/wolf-hunt-will-move-forward-after-panel-judges-dismisses-dnr-appeal; Complaint at ¶ 4, *Hunter Nation Inc. v. Wis. Dep't Nat. Res., No. 2021CV000031,* (Wis. Cir. Ct., Jefferson Cnty. Feb. 2, 2021).

[208] Olivier de Schutter (Special Rapporteur on the Right to Food), *Final Report: The Transformative Potential of the Right to Food*, ¶ 16, U.N. Doc. A/HRC/25/57 (Jan. 24, 2014); Anastasia Telesetsky, *Fulfilling the Human Right to Food and a Healthy Environment: Is It Time for an Agroecological and Aquaecological Revolution?*, 40 VT. L. REV. 791, 793 (2016).

[209] For example, a current North Carolina lawsuit alleging that the state has mismanaged its coastal fisheries such that the rights of present and future generations to fish are being threatened may prove illustrative in the future. The complaint relies in part on the state's constitutional guarantees of the right to fish, hunt and harvest wildlife and argues that the "privilege granted to a relative few citizens or companies to fish for profit must yield in priority to the constitutionally protected public-trust rights of the broader public." Complaint at ¶ 8, *Coastal Conservation Ass'n v. N.C.*, No. 20-CVS-12925, 2021 WL 9405572 (N.C. Super. 2021). In July of 2021 the Court rejected the State's Motion to Dismiss. *Major Victory for Citizen Coalition in NC Coastal Fisheries Lawsuit*, COASTAL CONSERVATION ASS'N, https://www.joincca.org/major-victory-for-citizen-coalition-in-nc-coastal-fisheries-lawsuit/ (last visited Nov. 11, 2022).

[210] "PFAS" stand for per- and polyfluoroalkyl substances, a group of man-made chemicals. *Basic Information on PFAS*, E.P.A., (Apr. 28, 2022) https://www.epa.gov/pfas/basic-information-pfas; Bevin Blake & Suzanne E. Fenton, *Early Life Exposure to Per- and Polyfluoroalkyl Substances (PFAS) and Latent Health Outcomes: A Review Including the Placenta as a Target Tissue and Possible Driver of Peri- and Postnatal Effects*, TOXICOLOGY 443 (Oct. 2020).

[211] *Managing PFAS in Maine*, MAINE PFAS TASK FORCE 3 (Jan. 2020), https://www.maine.gov/pfastaskforce/materials/report/PFAS-Task-Force-Report-FINAL-Jan2020.pdf.

his own expense.[212] Despite the level of contamination, Stone's farm only briefly qualified for a federal program set up to help farmers whose products are contaminated.[213] Nor could he pursue any other remedies in Maine as the contamination had occurred many years earlier and Maine law only allows suits over PFAS to be brought within six years of the pollution occurring.[214] Since the extent of PFAS contamination is unknown and testing is expensive, many farmers and gardeners will not discover the pollution within that six year time frame. When that happens the law effectively shuts Maine's courtroom doors on them and they must shoulder the burdens themselves. [215] A bill to address this issue, by allowing suits by farmers and other Maine citizens to be brought within six years of discovering PFAS pollution, was introduced in the Maine legislature, but did not pass,[216] even though numerous other states have longer timelines for injuries caused by chemicals with "latent harmful effects."[217] A RTF constitutional amendment can provide support for this effort, as well as for other food growing safety concerns. These include lead levels in congested areas with manufacturing histories that raise urban gardening safety concerns,[218] soil contamination in

[212] Shantal Riley, *Toxic Synthetic 'Forever Chemicals' Are in Our Water and on Our Plates*, NOVA (Nov. 2, 2020), https://www.pbs.org/wgbh/nova/article/pfas-synthetic-chemicals-water-toxic/.

[213] This is the federal Dairy Indemnity Program. *See* U.S.D.A., FACT SHEET: DAIRY INDEMNITY PAYMENT PROGRAM, (April 2011), https://www.fsa.usda.gov/Internet/FSA_File/dairy_ind_pay_program.pdf.

[214] *An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances: Hearing on L.D. 2160 before the J. Standing Comm. on the Judiciary*, 129th Legis., 2d Spec. Sess. (Me. 2020) (testimony of Rep. Henry Ingwersen).

[215] Although limited testing makes the extent of the problem unknowable, PFAS contamination was also found at the White family farm in Presque Island, Maine, forcing the family to purchase a filtration system, stop eating their garden vegetables and cease selling the meat they raised. *An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances: Hearing on L.D. 2160 before the J. Standing Comm. on the Judiciary*, 129th Leg., 2d Spec. Sess. (Me. 2020) (testimony of Dan White). Contamination was also found at the Tozier farm in Maine's Somerset County, which may have had the "highest milk contamination levels ever recorded in North America." Sharon Anglin Treat, *With a Second Farm Shuttered Due to Massive PFAS Contamination, Maine Legislators Weigh Easing Access to the Courts*, INS. FOR AGRIC. & TRADE POL'Y (July 30, 2020), https://www.iatp.org/blog/202007/second-farm-shuttered-due-massive-pfas-contamination-maine-legislators-weigh-easing.

[216] An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances, H.P. 1544, 129th Leg., 2d Spec. Sess. (Me. 2020).

[217] *An Act Relating to the Statute of Limitations for Injuries or Harm Resulting from Perfluoroalkyl and Polyfluoroalkyl Substances: Hearing on L.D. 2160 before the J. Standing Comm. on the Judiciary*, 129th Leg. 2d Spec. Sess. (Me. 2020) (testimony of Susan Faunce).

[218] Julia Bayly, *There is Lead-Contaminated Soil in Maine. Here's What You Need to Know Before You Plant*, BANGOR DAILY NEWS (May 1, 2021), https://www.bangordailynews.com/2021/05/01/homestead/there-is-lead-contaminated-soil-in-maine-heres-what-you-need-to-know-before-you-plant/; Laura Heinlein, *Lead Contamination in Maine's Soils*, PLANT ME.!, https://plantsomethingmaine.org/lead-contamination-in-maines-soils/ (last visited Oct. 8, 2021).

residential areas located near chemical and municipal waste sites,[219] or water quality issues that impact farms and gardens.[220]

While there are numerous possible soil safety issues that impact the RTF, there is also the issue of having enough soil in the first place. In fact, many states, including Maine, struggle over having enough agricultural land overall. Between 2012 and 2017, Maine was one of the states in the country that lost the most farmland.[221] This land loss is due to a number of factors, including rising prices and land amassment by private owners.[222] This concentration of land wealth is not unique to Maine, and the RTF provides proponents with an opportunity to reexamine the connection between private property and sustainable agriculture. While landowners in the state have the option to enter into conservation easements,[223] or land trusts,[224] the state can also set up community-based land trusts, parks, reserves or enter into longer lease agreements with cooperatives and community gardens.[225] Across the country, communities have been active in creative ways to preserve or capture more land for farms and gardens. As one example, New York garden enthusiasts engaged in a years' long legal and community battle in order to preserve community gardens slated to be sold in a city as eager for affordable housing as it is for gardens.[226] In other places, advocates have developed or

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[219] STEPHEN LESTER & ANNE RABE, CENTER FOR HEALTH, ENV. & JUST., SUPERFUND: IN THE EYE OF THE STORM 48 (2010).

[220] MARS HILL COMPREHENSIVE PLAN COMM., TOWN OF MARS HILL COMPREHENSIVE PLAN UPDATE II 8–6 (2014).

[221] U.S. DEP'T AGRIC. NAT'L AGRIC. STAT. SERV., 2017 CENSUS OF AGRICULTURE – MAINE STATE AND COUNTY DATA 18 (2019); *See also* Liz Barrett Foster, *States That Have Lost the Most Farms the Last 100 Years*, STACKER (Oct. 22, 2020), https://stacker.com/stories/4716/states-have-lost-most-farms-last-100-years (noting that the total number of acres devoted to farming in Maine declined 76% between 1920 and 2019); Jennifer Dempsey, *New Census of Agriculture Shows Decline in Number of America's Farms, Farmers, and Farmland*, AM. FARMLAND TRUST (Apr. 20, 2019), https://farmland.org/new-census-of-agriculture-shows-decline-in-number-of-americas-farms-farmers-and-farmland/ (noting Maine has one of the country's largest percentage decreases in farmland).

[222] Currently, J.D. Irving, Peter Buck and John Malone are the three largest private landowners in Maine, with the Pingree Family also holding significant acreage. *Largest Landowners by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/largest-landowners-by-state (last visited Nov. 11, 2022); *ME Landowner Tops Land Holdings List*, MAINEBIZ (Oct. 13, 2011), https://www.mainebiz.biz/article/me-landowner-tops-land-holdings-list (noting Maine land holdings by John Malone, Irving Woodlands and the Pingree family); Andy Kiersz, *The 20 Biggest Landowners in America*, BUSINESS INSIDER (Apr. 11, 2019), https://www.businessinsider.com/the-20-biggest-landowners-in-america-2019-4 (noting the large amounts of Maine land owned by John Malone, the Irving Family, the Buck Family and the Pingree heirs).

[223] *Agricultural Easements*, MAINE FARMLAND TRUST, https://www.mainefarmlandtrust.org/farmland-protection-new/agricultural-easements/#1456520719996-2a66b881-ec7a (last visited Nov. 11, 2022).

[224] *What is a Land Trust?*, MAINE LAND TRUST NETWORK (Sept. 15, 2022), https://www.mltn.org/trusts/what-is-a-land-trust/.

[225] Katherine Kelley, et al., *Lewiston Food Policy Audit*, CMTY. ENGAGED RSCH. REPS. 59, 23 (2018); Adam Calo, et al., *Achieving Food System Resilience Requires Challenging Dominant Land Property Regimes*, 5 FRONTIERS SUSTAIN. FOOD SYST. 1 (2021) (reviewing land ownership structure studies in the global North).

[226] Jennifer Steinhauer, *Ending a Long Battle, New York Lets Housing and Gardens Grow*, N.Y. TIMES, Sept. 19, 2002 at A1.

revised zoning districts and agricultural zones, utilized residential cluster developments, provided funds, directed federal and state grant programs, raised bond money, received startup and maintenance costs, entered agreements on utility bills, transportation and access issues, provided matching grants, engaged in participatory budgeting, and inventoried public land available for gardening.[227] Even when local governments have not inventoried or provided public land for growing food on their own, individuals and groups have taken over vacant land or proposed land use agreements for these unused spaces.[228] As Maine has a goal to increase the percentage of lands under conservation to 30% by the year 2030 innovative forms of land tenure initiatives, informed by a RTF amendment, are called for.[229]

IX. CONCLUSION

The reach of a state constitutional RTF has yet to be tested. And as this article illustrates, the RTF can implicate not only matters that are more obviously impacted by a right to feed oneself, but it also implicates issues that call for more in-depth examination. In short it is clear that the RTF provides anti-hunger advocates, farmers, and other RTF supporters with the grounds to seek advancements in numerous areas. Maine is the first state with the ability to explore these options and the experience there will provide guidance for activists across the country.

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[227] ZONING FOR URBAN AGRICULTURE: A GUIDE FOR UPDATING YOUR CITY'S LAWS TO SUPPORT HEALTHY FOOD PRODUCTION AND ACCESS, HEALTHY FOOD POL'Y PROJECT, 1 (2020); ASHTON O'CONNOR, GRASSROOTS GARDENS OF WESTERN N.Y., COMMUNITY GARDENING: CASE STUDIES AND RECOMMENDATIONS FOR THE BUFFALO COMMUNITY 4 (2020); *Municipal Action: Local Policies and Ordinances*, ME. FARMLAND TRUST, https://www.mainefarmlandtrust.org/building-farm-friendly-communities/local-policies-ordinances/ (last visited Nov. 11, 2022). For ideas about what subnational governments can do to promote urban farms *see* LAURA DRISCOLL, BERKELEY FOOD INST., URBAN FARMS: BRINGING INNOVATIONS IN AGRICULTURE AND FOOD SECURITY TO THE CITY 4, (2017).

[228] *See Dig, Eat, & Be Healthy*, CHANGELAB SOLS., https://www.changelabsolutions.org/product/dig-eat-be-healthy (offering model agreements when planning on growing food on public land).

[229] Maine currently has about 20% of its lands under conservation. Me. Climate Council, *Maine Won't Wait: A Four-Year Plan for Climate Action* (Dec. 2020) https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/MaineWontWait_December2020.pdf (last visited Oct. 3, 2021).

Ring and *Hurst* Retroactivity: Deconstructing Divergent Doctrines

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ABSTRACT

The U.S. Supreme Court's opinions in Ring v. Arizona *(2002) and* Hurst v. Florida *(2016) are two critical parts of the jurisprudence related to capital defendants' right to trial by jury under the Sixth Amendment to the U.S. Constitution. Each clarified capital defendants' rights under the Sixth Amendment. While the new rules announced in* Ring *and* Hurst *seemed clear at the time, courts have grappled with how to apply them for years—in part, whether the new rules apply retroactively to defendants whose capital sentences were final when the opinions were issued. As this article explains, courts have reached divergent conclusions on whether the new rules announced in* Ring *and* Hurst *apply retroactively. This article attempts to unravel the confusion surrounding the retroactivity of these landmark decisions.*

Ultimately, this article explains that the case law regarding the retroactive application of Ring *was mostly consistent. A close examination of the case law reveals that the confusion arose after the U.S. Supreme Court decided* Hurst*. This article identifies four points of confusion that arose surrounding the retroactivity of* Ring *and* Hurst*: (1) Was* Hurst *a direct result of* Ring*?; If so, should it apply retroactively?; (2) What role did the Eighth Amendment play in both* Ring *and* Hurst*?; (3) Why did some courts reach divergent conclusions on* Hurst *retroactivity even in applying the same federal standard?; (4) Does the Florida Supreme Court's invention of partial retroactivity for* Hurst *make sense? By exploring and explaining these sources of confusion, this article aims to help clarify the broader landscape of modern capital sentencing jurisprudence. Further, this article explains that the resolution to such uncertainty likely lies in the U.S. Supreme Court clarifying the distinction between the roles of the Sixth and Eighth Amendments in capital sentencing.*

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I. INTRODUCTION

When the U.S. Supreme Court decided *Hurst v. Florida* in 2016,[1] it answered a question that had been debated for fourteen years: does Florida's capital sentencing statute violate capital defendants' Sixth Amendment right to a trial by jury under the U.S. Supreme Court's 2002 decision in *Ring v. Arizona*?[2] In *Ring*, the Court held that the Sixth Amendment entitles capital defendants to a jury determination of the facts necessary to impose a sentence of death.[3] Meanwhile Florida's capital sentencing statute permitted a judge, rather than a jury, to find the aggravating factors required to impose the death penalty, so long as a jury recommended a death sentence by a majority vote of 7-5. Thus, in *Hurst*, the U.S. Supreme Court held that Florida's statute was unconstitutional because a jury's advisory recommendation is insufficient to satisfy the Sixth Amendment right to a trial by jury. The jury, not the judge, must make all of the required findings to sentence a defendant to death.[4]

Although the *Hurst* opinion focused on Florida's capital sentencing statute, it had national significance. *Hurst* built on the discussion surrounding capital defendants' right to trial by jury under the Sixth Amendment. After *Hurst*, states across the country were forced to, again, review their capital sentencing procedures to determine whether they complied with the Sixth Amendment. For example, Alabama determined its statute passed constitutional muster, while Delaware determined its did not.

While the U.S. Supreme Court aimed to clarify capital defendants' rights under the Sixth Amendment in *Hurst*, the decision might have caused more confusion than clarity. This article focuses on the confusion that arose surrounding the retroactivity of *Hurst*, which was not isolated in Florida. Similar to how courts reacted after *Ring*, courts across the country have grappled with this issue since 2016. In doing so, they reached different

[1] Hurst v. Florida, 577 U.S. 92 (2016). The U.S. Supreme Court is often referenced as the "Supreme Court" or "Court."

[2] U.S. CONST. amend. VI.

[3] Ring v. Arizona, 536 U.S. 583 (2002).

[4] *Hurst*, 577 U.S. at 97–99.

conclusions by applying different frameworks and relying upon different theories.

The case law surrounding the retroactivity of *Hurst* is almost impossible to follow. This article helps to trace the source of the doctrinal chaos surrounding the retroactivity of *Hurst* and *Ring*. In doing so, it identifies four points that led to the confusion. As the discussion outlines, the ideal solution is likely for the U.S. Supreme Court to clarify; however, retroactivity jurisprudence places the analysis squarely within the jurisdiction of the states, which essentially forecloses the Supreme Court from doing so.

By way of background, Part I briefly reviews the Supreme Court's decisions in *Ring* and *Hurst* as well as how state supreme courts interpreted *Hurst* and applied it to their respective states' capital sentencing schemes.[5] Part II canvasses the theory of retroactivity and relevant standards courts across the country apply in analyzing whether a new rule applies retroactively. Part III reviews the approaches courts took in addressing the retroactivity of *Ring*. This part shows that, altogether, the decisions regarding the retroactivity of *Ring* were consistent. Part IV explains the different approaches courts have taken in answering whether *Hurst* applies retroactively. Unlike the analyses regarding the retroactivity of *Ring*, this part shows that analyses regarding the retroactivity of *Hurst* varied greatly. Digesting the information from Parts III and IV, Part V identifies four points that likely led to the confusion surrounding the retroactivity of *Ring* and *Hurst*. By doing so, this article provides an explanation for a very confusing and entangled area of decades of jurisprudence that has affected the lives of hundreds, if not thousands, of capital defendants.

Finally, Part VI explains that a resolution to this uncertainty is for the U.S. Supreme Court to outline the distinct roles of the Sixth and Eighth Amendments in the capital sentencing context. While such clarification is unlikely to be given on *Hurst* at this juncture, especially considering that the litigation related to the retroactivity of *Hurst* is essentially complete, it is almost certain that *Hurst* is not the last decision of its kind to cause a paradigm shift in the states that continue to employ capital sentencing. For instance, the U.S. Supreme Court's 2022 decision in *Shinn v. Ramirez* significantly altered how capital defendants' federal habeas claims may be litigated, severely narrowing capital defendants' rights on postconviction.[6]

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[5] Hurst v. State, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*"). At times, where appropriate, *Hurst II* and *Hurst v. Florida* are referenced collectively as "*Hurst*."

[6] *See generally* Shinn v. Ramirez, 141 S. Ct. 2228 (2022); *Shinn v. Ramirez*, 136 HARV. L. REV. 400 (Nov. 10, 2022).

II. REVIEWING THE U.S. SUPREME COURT'S SIXTH AMENDMENT OPINIONS IN *RING V. ARIZONA* AND *HURST V. FLORIDA*

Even as societal support for capital punishment continues to decline and more states move toward abolition,[7] capital sentencing and executions continue in several jurisdictions.[8] During the Trump administration, the federal government restarted executions—conducting in 2020 more executions than all the states combined.[9] In July 2021, the Biden administration announced that it would halt federal executions while the Justice Department reviews its policies and procedures. However, the announcement does not eliminate the federal death penalty.[10]

As long as states and the federal government maintain capital punishment,[11] the Sixth Amendment provides crucial protections to capital defendants.[12] This article focuses on the Sixth Amendment's guarantee of a trial by jury.[13] As Section A below explains, the U.S. Supreme Court clarified in *Ring* that capital defendants have the right to a jury's finding of

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[7] *See, e.g.*, Ronald J. Tabak, *Capital Punishment*, *in* THE STATE OF CRIMINAL JUSTICE 2020, AM. BAR ASS'N 217, 217–18 (2020) (reviewing the decline in societal support for the death penalty); *id.* at 219–21, 223–26 (explaining states' move toward abolition); *see, e.g.*, 2021 V.A. H.B. 2263.

[8] Tabak, *supra* note 7, at 226–27 ("As in other recent years, new death sentences were geographically concentrated."); *id.* at 229 (explaining that the same is true for executions). In 2020, the Florida Supreme Court reversed its decision on remand from *Hurst v. Florida*, setting the stage for the Legislature to make it easier for defendants to be sentence to death. *See Florida Supreme Court "Recedes" From Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases*, AM. BAR ASS'N (Mar. 10, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/florida-supreme-court-state-v-poole (explaining the Florida Supreme Court's decision in *State v. Poole*, which receded from *Hurst v. State*, and made it easier to obtain a sentence of death) [hereinafter *Florida Supreme Court Major Decision*]. In 2022, 18 executions were completed in 6 states. *Outcomes of Death Warrants in 2022*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2022 (last visited Jan. 16, 2023). Even more are scheduled for 2023. *Upcoming Executions*, DEATH PENALTY INFO. CTR. (last updated Jan. 14, 2023), https://deathpenaltyinfo.org/executions/upcoming-executions.

[9] *See Executions Overview*, DEATH PENALTY INFO. CTR. (last visited Oct. 12, 2022, 2:25 PM), https://deathpenaltyinfo.org/executions/executions-overview; *see also* Tabak, *supra* note 7, at 236.

[10] Michael Balsamo, Colleen Long & Michael Tarm, *Federal Executions Halted: Garland Orders Protocols Reviewed*, AP NEWS (Jul. 1, 2021), https://apnews.com/article/joe-biden-executions-government-and-politics-9daf230ef2257b901cb0dfeeeb60be44 ("It does not "end [the] use [of executions] and keeps the door open for another administration to simply restart them. It also doesn't stop federal prosecutors from seeking the death penalty . . . .").

[11] As of August 14, 2020, 27 states and the federal government maintain the death penalty. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 14, 2020), https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1597410707.pdf.

[12] U.S. CONST. amend. VI; *see, e.g.*, Rauf v. State, 145 A.3d 430 (Del. 2016) (Strine, C.J., concurring). For more discussion on the protections afforded by the Sixth Amendment and *Hurst v. Florida*, *see generally, e.g.*, Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing in* Hurst, 66 UCLA L. REV. 448 (2019); Melanie Kalmanson, *Somewhere Between Death Row and Death Watch: The Procedural Trap Capital Defendants Face in Raising Execution-Related Claims*, 5 U. PA. J. L. & PUB. AFF. 413 (2020); Melanie Kalmanson, *Storm of the Decade: The Aftermath of* Hurst v. Florida & *Why the Storm Is Likely to Continue*, 74 U. MIAMI L. REV. CAVEAT 37 (2020); Melanie Kalmanson, *The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After* Hurst v. Florida, 74 U. MIAMI L. REV. 990 (2020).

[13] *See generally* Hurst v. Florida, 577 U.S. 92 (2016).

each element of their crimes beyond a reasonable doubt, thereby barring judges from unilaterally sentencing defendants to death.[14] Then, in 2016, the U.S. Supreme Court held in *Hurst v. Florida* that, for the reasons explained in *Ring*, Florida's capital sentencing scheme violated the Sixth Amendment for failing to require a jury's finding of each element necessary to impose a sentence of death.[15]

Although *Hurst v. Florida* did explain that Florida's capital sentencing scheme was unconstitutional, the opinion left many questions unanswered. For example, what factual findings did the Court deem necessary to sentence a defendant to death? Does the decision's invalidation of Florida's capital sentencing scheme apply retroactively to defendants whose sentences, which were imposed under the unconstitutional statute, were already final? Is a *Hurst* error capable of harmless error?[16] After *Hurst v. Florida*, state supreme courts were left to read between the lines as to how the decision applied to the capital sentencing scheme in each court's respective jurisdiction. Section B explains state supreme court interpretations of *Hurst v. Florida*.

A. From Ring v. Arizona *to* Hurst v. Florida

In *Ring v. Arizona*, the U.S. Supreme Court held a jury, not a judge, must find the aggravating factors necessary to impose the death penalty. Because Arizona's procedures permitted a judge to find these aggravating factors, the Court declared Arizona's statute unconstitutional. The Court arrived at this holding by applying its reasoning from *Apprendi v. New Jersey* to capital defendants.

The *Apprendi* Court held two years before *Ring* that if a defendant's sentence may be increased by aggravating factors, then it must be a jury, not a judge, that finds each of these factors. If a judge made the finding, it would violate the defendant's Sixth Amendment right to a trial by jury.[17] According to the *Apprendi* Court, a defendant's punishment must be based on facts reflected in the jury verdict.[18]

In *Ring*, the Court addressed whether *Apprendi*'s rule—requiring juries to find aggravating factors—applied to capital defendants. Answering that question in the affirmative,[19] the Court declared Arizona's capital

[14] *See generally* Ring v. Arizona, 536 U.S. 583 (2002).
[15] *See generally Hurst*, 577 U.S. 92.
[16] *See generally* Kalmanson, *Storm of the Decade*, *supra* note 12.
[17] Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).
[18] *Id.* at 483 (explaining a defendant may not be "[exposed] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone") (emphasis omitted).
[19] *Ring*, 536 U.S. at 587.

sentencing statute unconstitutional because it permitted judges to perform the fact finding that must be performed by the jury.[20]

On the heels of the Court's decision in *Ring*, several states revised their capital sentencing statutes in an effort to better comply with the mandates of the Sixth Amendment.[21] Other states abolished the death penalty altogether.[22] However, some states did not see a need for any change, determining that their capital sentencing schemes were not affected by *Ring*.[23]

For example, Florida—or at least a majority of the Supreme Court of Florida—determined Florida's capital sentencing scheme was sufficiently distinguishable from Arizona's and therefore remained constitutional.[24] As a result, Florida continued sentencing defendants to death under its pre-*Ring* capital sentencing statute, which required only a bare majority of the twelve-member jury to recommend death. In making that recommendation, the jury was not required to make any of the other findings necessary for the death penalty, such as the existence of one or more aggravating factors, that the aggravating factors were sufficient to sentence the defendant to death, or that the aggravating factors outweigh the mitigating circumstances. Those findings would be made by the judge.

Capital defendants in Florida and a minority of the Supreme Court of Florida were not convinced that Florida's capital sentencing scheme remained constitutional after *Ring*. Capital defendants in Florida continued to argue for years—as they had even before *Ring*—that their death sentences violated the Sixth Amendment, as explained in *Ring*.[25] Justices on the Supreme Court of Florida agreed and continued to write dissenting opinions documenting their positions.

After fourteen years of post-*Ring* debate, the U.S. Supreme Court finally weighed in. The U.S. Supreme Court's January 2016 decision in *Hurst v. Florida* finally addressed whether Florida's capital sentencing scheme violated the Sixth Amendment in light of *Ring*.[26] The Court held that, for the same reasons the Court invalidated Arizona's capital sentencing scheme in *Ring*,[27] Florida's capital sentencing scheme violated the Sixth

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[20] *Id.* at 609.

[21] *See U.S. Supreme Court: Ring v. Arizona*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/u-s-supreme-court-ring-v-arizona (last visited Oct. 29, 2022, 11:22 AM).

[22] *See id.*

[23] *See id.*

[24] *See id. See generally* Bottoson v. State, 813 So. 2d 31 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

[25] *See, e.g.*, Gaskin v. State, 218 So. 3d 399, 402 (Fla. 2017) (Pariente, J., concurring in part and dissenting in part) ("I would at least apply *Hurst* to Gaskin because he, through his attorneys, challenged the constitutionality of Florida's capital sentencing statute at trial in 1990 and, again, on direct appeal in 1991."); Mosley v. State, 209 So. 3d 1248, 1275 (Fla. 2016) (explaining Mosley had argued that Florida's capital sentencing scheme was unconstitutional).

[26] Hurst v. Florida, 577 U.S. 92 (2016).

[27] Ring v. Arizona, 536 U.S. 583 (2002).

Amendment. Specifically, the statute did not require the jury to make the necessary findings to sentence the defendant to death, and the jury's advisory verdict was insufficient to pass muster under the Sixth Amendment.[28]

B. State Supreme Courts' Interpretations of Hurst v. Florida

Despite addressing the long-term debate regarding the viability of Florida's capital sentencing scheme in light of *Ring*, the Supreme Court's opinion in *Hurst v. Florida* left a lot unanswered. For Florida specifically, the opinion was unclear as to what its holding meant for Florida and its almost 400 defendants awaiting execution on death row.[29] Rather than answering the specifics, the Court remanded the case to the Supreme Court of Florida for further review.

Similarly, other states across the country that also maintained the death penalty—and, more specifically, capital sentencing statues that did not require a jury's unanimous recommendation for death—were left to wonder how *Hurst v. Florida* applied to their capital sentencing schemes. At the time *Hurst v. Florida* was decided, Delaware and Alabama were the only other two states in the entire country—alongside Florida—that did not require a jury's unanimous recommendation for death. This section reviews, chronologically, how the state supreme courts in Delaware, Alabama, and Florida, respectively, applied *Hurst v. Florida* to their capital sentencing procedures.

Essentially, the question for each court was: to satisfy the post-*Ring* and post-*Hurst* mandates of the Sixth Amendment, what findings must be made by the jury instead of the judge? The discussion below shows that the courts chose one of two options. Option one is what this article will reference as "the minimalist option": a jury need only find the existence of one aggravating factor, which is what makes the defendant eligible for the death penalty. Option two is what this article will reference as "the comprehensive option": a jury must make every finding necessary to reach a sentence of death, including the relative weight of aggravating and mitigating factors.

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[28] *See Hurst*, 577 U.S. at 99.

[29] For a thorough discussion of the questions left unanswered in *Hurst v. Florida*, especially the Eighth Amendment concerns, *see generally* Craig Trocino & Chance Meyer, Hurst v. Florida*'s Ha'p'orth of Tar: The Need to Revisit* Caldwell, Clemons, *and* Proffitt, 70 U. MIAMI L. REV. 1118 (2016).

1. The Delaware Supreme Court Invalidates Delaware's Capital Sentencing Scheme

Similar to Florida, Delaware also reviewed its capital sentencing scheme after *Ring* and determined that it passed constitutional muster.[30] But that changed after *Hurst*.

In August 2016, while the Florida Supreme Court's decision on remand from *Hurst v. Florida* was pending, the Delaware Supreme Court decided *Rauf v. Delaware*.[31] In *Rauf*, the Delaware Supreme Court reviewed five certified questions of law related to the application of *Hurst v. Florida* to Delaware's capital sentencing scheme.[32] In other words, the Court reviewed whether Delaware's capital sentencing scheme could withstand constitutional scrutiny—specifically under the Sixth Amendment—in light of *Hurst v. Florida*.[33] The per curiam opinion was very short, merely setting forth "succinct answers" to the certified questions, while the Justices then independently explained their reasoning for joining the opinion.[34]

In pertinent part, the majority held that Delaware's capital sentencing scheme was unconstitutional because it allowed the judge, independent of the jury, to "find the existence of 'any aggravating circumstance,' statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding."[35] The Court held that, instead, the Sixth Amendment requires that such findings be made unanimously by the jury beyond a reasonable doubt.[36] Further, the Court held that the Sixth Amendment requires the jury, not the judge, "to find that the aggravating circumstances found to exist outweigh the mitigating circumstances."[37] Under Delaware's capital sentencing scheme, that "is the critical finding upon which the sentencing judge 'shall impose a sentence of death.'"[38]

Chief Justice Strine's concurring opinion, in which the other members of the majority joined, explained that invalidating Delaware's capital sentencing scheme was necessary "if the core reasoning of *Hurst* is that a jury, rather than a judge must make all the factual findings 'necessary' for a defendant to receive a death sentence."[39] As to the "necessary" factual findings, Chief Justice Strine explained that a jury's unanimous recommendation for death was not enough.[40]

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[30] *See generally* Brice v. State, 815 A.2d 314 (Del. 2003).
[31] Rauf v. State, 145 A.3d 430 (Del. 2016).
[32] *Id.* at 433–34.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 433
[36] *Id.* at 434
[37] *Id.*
[38] *Id.*
[39] *Id.* at 435 (Strine, C.J., concurring).
[40] *Id.*

> To sentence a defendant to death, the sentencing authority must consider all relevant factors bearing on whether the defendant should live or die, weigh those factors rationally against each other, and make an ultimate determination of whether the defendant should die or receive a comparatively more merciful sentence, typically life in prison. *The option for the sentencing authority to give a prison sentence, rather than a death sentence, must always exist.*[41]

In other words, the Delaware Supreme Court took the comprehensive approach to interpreting *Hurst v. Florida*.

2. Alabama's Capital Sentencing Scheme Passes Constitutional Muster

In September 2016, the Alabama Supreme Court took the approach opposite to Delaware in deciding *Bohannon v. State*.[42] Selecting the minimalist option, the *Bohannon* Court followed its prior decisions in *Ex parte Waldrop* and *Ex parte McNabb* to hold that all the U.S. Supreme Court's Sixth Amendment jurisprudence—including *Hurst*—requires "that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence."[43]

As to the jury's process of weighing the aggravation and mitigation, the Alabama Supreme Court held in *Waldrop* that the process "is not a factual determination or an element of an offense."[44] Nor is it "susceptible to any quantum of proof."[45] In *Bohannon*, the Court clarified that "*Hurst* does not address" the weighing process and does not "suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment."[46]

Regarding Alabama's capital sentencing scheme, the *Bohannon* Court determined it passed constitutional muster under the Sixth Amendment even after *Hurst* because "a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible."[47]

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[41] *Id.* (emphasis added).
[42] *See ex parte* Bohannon v. State, 222 So. 3d 525 (Ala. 2016).
[43] *Id.* at 528.
[44] *Id.* at 530.
[45] *Id.*
[46] *Id.* at 532.
[47] *Id.*

3. The Supreme Court of Florida's Decision on Remand in Hurst II

Two months after *Rauf*, approximately one week after *Bohannon*, and almost a year after *Hurst v. Florida*, the Supreme Court of Florida decided *Hurst v. State* on remand ("*Hurst II*").[48] *Hurst II* addressed several questions left unanswered by the Supreme Court's opinion in *Hurst v. Florida*.[49]

Most pertinent here, the Court determined that *Hurst v. Florida* required "that all the critical findings necessary . . . must be found unanimously by the jury" before the trial court may consider imposing a sentence of death.[50] The Supreme Court of Florida explained that, under Florida's capital sentencing statute, those findings "include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances."[51] In other words, *Hurst II* took the comprehensive approach to implementing *Hurst v. Florida*—consistent with how the Delaware Supreme Court applied *Hurst* to Delaware's capital sentencing scheme in *Rauf*.

Further, although the U.S. Supreme Court's decision in *Hurst v. Florida* relied exclusively on the Sixth Amendment, the Florida Supreme Court based its decision on Florida's independent constitutional right to jury trial and the Eighth Amendment to the U.S. Constitution. In doing so, the Florida Supreme Court held "that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous."[52]

Hurst forced a paradigm shift in Florida's capital sentencing scheme.[53] To maintain capital punishment after *Hurst*, the Florida Legislature was forced to revise Florida's capital sentencing scheme.[54] The new statute had to require that the twelve-member jury unanimously make each finding of fact necessary to impose a sentence of death *and*

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[48] Hurst v. State, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

[49] For more thorough discussion of the Florida Supreme Court's decision in *Hurst II* and framework created as a result thereof, *see generally* Kalmanson, *Storm of the Decade*, *supra* note 12.

[50] *Hurst*, 202 So. 3d at 44.

[51] *Id.*

[52] *Id.* In his dissenting opinion, joined by Justice Polston, Justice Canady disagreed with the majority's broadening of the discussion in *Hurst II* to include the Eighth Amendment and Florida's independent right to trial by jury. *See id.* at 80–82 (Canady, J., dissenting). Justice Pariente responded to these concerns in her concurring opinion. *Id.* at 74–75 (Pariente, J., concurring).

[53] *See generally* Kalmanson, *Storm of the Decade*, *supra* note 12.

[54] For more explanation on this, *see generally id.* Also, to review litigation regarding the statute that the Florida Legislature enacted between *Hurst v. Florida* and *Hurst II* that was ultimately invalidated, *see generally* Evans v. State, 213 So. 3d 856 (Fla. 2017) (per curiam), *receding in part from* Perry v. State, 210 So. 3d 630 (Fla. 2016) (invalidating the statute the Florida Legislature enacted after *Hurst*).

unanimously recommend a sentence of death.[55] Without the jury's unanimous recommendation for a sentence of death, the trial judge could not impose a sentence of death.[56]

The background above explained *Ring*, *Hurst*, and the implications *Hurst* had on Delaware, Alabama, and Florida. These decisions and related state-court decisions made clear that juries, not judges, must find aggravating factors necessary to impose the death penalty. In some instances, courts have required juries to also weigh the aggravating factors against the mitigation. A sentencing procedure that permitted the judge, rather than the jury, to make factual findings necessary to impose a sentence of death. If so, the statute fails to satisfy the demands of the Sixth Amendment. After these decisions, courts were faced with how to apply the new rules to those who were already sentenced to death in the state. What about death sentences that were imposed under prior, unconstitutional procedures? Should courts retroactively apply *Ring* and *Hurst* to death sentences that were imposed and made final under procedures that would now be considered unconstitutional? The next section discusses how courts across the country addressed the retroactivity of both *Ring* and *Hurst*.

III. BACKGROUND ON RETROACTIVITY

Retroactivity is the principle that a new rule applies to an old proceeding. If the law changes between an original hearing and the hearing's subsequent review, a party may claim the new law should apply to the original hearing retroactively. In other words, retroactivity is the principle that a new rule—usually in the form of a constitutional pronouncement from the U.S. Supreme Court—applies to cases that have already been decided.

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[55] *Evans*, 213 So. 3d at 858. This remains true in Florida based on the post-*Hurst* statute. FLA. STAT. § 921.141 (2019). However, in early 2020, the Florida Supreme Court decided *State v. Poole*, 297 So. 3d 487, 491 (Fla. 2020), which receded from *Hurst II*, and determined that the only necessary jury finding is that the State proved the existence of one aggravating factor beyond a reasonable doubt—switching to the minimalist option. For more information on *Poole*, *see* Hannah L. Gorman & Margot Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America's Most Active Death Row*, 51 COLUM. HUM. RTS. L. REV. 935, 954–57 (2020); *see also, e.g.*, *Florida Supreme Court Major Decision*, *supra* note 8. Shortly after *Poole*, the U.S. Supreme Court decided *McKinney v. Arizona*, 140 S. Ct. 702 (2020), which essentially affirmed the Supreme Court of Florida's explanation of *Hurst v. Florida* in *Poole*. *Compare McKinney*, 140 S. Ct. at 707–09, *with Poole*, 297 So. 3d 487. Although *McKinney* and *Poole* are significant to the discussion of *Hurst* and the Sixth Amendment jurisprudence regarding the meaning of the right to trial by jury, it does not affect the discussion here regarding retroactivity and how courts addressed the retroactivity of *Hurst v. Florida*. The retroactivity decisions discussed herein had been decided and applied to the defendants on Florida's death row before *Poole* was decided.

[56] Kalmanson, *Storm of the Decade*, *supra* note 12, at 42. After *Hurst II*, Alabama was the only state in the country that allowed a jury to sentence someone to death without a jury's unanimous recommendation for death, or by judicial override. *See, e.g.*, *Alabama Supreme Court Rules that Death Penalty Statute Is Still Valid*, EQUAL JUST. INITIATIVE (Sept. 30, 2016), https://eji.org/news/alabama-supreme-court-rules-death-penalty-statute-still-valid/. That remains true as of January 16, 2023, despite the Florida Supreme Court's decision in *Poole*; however, some expect the Florida Legislature to propose amendments to Florida's capital sentencing scheme in future legislative sessions.

In the context of capital sentencing, retroactivity would mean a new rule applies to a defendant's sentence of death that has already become final and is pending on collateral review.[57] While a new rule automatically applies prospectively[58]—*i.e.*, to defendants' sentences of death pending on direct appeal—a court must determine that a rule is retroactive for it to apply to a sentence that has already become final. Thus, whether a rule applies retroactively is a threshold question. If a rule does not apply retroactively, then the parties are precluded from reviewing the merits of the constitutional issue raised by the rule.[59] The capital sentencing rules announced in *Ring* and *Hurst v. Florida* raised such constitutional issues, but the question of retroactivity created a confusing barrier to reviewing the merits of claims for relief under those decisions. The following subsections explain the retroactivity questions asked at the federal and state levels.

In the context of capital sentencing, many capital defendants were convicted and sentenced under the laws that were ultimately invalidated by the Supreme Court in *Ring* and *Hurst v. Florida*. While numerous defendants raised claims that the new holdings should apply to the defendant's sentence, the threshold question was whether to apply the new holdings retroactively. As to what standard applies in addressing retroactivity, courts generally either (A) follow the federal *Teague* standard for determining retroactivity, or (B) craft their own retroactivity standards, often derived from federal retroactivity doctrine. In light of these different approaches, federal and state courts now apply different standards for determining the retroactivity of landmark U.S. Supreme Court rulings. These different standards are explained below.

A. The Federal Retroactivity Standard

At the federal level, the standard for determining whether a new rule applies retroactively comes from the Supreme Court's 1989 decision in *Teague v. Lane*.[60] Under the *Teague* analysis, a court may only give retroactive application to a new constitutional rule for criminal proceedings if the rule is (1) a substantive rule of due process, or (2) a watershed rule of criminal procedure.[61]

Beginning with *Fay v. Noia*[62] in 1962 and leading to *Teague* in 1989, the Supreme Court developed and tested a retroactivity standard that weighs

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[57] For a review of the capital appellate process, *see generally* Kalmanson, *Somewhere Between Death Row and Death Watch*, *supra* note 12.

[58] *See* Bowen v. United States, 422 U.S. 916, 921 (1975) ("It is true that this Court has suggested that Art. III is the primary impetus for applying new constitutional doctrines in cases that establish them for the first time." (citing Stovall v. Denno, 388 U.S. 293, 301 (1967))).

[59] *See id.* at 916.

[60] *See generally* Teague v. Lane, 489 U.S. 288 (1989).

[61] *Id.* at 311.

[62] *See generally* Fay v. Noia, 372 U.S. 391 (1963).

due process against finality. On one hand, due process concerns weigh in favor of allowing defendants to raise and litigate claims regardless of whether their sentence has already been finalized. On the other hand, courts', states', and victims' interest in finality weighs in favor of placing time-limits on defendants raising new claims.

The evolution of the federal retroactivity doctrine, from *Fay* to *Teague*, helps explain the various decisions courts have made regarding *Ring* and *Hurst* retroactivity. The Supreme Court first addressed retroactive application of new constitutional rules in *Fay*, in which the Court reviewed a habeas ruling.[63]

At trial, the defendant in *Fay*, Noia, was convicted based on his signed confession. Noia unsuccessfully pled that the confession was coerced and therefore unlawful.[64] After Noia failed to appeal his state conviction, separate legal proceedings for his co-defendants resulted in their release, finding that their confessions were coerced in violation of the Fourteenth Amendment.[65] Discovering this development, Noia filed for an appeal in federal court, on the grounds that his confession was also coerced in violation of the Fourteenth Amendment.[66] The Supreme Court held that Noia could be granted relief, despite his failure to pursue the remedy not available to him when he first applied for relief.[67] As the Court later stated in *Desist v. United States*, "[f]or the first time, it was there held that . . . a habeas petitioner could successfully attack his conviction collaterally despite the fact that the 'new' rule had not even been suggested in the original proceedings."[68]

The *Fay* Court, balancing due process against the prior decision's finality, determined it would retroactively apply legal developments that did not apply at the time of the original trial.[69] Because the Court was acknowledging this power of federal courts for the first time, the decision did not itself provide a standard for giving retroactive application to new rules.[70] Nonetheless, *Fay* did open the door for habeas petitioners to claim that constitutional rules that develop post-conviction should apply to their original proceedings.[71] It opened the door for questioning, many years later, whether *Ring* and *Hurst* could apply retroactively.

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[63] *Id.* at 394.
[64] *Id.*
[65] *Id.* at 395.
[66] *Id.* at 396.
[67] *Id.* at 398–99.
[68] Desist v. United States, 394 U.S. 244, 261 (1969).
[69] *Fay*, 372 U.S. at 424 ("[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied . . . .").
[70] *Id.* at 398–99.
[71] This decision did not go uncontested. Justices Harlan, Clark, and Stewart dissented, arguing federalism principles required the Court to respect the state court conviction that rested on adequate state

Three years after *Fay*, amidst rapid development in the criminal field, the Court faced another question of retroactivity.[72] This time, the Court offered the first federal retroactivity standard for evaluating whether new rules should apply to criminal cases on collateral appeal.[73] In *Linkletter v. Walker*, the Court reviewed a habeas ruling that occurred prior to legal developments that excluded illegally seized evidence.[74] The *Linkletter* Court could either apply the new rule to the recorded trial proceedings and exclude illegally seized evidence, or decline to apply the new rule and permit the use of illegally seized evidence. The Court created the following standard to decide whether to apply the new rule retroactively, a standard it clarified two years later in *Stovall v. Denno*: (1) look to the purpose of the new rule, (2) consider law enforcement's reliance on the old rule, and (3) evaluate what effect a retroactive application of the new rule would have on the administration of justice.[75]

The *Linkletter-Stovall* standard began a uniform approach to handling the tension between due process and finality that kept reappearing after the *Fay* decision.[76] It reflected a desire by the Court to limit the effect of "fundamentally unsound" constitutional decisions, particularly during a time of fast-moving innovation in criminal law.[77] However, as the consequences of this standard unfolded, Justice Harlan began to express his discontent.[78] To Justice Harlan, the *Linkletter-Stovall* standard led to broad judicial discretion[79] and produced excessive variation in rules.[80] These apprehensions eventually became the basis for subsequent retroactivity decisions.[81]

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grounds. *Id.* at 448 (Harlan, J., dissenting); *see also Desist*, 394 U.S. at 262 (Harlan, J., dissenting) ("I continue to believe that *Noia* . . . constitutes an indefensible departure both from the historical principles which defined the scope of the 'Great Writ' and from the principles of federalism . . . .").

[72] Linkletter v. Walker, 381 U.S. 618, 619–20 (1965).

[73] *Id.* at 636.

[74] Mapp v. Ohio, 367 U.S. 643 (1961).

[75] *Linkletter*, 381 U.S. at 636 ("In short, we must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*."); *see also* Stovall v. Denno, 388 U.S. 293, 297 (1967) ("The criteria guiding the resolution of the [retroactivity] question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.").

[76] After *Stovall*, courts began calling the standard first announced in *Linkletter* the *Linkletter-Stovall* standard. *E.g.*, Mosley v. State, 209 So. 3d 1248, 1277–82 (Fla. 2016).

[77] Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., dissenting).

[78] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); *see Mackey*, 401 U.S. at 677; *see also* William W. Berry III, *Normative Retroactivity*, 19 U. PA. J. CONST. L. 485, 499–500 (2016) (discussing Justice Harlan's criticism of the *Linkletter* test).

[79] *Mackey*, 401 U.S. at 677.

[80] *Desist*, 394 U.S. at 256–57; *see* Berry, *supra* note 78, at 499–500 (discussing Justice Harlan's criticism of the *Linkletter* test).

[81] *See* Griffith v. Kentucky, 479 U.S. 314, 321–22 (1987); *see also* United States v. Johnson, 457 U.S. 537, 554 (1982).

The Supreme Court adopted Justice Harlan's ideas on retroactivity in *Teague v. Lane*, creating the current federal retroactivity standard.[82] Addressing Justice Harlan's apprehensions, the *Teague* standard aims to limit discretion and thereby ensure more uniformity. The Court designed the *Teague* standard to presume non-retroactivity unless the rule in question falls under one of two exceptions.[83] By creating this presumption, the Court indicated its general preference for a judgment's finality over its responsiveness to post-conviction legal developments.

While the *Teague* standard presumes non-retroactivity, its exceptions acknowledge clear instances where finality should give way to due process. One scholar has characterized this double exception framework as a "substance-procedure dichotomy."[84] The first of two exceptions is for rules that place certain conduct beyond the State's power to punish by death.[85] This exception reflects historical uses of the writ of habeas corpus.[86] The second exception is for "watershed rules of criminal procedure," or those rules that "implicate the fundamental fairness of the trial."[87] This exception commissions a core function of habeas corpus: "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted . . . ."[88] In practice, "the Court's determination of whether a new rule is substantive or procedural becomes paramount" in the retroactivity framework.[89]

By outlining a presumption of non-retroactivity and two exceptions, the *Teague* Court intended to create a more workable and consistent approach to retroactivity. Since then, scholars have debated the merits of the *Teague* retroactivity standard.[90] In practice, confusion surrounding retroactivity persisted after *Teague*.[91]

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[82] Teague v. Lane, 489 U.S. 288, 310 (1989); *see, e.g.*, Berry, *supra* note 78, at 500.

[83] *Teague*, 489 U.S. at 310 ("Unless they fall within one of Justice Harlan's suggested exceptions to this general rule . . . new rules [of criminal procedure] will not be applicable to those cases that have become final before the new rules were announced.").

[84] Berry, *supra* note 78, at 502.

[85] *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1989)) (exempting rules placing "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe . . . ."); *e.g.*, Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989) (offering, as an example of a rule that would fit under *Teague's* first exception, a rule that prohibits imposing the death penalty on defendants because of their status).

[86] *Mackey*, 401 U.S. at 692–93.

[87] *Teague*, at 311–12; *e.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1963) (illustrating *Teague*'s second exception with the rule that a defendant has the right to be represented by counsel in all criminal trials for serious offenses).

[88] *Teague*, 489 U.S. at 312 (quoting Desist v. United States, 394 U.S. 244, 262 (1969)).

[89] Berry, *supra* note 78, at 502.

[90] *See generally, e.g., id.* at 491 (proposing an alternative framework for retroactivity that "relate[s] directly to the normative impact of the new rule on [previous] guilt and sentencing determinations").

[91] *See, e.g., id.* at 505 ("While the substance-procedure dichotomy may be clear at the margins, in practice it creates significant doctrinal confusion and disparities in lower courts such that the Supreme Court must determine the retroactivity question.").

While federal courts are bound by the U.S. Supreme Court's decision in *Teague*, state courts are not likewise bound to follow the *Teague* standard for retroactivity.[92] Rather, as the next section explains, states are at liberty to define their own retroactivity standards. Unsurprisingly, a review of state and federal rulings displays disparate sets of retroactivity standards that non-uniformly utilize the principles identified in *Fay*, *Linkletter*, *Stovall*, and *Teague*. This state survey presents a history of retroactivity principles that leaves an unclear how courts should handle landmark cases like *Ring* and *Hurst v. Florida*.

B. State-Specific Retroactivity Standards

As in many other areas of the law, state courts are not bound by the federal *Teague* standard, and instead may implement their own standards for deciding questions of retroactivity.[93] Because states are at liberty to stray from the federal standard, state-specific retroactivity standards may be broader than the federal retroactivity standard and may vary greatly across states.[94] Nevertheless, as this section explains, state courts have largely based their retroactivity standards on federal retroactivity doctrine, specifically on principles named in *Linkletter*, *Stovall*, and *Teague*.[95]

Although the frameworks may appear different, the state standards generally fall in two categories: (1) standards based on *Teague* and (2) standards based on *Linkletter* and *Stovall*. States in the "*Teague* category" also include states that have not developed a unique retroactivity standard but have expressly reserved the right to depart from *Teague*.[96] As one scholar put it, "[m]ost states use *Teague* as a nonbinding standard."[97]

Florida falls in the second category. Florida's retroactivity standard comes from the Florida Supreme Court's decision in *Witt v. State*[98] and is broader than *Teague*.[99] The *Witt* standard presents a three-prong test under which "a change in the law does not apply retroactively 'unless the change (a) emanates from [the Supreme Court of Florida] or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a

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[92] *E.g.*, Danforth v. Minnesota, 522 U.S. 264, 277–80 (2008) (explaining states may enact stricter standards than those laid down by the U.S. Supreme Court).

[93] *E.g.*, Knight v. Fla. Dep't Corr., 936 F.3d 1322, 1332 (11th Cir. 2019).

[94] *E.g.*, *id.*

[95] *See, e.g.*, Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of* Danforth v. Minnesota, 44 FLA. ST. U. L. REV. 53, 71 (2016) (discussing similarly how states have implemented *Teague* in state-specific retroactivity analyses).

[96] *See, e.g.*, Powell v. State, 153 A.3d 69, 72 (Del. 2016); Beach v. State, 348 P.3d 629, 636 (Mont. 2015); State v. Mantich, 842 N.W.2d 716, 724 (Neb. 2014); *see also, e.g.*, Deutsch, *supra* note 95.

[97] Deutsch, *supra* note 95.

[98] Witt v. State, 387 So. 2d 922 (Fla. 1980).

[99] Knight v. Fla. Dep't Corr., 936 F.3d 1322, 1332–33 (11th Cir. 2019).

development of fundamental significance.'"[100] The third prong of the *Witt* standard uses principles from the federal *Teague* and *Linkletter-Stovall* standards.[101] While *Witt* is broader than *Teague* and, therefore, arguably more defendant-friendly, some have argued that the test is "'malleable,' 'nebulous,' and hindered by its indeterminacy."[102]

Similar to Florida, courts in Alaska, Michigan, and Missouri have also developed state-specific retroactivity standards that utilize principles from Supreme Court rulings. The Alaska Supreme Court has adopted the old *Linkletter-Stovall* standard as its retroactivity standard despite the Supreme Court abandoning it.[103] Michigan and Missouri have likewise chosen to continue using the *Linkletter-Stovall* standard.[104]

These diverging retroactivity standards become important when reviewing jurisprudence regarding the retroactivity of *Hurst* and *Ring*, as discussed in Parts III–V below.

IV. HOW COURTS ADDRESSED THE RETROACTIVITY OF *RING*

Ring casts doubt on the constitutionality of death sentences across the country. As defendants subsequently challenged their sentences, which were already final, the question for courts was whether to apply the rule announced in *Ring* retroactively. For each defendant, retroactive application of *Ring* meant the opportunity for a new, constitutional sentencing proceeding and another chance at a sentence lesser than death.

To determine whether *Ring* applied retroactively, as explained above, courts across the country used either (A) the federal *Teague* standard or (B) a state-specific standard. Section A below explains the decisions in which courts applied the retroactivity standards and principles pronounced by the U.S. Supreme Court. Federal courts were bound to follow the Supreme Court's decisions regarding the retroactivity of *Ring*, which meant applying *Teague—i.e.*, presuming no retroactivity and confirming whether one of the two exceptions applied. In addition, many state courts, although

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[100] Mosley v. State, 209 So. 3d 1248, 1276 (Fla. 2016) (quoting Witt v. State, 387 So. 2d 922, 931 (Fla. 1980)); *see* Recent Case, Asay v. State: *Florida Supreme Court Denies Retroactive Application of* Hurst v. Florida *to Pre-*Ring *Cases*, 130 HARV. L. REV. 2251, 2253 (2016) (footnotes omitted).

[101] *Mosley*, 209 So. 3d at 1276–77 (quoting *Witt*, 387 So. 2d at 931) ("To be a 'development of fundamental significance,' the change in law must 'place beyond the authority of the state the power to regulate certain conduct or impose certain penalties,' or alternatively, be 'of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test' from *Stovall* and *Linkletter*. . . ."); *see* Recent Case, *supra* note 100.

[102] Recent Case, *supra* note 100, at 2254 (footnotes omitted).

[103] Judd v. State, 482 P.2d 273, 277–78 (Alaska 1971).

[104] People v. Maxson, 759 N.W.2d 817, 822 (Mich. 2008); State v. Whitfield, 107 S.W.3d 253, 268 (Mo. 2003).

not bound to follow the Supreme Court's decisions, chose to do so.[105] Thus, federal courts and many state courts declined to apply *Ring* retroactively.

Section B below explains the decisions in which state courts utilized broader standards than those created by the U.S. Supreme Court's standard set forth in *Teague*. Although these courts framed their standards differently, they all based their analyses on the abandoned federal standard announced in *Linkletter* and *Stovall*. The *Linkletter-Stovall* analysis inherently leads to state-specific results, yet most states confronted with the question still decided that *Ring* did not apply retroactively. The exception to this is Missouri, whose supreme court found that *Ring* applied retroactively to at least five cases.

This state survey of *Ring* retroactivity shows that courts across the country have generally been consistent in declining to apply *Ring* retroactively. This consistency may be attributed to the Supreme Court deciding the question for all federal courts and state courts that adopted the *Teague* standard,[106] and the remaining state courts' adherence to *Linkletter-Stovall* principles. This is a helpful contrast to courts' inconsistency on deciding whether *Hurst v. Florida* is retroactive, a question on which the Supreme Court provided less guidance.

A. Analyses Under Teague v. Lane

Courts applying the federal *Teague* standard for the retroactivity of *Ring* reached fairly consistent conclusions. This consistency seems to be a result of the Supreme Court's ruling in *Schriro v. Summerlin*, which federal courts and many state courts followed in addressing this issue.[107]

In *Summerlin*, the Supreme Court addressed the retroactivity of *Ring*.[108] Under the *Teague* standard, *Ring* would not apply retroactively unless the Court found that *Ring* met one of *Teague*'s exceptions: (1) a rule that places certain conduct beyond the power of the state to punish by death, or (2) watershed rules of criminal procedure implicating the fundamental fairness of the trial.[109] First, the *Summerlin* Court held that *Ring* did not fall under *Teague*'s first exception, for *Ring* had everything to do with the Sixth Amendment's right to trial by jury and nothing to do with the range of conduct a state may criminalize. Second, the Court held that *Ring*'s decision to send certain questions to the jury rather than the judge is not a watershed

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[105] *Cf.* Deutsch, *supra* note 95, at 71 ("[E]ven when states explicitly recognize *Teague* as nonbinding, anchoring effects induce states to follow the Supreme Court's lead in most cases."); *id.* at 73 ("Given the heaviness of *Teague*'s shadow, it is much less likely for states to grant retroactive relief for a new federal rule after the Supreme Court has already denied retroactive relief under *Teague*.").

[106] *See* Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (holding that *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review).

[107] *Id.* at 358; *see* Deutsch, *supra* note 95, at 72–73 (discussing this phenomena).

[108] *Schriro*, 542 U.S. at 349–51.

[109] *Id.* at 351–52.

rule of criminal procedure because there is no clear conclusion that juries are more accurate factfinders than judges.[110] Given the Court's determination that *Ring* did not fall within either of *Teague*'s exceptions to non-retroactivity, the *Summerlin* Court held *Ring* does not apply retroactively to cases already made final.[111]

Thereafter, any state court following the *Teague* standard need only adopt the Supreme Court's analysis in *Summerlin* as its own to reach this conclusion and, therefore, consistent outcomes. Indeed, many state courts faced with the issue of whether to apply *Ring* retroactively adopted the Supreme Court's analysis in *Summerlin* and declined to apply *Ring*.[112]

B. Analyses Under State Standards

While many state courts followed *Summerlin*, some state courts applied their own state-specific standards (based on *Teague* or *Linkletter-Stovall*, as discussed above) in analyzing whether *Ring* should apply retroactively. In doing so, state courts were surprisingly consistent. In fact, only one state determined *Ring* applied retroactively.[113] Otherwise, even state courts applying their own state-specific standards decided, consistent with the Supreme Court's decision in *Summerlin*, that *Ring* does not apply retroactively.

As explained in Part II.C, state courts generally took two approaches in addressing *Ring* retroactivity: (1) adopt the current federal standard under *Teague*, or (2) use a state-specific standard, which often mimics the abandoned federal *Linkletter-Stovall* standard. State courts that followed *Summerlin* fall under the first category, discussed above.[114] Also in the first category are states like Arizona, which adopted the federal *Teague* standard but performed its own analysis to determine whether to apply *Ring* retroactively.[115] Similar to the Supreme Court's explanation in *Summerlin*, the Arizona Supreme Court began by presuming *Ring* does not apply retroactively and then determined *Ring* did not meet either of *Teague*'s exceptions.[116]

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[110] *Id.* at 355–57.

[111] *Id.* at 358.

[112] *E.g.*, Wilson v. State, 911 So. 2d 40, 46 (Ala. Crim. App. 2005); Lambert v. State, 825 N.E.2d 1261, 1267 (Ind. 2005); State v. Synoracki, 126 P.3d 1121, 1123–24 (Kan. 2006); Bowling v. Commonwealth, 163 S.W.3d 361, 378–79 (Ky. 2005); State v. Tate, 130 So. 3d 829, 835 (La. 2013); State v. Lotter, 917 N.W.2d 850, 864 (Neb. 2018); Commonwealth v. Bracey, 986 A.2d 128, 141–42 (Pa. 2009); Moeller v. Weber, 689 N.W.2d 1, 19 (S.D. 2004); State v. Gomez, 163 S.W.3d 632, 651 (Tenn. 2005).

[113] State v. Whitfield, 107 S.W.3d 253, 256 (Mo. 2003).

[114] *See, e.g.*, *Lotter*, 917 N.W.2d at 864.

[115] State v. Towery, 64 P.3d 828, 831–36 (Ariz. 2003); *see also* Rhoades v. State, 233 P.3d 61, 64–68 (Idaho 2010) (requiring that Idaho courts independently review requests for retroactive application of newly announced principles of law under the *Teague* standard).

[116] *Towery*, 64 P.3d at 830, 835.

The second category of states includes Florida and Missouri, both of which applied their own retroactivity standards derived from federal retroactivity doctrine. The Florida Supreme Court adopted a unique standard in *Witt*, described above in Section II.B. The Missouri Supreme Court, in *State v. Whitfield*, adopted the abandoned federal standard from *Linkletter-Stovall*.[117] Despite both states using tests that were broader than *Teague* and drew on *Linkletter-Stovall*, they came to different conclusions regarding *Ring* retroactivity.

Their different conclusions can be explained by noticing that their tests rely on state-specific facts. For example, prong three of the *Witt* test and factor three of the *Linkletter-Stovall* test both ask what effect a retroactive application of the new rule would have on the administration of justice. In Florida, applying *Ring* retroactively would require reconsideration of hundreds of cases.[118] On the other hand, in Missouri, applying *Ring* retroactively would require reconsideration of only five cases.[119] Accordingly, Florida and Missouri reached different outcomes in determining the retroactivity of *Ring*.

The Florida Supreme Court's decision on *Ring* retroactivity was consistent with the conclusion reached by courts following the federal analysis. In *Johnson v. State*, the Florida Supreme Court evaluated *Ring* under its state-specific retroactivity standard from *Witt*, and held that *Ring* did "not apply retroactively to defendants whose convictions already were final when that decision was rendered."[120] Notably, though, some Justices on the Court did not agree that *Witt* was the proper test for retroactivity.[121] Justice Cantero's concurring opinion, joined by Justices Wells and Bell, argued that *Witt* was outdated and, instead, that *Teague* provided the proper framework.[122]

On the other hand, Missouri reached a decision on *Ring* retroactivity that differed from Florida's and all other states' decisions. In *Whitfield*, the Missouri Supreme Court evaluated *Ring* under the *Linkletter-Stovall* standard.[123] First, it stated that prong one, the purpose of *Ring*, was not a "sufficient basis in itself" to require retroactive application.[124] Then it argued

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[117] *Whitfield*, 107 S.W.3d at 268.

[118] Johnson v. State, 904 So. 2d 400, 411 (Fla. 2005) (per curiam) ("The retroactive application of *Ring* in Florida would require reconsideration of hundreds of cases to determine whether a new penalty phase is warranted.").

[119] State v. Whitfield, 107 S.W.3d 253, 269 (Mo. 2003).

[120] *Johnson*, 904 So. 2d at 405.

[121] *Id.* at 413 (Cantero, J., concurring).

[122] *Id.*

[123] *Whitfield*, 107 S.W.3d at 268 ("Applying the analysis set out in *Linkletter-Stovall* here, this Court must consider (1) the purpose to be served by the new rule, (2) the extent of reliance by law enforcement on the old rule, and (3) the effect on the administration of justice of retroactive application of the new standards.").

[124] *Id.* (drawing on the U.S. Supreme Court's reasoning in *DeStefano v. Woods*, 392 U.S. 631, 633–34 (1968) (per curiam)).

that prong two, the extent of reliance on the old rule, and prong three, the effect of retroactive application on the administration of justice, both favored retroactivity. In Missouri, juries had almost always made the decision of whether to apply the death penalty.[125] Moreover, there were only five cases in which the judge made the required factual findings and imposed the death penalty.[126] In turn, the Missouri Supreme Court applied *Ring* retroactively and found the defendant's sentence in violation of his right "to be sentenced on determinations made by a jury."[127] With its decision in *Whitfield*, Missouri became the only state to apply *Ring* retroactively. The *Ring* retroactivity decisions in Florida and Missouri represent the state-specific approach to *Ring* retroactivity. The other approach was to follow *Teague* and the Supreme Court's decision in *Summerlin*. Across both approaches, almost all courts decided that *Ring* should not apply retroactively. State courts following *Teague* did not apply *Ring* retroactively. Apart from courts in Missouri, neither did state courts following state-specific standards.

1. Summary of Analyses of Ring *Retroactivity*

The table below summarizes the cases regarding *Ring* retroactivity canvassed above in this part:

Table 1 Summary of Cases Analyzing Retroactivity of Ring

Jurisdiction	**Case**	**Retroactivity Standard**	**Conclusion**
U.S. Supreme Court	*Schriro v. Summerlin*, 542 U.S. 348 (2004).	*Teague*	Not retroactive
Alabama	*Wilson v. State*, 911 So. 2d 40 (Ala. 2005).	*Teague*	Not retroactive

[125] *Id.* at 268 (noting that juries do not apply the death penalty "in those few cases" in which a verdict could not be reached).

[126] *Id.* at 269 ("[T]he effect of application of *Ring* to cases on collateral review will not cause dislocation of the judicial or prosecutorial system. This Court's preliminary review of its records has identified only five potential cases.").

[127] *Id.* at 271.

Arizona	*State v. Towery*, 64 P.3d 828 (Ariz. 2003).	*Teague*	Not retroactive
Colorado	*People v. Johnson*, 142, P.3d 722 (Colo. 2006).	*Teague*	Not retroactive
Florida	*Johnson v. State*, 904 So. 2d 400 (Fla. 2005).	State-specific	Not retroactive
Idaho	*Rhoades v. State*, 233 P.3d 61 (Idaho 2010).	*Teague*	Not retroactive
Indiana	*Lambert v. State*, 825 N.E.2d 1261, 1267 (Ind. 2005).	*Teague*	Not retroactive
Kansas	*State v. Synoracki*, 126 P.3d 1121, 1123–24 (Kan. 2006).	*Teague*	Not retroactive
Kentucky	*Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005).	*Teague*	Not retroactive
Louisiana	*State v. Tate*, 130 So. 3d 829, 835 (La. 2013).	*Teague*	Not retroactive

Missouri	*State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003).	State-specific	Retroactive
Nebraska	*State v. Lotter*, 917 N.W.2d 850, 864 (Neb. 2018).	*Teague*	Not retroactive
Nevada	*Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002).	*Teague*	Not retroactive
Pennsylvania	*Commonwealth v. Bracey*, 986 A.2d 128 (Pa. 2009).	*Teague*	Not retroactive
South Dakota	*Moeller v. Weber*, 689 N.W.2d 1 (S.D. 2004).	*Teague*	Not retroactive
Tennessee	*State v. Gomez*, 163 S.W.3d 632, 652 (Tenn. 2005).	*Teague*	Not retroactive
Texas	*Ex parte Briseno*, 135 S.W.3d 1, 9 (Tex. Crim. App. 2004).	*Teague*	Not retroactive

All things considered, the retroactivity analyses of *Ring* were fairly consistent across-the-board. On the other hand, the retroactivity analyses of *Hurst v. Florida* were inconsistent; Part IV below explains the different *Hurst v. Florida* retroactivity analyses and the points on which courts diverged.

V. COMPETING ANALYSES ON THE RETROACTIVITY OF *HURST*

One of the questions *Hurst v. Florida* left unanswered was whether the Court's decision applied retroactively. Section A below explains how, in addressing the retroactivity of *Hurst*, the Supreme Court of Florida created the concept of partial retroactivity. Then, Section B reviews the decisions in which courts—both state and federal—applied *Teague* to determine whether *Hurst* should apply retroactively, explaining that, unlike the decisions applying *Teague* with respect to *Ring*, these decisions reached essentially opposite conclusions.

A. Partial Retroactivity in Florida

Shortly after issuing *Hurst II*, the Supreme Court of Florida began to address the question of retroactivity. Ultimately, the Court answered this question in two decisions—*Asay v. State*[128] and *Mosley v. State*[129]—which, as discussed in Sub-Section 1 below, relied on Sixth Amendment jurisprudence to hold that *Hurst* applied retroactively only to defendants whose sentences of death became final after June 24, 2002, the day the Supreme Court decided *Ring*. Later, as Sub-Section 2 explains, the Supreme Court of Florida relied upon *Asay* and *Mosley* to hold in *Hitchcock* that the same partial retroactivity framework applies to the Eighth Amendment rights announced in *Hurst II*. This partial retroactivity framework essentially split Florida's death row in half.[130]

1. Retroactivity of the Sixth Amendment Rights Announced in Hurst v. Florida *and* Hurst II

A few months after deciding *Hurst II*, the Florida Supreme Court addressed the retroactivity of *Hurst* in two decisions issued the same day. First, in *Asay*, the Supreme Court of Florida applied its state-specific retroactivity standard from *Witt* and held *Hurst* did not apply retroactively to Asay's sentence of death, which became final in 1991—before *Ring*.[131] Essentially, the Court reasoned that it had not held *Ring* retroactive, and since *Hurst* was a product of *Ring*, the right announced in *Hurst* did not apply to any cases decided before *Ring*.[132]

The Court's application of *Witt* was consistent with *Johnson*. However, the Supreme Court of Florida distanced itself from *Johnson*, explaining that the *Witt* analysis in *Johnson* was based on the Court's

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[128] Asay v. State, 210 So. 3d 1 (Fla. 2016) (per curiam).
[129] Mosley v. State, 209 So. 3d 1248 (Fla. 2016) (per curiam).
[130] *See* Kalmanson, *The Difference of One Vote or One Day*, *supra* note 12, at 997.
[131] *See generally Asay*, 210 So. 3d 1.
[132] *See* Recent Case, *supra* note 100. *See generally Asay*, 210 So. 3d 1.

understanding at that time that Florida's capital sentencing scheme withstood constitutional scrutiny after *Ring*, which, of course, *Hurst v. Florida* clarified was inaccurate.[133] Thus, the Court determined it had to "reconsider its prior decision in *Johnson*."[134]

Revisiting the *Witt* analysis, the Court found that *Hurst* satisfied the first two elements of the *Witt* standard because it "emanate[d] from the United States Supreme Court and is constitutional in nature."[135] Then, turning to the third prong, the Court first found that the purpose of the rule—protecting the Sixth Amendment's right to trial by jury—weighed in favor of retroactivity.[136] Next, as to reliance on the old rule, which the Court found to be the "most important factor," the Court explained it had relied heavily on pre-*Ring* jurisprudence.[137] Such reliance, the Court determined, weighed "heavily against" retroactively applying *Hurst* to pre-*Ring* cases.[138]

Finally, as to the effect on the administration of justice, the Court explained that 386 defendants were awaiting execution on Florida's death row when *Asay* was decided.[139] This was similar to when *Johnson* was decided—when approximately 367 defendants were on Florida's death row. Due to the large number of defendants on death row, the Court determined that the effect retroactivity would have on the effective administration of justice weighed heavily against applying *Hurst* retroactively to all defendants on death row.[140] In other words, the Court determined that granting retroactivity to all defendants on Florida's death row at the time would have a significant effect on the administration of justice.[141] Thus, the Court held, because the source of the right announced in *Hurst* was a result of *Ring*, which did not apply retroactively, the furthest "back" the right could extend was the day *Ring* was decided.[142]

Second, in *Mosley*, the Supreme Court of Florida addressed the other half of the question: what about sentences that became final after *Ring*? There, the Court relied on two theories to hold that *Hurst* applied retroactively to Mosley's sentence, which had become final *after* the Supreme Court decided *Ring*.[143] Based on principles of fundamental fairness, the Court determined *Hurst* applied retroactively to Mosley because he had "raised a *Ring* claim at his first opportunity and was then

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[133] *Asay*, 210 So. 3d at 15–16.
[134] *Id.* at 16.
[135] Mosley v. State, 209 So. 3d 1248, 1276 (Fla. 2016) (per curiam).
[136] Recent Case, *supra* note 100, at 2253.
[137] *Asay*, 210 So. 3d at 18, 20.
[138] *Id.* at 20.
[139] *Id.*
[140] *Id.* at 18, 20.
[141] *Id.*
[142] *Id.* at 22.
[143] *See* Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016) (per curiam).

rejected at every turn . . . ."[144] In other words, Mosley had preserved the *Hurst* argument and was, therefore, entitled to the benefit of the new rule.[145]

Then, after relying on *Asay* as to why *Johnson* was incorrect, the Court proceeded to conduct a *Witt* retroactivity analysis in Mosley's case.[146] As in *Asay*, the analysis turned on the third prong of the *Witt* standard, which the Court determined "turn[ed] entirely on whether the new rule, here *Hurst v. Florida*, is a 'development of fundamental significance.'" [147] To constitute a "development of fundamental significance," the Court explained, "the change in law must 'place beyond the authority of the state the power to regulate certain conduct or impose certain penalties,' or alternatively, be 'of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*.'"[148] As to *Hurst*, the Could concluded: "*Hurst v. Florida*, as interpreted by this Court in *Hurst*, falls within the category of cases that are of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" from *Stovall* and *Linkletter* . . . ."[149]

The "three-fold test of *Stovall* and *Linkletter*," the Court said, is to "determine where finality yields to fairness based on a change in the law."[150] Proceeding through this test, the Court determined:

> (1) "The purpose of the new rule announced in *Hurst* is to ensure that capital defendants' foundational right to a trial by jury—the only right protected in both the body of the United States Constitution and the Bill of Rights and then, independently, in the Florida Constitution—. . . is preserved within Florida's capital sentencing scheme."[151] Additionally, the Court determined that purpose weighed heavily in favor of retroactivity.[152]
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> (2) The old rule in this case was that the right announced in *Ring* did not apply to Florida's death penalty statute.[153] Since *Ring*, Florida Courts, including the Supreme Court of Florida, relied "in good faith on precedent supporting the validity of Florida's capital sentencing scheme, despite doubt about its constitutionality."[154] "Because Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002, fairness strongly favors applying *Hurst*, retroactively to that time."[155]

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[144] *Id.* at 1275 (citing James v. State, 615 So. 2d 668, 669 (Fla. 1993)).
[145] *Id.*
[146] *Id.* at 1276.
[147] *Id.* (quoting Witt v. State, 387 So. 2d 922, 931 (Fla. 1980)).
[148] *Id.* at 1276–77 (quoting *Witt*, 387 So. 2d at 929).
[149] *Id.* at 1277.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 1278.
[154] *Id.*
[155] *Id.*

> (3) As to the effect on the administration of justice, "any decision to give retroactive effect" to a new rule "will have some impact on the administration of justice," but "[h]olding *Hurst* retroactive to when the United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual."[156]

Based on these findings, the Court concluded *Hurst* should apply retroactively to sentences like Mosley's that became final after *Ring* because, in essence, those sentences were unconstitutional all along—it just took the U.S. Supreme Court fourteen years to say so:

> Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.[157]

Applying *Hurst* retroactively to Mosley's sentence, the Court did not make clear which of the two theories was the Court's primary reason for doing so.[158] Nor did the Court ever clarify which theory was the Court's primary reasoning for applying *Hurst* retroactively to post-*Ring* sentences in any other case. However, reading the case law holistically, it appears that the latter theory was the Court's primary reasoning for its retroactivity decision because it is the reason mentioned in all of the cases; whereas, the former is only mentioned in some cases.[159]

With its decisions in *Asay* and *Mosley*, the Supreme Court of Florida "split the baby" on retroactivity and drew a bright line on a figurative calendar through June 24, 2002, the day the U.S. Supreme Court decided *Ring*.[160] On one side of the line were sentences of death that became final

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[156] *Id.* at 1281.

[157] *Id.* at 1283 (quoting Witt v. State, 387 So. 2d 922, 925 (Fla. 1980)).

[158] *See generally id.*

[159] *See, e.g.*, Hojan v. State, 212 So. 3d 982, 999–1000 (Fla. 2017).

[160] Between *Hurst II* and January 2019, the Supreme Court of Florida experienced a sea change. *See* Kalmanson, *Storm of the Decade*, *supra* note 12, at 58–61. In the spring of 2019, it looked like the

before that date, to which *Hurst* did not apply retroactively.[161] As a result, the Supreme Court of Florida denied numerous defendants the opportunity to raise a *Hurst*-related claim because of this decision.[162]

On the other side of the line were sentences of death that became final after that day, to which *Hurst* did apply retroactively. Those defendants were eligible for *Hurst* relief if they could prove that the *Hurst* error in their case was not harmless beyond a reasonable doubt.[163] Practically, this split Florida death row almost in half, making approximately 55.4% of defendants on Florida's death row at the time eligible for *Hurst* relief—subject to harmless error review—because either *Hurst* applied retroactively to their sentences (44.6%), or their sentences had not yet become final (10.8%).[164] The other 44.6% of defendants were not eligible for *Hurst* relief because their sentences were too old for *Hurst* to apply retroactively to their sentences.[165]

2. Retroactivity of the Eighth Amendment Rights Announced in Hurst II

At first blush, *Asay* and *Mosley* appeared to answer the question of *Hurst* retroactivity in Florida. But upon further review, it became clear that *Asay* and *Mosley* were incomplete. They addressed only the Sixth Amendment rights at issue in *Hurst v. Florida* and *Hurst II*. They did not address the retroactivity of the Eighth Amendment rights the Supreme Court

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Court's decisions in *Asay* and *Mosley* were vulnerable to rescission in *Owen v. State*. *See id.* at 64–65; *see also* Gorman & Ravenscroft, *supra* note 55, at 973–74. The "new" Court expressed dissatisfaction with the "old" Court's analysis on *Hurst* retroactivity when it issued an order in *Owen* asking the parties to brief the Court on the validity of *Asay* and *Mosley* (the "Order"). *See* Gorman & Ravencroft, *supra* note 55, at 961. In theory, the Order could mean the Court intended to explore both whether *Hurst* should be fully retroactive (overturning *Asay*) and whether *Hurst* should not be retroactive at all (overturning *Mosley*). *See id.* at 961, 973. However, a close review of the Order and indications at oral argument after the Order suggests the Court's true intention was to explore only the latter—rescinding *Mosley* such that *Hurst* does not apply retroactively to any defendants on Florida's death row. *See id.* Notwithstanding, the Court ultimately did not address the issue of retroactivity in its decision in *Owen* and, instead, relied on the Court's decision in *Poole*, which changed the Court's interpretation of *Hurst v. Florida*. *Owen v. State*, 304 So. 3d 239, 241–43 (Fla. 2020) (per curiam).

[161] *See generally* Asay v. State, 210 So. 3d 1 (Fla. 2016) (per curiam).

[162] *See, e.g.*, Stein v. Jones, No. SC16–621, 2017 WL 836806 (Fla. Mar. 3, 2017); Hamilton v. Jones, No. SC16–984 2017 WL 836807 (Fla. Mar. 3, 2017).

[163] *See generally* Bevel v. State, 221 So. 3d 1168 (Fla. 2017) (per curiam) (reversing and remanding for a new penalty phase because of *Hurst*); Hertz v. Jones, 218 So. 3d 428 (Fla. 2017) (per curiam) (same). For more on *Hurst* harmless error, *see* Kalmanson, *Storm of the Decade*, *supra* note 12, at 45–47. However, as explained in *supra* note 55, the analysis for harmless error changed in 2020 after the Supreme Court of Florida decided *Poole*.

[164] Kalmanson, *The Difference of One Vote or One Day*, *supra* note 12, at 1028.

[165] *Id.*; *see* Gorman & Ravenscroft, *supra* note 55, at 973 (explaining similar statistics); *Florida Supreme Court: More Than 200 Prisoners Unconstitutionally Sentenced to Death May Get New Sentencing Hearing*, DEATH PENALTY INFO. CTR. (Dec. 22, 2016), https://deathpenaltyinfo.org/news/florida-supreme-court-more-than-200-prisoners-unconstitutionally-sentenced-to-death-may-get-new-sentencing-hearing.

of Florida discussed in its decision in *Hurst II*, which were not discussed in the U.S. Supreme Court's decision in *Hurst v. Florida*.

Inevitably, several defendants raised this issue. Almost a year after *Asay* and *Mosley*, the Supreme Court of Florida addressed this lingering question in *Hitchcock v. State*, which was designated as the "lead" case for this issue.[166] Relying on *Asay*, the Court held that the Eighth Amendment rights announced in *Hurst II*—like the Sixth Amendment rights—did not apply retroactively to defendants whose sentences of death became final before *Ring*.[167] In doing so, the Court recycled its *Witt* analysis from *Asay* to deny retroactivity of the Eighth Amendment rights announced in *Hurst II* to sentences that became final before *Ring*—which, of course, was a decision based on the Sixth Amendment.[168]

B. Split Analyses Under Teague v. Lane

This section reviews courts' analyses of the retroactivity of *Hurst* under the *Teague* standard.[169] This section shows that, unlike the outcome of these analyses regarding *Ring*, courts reached varied conclusions. First, the Supreme Court of Delaware determined that *Rauf* (the Delaware Supreme Court's decision applying *Hurst v. Florida* to Delaware's capital sentencing scheme, as described above) was retroactive to all defendants on Delaware's death row.[170] Shortly thereafter, separate opinions from the Supreme Court of Florida's decisions regarding the retroactivity of *Hurst* argued *Teague*, rather than *Witt*, was the proper standard and, under the *Teague* analysis, *Hurst* is not retroactive.[171] Then, years later, the Eleventh Circuit Court of Appeals held *Hurst* was not retroactive under *Teague*, at least in federal habeas proceedings.[172]

1. Full Retroactivity in Delaware

About a week before the Supreme Court of Florida issued *Asay* and *Mosley*, the Delaware Supreme Court issued its decision in *Powell v. State*. In *Powell*, the Delaware Supreme Court applied *Teague* in determining

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[166] Hitchcock v. State, 226 So. 3d 216, 217 (Fla. 2017) (per curiam).

[167] *Id.*

[168] *Id.*; *see* Kalmanson, *Storm of the Decade*, *supra* note 12.

[169] For an academic article that was written before the first decision on this topic, arguing that *Hurst* should be retroactive under Teague v. Lane, 489 U.S. 288, 310 (1989), *see generally* Angela J. Rollins & Billy H. Nolas, *The Retroactivity of* Hurst v. Florida, *136 S. Ct. 616 (2016) to Death-Sentenced Prisoners on Collateral Review*, 41 S. ILL. UNIV. L. J. 181 (2017).

[170] *See generally* Powell v. Delaware, 153 A.3d 69 (Del. 2016) (per curiam).

[171] Asay v. State, 210 So. 3d 1, 29–30 (Fla. 2016) (Polston, J., concurring) (agreeing that *Hurst* is not retroactive to pre-*Ring* cases but stating that *Teague* "is the proper and applicable test"); *see* Mosley v. State, 209 So. 3d 1248, 1286–87 (Fla. 2016) (Canady, J., dissenting) (arguing *Hurst* should not be retroactive under *Witt*).

[172] Knight v. Fla. Dep't Corr., 936 F.3d 1322, 1328 (11th Cir. 2019).

whether *Hurst v. Florida*, as the Delaware Supreme Court interpreted it in *Rauf*, was retroactive. But, the Court explained, it viewed the issue as "a matter of Delaware law" and, therefore, the Court was not strictly bound by federal precedent.[173] Instead, the Court looked to how Delaware courts had interpreted *Teague* in the past.[174]

Applying *Teague*, the Delaware Supreme Court determined that the State's reliance on *Schriro v. Summerlin* to argue that *Hurst*/*Rauf* is not retroactive was misplaced because, while *Ring* and *Hurst* "did not address the burden of proof" issue—*i.e.*, the burden of proof by which juries must make the necessary findings—the Court's decision in *Rauf* did.[175] Therefore, *Rauf*, unlike *Ring* and *Hurst*, "involved a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof."[176]

As a result, the Court determined *Rauf* fell "squarely within the second exception set forth in *Teague* requiring retroactive application of 'new rules' of criminal procedure 'without which the likelihood of an accurate [sentence] is seriously diminished.'"[177] Determining *Rauf* must apply retroactively, the Court relied on the U.S. Supreme Court's ruling in *Ivan V. v. City of New York*,[178] in which the Court held that the new rule announced in *In re Winship*[179] applied retroactively. In *Ivan V.*, the U.S. Supreme Court wrote: "[T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."[180] Analogizing "[t]he change in the burden of proof in *Winship* that was ruled retroactive in *Ivan V.*" to "the change in the burden of proof that occurred in *Rauf*,"[181] the *Powell* Court determined *Rauf* "constitute[d] a new watershed procedural rule of criminal procedure that must be applied retroactively in Delaware."[182]

2. Separate Opinions on the Supreme Court of Florida

Concurring with the Supreme Court of Florida's decision in *Asay*, Justice Polston explained that while he agreed "*Hurst v. Florida* is not

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[173] *Powell*, 153 A.3d at 72–73, 72 nn.18–19.
[174] *Id.*
[175] *Id.* at 73–74 (footnotes omitted).
[176] *Id.* at 74.
[177] *Id.*
[178] Ivan V. v. City of New York, 407 U.S. 203, 204–05 (1972) (per curiam).
[179] In re Winship, 397 U.S. 358, 359, 364–65, 368 (1970).
[180] *Ivan V.*, 407 U.S. at 205.
[181] *Powell*, 153 A.3d 69 at 76.
[182] *Id.* (noting that this conclusion was consistent with how the Court addressed the existing death sentences in the State after *Furman v. Georgia*, 408 U.S. 238 (1972), which held that imposition carrying out of death penalty in cases before court violated the Eighth and Fourteenth Amendments, when Delaware's death row prisoners' sentences were vacated).

retroactive to pre-*Ring* cases under" *Witt*, he believed that the *Teague* standard "is the proper and applicable test."[183] Similarly, in *Mosley*, Justice Canady wrote a concurring in part and dissenting in part opinion, joined by Justice Polston, which noted that he agreed with Justice Polston that the *Teague* framework is "more workable than *Witt*."[184] Justice Canady explained that he viewed *Johnson* as controlling and felt the majority's "wave-of-the-hand" to *Johnson* was no way to "treat a carefully reasoned precedent."[185]

Notwithstanding, Justice Canady determined that analyzing the issue "under *Witt* [was] sufficient to resolve the retroactivity issue."[186] Even applying *Witt*, Justice Canady argued, *Hurst* should not be retroactive.[187] Justice Canady argued that the analysis of *Hurst* retroactivity necessarily flowed from the analysis of *Ring* retroactivity, which flowed from the retroactivity of *Apprendi*[188]—as the Court had explained in *Johnson*. Justice Canady argued *Hurst* was, like *Ring*, an "evolutionary refinement" that ascended from *Apprendi* and was not justification for retroactivity.[189] In other words, because the Court had determined that neither *Ring* nor *Apprendi* were retroactive, Justice Canady argued that the decision in *Mosley* was inconsistent and out of place. In both of those prior decisions, the Court had determined that the decisions did not "cast serious doubt on the veracity or integrity" of the underlying decisions and, therefore, did not warrant retroactive relief.[190] Justice Canady felt the majority failed to make the same consideration in *Mosley*, which was required under *Witt*.[191] Essentially, Justice Canady felt the majority disregarded the elements of the *Witt* framework and improperly broadened retroactivity.[192]

Justice Canady further disagreed with the Court's alternative theory for granting retroactivity in Mosley's case based on fundamental fairness, writing that it was inconsistent "with the balancing process required by *Witt*."[193] Justice Canady explained that he disagreed with the entire premise of *James* and argued that the decision should be abrogated because it "ignored existing precedent"—namely *Witt*—and itself was incoherent.[194]

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[183] Asay v. State, 210 So. 3d 1, 29–30 (Fla. 2016) (Polston, J., concurring).

[184] Mosley v. State, 209 So. 3d 1248, 1288 n. 28 (Fla. 2016) (Canady, J., concurring in part and dissenting in part).

[185] *Id.* at 1285.

[186] *Id.* at 1288 n. 28.

[187] *Id.* at 1285.

[188] In *Hughes v. State*, 901 So. 2d 837, 838, 846, 848 (Fla. 2005), the Court determined *Apprendi* was not retroactive.

[189] Mosley v. State, 209 So. 3d 1248, 1287 (Fla. 2016).

[190] *Id.* at 1286–88 (quoting *Witt*, 287 So. 2d at 929).

[191] *Id.* at 1289.

[192] *Id.* at 1290.

[193] *Id.* at 1291.

[194] *Id.*

In conclusion, Justice Canady wrote that the majority's decision in *Mosley* "unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years."[195] Whether it was *Mosley* that caused it or not, Justice Canady eerily foreshadowed the future of Florida's death penalty.

3. No Retroactivity Under U.S. Court of Appeals for the Eleventh Circuit's Decision in Knight

Several years after *Hurst v. Florida*, *Hurst II*, *Asay*/*Mosley*, and *Rauf*/*Powell*, the Eleventh Circuit became the first federal court to address the retroactivity of *Hurst* for federal habeas proceedings.[196] Although the Florida Supreme Court had addressed the retroactivity of *Hurst* for state postconviction proceedings in *Asay* and *Mosley* and filtered through the hundreds of post-*Hurst* requests for relief, parts of which were based on retroactivity, this was the first time a federal court analyzed the retroactivity of *Hurst*.[197] This makes sense because by this time most of the death penalty cases across the country were centralized in states within the Eleventh Circuit's jurisdiction.

Before delving into the analysis of whether *Hurst* is retroactive, the Court explained why it could not "simply accept the Florida Supreme Court's decision to apply *Hurst* retroactively to Knight . . ., as Knight urge[d]" the Court to do.[198] State-specific standards could not "displace *Teague* on the federal stage." The Court explained that when states "choose to apply new rules of constitutional procedure that are not retroactive under *Teague* in federal courts," they do not misconstrue *Teague* but, rather, "develop[] *state* law to govern retroactivity in state postconviction proceedings."[199] That, the Eleventh Circuit said, is what the Florida Supreme Court did in *Mosley*.[200]

As to the federal courts, the Eleventh Circuit explained, it was "bound to follow *Teague*'s retroactivity principles" regardless of the

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[195] *Id.*

[196] Knight v. Fla. Dep't Corr., 936 F.3d 1322 (11th Cir. 2019).

[197] *Id.* at 1332. The Eleventh Circuit dipped its toe in the rough waters of *Hurst* retroactivity in *Lambrix v. Secretary, Florida Department of Corrections*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017), noting that "under federal law Hurst, like Ring, is not retroactively applicable on collateral review." In *Knight*, the Court noted that "*Hurst* would not apply retroactively to a petitioner whose convictions became final long before the Supreme Court decided *Ring* . . . and even before *Apprendi*." *Knight*, 936 F.3d at n.2. This was the first time the Court "was . . . squarely presented" with the question of the retroactivity of *Hurst* under *Teague*. *Id.*

[198] *Id.* at 1331–32.

[199] *Id.* at 1332.

[200] *Id.*

applicable state court's decision in collateral proceedings.[201] For federal habeas cases, "*Teague* retroactivity is a 'threshold question . . . .'"[202]

The Eleventh Circuit's decision in *Knight v. Florida Department of Corrections* was similar to the approach Justices Canady and Polston advocated for in their separate opinions years before—applying *Teague* to *Hurst* and finding that it does not apply retroactively. But the nuances of the Eleventh Circuit's decision are significant. Applying *Teague*, the Eleventh Circuit determined *Hurst* did not apply retroactively to federal habeas proceedings because "*Ring* did not dictate the Supreme Court's later invalidation of Florida's death penalty sentencing scheme in *Hurst*."[203] In other words, the Eleventh Circuit determined *Hurst* was a new rule and not merely an extension or product of *Ring*. The Court explained that the *Hurst* conclusion was not "apparent to all reasonable jurists" at the time Knight's sentence became final—as illustrated by even that Court's own jurists determining Florida's capital sentencing scheme passed muster under *Ring*.[204] Of course, the Eleventh Circuit's determination that *Hurst* was not the product of *Ring* is at odds with how the Supreme Court of Florida characterized *Hurst* in conducting its *Witt* analysis in *Mosley*.

4. Summary of Analyses of Hurst *Retroactivity*

The table below summarizes the cases regarding *Hurst* retroactivity canvassed above in this part:

Table 2 Summary of Cases Addressing the Retroactivity of Hurst

Jurisdiction	**Case**	**Retroactivity Standard**	**Conclusion**
Delaware	*Powell v. Delaware*, 153 A.3d 69 (Del. 2016).	*Teague*	Retroactive

[201] *Id.* at 1333.
[202] *Id.* (quoting Caspari v. Bohlen, 510 U.S. 383, 389 (1994)).
[203] *Id.* at 1335.
[204] *Id.*

Florida	*Asay v. State*, 210 So. 3d 1 (Fla. 2016).	State-specific	No retroactivity before *Ring* for Sixth Amendment rights
Florida	*Mosley v. State*, 209 So. 3d 1248, 1290–91 (Fla. 2016	State-specific	Retroactive after *Ring* for Sixth Amendment rights
Florida	*Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).	State-specific	Partial retroactivity for Eighth Amendment rights, as explained in *Asay*/*Mosley*
Eleventh Circuit Court of Appeals	*Knight v. Florida Department of Corrections*, 936 F.3d 1322 (11th Cir. 2019).	*Teague*	Not retroactive

VI. IDENTIFYING AND UNRAVELING SOURCES OF CONFUSION

The confusion surrounding the retroactivity of *Ring v. Arizona* and *Hurst v. Florida* is the quintessential Gordian Knot.[205] Attempting to disentangle the divergent doctrine that has developed in this area, this part identifies four points that likely caused the confusion: (A) it was unclear from the beginning whether *Hurst v. Florida* was a direct result of *Ring v. Arizona* and, if so, there was an absence of guidance regarding retroactivity;

[205] *See* Evan Andrews, *What Was the Gordian Knot*, HISTORY, https://www.history.com/news/what-was-the-gordian-knot (last updated Aug. 29, 2018).

(B) the role of the Eighth Amendment in the *Hurst*/*Ring* context has never been properly defined; (C) although courts consistently applied *Teague* to deciding *Ring* retroactivity, that consistency ended when it came to applying *Teague* to *Hurst*; and (D) the Supreme Court of Florida introduced the concept of partial retroactivity.

Of course, the obvious answer is that the Court weighs in as to the appropriate standard that should apply when courts analyze whether *Hurst* applies retroactively—*i.e.*, whether courts must or may apply *Teague* to such analysis. Absent such explicit clarity, this part identifies the sources of the confusion plaguing the lower courts' retroactivity jurisprudence and what judges might do to resolve it.

A. The Ambiguous Relationship Between Ring *and* Hurst

The relationship between *Ring* and *Hurst* has generated some of the confusion that bogs down related retroactivity analyses. On one hand, the *Hurst* decision itself connects the two opinions, stating: "The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's."[206] Likewise, on remand in *Hurst II*, the Supreme Court of Florida carried that forward, stating: "Against this backdrop of decisions implementing the guarantees of the Sixth Amendment in *Apprendi*, *Ring*, and *Blakely*, the Supreme Court issues its opinion in *Hurst v. Florida*, holding that Florida's capital sentencing scheme violated the Sixth Amendment and the principles announced in *Ring* by committing to the judge, and not to the jury, the factfinding necessary for imposition of the death penalty."[207] *Hurst v. Florida* overruled the Supreme Court of Florida's earlier decisions determining *Ring* did not apply to Florida's capital sentencing statute—to indicate the Court got it wrong fourteen years prior.[208] In fact, one of the Court's theories regarding the retroactivity of *Hurst*—the preservation theory—turned on whether the defendant had raised a *Ring* claim that would have been successful after *Hurst* (as discussed below).[209]

On the other hand, in *Knight*, the Eleventh Circuit determined that *Ring* did not dictate the result in *Hurst.* For the Eleventh Circuit's *Teague* analysis in *King*, it was insufficient that *Hurst* was "within the logical compass of" or even "controlled by" *Ring*. In determining that *Hurst* was not a direct result of *Ring*, the Court relied on (1) the *Ring* Court's acknowledgment of differences in Florida's capital sentencing scheme at the time,[210] (2) the "obvious pains" the Supreme Court of Florida took to

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[206] Hurst v. Florida, 577 U.S. 92, 98 (2016).

[207] Hurst v. State, 202 So. 3d 40, 50 (Fla. 2016).

[208] *See* Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002); King v. Moore, 831 So. 2d 143, 151–52 (Fla. 2002).

[209] *See* Mosley v. State, 209 So. 3d 1248, 1275 (Fla. 2016) (per curiam).

[210] Knight v. Fla. Dep't Corr., 936 F.3d 1322, 1335 (11th Cir. 2019).

distinguish Florida's capital sentencing scheme from Arizona's to salvage its capital sentencing scheme after *Ring*,[211] and (3) the fact that the *Ring* Court did not address *Spaziano* and *Hildwin*, which upheld Florida's capital sentencing scheme.[212] The Court also noted Justice Alito's dissenting opinion in *Hurst* in which he noted again the differences between Arizona's sentencing statute at issue in *Ring* and Florida's at issue in *Hurst*—which had been in place since *Ring*.[213]

The Eleventh Circuit further explained that the outcome of *Hurst* was not "apparent to all reasonable jurists" at the time *Ring* was decided.[214] In fact, the Court noted that jurists on the Eleventh Circuit were within the group of jurists to which that question was unclear.[215] Thus, the Eleventh Circuit determined *Hurst* was a *new* rule—independent of *Ring*.[216]

Of course, the Supreme Court of Florida essentially found the opposite in *Asay* and *Mosley* and the Justices on the Supreme Court of Florida who dissented in 2002 would argue it *was* clear then. The Eleventh Circuit went on to determine *Hurst* did not fall within either of *Teague*'s exceptions to justify retroactivity.

While the *Knight* Court's determination that *Hurst* was a *new* rule was in stark contrast to the Supreme Court of Florida's determination in *Asay* and *Mosley*, it was not completely inconsistent with the Delaware Supreme Court's analysis in *Powell*. In *Powell*, the Supreme Court of Delaware similarly determined there was a *new* aspect to *Hurst* that was not present in *Ring*, as discussed above. The difference between *Knight* and *Powell*, though, was that the Eleventh Circuit determined *Hurst* did not fall within either of the *Teague* exceptions to warrant retroactivity. While the obvious distinction is that *Powell* was based on a Delaware-specific interpretation of *Teague*, that does not seem sufficient to reconcile these two opinions, which reach essentially opposite conclusions.

After all of these decisions, in *McKinney v. Arizona*, the U.S. Supreme Court stated that *Hurst v. Florida* "applied *Ring* and decided that Florida's capital sentencing scheme" violated the Sixth Amendment.[217] This seems to suggest that *Hurst* was *not* a new rule but, rather, the Court merely applying the same rule from *Ring* to Florida—as the Supreme Court of Florida viewed it. However, the Supreme Court has not provided guidance as to retroactivity.

To avoid this confusion, the *Hurst* Court could have further clarified the relationship between *Hurst* and *Ring*, perhaps indicating whether it

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[211] *Id.*
[212] *Id.* at 1336.
[213] *Id.* at 1335–36 (quoting Hurst v. Florida, 577 U.S. 92, 104 (2016) (Alito, J., dissenting)).
[214] *Id.* at 1335.
[215] *Id.*
[216] *Id.* at 1336.
[217] *McKinney* also indicated that the Court adopted the narrow reading of *Hurst v. Florida* on the merits.

viewed *Hurst* as a decision that should have been made at the time *Ring* was decided—or to have applied since *Ring*. This seems analogous to the Court indicating, in overturning precedent, that a decision was wrong the day it was decided—*i.e.*, Florida's capital sentencing scheme was also unconstitutional the day *Ring* was decided. It is possible that *McKinney*, had it been decided sooner, would have affected retroactivity analyses like the Eleventh Circuit's in *Knight*. However, retroactivity was essentially "set in stone" by the time *McKinney* was decided.

B. Unclear Role of the Eighth Amendment in the Ring/Hurst *Discussion*

To say the Eighth Amendment has been lost in translation in the mess of *Hurst v. Florida* and its progeny would be an understatement.[218] First, the Supreme Court heard briefing and argument regarding the effect of the Eighth Amendment on the issue in *Hurst v. Florida* but, in its decision, addressed only the Sixth Amendment—against dissent.[219]

Likewise, while the Supreme Court of Florida's decision on remand in *Hurst II* was pending, scholars contemplated the effect of the Eighth Amendment on the impending discussions. For example, Professors Trocino and Meyer's article "Hurst v. Florida *Ha'p'orth of Tar: The Need to Revisit* Caldwell, Clemons, *and* Proffitt" focused explicitly on the Eighth Amendment and strongly urged the Supreme Court of Florida to address the Eighth Amendment in its decision on remand.[220]

In addressing *Hurst* on remand and its fallout, the Florida Supreme Court did not do much by way of clarification as to the Eighth Amendment's role in the *Hurst* discussion. On remand, the Supreme Court of Florida attempted to include the Eighth Amendment in *Hurst II* in holding that the jury's recommendation for death must be unanimous. Ultimately, however the court failed to follow through with properly analyzing the effect of this distinct amendment in other discussions—including, pertinent here, retroactivity.[221]

Rather, seemingly fatigued by the carousel of unanswered questions and confusing analyses, the Court either conflated the Eighth and Sixth Amendments for purposes of answering post-*Hurst* questions or excluded the Eighth Amendment completely. Most significantly, in *Hitchcock*, the Court denied retroactivity of the Eighth Amendment right discussed in *Hurst*

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[218] *See generally* Trocino & Meyer, *supra* note 29.

[219] *See* Hurst v. Florida, 577 U.S. 92 (2016) (Breyer, J., concurring); Reply Brief for Petitioner, *Hurst*, 577 U.S. 92 (No. 14-7505) 2015 WL 5138584 (U.S. 2015); Brief for Respondent, *Hurst*, 577 U.S. 92 (No. 14-7505) 2015 WL 4607695 (U.S. 2015); Brief for Respondent, *Hurst*, 577 U.S. 92 (No. 14-7505) 2015 WL 6865696 (U.S. 2015).

[220] *See generally* Trocino & Meyer, *supra* note 29.

[221] As explained *supra*, the Court did not address the retroactivity of the Eighth Amendment rights in *Hurst II* until *Hitchcock* and, in doing so, applied the Court's Sixth Amendment analysis.

II based on the Sixth Amendment discussion in *Asay*.[222] In doing so, the Court conflated the Eighth and Sixth Amendments by applying the Court's *Witt* analysis in *Asay*, which was based on Sixth Amendment jurisprudence, to deny retroactivity of the Eighth Amendment right in *Hitchcock*. Had the Court separately analyzed the retroactivity of the Eighth Amendment, the Court's analysis likely would have been different.

Further, in analyzing various aspects of *Hurst*, the Court excluded the Eighth Amendment from the discussion. As Justice Sotomayor noted in her dissenting opinion from the Court's denial of the petition for a writ of certiorari (joined by Justices Ginsburg and Breyer) in *Truehill v. Florida*, the Supreme Court of Florida failed to address the effect of *Caldwell v. Mississippi* on the *Hurst* analysis, which defendants raised numerous times.[223] It was not until the Florida Supreme Court's decision in *Reynolds v. State*—almost two years after *Hurst II*—that the Court addressed *Caldwell*, in a seemingly *post hoc* analysis.[224]

Distinguishing the Sixth and Eighth Amendments in the capital sentencing context remains an important area of jurisprudence that could benefit from clarification—as discussed further below.

C. Inconsistent Application of Teague *to Retroactivity of* Hurst

Another area of confusion is the inconsistent application of *Teague* in the context of *Hurst* retroactivity, in contrast to its consistent application in the context of *Ring* retroactivity. Delaware's decision in *Powell* seems to be the turning point here.

Consider the *Teague* cases as two groups: (1) cases addressing *Ring* retroactivity, and (2) cases addressing *Hurst* retroactivity. In the first group, all of the cases reached the same conclusion: *Ring* does not apply retroactively. However, in the second group, the cases are inconsistent. In *Powell*, the Delaware Supreme Court applied *Teague* and determined that *Hurst* applied retroactively. But, in *Knight*, the Eleventh Circuit Court of Appeals applied *Teague* and determined that *Hurst* did not apply retroactively. Of course, *Knight* was consistent with all of the *Teague*-based decisions regarding *Ring* retroactivity, as well as the separate opinions from the Supreme Court of Florida arguing that *Teague* was the proper standard but, regardless, *Hurst* was not retroactive.

The procedural posture seems to be the key to distinguishing *Knight* and *Powell*. The analysis in *Knight* seemed specific to the federal habeas corpus context in which it was decided. It had to be because, otherwise, it would have completely contradicted the retroactivity decisions from the

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[222] *See generally* Hitchcock v. State, 226 So. 3d 216 (Fla. 2017) (per curiam).

[223] Truehill v. Florida, 138 S. Ct. 3, 3–4 (2017) (Sotomayor, J., dissenting).

[224] Reynolds v. State, 251 So. 3d 811, 818 (Fla. 2018). *But see id.* at 831–32 (Pariente, J., dissenting).

Supreme Court of Florida that applied to defendants whose cases would also be reviewed by the Eleventh Circuit. But is that enough to explain away two courts reaching opposite conclusions on whether *Hurst* applies retroactively under *Teague*?

Moreover, if *Hurst* is a direct result of *Ring*, the second group of cases should be consistent with the first group. However, *Powell* (in the second group) is inconsistent with the outcome in the first group.

Jurisprudentially, this inconsistency undermines the stability of the *Teague* standard, which seemed to be the stronghold of the *Ring* retroactivity analysis. Or was the source of consistency for *Ring* retroactivity merely that the U.S. Supreme Court decided the question in *Shriro* and, thereby, provided guidance? If so, only the U.S. Supreme Court can resolve the confusion.

D. Supreme Court of Florida's Novel Partial Retroactivity in Deciding Hurst *Retroactivity*

Sorting out the issues with *Teague* would not have fixed the issue in Florida, where the Court applied state-specific case law in analyzing *Hurst* retroactivity. Not only that, but the way the Supreme Court of Florida approached *Hurst* retroactivity was novel. As this section explains, the Court (1) presented alternative theories of retroactivity, and (2) invented partial retroactivity.

First, as explained above, the Supreme Court of Florida's decision in *Mosley* presented two alternative theories of retroactivity, both of which could independently support the Court's decision.[225] In addition to determining that *Hurst* should apply retroactively to post-*Ring* sentences under *Witt*, the Court also determined that Mosley should receive retroactive application of *Hurst* based on a fundamental fairness theory because he had preserved a *Hurst*-like argument.[226] Although based on completely different logic not tied to *Ring*, the Court determined the fundamental fairness theory, like the *Witt* analysis, applied only to defendants whose sentences became final after *Ring*.[227] For example, defendants like Louis Gaskin and Michael Lambrix, who had also preserved the argument but whose sentences became final before *Ring*, did not receive the benefit of the Court's fundamental fairness theory.[228]

In presenting these two theories, the Court failed to designate one as the Court's primary reasoning for its holding.[229] While case law suggests

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[225] *See generally* Mosley v. State, 209 So. 3d 1248 (Fla. 2016).
[226] *See generally id.*
[227] *See generally id.*
[228] *See generally* Lambrix v. State, 217 So. 3d 977 (Fla. 2017); Gaskin v. State, 218 So. 3d 399 (Fla. 2017).
[229] *See generally Mosley*, 209 So. 3d 1248.

that the *Witt* analysis was the Court's primary reasoning,[230] the interaction between the two Court's alternative theories for retroactivity no doubt contributed to the confusion surrounding *Hurst* retroactivity.

To minimize confusion here, the obvious solution would have been for the Supreme Court of Florida to have relied upon only one theory to reach its retroactivity holding. Based on the suggestion in the Court's case law after *Asay* and *Mosley* as well as the way the Court has analyzed retroactivity in the past, it seems the primary theory was *Witt* rather than fundamental fairness.

Outside of that, if the Court determined that both theories were necessary for its holding in *Mosley*, the Court could have designated one theory as the primary reasoning for reaching its holding—i.e., designating the other as a form of dicta. That would have at least signaled to counsel and other courts—either trial courts or courts reviewing this issue in the future—which theory the Court relied upon more in reaching its holding.

Second, the Florida Supreme Court's determination that *Hurst* applied retroactively to only a portion of Florida's death row undoubtedly created confusion. Through *Asay* and *Mosley*, the Florida Supreme Court essentially invented the concept of partial retroactivity.[231] Considering the Court's reasoning for doing so, the new concept of partial retroactivity seems to be a product of compromise between (a) the Court being uncomfortable with granting full retroactivity in light of the fact that the Court denied retroactivity of *Ring* and (b) the Court's acknowledgement of the significance of *Hurst*, which weighed in favor of granting retroactivity.

The obvious solution here seems to lie in absoluteness. Consistent with decades of retroactivity case law, the Supreme Court of Florida could have held that *Hurst v. Florida* was either fully retroactive or not retroactive at all, as the Court did after *Ring* and as other courts that reviewed the retroactivity of *Ring* and *Hurst* did. Had the Court done so, it is likely that the additional litigation surrounding *Hitchcock* would have been avoided because the pre-*Ring* defendants would not have been left wondering why they were left without retroactivity based on a seemingly arbitrary deadline.

Absent guidance at the outset to *prevent* confusion, the Court could have also attempted to provide guidance *after Hurst* once confusion had begun. Instead, after *Hurst*, the Supreme Court did not provide any further guidance. Until *McKinney v. Arizona* almost four years later, the Court seemed to avoid any post-*Hurst* issues, including whether Florida could execute defendants whose sentences had not been reviewed in light of *Hurst* because their sentences were not entitled to retroactive application of *Hurst* based on *Asay*. Even against strong dissents, the Court denied petition after

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[230] *See, e.g.*, Gregory v. State, 224 So. 3d 719, 738 (Fla. 2017).

[231] *See generally* Asay v. State, 210 So. 3d 1 (Fla. 2016); Mosley v. State, 209 So. 3d 1248 (Fla. 2016).

petition.[232] Indeed, Florida has conducted seven executions since *Hurst*. All of the executed defendants were executed based on pre-*Ring* sentences that were not entitled to the retroactive application of *Hurst* under *Asay*:

Name	**Date of Offense**[233]	**Date Sentence Became Final**[234]	**Date of Execution**[235]
Mark Asay	March 12, 1964	October 7, 1991	August 24, 2017
Michael Lambrix	March 29, 1960	1986	October 5, 2017
Patrick Hannon	October 24, 1964	February 21, 1995	November 8, 2017
Eric Branch	February 7, 1971	1997	February 22, 2018
Jose Jimenez	October 12, 1963	1998	December 13, 2018
Robert Long	October 14, 1953	1993	May 23, 2019
Gary Bowles	January 25, 1962	June 17, 2002	August 22, 2019

[232] *See, e.g.*, Middleton v. Florida, 138 S. Ct. 829 (2018) (Breyer, J., dissenting); *id.* at 829–30 (Sotomayor, J., dissenting); Truehill v. Florida, 138 S. Ct. 3, 3–4 (Sotomayor, J., dissenting).

[233] *Execution List: 1976-Present*, FLA. DEP'T CORR., http://www.dc.state.fl.us/ci/execlist.html.

[234] Bowles v. State, 276 So. 3d 791 (Fla. 2019); Long v. State, 235 So. 3d 293, 294 (Fla. 2018); Jimenez v. State, 265 So. 3d 462, 469 (Fla. 2018); Branch v. State, 234 So. 3d 548, 549 (Fla. 2018); Hannon v. State, 228 So. 3d 505, 507 (Fla. 2017) (per curiam); Lambrix v. State, 217 So. 3d 977, 980 (Fla. 2017); Asay v. State, 210 So. 3d 1, 39 (Fla. 2016).

[235] *Execution List*, *supra* note 233.

Notwithstanding the Court's avid avoidance of reviewing *Hurst*-related cases, specific circumstances likely contributed to the Supreme Court's lack of guidance on the retroactivity of *Hurst*. To the extent the Court had any interest in affecting the Supreme Court of Florida's decisions in *Asay* and *Mosley*, the fact that the Supreme Court of Florida relied on state law in deciding those cases likely made it more difficult. Had the Florida Supreme Court applied *Teague* in addressing the retroactivity question, the Supreme Court may have been more inclined to accept certiorari.

VII. RESOLVING THE CONFUSION BY DELINEATING THE ROLES OF THE SIXTH AND EIGHTH AMENDMENTS

As discussed throughout this article, the confusion that surrounded the retroactivity of *Ring* and, even more so, *Hurst*, affected hundreds of capital appeals. More importantly, it left the lives of those on death row hanging in the balance. Ultimately, resolving this confusion is in the purview of the courts, both in hindsight and prospectively; and, doing so seems to lie in the clearer demarcation between the Sixth and Eighth Amendments.

In hindsight, confusion could have been avoided if the courts had more clearly distinguished between the Sixth and Eighth Amendments in the *Hurst* conversation. The Supreme Court of Florida could have course-corrected a few times. First, the Court could have fully explained the Eighth Amendment argument in *Hurst II* and how the Eighth Amendment interacted with the Sixth Amendment in supporting the Court's holding.

Then, the Court could have carried forward such demarcation between the Sixth and Eighth Amendments in formulating its harmless error standard and in analyzing the retroactivity of *Hurst*. Instead, when deciding *Asay*, the Court ignored the Eighth Amendment.

Third, the Court could have addressed retroactivity of the Eighth Amendment right discussed in *Hurst II* separate from the Sixth Amendment rights on the front-end when presented with the question of the retroactivity of *Hurst* in *Asay* and *Mosley*. The analysis likely would have been wholly different considering *Ring* is not the source of the Eighth Amendment rights discussed in *Hurst II* and, therefore, would likely not be the basis for any turning point in the retroactivity analysis.

Absent that, when the issue arose in *Hitchcock*, the Court could have performed the retroactivity analysis anew on Eighth Amendment grounds rather than merely applying its Sixth Amendment analysis to the Eighth Amendment discussion from *Hurst II*. Of course, that would have caused a tidal wave of litigation from defendants who were denied Sixth Amendment retroactivity based on *Asay*. (But *Hitchcock* ultimately caused that effect anyway.)

Had it done so, it is likely the Court would have reached a different conclusion on the retroactivity of the Eighth Amendment rights discussed in

Hurst II, as the line of demarcation for retroactivity that the Court defined in *Asay* (i.e., the day on which the U.S. Supreme Court decided *Ring*) would not apply. Therefore, more defendants would have been entitled to retroactive relief under the Eighth Amendment rights in *Hurst II*.

Barring self-correction by the Supreme Court of Florida, the U.S. Supreme Court could have granted certiorari to clarify confusion. While the Court understandably would not want to insert itself in the Florida Supreme Court's application of the state-specific *Witt* standard, granting certiorari from the Supreme Court of Florida's decision in *Hitchcock* could have been an opportunity for the Court to make the necessary and important clarification that the Sixth Amendment is separate and distinct from the Eighth Amendment, including, and especially, in the capital sentencing context. Such clarification would have likely affected the Eleventh Circuit's decision in *Knight*, in which the Eleventh Circuit grappled with the vague language of the U.S. Supreme Court's opinion in *Hurst*, and which ultimately created differing conclusions on the retroactivity of *Hurst* under the *Teague* analysis.

Albeit, such clarification never came. The proper role of the Eighth Amendment in the *Hurst* discussion—and the capital sentencing process more broadly—remains ambiguous. Of course, this creates fodder for future confusion.

It is almost certain that *Hurst* is not the last decision to create a paradigm shift in capital sentencing before abolition—which seems to be the ultimate resting point for capital sentencing.[236] As in the past leading up to the modern-day framework, future decisions are likely to be grounded in either the Sixth or Eighth Amendment.[237] Most basically, decisions about *who* can be sentenced to death are likely to be based in the Eighth Amendment; and, decisions about *how* defendants are sentenced to death are likely to be based in the Sixth Amendment. However, courts have conflated these two theories and bases for decisions for decades—which has contributed to confusion in several areas, including in the retroactivity context. Thus, the Court would be well-served to properly distinguish between the Sixth and Eighth Amendment in reaching each such decision. If both the Sixth and Eighth Amendments are involved, the Court would be well-served to define the boundaries of each Amendment's role in the discussion. Doing so would aid courts in analyzing the new rules for purposes of determining retroactivity and, therefore, avoid confusion like the uncertainty that surrounds the retroactivity of *Hurst*.

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[236] *See generally* Melanie Kalmanson, *Steps Toward Abolishing Capital Punishment: Incrementalism in the American Death Penalty*, 28 WM. & MARY BILL RTS. J. 587 (2020) (arguing that the path toward abolition resembles incrementalism).

[237] *See generally id.*

VIII. CONCLUSION

The U.S. Supreme Court's decisions in *Ring v. Arizona* and *Hurst v. Florida* significantly improved capital defendants' right to a trial by jury under the Sixth Amendment. So long as capital sentencing remains a viable punishment in the United States, cases like *Ring* and *Hurst* will undoubtedly continue emanating from the U.S. Supreme Court—or, worse, cases restricting capital defendants' rights. Indeed, several such decisions have been decided since *Hurst*.[238]

Despite the substantive "wins" for capital defendants in *Ring* and *Hurst*, applying these two decisions to capital defendants whose sentences were already final when the decisions were issued created confusion and roadblocks to relief. As this article explained, the jurisprudence surrounding the retroactivity of *Hurst* and *Ring* is the quintessential Gordian Knot. At their essence, decisions regarding the retroactivity of *Ring* were ultimately consistent; courts that applied the *Teague* standard concluded, consistent with the U.S. Supreme Court's decision in *Shriro v. Summerlin*, that *Ring* was not retroactive.

However, decisions surrounding the retroactivity of *Hurst* are inconsistent and difficult to reconcile. While the debate of *Hurst* retroactivity seems to be settled, this article disentangled this confusing area of jurisprudence to hopefully provide guidance for similar issues that arise the future. This article identified four points that led to the confusion in determining the retroactivity of *Hurst*: (1) it was unclear from the beginning whether *Hurst v. Florida* was a direct result of *Ring v. Arizona* and, if so, the U.S. Supreme Court did not provide guidance regarding retroactivity; (2) the role of the Eighth Amendment in the *Hurst*/*Ring* context has never been properly defined; (3) although courts consistently applied *Teague* to *Ring* retroactivity, courts applying *Teague* to the retroactivity of *Hurst* have reached different conclusions; and (4) in analyzing the retroactivity of *Hurst*, the Supreme Court of Florida introduced the concept of partial retroactivity, which added uncertainty to retroactivity jurisprudence. In many instances, the retroactivity determination could mean the difference between life or death.

There clearly remains room for improvement in this area. As this article explained, capital jurisprudence would greatly benefit from clarification by the U.S. Supreme Court as to the proper distinction between the Sixth and Eighth Amendments in the capital sentencing process. This entangled area of decades of jurisprudence has affected the lives of hundreds, if not thousands, of capital defendants. As long as capital sentencing remains viable in any jurisdiction, it is imperative that defendants' constitutional rights are honored throughout the sentencing

[238] *See generally, e.g.*, Shinn v. Ramirez, 141 S. Ct. 2228 (2022).

process and such rights are not jeopardized due to inconsistent and imprecise analyses.

The Effect of Termination of Parental Rights on Incarcerated Parents

KARINA ARREDONDO[†]

I. INTRODUCTION

Taisie Baldwin remembered leaving her child behind to serve her incarceration sentence as "the most painful thing I'd ever felt in my life."[1] After being notified that her daughter was given to the state by her grandmother, she attended the termination of parental rights (TPR) hearings every three months for two years to no avail.[2] Her appeal would be insufficient, because her daughter was already placed with a foster family who sought to adopt her. Despite the adoptive families' promise to keep Taisie in touch with her daughter, before long, she was refused access even after serving her prison sentence.[3]

As of 2016, one in one hundred American children faced the potential termination of parental rights for both of their parents.[4] This number has roughly doubled since 2000.[5] Approximately 2.7 million American children have a parent in jail or in prison.[6] The actual number of affected children is currently unknown, because correction facilities fail to collect this data.[7] However, it is known that between 2006 and 2016, at least 32,000 incarcerated parents had their children taken from them – nearly 5,000 of those parents appear to have lost their parental rights because of their imprisonment alone.[8] A caregiver's incarceration can adversely impact a child's life, possibly leading to future posttraumatic stress, increased child mental health problems, physical health problems, and antisocial behavior.[9]

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[1] ALLISON DURKIN ET AL., INCARCERATED PARENTS AND TERMINATION OF PARENTAL RIGHTS IN CONNECTICUT: RECOMMENDATIONS FOR REFORM 14 (2021).

[2] *Id.*

[3] *Id.*

[4] Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016*, 25 CHILD MALTREATMENT 32, 33 (2019).

[5] *Id.*

[6] THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010).

[7] *Cf.* Wildeman, *supra* note 4, at 32 (noting that estimates of the termination of parental rights have never before been calculated).

[8] Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018, 10:00 PM), https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever.

[9] JAMES M. CONWAY ET AL., NEEDS CREATED IN CHILDREN'S DAILY LIVES BY THE ARREST OF A CAREGIVER 4, 8, 15 (2016).

Along with the adverse emotional and psychological effects of incarceration on a family, the costs incurred are also extreme. It costs the United States' taxpayers more than one hundred and eighty billion dollars a year to keep over two million people behind bars.[10] This estimated figure is an underestimate, however, when taking into consideration the costs borne by prisoners' loved ones, particularly when trying to access them by phone call or video visit.[11] Women often shoulder this burden: Telita Hayes' ex-husband has been incarcerated in the Louisiana State Penitentiary for 28 years. In just one year, she spent approximately four thousand dollars in charges for phone calls, the hourlong drive to prison, and around four hundred dollars for emails sent through the prison-sanctioned email system. [12] Not all families have the income required to maintain communication with incarcerated individuals, and the funding would be better used to support the reunification of families rather than their separation.

This Note will explore the enactment of the Adoption and Safe Families Act (ASFA), and its influence on the termination of parental rights of incarcerated individuals in the United States. It will also explore the disproportionate effect of incarceration on individuals of color, and methods of communication for families that promote reunification and the prevention of termination of parental rights. Lastly, it will offer some policy recommendations such as implementing child friendly visitation facilities within the correctional system, utilizing video technology as an enhanced tool for visitation, considering proximity to home when an individual is incarcerated, and financially incentivizing states to promote reunification rather than out-of-family adoption. These recommendations seek to encourage legislative and judicial change in the current existing protocol regarding termination of parental rights for incarcerated individuals.

II. BACKGROUND AND HISTORY ON LEGISLATION REGARDING PARENTAL RIGHTS

Congress enacted the Adoption and Safe Families Act in 1997 to promote adoption of children in foster care to permanent homes.[13] It granted fiscal incentives to states that adopted the ASFA so long as they complied with its requirements.[14] In 1998, the Office of Legislative Research (OLR) in Connecticut submitted research and guidance that would allow the state

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[10] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

[11] Nicole Lewis & Beatrix Lockwood, *How Families Cope with the Hidden Costs of Incarceration for the Holidays*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html.

[12] *Id.*

[13] Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2122 (codified as amended at 42 U.S.C. § 673b).

[14] *Id.*

to comply with ASFA requirements necessary to receive federal funds reserved for states.[15] The ASFA requires that states, or the state agencies that govern child welfare services, file for termination of parental rights when a child is in foster care for fifteen out of the preceding twenty-two months.[16]

Connecticut subsequently enacted the statute reflecting the ASFA timeline, setting forth that a termination of parental rights petition can be filed by the Department of Children and Families (DCF) if a "child has been in the custody of the commissioner for at least fifteen consecutive months, or at least fifteen months during the [preceding] twenty-two months, immediately preceding the filing of such petition."[17] Children who have parents incarcerated for longer than fifteen months are in danger of being in the custody of the Department of Children and Families rather than their parents simply because of a time frame.

When custody of a child is in question, the Commissioner of Children and Families has general supervision over the welfare of the children who require the care and the protection of the state.[18] Under Connecticut General Statutes section 47a-112(n), "[i]f the parental rights of only one parent are terminated, the remaining parent shall be the sole parent and, unless otherwise provided by law, guardian of the person."[19] However, when the rights of both parents are terminated, the Commissioner becomes the guardian of the minor child; this is why the DCF can file the petition to terminate parental rights.[20] At all times, the Commissioner of Children and Families has the statutory obligation to make reasonable efforts to reunify a parent with a child, unless that child has been abandoned or otherwise harmed by that parent.[21]

The ASFA and the Connecticut statute both have exceptions to the filing of a petition to terminate parental rights. These include when the child is under care of a relative, when it would not be in the best interests of the child, or when services which would make reunification possible were not offered to the family in question.[22] Despite these exceptions, the ASFA financially incentivizes states to encourage adoptions out of foster care rather than reunification with children's biological families.[23]

The legislative intent behind Connecticut's adoption of the ASFA and the consequent statute reflects the change in priority from reuniting children with their birth families to a new focus on permanency planning

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[15] LAWRENCE K. FURBISH, OFF. LEGIS. RSCH., FEDERAL ADOPTION AND SAFE FAMILIES REQUIREMENT, 98-R-0627 (1998), https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1142.htm.

[16] DURKIN ET AL., *supra* note 1, at 11.

[17] CONN. GEN. STAT. § 17a-111a (2021).

[18] CONN. GEN. STAT. § 17a-90 (2021).

[19] CONN. GEN. STAT. § 17a-112(n) (2021).

[20] FURBISH, *supra* note 15.

[21] CONN. GEN. STAT. § 17a-111b(a) (2021).

[22] *Id.* at §§ 17a-111a(b)(1–3).

[23] DURKIN ET AL., *supra* note 1, at 11.

post-termination of parental rights, effectively changing the notion of familial preservation.[24]

III. THE IMPACT OF THE ASFA

Since the enactment of the ASFA, the number of children with an incarcerated parent has increased by nearly eighty percent.[25] In 2019, states across the country terminate the parental rights of 71,300 parents.[26] The increase in parental incarceration along with the enactment of the ASFA may be the root cause of an increase in termination of parental rights proceedings.[27] Because the average length of incarceration in the United States is around 2.6 years from the date of admission to the date of release, an increase in termination of parental rights proceedings is the predictable result of the ASFA provision that allows state actors to move for termination of parental rights if a child has been in state custody for fifteen out of twenty-two months.[28]

a. Termination of Parental Rights Procedure

In Connecticut, both the Superior Court and the probate courts have jurisdiction over termination of parental rights.[29] Generally, termination of parental rights petitions heard in the probate courts are uncontested and heard prior to adoption.[30] A petition regarding termination of parental rights is filed in either the probate court or the Superior Court and can be filed by a parent, a child's guardian, DCF, or a relative if the child has been deserted by their parents.[31] A termination of parental rights hearing must be set within thirty days of the petition being filed, and all parties must have notice of the hearing, unless the probate court sets forth an exception.[32]

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[24] CONN. GEN. STAT. § 17a-110(a) (2021).

[25] LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (U.S. Dep't of Just., Bureau Just. Stat. 2008).

[26] ADMIN. FOR CHILD. & FAMS., TRENDS IN FOSTER CARE AND ADOPTION: FY 2010 – FY 2019 1 (U.S. Dep't Health & Hum. Servs., 2020).

[27] *See generally*, RAQUEL ELLIS ET AL., CHILD TRENDS, THE TIMING OF TERMINATION OF PARENTAL RIGHTS: A BALANCING ACT FOR CHILDREN'S BEST INTERESTS, (Sept. 2009), (establishing that no causal connection has been made, but it is likely to exist due to the timing of the ASFA enactment and increase in termination of parental rights cases).

[28] DANIELLE KAEBLE, TIME SERVED IN STATE PRISON, 2016 1 (U.S. Dep't Just., Bureau Just. Stat., Nov. 2018) (citing that there is no Connecticut average because there is no Connecticut data on average length incarceration).

[29] LAWRENCE K. FURBISH, OFF. LEGIS. RSCH., STANDARDS AND PROCEDURES FOR TERMINATION OF PARENTAL RIGHTS, 98-R-1142 (1998), https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1142.htm.

[30] *Id.*

[31] *Id.*

[32] CONN. GEN. STAT. § 45a-716(a)-(b), (d) (2021).

b. Necessary Findings to Establish Termination of Parental Rights

Before terminating parental rights, the court must take into consideration various factors when a parent is incarcerated in order to prevent the termination of their parental rights including:

> (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent.[33]

Parental rights cannot be terminated unless the court establishes a "clear and convincing" burden of proof and finds that the termination is in the best interests of the minor child. One of the following statutory requirements must also be met:

> the child has been abandoned by the parent . . . (B) the child has been denied . . . the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being . . . (C) there is no ongoing parent-child relationship . . . (D) a child of the parent (i) was found by the Superior Court or the Probate Court to have been neglected, abused or uncared for . . . (E) a child of the parent, who is under the age of seven years is found to be neglected, abused or uncared for, and the parent has failed, is unable or is unwilling to achieve such degree of personal

[33] CONN. GEN. STAT. § 17a-112(k)(4)–(7) (2019).

> rehabilitation as would encourage the belief that within a reasonable amount of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . (F) the parent has killed through deliberate, nonaccidental act another child of the parent . . . (G) . . . the parent committed an act that constitutes sexual assault . . . (H) the parent was finally adjudged guilty of sexual assault . . . .[34]

The statute does not set forth that incarceration alone is enough to terminate parental rights. Abandonment is not equivalent to incarceration if the parent continues to be in contact with their child and is given the opportunity to do so. Despite the stringency in meeting the standard of proof for termination of parental rights, incarcerated parents face this risk simply for being incarcerated. However, if incarcerated parents lack access to their children and are facing the possible violation of due process procedural rights as previously discussed, the rights of incarcerated parents are severely limited in advocating for themselves, and thus maintaining rights to their children.

c. Incarcerated Parents' Due Process Right to be Heard

What is troubling is that termination of parental rights proceedings under the ASFA are involuntarily filed against parents, and when those parents are incarcerated, the court does not always take into consideration factors in their favor, particularly because no legislation has been enacted to protect the rights of incarcerated parents.[35] Further, Connecticut General Statutes Section 45a-716(d) sets forth that if personal service or abode service cannot be effectuated on "a parent or the father of a child born out of wedlock who is either a petitioner" or someone who waives service, the court may allow first class mail as effective service.[36] If the incarcerated individual does not receive mail, they may not receive sufficient notice. Or like in Taisie Baldwin's experience, notice and a chance to be heard may not be enough.

The lack of effectuated service to incarcerated parents brings up the notion of due process violations, in which parents at risk of losing parental rights should not be "deprive[d] of life, liberty, or property without due process of law."[37] In fact, not all states have established law on parents' constitutional due process right to participate during termination of parental rights proceedings, highlighting a responsibility on the trial court to ensure

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[34] CONN. GEN. STAT. § 45a-717(g) (2022).
[35] DURKIN ET AL., *supra* note 1, at 13.
[36] CONN. GEN. STAT. § 45a-716(d) (2021).
[37] U.S. CONST. amend. XIV, § 1.

that the parent can respond or rebut evidence in the proceeding.[38] This potential violation of incarcerated parents' due process rights to be heard at a termination of parental rights proceeding can adversely affect not only the parent, but also the child, who may perceive their parents' absence or lack of advocacy as disinterest in their parental rights and the parent-child relationship.

d. Legal Orphanage Created by the ASFA

A notable adverse effect of the termination of parental rights subject to the ASFA timeline is the creation of "legal orphans," or children "whose parents' rights have been terminated and who [have] no legal permanent connection to a family."[39] The ASFA timeline (fifteen out of twenty-two months) is particularly troubling in the cases of legal orphans because there is no requirement that the state find a reasonable replacement family for the minor child before terminating their birth parents' parental rights. Rather, the timeline is strictly time itself – the fifteen out of twenty-two months declares when the State can move for termination of parental rights.[40] Legal orphanage is more likely to impact children whose parents are incarcerated, and in turn, "children with incarcerated parents are more likely to remain in foster care than to be adopted, relative to children whose parents are not incarcerated."[41] This leaves children with very few options in regards to where they end up – their parents' rights can be terminated based simply on time, and then, they can be placed in foster care. In fact, children who enter foster care between the ages of nine and thirteen are more likely to remain in foster care longer if they do not reunify with their families within the first two years.[42]

On the other hand, fifty-five percent of children who enter foster care between ages eleven and sixteen and later have their parents' rights terminated are adopted.[43] This is not a negative effect because children having a space to belong in supports their growth and development.[44] However, reunification between a child and their biological family should be the ultimate goal of offices like DCF. Adoption outside of the biological family can lead to emotional damage to both parents and their children,

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[38] Nicole Johnson, *Incarcerated Parents Must be Allowed to Participate in Entire TPR Hearing*, AM. BAR ASS'N: CHILD L. PRAC. TODAY (May 28, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/incarcerated-parents-must-be-allowed-to-participate-in-the-entir/.

[39] SHARON MCCULLY & ELIZABETH WHITNEY BARNES, FOREVER FAMILIES: IMPROVING OUTCOMES BY ACHIEVING PERMANENCY FOR LEGAL ORPHANS 4 (Nat'l Council Juv. & Fam. Ct. Judges 2013).

[40] *See generally* MCCULLY & WHITNEY BARNES, *supra* note 39.

[41] DURKIN ET AL., *supra* note 1, at 15.

[42] ELIZABETH DARLING, U.S. DEP'T HEALTH & HUM. SERVS. ADMIN. FOR CHILD., YOUTH, & FAMS., ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH 8 (Jan. 5, 2021).

[43] *Id.* at 9.

[44] MCCULLY & WHITNEY BARNES, *supra* note 39, at 4.

particularly if parents are deprived of their right to attend the hearings which determine their parental rights.

Ultimately, children can be adversely affected by becoming legal orphans due to the timelines created by the ASFA. Legal orphans can remain in the foster care system with no hope of leaving. If children are not adopted after their parents' rights have been terminated, and they age out of the foster care system, they are more likely to participate in low wage employment and face poverty.[45] Additionally, they may suffer from food insecurity, higher incarceration rates, and single parenthood along with higher rates of homelessness after leaving foster care.[46] As a result, it would be advisable for courts to look at the resources given to children, including safe and acceptable housing or other family care or adoption, rather than simply implementing termination of an incarcerated parents' rights subject to the timeline implemented by the ASFA.

IV. WHAT ARE THE PARENTAL RIGHTS OF AN INCARCERATED PARENT?

An incarcerated parent may find it difficult to access time with their minor child simply based on their lack of access to the outside world while incarcerated. In a particular case, Ms. T, a mother of three children, lost custody of her children after she was sentenced to prison for two years in Connecticut in 2018.[47] She tried to arrange visits with her children as much as possible, including making recordings of herself reading books to her children, and enrolled in programs to assist her in her personal development, including parenting, anger management and therapy.[48] Despite these efforts, in 2019 she found out that DCF filed to terminate her parental rights due to the fifteen months out of twenty-two months rules set forth by the ASFA.[49] Despite her best efforts, Ms. T was still unable to access her children and to preserve her rights to her children. Ms. T's story is a cautionary tale of what can happen when parents' efforts are ignored, and irreparable harm is done to a family.

However, Connecticut law requires that reasonable efforts to reunify a parent with a child must be made.[50] In *In re Shafari B.*, the Court analyzed the level of reunification efforts that the Department of Children and Families must take in order to satisfy the statutory requirement pursuant to Connecticut General Statues section 17a-111b(a).[51] The mother in *Shafari B.*

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[45] *Id.*
[46] *Id.*
[47] DURKIN ET AL., *supra* note 1, at 8.
[48] *Id.*
[49] *Id.*
[50] CONN. GEN. STAT. § 17a-111b(a) (2021).
[51] *In re* Shafari B., Nos. H12CP04009696A, H12CP04009697A, H12CP04009698A, 2007 WL 155169, at *13 (Conn. Super. Ct. Jan. 9, 2007); *see also* § 17a-111b(a) (2021).

suffered various traumas, and was incarcerated for a period of time.[52] Upon finding three minor children in the mother's home unattended, DCF became involved and sought to assist the mother by utilizing specific steps to help her regain access to her children.[53] The Department reported trying to contact the mother for services, with very little success or compliance.[54] The Court explained that in order to pursue termination of parental rights, DCF must take reasonable efforts to locate the parent and to reunify the child with the parent.[55] The Court held that DCF must make reasonable efforts to reunify, subject to the objective standard of reasonableness which is not "useless and futile."[56]

The *Shafari B.* Court went on to state that "the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate."[57] In other words, DCF must show that they have made an effort to reunify the child with their incarcerated parent so long as the efforts are not futile. This does not necessarily hold DCF to such an obligation because the statute carves out exceptions, but the State may consider in the future making this a strict obligation before termination of parental rights are granted.

The Court noted that while incarceration may limit the amount of visitation opportunities available to both the parent and child, "[a] respondent's imprisonment, however, does not, in and of itself, excuse DCF from providing her with visitation with his child."[58] The Court effectively held that incarceration alone is not enough for DCF to sever the parent-child relationship or to impede visitation for them. Therefore, the incarcerated parent should have access to visitation from their minor children, so long as there have been no other reasons indicating that the parent or child would not benefit from such visitation, or that the Court had previously found that the efforts would not be appropriate. Because incarceration alone is not enough for DCF to cease visitation efforts between an incarcerated parent and child, a concerted effort should be made to encourage contact so long as it is in the child's best interests.

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[52] *Id.* at *4.
[53] *Id.* at *5.
[54] *Id.* at *7.
[55] *Id.* at *13
[56] *In re* Shafari B., 2007 WL 155169, at *13.
[57] *Id.*
[58] *Id.* at *15.

a. Racial Disparities in Termination of Parental Rights Among Individuals of Color

In Connecticut, Black children are 3.77 times more likely to experience termination of parental rights proceedings than white children, while Latinx children are 2.6 times more likely to experience termination of their parents' rights than white children.[59] There are several possible causes for this racial disparity, but as previously mentioned, solely having an incarcerated parent for a time period over twenty-two months can trigger a termination of parental rights proceeding.

Incarceration disproportionately affects people of color because of the disparate impact of mass incarceration in these communities.[60] Children of color, particularly Black children, are disproportionately affected by their parents' incarceration because Black Americans are incarcerated at 4.8 times the rate of white Americans.[61] Even though racial disparity has decreased from 2000-2016, there remains a 5-to-1 disparity between Black and white incarcerated individuals.[62] Additionally, the number of Black men and women has declined, while the incarceration of white individuals has increased.[63] The decline in racial incarceration rates is offset, however, by the increase of expected length of stay in prison for Black individuals.[64] In fact, the average length of incarceration stays for Black persons increased by almost two percent more for each convicted individual.[65] Therefore, children of Black incarcerated individuals are more likely to be disproportionately affected by ASFA's time frames.

Ultimately, the interaction of longer sentences and the timeline requirement of the ASFA thus results in increased termination of the rights of Black parents.

b. Cost of Access for Incarcerated Individuals to Contact their Children

Up until new legislation in the fall of 2022, Connecticut had the most expensive rate for prison phone calls.[66] A fifteen-minute phone call between an incarcerated person in Connecticut and an outside member cost

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[59] Wildeman et al., *supra* note 4, at 40.

[60] DURKIN ET AL., *supra* note 1, at 13.

[61] ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 6 (The Sent'g Project 2021).

[62] WILLIAM J. SABOL ET AL., TRENDS IN CORRECTIONAL CONTROL BY RACE AND SEX 4 (Council on Crim. Just. 2019).

[63] *Id.* at 5.

[64] *Id.* at 1, 15–17, 20–21; *see also* Weihua Li, *The Growing Racial Disparity in Prison Time*, MARSHALL PROJECT (Dec. 3, 2019), https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time.

[65] SABOL ET AL., *supra* note 62, at 5.

[66] Rachel M. Cohen, *Connecticut Lawmakers Want to Try Again to Make Prison Phone Calls Completely Free*, THE INTERCEPT (Feb. 22, 2021), https://theintercept.com/2021/02/22/prison-phone-calls-connecticut/.

nearly five dollars.[67] Connecticut families spent over fourteen million dollars per year to talk to their incarcerated family members.[68] The State received over seven million dollars in kickbacks, with the rest going to Securus, a private telecommunications corporation contracted by the Department of Corrections.[69] Effectively, the State has been profiting off of incarcerated individuals communicating with their families. Additionally, of the remaining estimated seven million dollars that are kicked back to the State of Connecticut, only about 350,000 dollars of that budget is allotted to programs for the incarcerated population.[70] A hefty portion of the funds, around five and a half million dollars, goes to the Judicial Branch to pay for probation officers in a specialized probation unit that helps individuals avoid technical violations of their probation and consequent rearrests.[71] While the legislature is seemingly well-intended, these funds could be used to better support incarcerated individuals.

It Is only recently that the Connecticut legislature has signed Into law free phone calls for inmates, beginning October 1, 2022.[72] In the meantime, however, families and individuals have incurred these extra costs and will continue doing so to communicate with their incarcerated loved ones. The change in phone call policy will benefit incarcerated individuals and their families. However, more effective methods of contact such as video calls still place the cost on incarcerated individuals.

The State of Connecticut has Implemented the distribution of more than 1,500 computer tablets to incarcerated individuals at one facility, the MacDougall-Walker Correctional Institution, with aspirations to expand the pilot program until all incarcerated individuals in Connecticut have received a tablet.[73] The tablets allow incarcerated individuals to view "educational materials – including books and educational videos – at no cost. They will also have the opportunity to purchase additional materials such as electronic books, and music."[74] It is important to note that incarcerated individuals must pay not only for materials such as books and music, but also must pay a charge of nineteen cents to send an email to family members.[75] Among many video visitation contractors, family members may have to pay per

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[67] *Connecticut State Prison Phone Rates and Kickbacks*, PRISON PHONE JUST., https://www.prisonphonejustice.org/state/CT/ (last visited Sept. 5, 2022).

[68] Cohen, *supra* note 66.

[69] *Id.*

[70] Lisa Backus, *State to Give Inmates Tablets, Charge Fees*, CT NEWS JUNKIE (Jan. 25, 2021), https://ctnewsjunkie.com/2021/01/25/state-to-give-inmates-tablets-charge-fees/.

[71] *Id.*

[72] Act of June 16, 2021, Conn. Pub. Act No. 21-54.

[73] Press Release, State Conn. Dep't Corr., Department of Corrections Begins Rollout of Computer Tablets for Inmates at the MacDougall-Walker Correctional Institution (Jan. 22, 2022), https://portal.ct.gov/-/media/DOC/Pdf/Coronavirus-3-20/Coronavirus-Press-Releases-2021/DOC-Press-Release-reTablets-012221.pdf.

[74] *Id.*

[75] Backus, *supra* note 70.

minute during video visits, or per visit, along with credit card fees.[76] These charges can quickly add up for low-income individuals and for incarcerated individuals who use their funds for personal items while they are incarcerated.

c. The Difficulty in Accessing Incarcerated Parents for Visitation

Understandably, it is difficult for incarcerated parents to have access to their children during their time in jail or prison. There are restrictions for jail or prison visitors, lack of access to communication tools, and physical separation between the incarcerated individual and their families. In person contact remains relatively rare.[77]

Additionally, when a parent is incarcerated, there is no consideration regarding the distance between their correctional facility and where their family resides, so access to their children can become impossible. Research shows that around sixty-three percent of people in state prison are incarcerated over one hundred miles away from their families.[78] This data also reflects that about over half of incarcerated people in a facility less than fifty miles from home receive a visit, but as the mileage away from home increases, the likelihood of visitation decreases (for example, an incarcerated person who lives between 101 and 500 miles away only has an approximately twenty-six percent chance of receiving a visit).[79]

Four states, including Hawaii, resolve their prison crowding problem by shipping approximately 7, 200 inmates to out-of-state facilities run by for-profit companies: "California prisoners go to Arizona and to the Mississippi Delta; Vermont prisoners go to a remote corner of Michigan; and Arkansas prisoners go to Texas. The U.S. Virgin Islands also sends its prisoners away, to Florida, Arizona and Virginia."[80] Individuals from large cities are likely to be imprisoned in rural state prisons which can be hundreds of miles away from their homes and federal inmates can be held at any federal prison in the United States.[81] This inaccessibility can lead to families spending thousands of dollars; a visit from Hawaii to an incarceration center in Arizona can cost anywhere from 2,000 dollars and upwards.[82]

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[76] BERNADETTE RABUY & PETER WAGNER, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITATION INDUSTRY IN PRISONS AND JAILS 19 (Prison Pol'y Initiative 2015).

[77] DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN? 9 (Child Trends, 2015).

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

[79] *Id.*

[80] Eli Hager and Rui Kaneya, *The Prison Visit that Cost My Family $2,370*, MARSHALL PROJECT (Apr. 12, 2016), https://www.themarshallproject.org/2016/04/12/the-hawaii-prison-visit-that-cost-my-family-2-370.

[81] *Id.*

[82] *Id.*

Incarcerated parents are not granted parental visitation rights, and the effort to have children visit with incarcerated parents is subject to what is in their best interests and what is accessible. One grandmother, Jean White, reported that due to the distance between her son and his children – they were all from Vermont and he was incarcerated in Michigan – they were only able to visit their father once a year, if that.[83] Placing inmates such a far distance away from their families and their children can only adversely affect both parties. Studies have shown that limited access to in-person visitations can affect inmates positively.[84] Having additional visits from family members reduces the risk of recidivism once an incarcerated person leaves prison.[85]

Additionally, physical visitation of prison facilities can be frustrating and difficult to achieve. Some states have restrictions on time frames – North Carolina only allows one visit per week for two hours – other states require prospective visitors to give their social security numbers, effectively excluding visitors that are undocumented.[86]

During the COVID-19 pandemic, when in-person visits were prohibited, Departments of Correction began to realize how expensive phone calls were for inmates.[87] A study showed that phone calls between parents and their children increased the quality of their relationship, especially those who had more frequent phone calls.[88] While the high cost of phone calls was resolved through legislation in Connecticut, in-person visits also have a positive effect on incarcerated individuals.

Further, prisons have gone so far as to ban sending mail, and permitting inmates to send postcards only, leading to expenses thirty-four times as much as it would cost an inmate to send a fully-fledged letter.[89] Harsher Departments of Correction, such as the one found in Maricopa County, Arizona instituted a post-card only policy in the county jail, after which, 14 states followed suit.[90] The implementation of these harsh restrictions on methods of communication as simple as sending letters can adversely affect the incarcerated parent-child relationship in that mail communication is one of the most common forms of communication.[91] In

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[83] *Id.*

[84] Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POL'Y INITIATIVE (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/.

[85] *Id.*

[86] Rabuy & Kopf, *supra* note 78.

[87] Lindsey Van Ness, *COVID Froze Prison Visits, Spotlighting High Cost of Phone Calls*, PEW CHARITABLE TRUSTS (Aug. 4, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/04/covid-froze-prison-visits-spotlighting-high-cost-of-phone-calls.

[88] Danielle L. Haverkate & Kevin A. Wright, *The Differential Effects of Prison Contact on Parent-Child Relationship Quality and Child Behavioral Changes*, 5 CORR.: POL'Y, PRAC., & RSCH. 222, 237–39 (2018).

[89] Wang, *supra* note 84.

[90] *Id.*

[91] *See* Haverkate & Wright, *supra* note 88, at 237–38.

fact, restricting access to visits can even be particularly harmful for prisons – a prison that banned in-person visits saw an increase in assaults within their facility.[92]

Even if families can access the resources it takes to visit a faraway prison – transportation, time, accessibility – upon arriving at a facility they may face searches and prison-like conditions that can be traumatizing. In-person visits may be upsetting to children and cause a reaction in which the children feel that they are also subject to incarceration due to the conditions of the visiting locations.[93] This, among the plethora of difficulties in access to incarcerated individuals, makes it difficult to encourage visitation between incarcerated parents and their minor children. Despite the difficulties that some facilities implement to encourage inmate-family member contact, prison visitation is crucial for the overall well-being of the family unit.

V. POSSIBLE OPTIONS FOR REFORM AND THE IMPORTANCE OF VISITATION

Despite the difficulties, communication between incarcerated individuals and their families is crucial for the maintenance of relationships outside of the incarceration setting. This can be done with the use of: (1) alternative methods of visitation, (2) facilities specifically created to enable children to visit their incarcerated parents, and (3) overall reform to benefit incarcerated individuals.

a. Alternative Methods of Communication to Promote Relationships

Visits with family and otherwise generally maintaining family relationships have been found to be some of the best ways to reduce recidivism in incarcerated individuals.[94] States' legislatures should focus on access for incarcerated individuals in order to prevent released individuals from reoffending. The simplest method of contact, phone calls, are only just now becoming more accessible: in fact, Connecticut was the first state in the United States to pass legislation making phone calls for incarcerated individuals free.[95] Other states should implement similar legislation to allow for free phone calls, rather than utilizing for-profit contracts with telephonic providers.[96]

An additional way to assist incarcerated parents' access to their children is the use of video visitation to help supplement in-person visitation.

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[92] Wang, *supra* note 84.

[93] MURPHEY & COOPER, *supra* note 77; *see also* Joyce A. Arditti, *Child Trauma Within the Context of Parental Incarceration: A Family Process Perspective*, 4 J. FAM. THEORY & REV. 181, 193–95 (2012).

[94] Rabuy & Kopf, *supra* note 78.

[95] Act of June 16, 2021, Conn. Pub. Act No. 21-54.

[96] *See generally* Human Rights Defense Center, *Rates and Kickbacks*, PRISON PHONE JUST., https://www.prisonphonejustice.org (last visited Sept. 16, 2022) (noting that prison phone contracts are based on a commission model that results in inflated costs of prison and jail phone calls).

With the development of technology, and as prisoners get more access to tablets, the use of video visitation may allow children to have more contact even if only virtually. Having access to video visits actually increases the amount of the average number of in-person monthly visits.[97] Encouraging user-and-budget-friendly video visitation software into prisons would help states overall, as data suggests that recidivism is lowered when an inmate has more contact with their families.[98] States must be careful, however, to avoid for-profit contracts with telecommunications companies that charge inmates per minute or per virtual visit. A better system would be that inmates could receive free visits so long as communication is with their child.

b. Change in Institutions to Benefit Children and Their Incarcerated Parents

Facilities in Connecticut and more broadly, in the United States, should place a focus on family-friendly visitation, whether it is an adjacent facility, or an area specially designated to host children and their families. These facilities or spaces should be child-friendly, providing the families with safe activities and methods to create memories together, such as providing games or photographs. An exemplary program is Hour Children, a provider of services for incarcerated women and children in New York State.[99] Hour Children provides a residential nursery at Bedford Hills Correctional Facility so that mothers can live with their infants for up to 18 months and a Child Development Center to provide care for those infants while the mothers attend school or programming during the day. Additionally, they provide playrooms at two correctional facilities to encourage "child-friendly environment, with age-appropriate games and . . . arts projects to encourage mother-child bonding."[100] Most notably, their Visiting and Family Assistance Program at the Rose M. Singer Center Correctional Facility helps connect incarcerated mothers to their families by helping them access virtual visitation, counseling, advocates for family court, and other community referrals.[101]

Connecticut could easily implement some sort of facility at their women's prison, since there is only one in the state.[102] Facilities may need to have Department of Correction employees, and other workers staffed which may assist in the transition for children from the outside world to a

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[97] Wang, *supra* note 84.

[98] Rabuy & Kopf, *supra* note 78.

[99] *Who We Are: Hour Story*, HOUR CHILDREN, https://hourchildren.org (last visited Sept. 9, 2022).

[100] *Prison-Based Family Services Programs*, HOUR CHILDREN, https://hourchildren.org/how-we-help/prison-based-family-services-programs/#:~:text=Hour%20Children%20helps%20women%20to,that%20may%20impact%20her%20children. (last visited Jan. 20, 2023).

[101] *Id.*

[102] *Frequently Asked Questions*, CONN. STATE DEP'T CORR., https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Frequently-Asked-Questions-FAQ (last visited Sept. 24, 2022).

closed-in facility, and assistance coping with seeing their parents incarcerated. This may include social workers, case workers, or other social service employees tasked with assisting families within visitation. However, this money would be well spent, considering that Connecticut pays over 125 million dollars for foster care expenditures, and over 170 million dollars for congregate care expenses.[103] Connecticut is one of only four states that allows extended visitation with children and incarcerated individuals, but eligibility guidelines are strict, and inmates only have access to these types of visits every ninety days.[104] Although the conjugal visit system is better than nothing, children with incarcerated parents deserve bonding time in spaces that are child friendly.

Additionally, alongside intra-prison facilities to promote the reunification of families, intra-prison programming should be implemented that allows incarcerated parents to learn more about parenting, child development, and the importance of family bonds. Connecticut's facilities currently do offer some forms of parent programming, but they are limited in scope.[105] The implementation of parent programming should include virtual visits and other methods of communication that assist parents in actually connecting and communicating with their minor children.

c. Overall Reform

Additionally, as previously discussed, the ASFA incentivizes states to finalize adoptions, by providing financial payments.[106] Federal funding should be equalized, and states should receive similar incentives for when families are reunified. Even if these cases are rarer, equalizing incentives will encourage states to truly consider what is better for the minor child.

States can also consider implementing legislation similar to that enacted in New York. In 2021, Governor Andrew Cuomo signed into law "April's Bill" or the "proximity bill" which requires that the Department of Corrections and Community Services begin housing incarcerated individuals in prisons closest to the residences of their children to help facilitate visitation and family support. [107] This, however, will only be effective if states consider the locations of their prisons, and potential

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[103] CHILD WELFARE AGENCY SPENDING IN CONNECTICUT, CHILD TRENDS 5 (2018).

[104] Thomas Dutcher, *Extending the Ties that Bind: Considering the Implementation of Extended Family Visits in Prisons*, EBP SOC'Y: EDUC. BLOG (Sept. 7, 2021), https://www.ebpsociety.org/blog/education/487-extending-the-ties-that-bind; *see also* State Conn. Dep't Corr., Admin. Directive 10.6 (2020), https://portal.ct.gov/-/media/DOC/Pdf/Ad/AD10/AD1006.pdf.

[105] *See generally Programs and Services*, CONN. STATE DEP'T CORR., https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Program-and-Services (last visited Sept. 24, 2022).

[106] DURKIN ET AL., *supra* note 1, at 11.

[107] Kevin Bliss, *Law Passes Requiring Parents in New York Prisons to be Housed Close to Their Children*, PRISON LEGAL NEWS (June 1, 2021), https://www.prisonlegalnews.org/news/2021/jun/1/law-passes-requiring-parents-new-york-prisons-be-housed-close-their-children/.

relocation of those facilities. Other suggestions include providing free transportation methods to families who want to visit prison facilities with the use of federal grants or crowd fundraising. One program, "Get on the Bus," was implemented in California with the use of volunteers and supporters to unite children with their parents in prison.[108] This program also seeks to eliminate mandatory minimum sentences for non-violent offenses, and advocates for community-based alternatives to incarceration for primary caregiver women with dependent children.[109]

VI. CONCLUSION

More comprehensively, the United States should consider overall prison reform in the shape of fewer prison sentences and less prison time. Despite the decrease in the number of incarcerated individuals, the United States has the highest incarceration rate of any country in the world.[110] As set within this Note, the incarceration of a parent can have life-changing consequences for minor children. As such, the United States should consider an overall reform of incarceration to benefit children, or, at the bare minimum, reforms within the incarceration systems that currently exist that will at the very least support those who are most vulnerable within it.

[108] Get on the Bus, *Who We Are*, CTR. FOR RESTORATIVE JUST. WORKS, https://crjw.org/get-on-the-bus/ (last visited Sept. 10, 2022).

[109] Get on the Bus, *History*, CTR. FOR RESTORATIVE JUST. WORKS, https://crjw.org/get-on-the-bus/history-gotb/ (last visited Sept. 10, 2022).

[110] *United States Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/US.html (last visited Sept. 10, 2022).

Systemic Foster Care Reform: An Essential Constitutional Remedy for Vulnerable Foster Youth

EMILY P. LEEN[†*]

INTRODUCTION

Across the United States, there are currently over 630,000 children in the foster care system, with just over 216,000 entering foster care during fiscal year 2020.[1] Of the children who recently entered foster care, nearly fifty percent were children less than six years of age.[2] Both the age at which a child enters the child welfare system and the duration of their system-involvement are relevant factors in determining the lasting impact the system may have on that child.[3] Recent scholarship in the area of early childhood development suggests that children who experience toxic stress, or "excessive or prolonged activation of stress response systems in the body and brain," may consequently face lifelong learning, behavioral, and health issues.[4] Children in the foster care system have been identified as being at an increased risk for toxic stress.[5]

Of the children placed in foster care in fiscal year 2020, approximately eighty-one percent were removed from their families following allegations of parental abuse or neglect.[6] Tragically, studies have continually shown that once children are in the foster care system, they may be even more vulnerable to similar maltreatment.[7] Given that children in

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[*] Many thanks to Professor Anne C. Dailey for her wisdom and mentorship throughout this writing process, and for the duration of my time as a law student at the University of Connecticut School of Law. Additional gratitude to Stacy Schleif, Director of the Child Welfare Advocacy Project at the Center for Children's Advocacy, for inspiring me to pursue research focused on improving the lives of youth trapped in America's failing foster care system.

[1] THE AFCARS REPORT, U.S. DEP'T HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS. 1 (Oct. 4, 2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf.

[2] *Id.*

[3] *See* FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE, THE PEW CHARITABLE TRS. (May 1, 2004), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf.

[4] *Toxic Stress*, CTR. ON DEVELOPING CHILD, HARV. UNIV., https://developingchild.harvard.edu/science/key-concepts/toxic-stress/ (last visited Mar. 28, 2022).

[5] *Toxic Stress*, ADMIN. FOR CHILD. & FAMILIES, U.S. DEP'T HEALTH & HUM. SERVS., https://www.acf.hhs.gov/trauma-toolkit/toxic-stress (last visited Mar. 28, 2022).

[6] THE AFCARS REPORT, *supra* note 1, at 2. The percentage of 81% was reached by combining the total percentages of children removed for neglect, physical abuse, and/or sexual abuse.

[7] Sarah A. Font & Elizabeth T. Gershoff, *Foster Care: How We Can, and Should, Do More for Maltreated Children*, 33 SOC. POL'Y REP. 1, 3 (2020).

foster care are in state custody,[8] one might assume that the State, as parents do,[9] has some duty to reasonably protect said foster youth from suffering maltreatment.[10] Unfortunately, more often than not, the State faces no liability for injuries endured by foster children in their care.[11]

Though they are profoundly disturbing, some specific examples of abuse that foster youth have endured must be provided for context. A particularly distressing story came to an end when, in 2018, Jennifer Hart, foster mother to six children, drove her car off the road, killing herself, her wife and all six of her foster children.[12] This incident occurred after over ten years of abuse allegations spanning Texas, Minnesota, and California went seemingly uninvestigated by state officials.[13] Another tragedy was uncovered in 2019, when Rick Hazel of Florida was arrested after fostering more than seventy children over seven years, at least one of which he filmed and raped repeatedly.[14]

It is also helpful to analyze this issue through a statistical lens. A study conducted by Johns Hopkins University found that, within their sample of Baltimore children in foster family placements, children in foster families were about seven times more likely to report physical abuse and four times more likely to report sexual abuse than their peers in non-foster families.[15] Not only are foster children at a greater risk of physical and sexual abuse in their foster placements,[16] they are also more vulnerable to child sex trafficking.[17] In the United States, it has been estimated that sixty percent of

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[8] THE PEW CHARITABLE TRS., *supra* note 3, at 34.

[9] 59 AM. JUR. 2D *Parent and Child* § 22 (2022).

[10] Andrea Koehler, *The Forgotten Children of the Foster Care System: Making A Case for the Professional Judgment Standard*, 44 GOLDEN GATE U. L. REV. 221, 222 (2014).

[11] *Id.* at 222.

[12] Joe Heim & Julie Tate, *Abuse, Neglect and a System that Failed: The Tragic Lives of the Hart Children*, WASH. POST (July 12, 2018), https://www.washingtonpost.com/graphics/2018/national/hart-family-abuse-interstate-adoption/.

[13] *Id.*

[14] Josh Salman et al., *Foster Kids Lived with Molesters. No One Told Their Parents.*, USA TODAY (Oct. 15, 2020, 10:09 PM), https://www.usatoday.com/in-depth/news/investigations/2020/10/15/no-one-checks-on-kids-who-previously-lived-with-abusive-foster-parents/5896724002/.

[15] Mary I. Benedict et al., *Types and Frequency of Child Maltreatment by Family Foster Care Providers in an Urban Population*, 18 CHILD ABUSE & NEGLECT 577, 581 (1994).

[16] *Id.*

[17] HUMAN TRAFFICKING AND CHILD WELFARE: A GUIDE FOR CHILD WELFARE AGENCIES, CHILD WELFARE INFO. GATEWAY 4 (July 2017), https://www.childwelfare.gov/pubpdfs/trafficking_agencies.pdf. *See, e.g.*, Reese Oxner, *State-Licensed Shelter Where Sex Trafficking Victims Were Reportedly Abused Ordered to Close*, TEX. TRIB. (Mar. 11, 2022, 5:00 PM), https://www.texastribune.org/2022/03/11/texas-foster-care-shelter-abuse/; Alexei Koseff, *Sex-Trafficking Sting Highlights Vulnerability of Foster Children*, L.A. TIMES (July 29, 2013, 12:00 AM), https://www.latimes.com/nation/la-xpm-2013-jul-29-la-na-child-sex-20130730-story.html.

child sex trafficking victims have a history of involvement with the child welfare system.[18]

Given these recent tragedies and the related statistical findings, it should come as no surprise that for the past several decades child advocates have been pushing for systemic reforms to the foster care systems across all fifty states.[19] Though frustration is warranted, given the foster care system's "remarkable immunity to reform,"[20] recent case law addressing alleged violations to the constitutional rights of foster youth does provide a sliver of hope for systemic reform.

This note seeks to: (1) provide a background on the substantive due process framework that has established the substantive due process rights of foster youth; (2) present and analyze recent cases that may support systemic reforms as a remedy to these constitutional violations; and (3) assert that said recent case law should act as a catalyst for systemic reform efforts moving forward.

I. THE SUBSTANTIVE DUE PROCESS RIGHTS OF FOSTER YOUTH

In order to explore the connection between substantive due process rights and foster youth, this section will provide a brief history of substantive due process doctrine. To begin, the United States Constitution contains Due Process Clauses in both its Fifth and Fourteenth Amendments.[21] Of relevance to this article's analysis is the Due Process Clause of the Fourteenth Amendment, which seeks to regulate state, rather than federal, governmental action.[22] Thus, in order to bring a claim under the Fourteenth Amendment, said claim must satisfy the state action doctrine: where a plaintiff alleges to have suffered harm at the hands of the State and said harm deprived them of their "constitutionally protected interest in life, liberty, or property."[23]

Such claims may allege a violation of either a procedural or substantive due process right.[24] A procedural due process claim may allege that, under the circumstances, the proper procedures were not applied to concede the resulting deprivation of life, liberty, or property.[25] On the other hand, a substantive due process claim may allege that the State has violated

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[18] *Child Sex Trafficking*, CHILD'S RTS., https://www.childrensrights.org/newsroom/fact-sheets/child-sex-trafficking/ (last visited May 5, 2022); *The Foster Care-Human Trafficking Nexus*, HUM. TRAFFICKING SEARCH (Jan. 16, 2018), http://humantraffickingsearch.org/foster-care-and-human-trafficking-nexus/.

[19] Font & Gershoff, *supra* note 7.

[20] Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.C.L. L. REV. 199, 212 (1988).

[21] U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[22] U.S. CONST. amend. XIV.

[23] 15 AM. JUR. 2D *Civil Rights* § 65 (2022).

[24] 16B AM. JUR. 2D *Constitutional Law* § 944 (2022).

[25] *Id.* § 945.

an unenumerated fundamental right – derived from the aforementioned protected interests, particularly liberty – and require a strict scrutiny analysis to ascertain whether the State had a compelling governmental interest and its actions were narrowly tailored to achieve that interest.[26]

Within that framework, a substantive due process claim may also be brought which more broadly alleges that the State's conduct was so egregious it "shocks the conscience," thus resulting in a deprivation of liberty for which relief is sought.[27] It is this type of claim, under 42 U.S.C. § 1983, that is most often brought on behalf of abused or neglected children in the child welfare system.[28] In these cases, "the State" typically refers to agents of the State, such as employees within a state's Department of Human Services, and targets their alleged failure to monitor the safety and well-being of foster children in state custody.[29] To accurately analyze such a claim requires a foundational understanding of the application of three specific standards: (1) deliberate indifference; (2) special relationship; and (3) professional judgment. Given that the "deliberate indifference" and "special relationship" standards have frequently been evaluated in tandem, this article will discuss them together. Since the "professional judgment" standard is less commonly applied and approaches such claims in a distinct manner, this article will discuss it separately.

a. The Deliberate Indifference & Special Relationship Standards

The deliberate indifference standard is derived primarily from *Estelle v. Gamble*, where a state prisoner alleged that prison officials had failed to provide him with adequate medical care.[30] It was subsequently applied in the foster care context in *Doe v. N.Y.C. Dep't Soc. Servs.*, where a foster child alleged that state officials had failed to protect her from being sexually abused by her foster father.[31] In *Doe*, the Second Circuit held that if a state official's deliberate indifference is a "substantial factor" in the alleged Fourteenth Amendment violation, then the state officials responsible for the foster placement may be liable under § 1983.[32] The *Doe* Court further clarified that the standard required a showing that state officials "exhibited deliberate indifference to a known injury, a known risk, or a specific duty

[26] *Id.* § 956.
[27] *Id.* § 960.
[28] Koehler, *supra* note 10, at 231.
[29] *See* Eric M. Larsson & Jean A. Talbot, *Cause of Action for Negligent Placement in or Supervision of Foster Home*, 43 CAUSES ACTION 2D 1 (2022). This source was critical to understanding the basis for various claims brought on behalf of foster youth, what they have typically alleged, against whom liability is sought, and what remedies have been ordered under 42 U.S.C. § 1983.
[30] Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 795–96 (11th Cir. 1987) (citing Estelle v. Gamble, 429 U.S. 97 (1976)).
[31] Doe v. N.Y.C. Dep't Soc. Servs., 649 F.2d 134 (2d Cir. 1981).
[32] Taylor, 818 F.2d at 795–96 (citing Doe, 649 F.2d).

and their failure to perform the duty or act to ameliorate the risk of injury was a proximate cause of plaintiff's deprivation of rights under the Constitution."[33]

Shortly thereafter, the Eleventh Circuit, in *Taylor By & Through Walker v. Ledbetter*, was faced with whether to apply the Second Circuit's holding in *Doe* to a particularly gruesome fact pattern: a foster child was left in a coma after being "willfully struck, shaken, thrown down, beaten and otherwise severely abused by [her] foster mother."[34] The Eleventh Circuit determined that these facts were sufficiently analogous to *Doe* to hold that the county officials acted with deliberate indifference and that they could be held liable under § 1983.[35] Thinking ahead, the Eleventh Circuit wisely clarified that such a holding shall not impose liability where a foster child suffers "incidental" or "infrequent" abuse, but only where there is proof state officials acted with deliberate indifference as to the child's welfare.[36] Critically, the *Ledbetter* Court recognized that as our society progresses, the standards of decency may evolve and the application of the Fourteenth Amendment must evolve with them.[37]

In addition, though neither the *Doe* nor *Ledbetter* Courts did, some courts may frame their deliberate indifference analysis within the contours of the Supreme Court's "shocks the conscience" test, which holds that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty.'"[38] For example, in *Tamas v. Dep't Soc. & Health Servs.*, the Ninth Circuit faced a claim that the Department of Social and Health Services for the State of Washington had deprived three foster children, who had been sexually molested by their foster father, of their liberty interest in a safe foster care placement.[39] In addressing this claim, the Ninth Circuit understood "deliberate indifference" to mean "conduct which shocks the conscience" and remanded back to the District Court as to properly apply their interpretation of the deliberate indifference standard.[40]

Though analysis under the "deliberate indifference" standard typically encompasses the bulk of a court's reasoning in these cases, most courts also address whether the child(ren) and the state official(s) had a sufficiently "special relationship" from which an affirmative duty would

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[33] Doe, 649 F.2d at 145.

[34] Taylor, 818 F.2d at 792–93.

[35] *Id.* at 797.

[36] *Id.*

[37] *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Though this is but a brief side note in the *Ledbetter* Court's reasoning, this acknowledgment from the Court that our society's standards can and should shift over time is critical to not just reforming foster care but many other institutions within American society.

[38] United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Rochin v. California, 342 U.S. 165, 172 (1952); *see also* Palko v. State Conn., 302 U.S. 319, 325–26 (1937)).

[39] Tamas v. Dep't Soc. & Health Servs., 630 F.3d 833, 837 (9th Cir. 2010).

[40] *Id.* at 844–47.

arise to render the State's alleged "deliberate indifference" relevant.[41] Accordingly, in *Bowers v. DeVito*, the Seventh Circuit clarified this special relationship standard when it held that, where a special or custodial relationship exists, the State retains an affirmative duty to protect private citizens.[42] This has also been referred to as the "special relationship exception," whereas generally no affirmative duty exists for the State to protect the rights of private citizens, a special relationship may take exception to that rule.[43]

While the Seventh Circuit's holding in *Bowers* considered the relationship between doctors employed by a state facility and their mentally ill patients, the Eleventh Circuit, in *Jones v. Phyfer*, applied its reasoning to the special relationship between a foster child and their case worker.[44] The *Jones* Court explained that "the case workers were hired specifically to protect the children and . . . it would therefore be unreasonable to characterize the child's death as too remote a consequence of the case workers' failure to perform their duties."[45] Thus, case workers and foster children have been found to have a special relationship which suggests that case workers may be found liable under § 1983 claims where foster youth have been harmed while in state custody.[46]

The somewhat amorphous question of "state custody" was addressed within the Supreme Court's special relationship analysis of likely the most controversial case in this area of law: *DeShaney v. Winnebago County Department of Social Services*.[47] The *DeShaney* Court faced a particularly grim set of facts: a four-year-old, Joshua DeShaney, had been beaten by his father to the point of permanent brain damage.[48] Following this tragic incident, Joshua's mother alleged that the Department of Social Services ("DSS") had violated Joshua's substantive due process rights under the Fourteenth Amendment, since DSS had failed to remove him into state custody despite having been notified of repeated allegations of physical abuse and having made numerous visits to the DeShaney home during which

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[41] Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987) (citing Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)). It is critical to the protection of the substantive due process rights of foster youth that this duty be framed in an affirmative context. Since the duty is "affirmative," that requires the State to take action to fulfill said duty and allows for inaction to be framed as a constitutional violation. *See* DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 204–12 (1989) (Brennan, J., dissenting).

[42] Taylor, 818 F.2d at 797 (citing Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)).

[43] Henry A. v. Willden, 678 F.3d 991, 998 (9th Cir. 2012). Notably, this framework of exceptionality has also been used with regard to the aforementioned deliberate indifference standard; specifically, deliberate indifference has alternatively been referred to as the "state-created danger exception." *See* 15 AM. JUR. 2D *Civil Rights* § 65 (2022).

[44] Taylor, 818 F.2d at 798 (citing Jones v. Phyfer, 761 F.2d 642, 644–45 (11th Cir. 1985)).

[45] *Id.*

[46] *See id.*

[47] DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189 (1989).

[48] *Id.* at 193.

evidence of abuse mounted.[49] Since Joshua had never actually been removed into state custody, the Court held that no "special relationship" existed.[50] Consequently, though the *DeShaney* Court briefly cited to the "shocks the conscience test," it saw no need to apply it or to determine whether DSS had in fact been "deliberately indifferent" to Joshua's safety.[51] Rather, the *DeShaney* Court held that no constitutional protection is owed to children still in the custody of their parents, even where abuse has been reported.[52] In this case, the Supreme Court's formalism limited their application of both the special relationship and deliberate indifference standards and failed to conceive a just outcome for Joshua.[53]

b. The Professional Judgment Standard

When faced with claims on behalf of foster youth alleging a violation of their substantive due process rights under the Fourteenth Amendment, many courts have also applied the "professional judgment" standard. The basis for the professional judgment standard is derived from *Youngberg v. Romeo*, where a mother filed suit on behalf of her intellectually disabled son to contest the allegedly unsafe conditions of the Pennsylvania state institution to which her son had been involuntarily committed.[54] In *Youngberg*, the Supreme Court held that to determine whether a state official has adequately protected the liberty interests of those in their care, a court must ascertain if that state official exercised professional judgment.[55] The *Youngberg* Court further reasoned that, while decisions made by professionals are presumed valid, "liability may be imposed . . . when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[56] In the foster care context, this standard asserts that state officials, such as employees of a state's Department of Human Services, may violate a foster child's substantive due process rights under the Fourteenth Amendment by

[49] *Id.* at 191–93.
[50] *Id.* at 189–90.
[51] *Id.* at 197–200.
[52] *DeShaney*, 489 U.S. at 197–200.
[53] *Id.* at 212 (Blackmun, J., dissenting). Though his dissent is quite brief, Justice Blackmun is articulating an ever-persistent conflict between formalism and functionalism. When the Court constricts itself with formalistic rules, it simply cannot be dynamic when faced with a more nuanced fact pattern, as was tragically illustrated in *Deshaney*. *See also* Benjamin Zipursky, *Deshaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1101 (1990).
[54] Youngberg v. Romeo, 457 U.S. 307 (1982).
[55] *Id.* at 323.
[56] *Id.*

failing to base their decisions surrounding that child's care on their professional judgment.[57]

In revisiting *DeShaney*, in his dissent, Justice Brennan expressed concern that applying the professional judgment standard in these types of cases could result in the poor decisions of state officials with regard to foster children being excused as merely "professional judgment."[58] On the contrary, many advocates for the protection of foster youth disagree with Justice Brennan and view the application of the professional judgment standard as the most supportive of the substantive due process rights of foster youth.[59] Advocates have argued that it may be easier to prove that a state official, like a caseworker who repeatedly fails to conduct mandated visits to a foster placement, has failed to meet a professional judgment standard, rather than applying the more amorphous deliberate indifference standard.[60] Whereas under the deliberate indifference standard it can highly subjective what conduct a court may find a state official liable for, the professional judgment standard reasons that a state official is meant to conform to specific "judgment, practice, or standards" and that they face liability when their conduct falls outside of those prescribed bounds.[61]

While the professional judgment standard may seem favorable to foster youth for the aforementioned reasons, some courts have also argued that the "deliberate indifference" and "professional judgment" standards are essentially the same.[62] Though that ambiguity may seem frustrating, it could actually swing in favor of protecting foster children. As long as courts recognize that foster children have a substantive due process right to be free from a substantial risk of harm while in state custody, courts can and should find liability and order a remedy to address said harm regardless of the standard applied.

II. OVERVIEW & ANALYSIS OF RECENT BREAKTHROUGH CASES

Though it is critical to have a foundational understanding of the standards courts have applied in cases addressing alleged violations of a foster child's substantive due process rights under the Fourteenth Amendment, what has become even more urgent is conceiving a suitable remedy for these harms. Though the Supreme Court has yet to take up a case

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[57] *See* Yvonne L., *ex rel.* Lewis v. New Mexico Dep't Hum. Servs., 959 F.2d 883 (10th Cir. 1992) (holding that the state officials' liability should be determined by their failure to exercise professional judgment).

[58] DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 211 (1989) (Brennan, J., dissenting).

[59] *Id.*; Koehler, *supra* note 10, at 221–25.

[60] Koehler, *supra* note 10, at 221–25.

[61] *Id.* at 237 (citing Youngberg v. Romeo, 457 U.S. 307, 323 (1982)).

[62] *Id.* at 242–43. *See Yvonne L.*, 959 F.2d at 893–94; Weatherford *ex rel.* Michael L. v. State, 81 P.3d 320, 328 (Ariz. 2003). Both cases suggest that there is little difference in the application of the "deliberate indifference" and "professional judgment" standards.

that addresses this issue directly,[63] that does not mean that lessons cannot be gleaned from the decisions of lower courts across the country. Several recent cases have taken a more radical approach to remedying these alleged constitutional violations. The following three recent cases could provide the spark necessary to support systemic foster care reform: (1) *M.D. ex rel. Stukenberg v. Abbott*;[64] (2) *Wyatt B. by McAllister v. Brown*;[65] and (3) *Ashley W. ex rel. Durnell v. Holcomb*.[66]

a. Overview of Recent Case Law

1. M.D. ex rel. Stukenberg v. Abbott

M.D. ex rel. Stukenberg v. Abbott is a class action suit brought on behalf of minor children in the custody of the Texas Department of Family Protective Services ("DFPS").[67] The plaintiffs filed a cause of action under 42 U.S.C. § 1983 seeking injunctive relief and alleging that DFPS had violated the substantive due process rights under the Fourteenth Amendment of minors in DFPS custody by failing to protect them from the unreasonable risk of harm caused by the State.[68] Specifically, the plaintiffs challenged DFPS's excessive caseloads, poor abuse and neglect investigations, insufficient placement arrays, and failures to ensure the safety of children in foster group homes.[69] The plaintiffs sought to prove that said failures had led to actual harm, like a facility remaining operational for seventeen years despite three teenage girls dying of asphyxiation from being hog-tied, developmentally disabled children failing to receive proper nutrition, and multiple children reporting sexual abuse.[70]

Though the defendants immediately appealed, it is worth first reflecting on the reasoning of the District Court before considering the Fifth Circuit's subsequent analysis. Relying on *DeShaney*, the District Court found that "custody . . . creates a 'special relationship' between the State and

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[63] *See, e.g.*, Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); Doe v. N.Y.C. Dep't Soc. Servs., 649 F.2d 134 (2d Cir. 1981), *cert. denied*, Cath. Home Bureau v. Doe, 464 U.S. 864 (1983). *See also* DeShaney *ex rel.* DeShaney v. Winnebago Cnty. Dep't Soc. Servs. 489 U.S. 189 (1989) (holding that, given the child was no longer in the custody of the State and had been returned to his father's custody, the State could not be held liable under any prior duty they may have had to protect the child from abuse).

[64] M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684 (S.D. Tex. 2015), *aff'd in part, rev'd in part & remanded sub nom.* M. D. *ex rel* Stukenberg v. Abbott, 907 F.3d 237 (5th Cir. 2018).

[65] Wyatt B. *ex rel.* McAllister v. Brown, No. 6:19-CV-00556-AA, 2021 WL 4434011 (D. Or. Sept. 27, 2021).

[66] Ashley W. *ex rel.* Durnell v. Holcomb, 467 F. Supp.3d 644 (S.D. Ind. 2020), *motion to certify appeal granted sub nom.* Ashley W. v. Holcomb, No. 319CV00129RLYMPB, 2021 WL 5121146 (S.D. Ind. Sept. 29, 2021).

[67] M. D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237, 243 (5th Cir. 2018).

[68] *Stukenberg*, 152 F. Supp. 3d.

[69] *Id.*

[70] *Id.* at 803.

that person, which triggers a constitutional duty to provide basic needs."[71] The District Court recognized that the Fifth Circuit had, in the context of foster care, previously established that the State's duty extended to providing foster children with "personal security and reasonably safe living conditions."[72] Most significantly, the District Court articulated that these affirmative duties fall under the exercise of a foster child's "right to be free from an unreasonable risk of harm."[73] Given the existence of a "special relationship" between DPFS and the minor children in their custody, the District Court then turned to a determination of liability by applying both the "deliberate indifference" and "substantial departure from professional judgment" standards.[74] In so doing, the District Court examined the conditions that foster children in DFPS had been subjected to and found that, "judged by either standard, Texas's conduct shock[ed] the conscience."[75]

In this groundbreaking decision, the District Court held that DPFS had: (1) been deliberately indifferent to its excessive caseloads; (2) substantially departed from professional judgment with respect its excessive caseloads; (3) been deliberately indifferent to its faulty abuse and neglect investigations; (4) been deliberately indifferent in its insufficient placement array; (5) substantially departed from professional judgment with respect to its placement array; and (6) been deliberately indifferent to the safety of children placed in foster group homes.[76] Given that plaintiffs sought injunctive relief, the District Court appointed a Special Master to implement the policies and procedures necessary to protect Texas's foster children from unreasonable risk of harm.[77] In so doing, the District Court effectively gave the green light for a complete overhaul and restructuring of the Texas foster care system.[78] The District Court was willing to be bold and recognize that *systemic* failures are worthy of *systemic* solutions.[79]

Unfortunately, the Fifth Circuit was not willing to be quite as radical as the District Court. They reversed the District Court's holdings with regard to allegedly insufficient placement arrays and the safety of foster children in group homes, and held that the permanent injunction was overbroad.[80] Critically, two primary holdings were affirmed: (1) DFPS was deliberately indifferent given the risks posed by their caseload management; and (2) DFPS was deliberately indifferent given the risk posed by their practices and

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[71] *Id.* at 695 (citing DeShaney *ex rel.* DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 200 (1989)).

[72] *Id.* at 697 (quoting Hernandez v. Tex. Dep't Protective & Regul. Servs., 380 F.3d 872, 880 (5th Cir. 2004)).

[73] M. D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684, 696 (S.D. Tex. 2015).

[74] *Id.* at 697.

[75] *Id.* at 700.

[76] *Id.* at 820–21.

[77] *Id.* at 823.

[78] *Id.* at 828.

[79] M. D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684, 799, 820–21 (S.D. Tex. 2015).

[80] M. D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237 (5th Cir. 2018).

policies of monitoring and oversight.[81] The Fifth Circuit remanded back to the District Court so that the injunctive relief sought could be modified to reflect their decision.[82]

Per the Fifth Circuit's decision, the District Court revisited the issue of what should constitute appropriate injunctive relief.[83] The Defendant then appealed again and the injunction was reviewed for the final time by the Fifth Circuit.[84] While the Fifth Circuit, once again, did not agree with all of the provisions of the injunction, the District Court was partially affirmed, partially vacated and ordered to begin implementing the modified injunction without further changes.[85] Crucially, the modified injunction still contains several provisions which target systemic issues within the Texas foster care system, including a 24-hour supervision requirement for all licensed foster care placements, and an order for DFPS to complete "workload studies" on their caseworkers to determine the appropriate caseload that would not impose an unreasonable risk to the safety of foster children.[86]

2. Wyatt B. by McAllister v. Brown

The next case of note, *Wyatt B. by McAllister v. Brown*, is a class action suit brought on behalf of all youth in the custody of Oregon Department of Human Services ("DHS"), either housed in foster homes or facilities contracted by DHS.[87] The plaintiffs allege "that Oregon's child welfare and foster care systems are dysfunctional and plagued by *systemic* deficiencies."[88]

Some of the specifically identified deficiencies include failures to: (1) employ a sufficient number of caseworkers; (2) provide adequate training and support to caseworkers; (3) provide adequate training and support to foster parents; (4) evaluate the needs of each child in state custody; (5) protect children from abuse and neglect in foster placements; (6) support children with disabilities with placements in least restrictive environments; and (7) prepare children for when they age out of the foster care system.[89] The plaintiffs allege that, through these omissions, the DHS had violated their substantive due process rights under the Fourteenth Amendment, as well as their rights under the Adoption Assistance and Child Welfare Act of 1980, the Americans with Disabilities Act, and the

[81] *Id.*
[82] *Id.*
[83] M. D. *ex rel.* Stukenberg v. Abbott, 418 F. Supp. 3d 169 (S.D. Tex. 2019).
[84] M. D. *ex rel.* Stukenberg v. Abbott, 929 F.3d 272 (5th Cir. 2019).
[85] *Id.*
[86] *Id.* at 278.
[87] Wyatt B. *ex rel.* McAllister v. Brown, No. 6:19-CV-00556-AA, 2021 WL 4434011 *1 (D. Or. Sept. 27, 2021).
[88] *Id.* at *2 (emphasis added).
[89] *Id.*

Rehabilitation Act.[90] Given the extensive list of issues plaintiffs have taken with DHS, rather than targeting one or two specifically identified deficiencies, the relief they are seeking is *systemic*.[91]

In *Wyatt B.*, the District Court asserted that, while the Due Process Clause of the Fourteenth Amendment does not generally "confer any affirmative right to governmental aid and typically does not impose a duty on the State to protect individuals from third parties," there are two exceptions: (1) the special relationship exception; and (2) the state-created danger exception.[92] If either applies, state officials may face liability under § 1983.[93] The District Court affirmed that both of these exceptions apply in the context of foster youth in state custody.[94]

As such, the *Wyatt B.* Court noted that the State owes children in their custody "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child"[95] and that such a duty shall extend "to the right to be free from 'the infliction of unnecessary harm,' and to 'adequate medical care, protection, and supervision.'"[96] The *Wyatt B.* Court additionally relied on the Fifth Circuit's reasoning in *Abbott*, where it was determined that a court may consider challenged policies as they interact with one another systemically, rather than being forced to examine each policy individually.[97] At present, the plaintiffs' claims, with the exception of those calling for placements in least restrictive environments and support for children aging out of foster care, have survived the defendant's motion to dismiss and advocates are optimistic as they await the continued litigation of the surviving claims.[98]

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[90] *Id.*

[91] *Id.* at *4–5 (citing O'Shea v. Littleton, 414 U.S. 488 (1974)).

[92] *Id.* at *6 (citing Henry A. v. Willden, 678 F.3d 991, 998 (9th Cir. 2012)). While the "deliberate indifference" standard and "state-created danger exception" elicits virtually the same analysis, this language of exceptionality does more forcefully imply that, through their inaction, the State has deliberately placed the foster child in a dangerous situation for which they should bear some responsibility. *See* 15 AM. JUR. 2D *Civil Rights* § 65 (2022).

[93] Wyatt B. *ex rel.* McAllister v. Brown, No. 6:19-CV-00556-AA, 2021 WL 4434011 at *6 (D. Or. Sept. 27, 2021).

[94] *Id.* at *6–7.

[95] *Id.* at *7 (quoting Lipscomb *ex rel.* DeFehr v. Simmons, 962 F.2d 1374, 1379 (9th Cir. 1992)).

[96] *Id.* (quoting Tamas v. Dep't Soc. & Health Servs., 630 F.3d 833, 846–47 (9th Cir. 2010)).

[97] *Id.* (quoting M. D. *ex rel.* v. Abbott, 907 F.3d 237, 255 (5th Cir. 2018)).

[98] *Id.* at *****7–9. *See also* Hillary Borrud, *Federal Judge Keeps Alive Potential Class Action Lawsuit Alleging Oregon Foster Care Failures, Saying State Can't Bat Away Charges it Mistreats Children*, THE OREGONIAN (Oct. 7, 2021, 9:57 AM), https://www.oregonlive.com/politics/2021/10/federal-judge-keeps-alive-lawsuit-alleging-oregon-foster-care-failures-saying-state-cant-bat-away-charges-it-mistreats-children.html; *Wyatt B. v. Governor Brown*, A BETTER CHILDHOOD, https://www.abetterchildhood.org/oregon (last visited May 11, 2022); *Lawsuit: Foster Care*, DISABILITY RTS. OR., https://www.droregon.org/litigation-resources/wyatt-b-v-brown?eType=EmailBlastContent&eId=46fe47b8-2d7c-4d7e-be8a-4bfced77d024 (last visited Aug. 6, 2022). This class action lawsuit was brought by Disability Rights Oregon and A Better Childhood and is currently stalled following a mostly successful outcome for

3. Ashley W. v. Holcomb

The final recent case of interest is *Ashley W. v. Holcomb*.[99] *Ashley W.* is yet another class action suit, this one brought on behalf of all children in the custody of the Indiana Department of Child Services ("DCS"), alleging that DCS violated the substantive due process rights of foster children to be free from harm under the Fourteenth Amendment.[100] In response to Defendants' initial motion to dismiss, the District Court for the Southern District of Indiana was faced with a particularly disturbing set of facts: two of the named plaintiffs, four and five-year-old sisters Ashley W. and Betty W., were placed into fourteen different foster homes over two years, then, despite allegations of abuse, placed with their biological father for two months, during which time they contracted lice, ringworm, and had unexplained bruising, and eventually were separated into different foster placements.[101]

Though the Seventh Circuit did recently dismiss this case under the *Younger* abstention doctrine,[102] the initial complaint and remedies sought remain relevant. Thankfully, given the severity of the harm suffered and the "special relationship" that had been established between this class of children and DCS, Defendants were initially unsuccessful in their motion to dismiss Plaintiffs' substantive due process claim.[103] Had this case been argued on the merits, Plaintiffs were seeking declaratory and injunctive relief to address the *systemic* deficiencies currently plaguing Indiana's foster care system and have directed "that necessary and appropriate relief be granted so that Indiana's children are no longer irreparably harmed by the system that has failed its mandate to protect them. Plaintiffs ask this Court to protect their right to a safe and nurturing childhood."[104] Though Plaintiffs

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plaintiffs to Defendant's motion to dismiss. Defendants have also filed a motion for interlocutory appeal, which plaintiffs' attorneys have responded to. Settlement negotiations allegedly continue as well. *See also Wyatt B. et al v. Brown et al*, JUSTIA, https://dockets.justia.com/docket/oregon/ordce/6:2019cv00556/144652 (last visited Aug. 6, 2022).

[99] Ashley W. *ex rel.* Durnell v. Holcomb, 467 F. Supp. 3d 644 (S.D. Ind. 2020), *motion to certify appeal granted sub nom.* Ashley W. v. Holcomb, No. 3:19-CV-00129RLYMPB, 2021 WL 5121146 (S.D. Ind. Sept. 29, 2021).

[100] *Holcomb*, 467 F. Supp. 3d at 644.

[101] *Id.* at 653–54.

[102] Ashley W. v. Holcomb, 34 F.4th 588, 594 (7th Cir. 2022), *reh'g denied*, No. 21-3028, 2022 WL 2165486 (7th Cir. June 15, 2022).

[103] *Holcomb*, 467 F. Supp. 3d at 653–54.

[104] Am. Compl. at 4–5, *Holcomb*, 467 F. Supp. 3d 644 (No. 3:19-cv-129-RLY-MPB) ("DCS lacks sufficient foster placements for youth alleged to be Children in Need of Services ('CHINS'), leaving children for extended periods of time in emergency shelter care or forcing children to sleep in DCS offices; fails to engage in appropriate placement matching, subjecting children to multiple and inappropriate foster care placements; regularly separates sibling groups; and fails to provide children with disabilities with adequate support services to meet their medical, psychological, or developmental needs in the most appropriate, least restrictive environment."). These are the systemic deficiencies listed in the amended complaint.

were denied the opportunity to seek said remedies before a federal court,[105] advocates should take some comfort that the District Court initially ruled in favor of Plaintiffs and a ruling on the merits has yet to be made.[106]

b. Analysis & The Case for Tackling Systemic Foster Care Reforms

In each of the aforementioned cases, courts have acknowledged a substantive due process right of foster children to be free from the substantial risk of harm while in state custody.[107] This finding remained true whether the Court applied the deliberate indifference standard, special relationship standard, professional judgment standard, multiple standards together or hardly any at all.[108] This rather arbitrary application was particularly evident in *Abbott*, which found that any difference in the Court's application of the deliberate indifference and professional judgment standards, like an "actual knowledge" requirement under deliberate indifference, was "dulled" when "the risk of harm is obvious."[109] As previously acknowledged in Part IB, a fluid and varied application of these standards should benefit foster children seeking systemic relief, as it will not constrain judges based on their preferred method of analysis or the specific precedent within their circuit.

The tempered conclusion of the *Abbott* case, the delay in adjudicating the *Wyatt B.* case, and the halted adjudication of the *Ashley W.* case are all admittedly frustrating. However, all hope should not be lost since: (1) there is still the distinct possibility that *Wyatt B.* will result in sweeping injunctive relief aimed at systemically reforming Oregon's foster care system; and (2) all the aforementioned cases are still useful as a roadmap for activists, both inside and outside of their respective states, to make more strategic advocacy decisions moving forward. If more courts follow Justice Blackmun's suggested "sympathetic reading" of the Fourteenth Amendment, then there is no reason why systemic reform cannot be a remedy consistently granted when viable substantive due process claims are made on behalf of foster children.[110]

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[105] *Holcomb*, 34 F.4th at 594, *reh'g denied*, No. 21-3028, 2022 WL 2165486 (7th Cir. June 15, 2022).

[106] *Holcomb*, 467 F. Supp. 3d at 653–54.

[107] M.D. *ex rel.* Stukenberg v. Abbott, 152 F. Supp. 3d 684, 694 (S.D. Tex. 2015); Wyatt *ex rel.* McAllister v. Brown, No. 6:19-CV-00556-AA, 2021 WL 4434011, at *7 (D. Or. Sept. 27, 2021); *Holcomb*, 467 F. Supp. 3d at 648.

[108] *Abbott*, 152 F. Supp. 3d at 697, 700; *Brown*, 2021 WL 4434011, at *6–7; *Holcomb*, 467 F. Supp. 3d at 653–54.

[109] *Abbott*, 152 F. Supp. 3d at 700.

[110] DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) ("our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.").

III. CONCLUSION

As referenced throughout this note, the conditions that foster children face are not unique to one state or even one area of the country; the suffering of hundreds of thousands of children is ubiquitous.[111] Given this reality, advocates for systemic foster care reform and courts can waste no more time dodging this issue because it is too difficult or the conception of constitutional remedies is too rigid. The cases reviewed and analyzed in Part II should compel advocates to consider filing similar class action lawsuits to build on their momentum.

Answering Justice Blackmun's call to exhibit "moral ambition,"[112] particularly on behalf of vulnerable foster children, may at times feel futile, but those who are committed to the protection of foster youth can no longer throw their hands up and proceed as if the system is inevitably doomed. The aforementioned cases have proven that systemic reform can and should be a viable constitutional remedy, so all that is left to do is seek it.

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[111] THE AFCARS REPORT NO. 28, *supra* note 1.

[112] *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting) ("We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort.") (quoting ALAN A. STONE, LAW, PSYCHIATRY, AND MORALITY 262 (1984)).

Accountability for Human Rights Abuses in Authoritarian Regimes? The Insufficiency of International Justice Institutions: A Critical Look at Syria, China, and Russia

JULIA R. SUESSER[†*]

ABSTRACT

One of the key motivations behind the establishment of international justice institutions was accountability for countries to act within the confines of "international norms." Egregious violations of human rights occurring in a country should reasonably be protected against by international justice institutions. However, this paper will argue that these institutions have been insufficient to deal with the violations of human rights occurring across the world in authoritarian regimes, specifically in China and Syria. Conversely, the current conflict with Russia's invasion of Ukraine will be used to explore the idea that there is an opportunity for international justice institutions to capably provide accountability. The paper will conclude with suggestions on how international justice mechanisms can be best engaged to provide accountability for violations of human rights in authoritarian regimes.

I. INTRODUCTION

This paper will address the following inquiry: given the rise of authoritarian regimes over the past decade, to what degree have international justice institutions been capable of providing accountability for ongoing violations of human rights occurring across the world? In analyzing this question, three specific countries will serve as case studies: Syria, China, and Russia. These countries provide different perspectives of authoritarian regimes, all of which are currently, or have in recent history, committed human rights violations on a significant scale. An in-depth evaluation of the international justice institutions which are supposedly tasked with creating accountability for human rights abuses is necessary to evaluate whether the institutions are actually living up to the job. This paper will address the varying degrees to which these institutions have proved insufficient, and the

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[*] This article is dedicated to all those who are suffering in silence across the world. Many thanks to the passionate members of the Connecticut Public Interest Journal for their help in the editing and publication of this article.

devesting consequences of such inadequacy on the victims of human rights violations. Some potential explanations that account for these institutions' failures will be explored throughout the paper. The paper will conclude by offering some potential solutions for the international justice mechanisms to promote greater accountability.

Before beginning the analysis, this paper will explore the background on the international justice institutions as well as the countries serving as case studies. The international justice institutions this analysis will cover are the International Criminal Court, Hybrid Tribunals, and the UN Human Rights Council. These three institutions each employ various mechanisms in attempts to hold countries and individual perpetrators accountable for human rights violations.

This paper focuses on authoritarian regimes in connection to international justice mechanisms, because in many cases, those living under an authoritarian regime have no substantive accountability measures at a domestic level.[1] This poses a problem specifically in the human rights context because victims of human rights abuses must rely on international institutions for protection / some semblance of justice when the authoritarian regime in power is the one committing, or furthering, the violation of human rights.[2] The countries of China and Syria provide worthy examples of authoritarian regimes in which human rights abuses are being committed with little to no oversight domestically.[3] Therefore, international justice mechanisms should step up to provide the needed accountability and protection for the human rights of Syrian and Chinese citizens.

II. BACKGROUND ON THE AUTHORITARIAN REGIMES OF SYRIA AND CHINA

In Syria, the rise of the current authoritarian regime began in 2011 with the start of the Syrian Revolution. It was initiated by human rights abuses that were occurring in the capital of Damascus in March of 2011.[4] The attempted peaceful revolution quickly turned into an armed insurgency, and an attempt to establish a new constitutional order was made on February 15, 2012 by Bashar al-Assad.[5] However the "democratic" nature of the newly proposed constitution was highly suspect; in reality, the new constitutional amendments allowed the government to indirectly maintain

[1] *See generally* Omar El Manfalouty, *Authoritarian Constitutionalism in the Islamic World: Theoretical Considerations and Comparative Observations on Syria and Turkey*, *in* AUTHORITARIAN CONSTITUTIONALISM: COMPAR. ANALYSIS & CRITIQUE 95 (Helena Alviar Garcia & Güenter Frankenberg eds., 2019).

[2] *See generally id.* at 104.

[3] *See generally id.*; *see generally* Stan Hok-wui Wong & Minggang Peng, *Petition and Repression in China's Authoritarian Regime: Evidence from a Natural Experiment,* 15 J. EAST ASIAN STUD. 27 (2015).

[4] Manfalouty, *supra* note 1, at 104.

[5] *Id.*

control of the election and decide with whom power would be shared.[6] The constitutional regime established was in all material ways a farce, and Syrians were arguably aware of this, as the previous constitution had also claimed to guarantee citizens' rights, yet failed to protect the citizens' ability to exercise those rights.[7]

However, the establishment of this new "constitutional" order had significant strategical implications for Syria's standing in the international community.[8] The new constitutional amendments, while realistically useless, gave Syria the perceived democratic legitimacy necessary to avoid scrutiny on the world stage, particularly by the "West."[9] This is a crucial issue within the discussion of international justice mechanisms, as Syria was able to counteract some international scrutiny while effectively still running an authoritarian regime that continued to commit egregious human rights abuses with little to no domestic or international accountability.

China provides another example of an authoritarian regime which abuses its totalitarian power to restrict the human rights of its people.[10] Human Rights Watch[11] called China an "authoritative one-party state that imposes sharp curbs on freedom of expression, association, and religion" in its annual report in 2012.[12] China's authoritarian regime is able to repress and censor domestic and international mechanisms from reporting information that would expose to Chinese citizens the extent to which human rights abuses are occurring in the country.[13] While these restricted rights may not reach the extent of the violence and abuse that faces citizens in Syria, they are still quintessential human rights which citizens in China should be free to exercise. The restriction of information available to citizens can have devastating effects on individual's ability to recognize if their rights are being violated.[14]

In his article addressing the effect of international pressure on authoritarian regimes committing human right abuses, Gruffydd-Jones argues that restriction of information further perpetrates the power of the

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[6] *Id.* at 106.

[7] *Id.* at 107.

[8] *Id.* at 108.

[9] Manfalouty, *supra* note 1, at 108.

[10] *See generally* Jamie J. Gruffydd-Jones, *Citizens and Condemnation: Strategic Uses of International Human Rights Pressure in Authoritarian States*, 52(4) COMPAR. POL. STUD. 579 (2019), https://journals-sagepub-com.ezproxy.law.uconn.edu/doi/pdf/10.1177/0010414018784066.

[11] *Donate to Defend Human Rights*, HUM. RTS. WATCH (Sept. 6, 2022, 12:55 PM), https://donate.hrw.org/page/86262/donate/1?locale=en-US ("Human Rights Watch investigates and reports on abuses happening in all corners of the world. We are roughly 450 people of 70-plus nationalities who are country experts, lawyers, journalists, and others who work to protect the most at risk, from vulnerable minorities and civilians in wartime, to refugees and children in need. In order to maintain our independence, we accept no money from any government.").

[12] *World Report 2012: China*, HUM. RTS. WATCH (Sept. 6, 2022, 12:58 PM), https://www.hrw.org/world-report/2012/country-chapters/china-and-tibet.

[13] Gruffydd-Jones, *supra* note 10, at 583.

[14] *See generally id.* at 581.

authoritarian regime.[15] He illustrates how the state-media is able to influence the way in which international criticism is reported, and prevent damage to the reputation of the country through reframing of the reports.[16] Therefore, citizens within the country are much less likely to protest the repression of their human rights, as they are largely blind to the fact that said repression is occurring, and the power of the authoritarian regime can continue to thrive.[17] Gruffydd-Jones's article illustrates how the international pressures opposing China's human rights abuses are fundamentally insufficient because of the control China's government has over the media, clearly illustrating the need for active intervention by international justice mechanisms.[18]

III. BACKGROUND ON THE INTERNATIONAL JUSTICE MECHANISMS

A. The International Criminal Court

For purposes of this analysis the "international justice mechanisms" discussed are the International Criminal Court[19] ("ICC"), Hybrid Tribunals,[20] and the UN Human Rights Council.[21] The ICC has issues with the referral process of cases, as well as admissibility issues which cause significant barriers to accountability. To initiate proceedings under the ICC there are a series of "trigger mechanisms" laid out in Article 13 of the Rome Statute:[22] "a referral by a State Party; a referral by the Security Council; and the opening of an investigation by the Prosecutor acting on his or her own initiative."[23] Each of these triggers poses unique issues. First, States do not always want to admit that human rights abuses are occurring within their

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[15] *See generally id.*

[16] *Id.* at 583.

[17] *See generally id.* at 583–84.

[18] *See id.* at 604.

[19] *About the Court*, INT'L CRIM. CT. (last visited Sept. 6, 2022), https://www.icc-cpi.int/about/the-court ("The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.").

[20] *Hybrid Courts and Tribunals*, PRITZKER LEGAL RSCH. CTR. NORTHWESTERN PRITZKER SCH. L. (last visited Sept. 6, 2022), https://library.law.northwestern.edu/IntlCrimLaw/Hybrid ("Hybrid courts and tribunals are institutions that are created to address particular situations for a limited amount of time, but their nature incorporates international and national features (mixed). These courts and tribunals are composed of international and local staff and apply a mix of international and national substantive and procedural law.").

[21] U.N. HUM. RTS. COUNCIL (Sept. 6, 2022 1:22 PM), https://www.ohchr.org/en/hr-bodies/hrc/about-council ("The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe. It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN Office at Geneva.").

[22] Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90. (The Rome Statute of the International Criminal Court is the treaty that established the International Criminal Court (ICC)).

[23] ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 151 (Cambridge Univ. Press ed., 4th ed. 2019).

territory, but also issues can arise when a State refers a case to the ICC that might be better handled domestically.[24] Second, the Security Council referrals are significantly restricted by the veto powers of permanent members of the council (such as China and Russia), as well as a lack of funding for investigations by the Security Council.[25] Finally, initiation by the Prosecutor is imperfect as the Prosecutor has limited powers of investigation when first receiving a referral or communication, but must determine if there is a "reasonable basis to proceed with an investigation," keeping in mind issues of admissibility, jurisdiction, and "interests of justice."[26] This is a high bar to meet, and it is only after an investigation can be justified that the Prosecutor gains more substantial legal powers of action.[27]

Arguably, the biggest issue when assessing the success of the ICC in promoting accountability is the jurisdictional / admissibility issue. The ICC has limited jurisdiction, covering only "the most serious crimes of international concern, genocide, crimes against humanity, war crimes and aggression (Article 5).[28]" Additionally, the ICC only has jurisdiction over States that accept the ICC's jurisdiction and nationals of a State which accepted jurisdiction.[29] Moreover, the ICC will only have an admissible case if the aspects of complementarity and gravity are sufficiently established.[30] The concept of complementarity means that if a case is already being prosecuted or investigated domestically than the ICC cannot exercise jurisdiction.[31] While the rationale of the complementarity principle is strong in theory, in the context of these authoritarian regimes it breaks down. This is due in large part to the fact that the human rights abuses are being perpetrated by the government, and therefore it is naïve to think that the government will bring a legitimate case against themselves. This means in theory a case could be brought domestically to ward off the jurisdiction of the ICC, but be a farce in that the domestic system has no intention of actually providing proper accountability.

Additionally, under Article 17, the gravity of the situation must be considered and four factors are applied by the Office of the Prosecutor: "(1) the scale of the crimes; (2) the nature of the crimes; (3) the manner of their jurisprudence; and (4) their impact.[32]" After doing that analysis, if the crime is not "grave" enough, it will be inadmissible.[33] The limited investigatory

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[24] *Id.* at 151–52.
[25] *Id.* at 152.
[26] *Id.* at 153–54.
[27] *See generally id.* at 155.
[28] *Id.* at 147.
[29] CRYER ET AL., *supra* note 23, at 149.
[30] *Id.* at 154.
[31] *Id.* at 156.
[32] *Id.* at 161.
[33] *Id.*

powers of the Prosecutor when first opening an investigation can mean that finding sufficient gravity to justify a formal case is challenging.[34] In considering these substantive requirements on the ICC, barriers to accountability become more apparent, especially when thinking about how powerful authoritarian regimes fit into this framework.

B. Hybrid Tribunals

Hybrid tribunals are courts established with elements of both international and domestic jurisdiction, composition, and law.[35] There are three pathways in which hybrid tribunals can be established:

> (1) courts established by an agreement, being either bilateral agreement between a State and an international organization (such as the United Nations or the European Union) or a multilateral agreement between (regional) States; (2) courts established by an international transitional administration temporarily replacing weak or unavailable domestic institutions; and (3) courts established by a State under national law but with international support.[36]

Hybrid tribunals function in complement to the ICC as they work in tandem with the domestic system of a state where Article 17 of the Rome Statute applies.[37] These tribunals have been established in part to counteract some of the deficiencies of the ICC, but also contain some of their own problems. For example, hybrid tribunals are important contributors to building domestic accountability, rule of law, and expanding the reach of domestic jurisprudence and international criminal law.[38] However, the cooperation of the relevant States is an essential element of the hybrid tribunal's ability to function, and this can be difficult to obtain in many circumstances.[39]

Exploring this institutional deficiency is important when considering the positive public interest implications of a "successful" hybrid tribunal. The domestic framework of the hybrid tribunal offers a unique opportunity for domestic organizations to have a more influential role in the tribunal's implementation, including "public interest" organizations. Therefore, strong engagement by these organizations has the potential to encourage the cooperation of States in hybrid tribunals. Moreover, if there is significant public attention on the human rights abuses occurring in any

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[34] *See generally id.*
[35] CRYER ET AL., *supra* note 23, at 174.
[36] *Id.* at 173.
[37] *Id.* at 198.
[38] *Id.* at 200.
[39] *See generally id.* at 199.

given regime, is becomes harder for a State to refuse hybrid tribunal jurisdiction without fear of significant public outcry and protest.

On the other hand, there are financial and structural deficiencies in the domestic system which can make it very challenging for the tribunals to sufficiently conduct investigations and trials at the level necessary for reasonable accountability.[40] Moreover, in the authoritarian context it would be easy for the state to simply refuse to cede jurisdiction to a hybrid tribunal in its territory, therefore effectively blocking the mechanism from its attempt on accountability.

C. The Human Rights Council

The Human Rights Council was established in 2003, after insufficiencies within the former UN Commission on Human Rights required a review of the method in which global threats to peace and security should be handled.[41] Some important functions of the Human Rights Council are "making recommendations on the promotion and protection of human rights, contributing to the further development of international human rights law, and mainstreaming human rights within the UN System."[42] Additionally, the process of the council is supposedly cooperative and non-confrontational, which can incentivize countries to commit to being a part of the council.[43] China and Syria are both members of the Human Rights Council, and Russia was a member until the country was suspended on April 7, 2022.[44] Notably, China and Syria both voted against the suspension.[45]

Once a country has joined the Human Rights Council there are three stages implemented to try to promote accountability for human rights violations.[46] First, a country must create a national report reflecting a self-assessment, which is then compared with the reports of UN treaty bodies, independent experts, NHRIs and NGOs.[47] This report is called a Universal Periodic Review ("UPR").[48] Once the UPR "peer review" process is complete, an interview like process between the UPR Working Group, the other UN Member States, and the state under review takes place.[49] Throughout this dialog, questions, comments, and concerns are heard, and

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[40] *Id.*

[41] Jarvis Matiya, *Repositioning the International Human Rights Protection System: the UN Human Rights Council*, 36 COMMONWEALTH L. BULL. 313, 317 (2010).

[42] *Id.* at 318–19.

[43] *See generally id.* at 320.

[44] *UN General Assembly Votes to Suspend Russia from the Human Rights Council*, U.N. (Apr. 7, 2022), https://news.un.org/en/story/2022/04/1115782.

[45] *Id.*

[46] *See generally* Matiya, *supra* note 41, at 321.

[47] *Id.*

[48] Junxiang Mao & Xi Sheng, *Strength of Review and Scale of Response: A Quantitative Analysis of Human Rights Council Universal Periodic Review on China*, 23 BUFF. HUM. RTS. L. REV. 1, 1 (2016-2017).

[49] *Id.* at 6.

recommendations for measures to be implemented are proposed to the state.[50] The state then must consent to certain recommendations.[51] Four and half years later a follow-up process is integrated into the UPR framework, where states report on actions taken to improve their human rights conditions and whether the recommendations have been implemented.[52] While the Human Rights Council methods of reporting and bringing attention to human rights violations have improved since the Commission on Human Rights, there are still significant deficiencies which counteract the Council's ability to promote accountability.[53]

One major weakness of the Council is that the member states that make up the council are the same members judging behavior as those whose behavior must be judged.[54] The rationale is that those member states who have committed to being members are committed genuinely to a process,[55] but this is not a particularly persuasive argument when considering the activities of China, Syria, and Russia. Moreover, countries with strong "friendly" relationships with each other are engaging in "block voting" and giving only positive comments on reports without engaging in any substantial review.[56] This can significantly undercut the legitimacy of the Council's process because powerful countries that have relationships with other countries are realistically able to skirt accountability for human rights abuses when the other countries choose to not submit recommendations.[57]

Additionally, once the recommendations are made, the country must accept the recommendations in order for their adoption to be enforced in any capacity.[58] These limitations of the institution can be exploited by powerful regimes like China, Russia, and Syria and illustrate that the Council cannot be individually relied on to obtain sufficient accountability for human rights abuses.

IV. APPLICATION OF THE CASE STUDY OF SYRIA

A. Background on the Human Rights Abuses Occurring

The human rights abuses occurring in Syria are widespread and horrific, but importantly, are also very well-known to the international

[50] *Id.*
[51] *Id.*
[52] *Id.* at 6–7.
[53] *See generally* Matiya, *supra* note 41, at 321.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 319.

community.[59] The Syrian Civil War that began in 2011 has been traced as the start of more significant atrocities being committed against the civilian population.[60] The war subjected civilians to war crimes and crimes against humanity of drastic proportions including: "unlawful killings, arbitrary arrests and enforced disappearances, violations of children's and women's rights, illegal detentions and torture, use of illegal weapons [including chemical weapons], sieges, and destruction of property.[61]" The human rights violations occurring in Syria are relatively well-documented, especially considering the government imposed media blockage which restricted first-hand reporting, created shortly after the war began.[62]

Presumably to counteract the informational restriction, the U.N. Human Rights Council established the Independent International Commission of Inquiry on the Syrian Arab Republic, which was able to expose the human rights abuses occurring within Syria.[63] Through these investigations the U.N. reported over 100,000 Syrian casualties, and even additional injured parties.[64] Additionally, the report states 2.5 million refugees have escaped the State, and 6.5 million have been internally displaced within Syria.[65] These facts and figures illustrate the serious violations of human rights occurring in Syria, and how the international community is aware of what is occurring.[66]

B. The ICC

As previously discussed within the context of the ICC, adequate jurisdiction must exist in order for a case to be brought forth to the Court, and unfortunately Syria is not a state party to the ICC.[67] The ICC Prosecutor cites jurisdictional issues as the primary reason behind not opening an investigation, and Syria has refused to voluntarily accept ad hoc jurisdiction of the Court.[68] Additionally, the Prosecutor refused to open an investigation *proprio motu*, finding that it would likely be a futile task, as those allegedly perpetrating the crimes against humanity and war crimes were Iraqi and

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[59] *See generally* Nadia Shamsi, *Peace and Justice in the Middle East: Balancing International and Local Solutions to the Crises in Syria, Lebanon, and Palestine*, 3 INDON. J. INT'L & COMPAR. L.: SOCIO-POL. PERSP. 315, 329 (2016).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 330.

[65] Shamsi, *supra* note 59, at 330; (This source's figures were based off of 2016, the more current figures are: 6.6 Million refugees and 6.7 internally displaces peoples).U.S.A. FOR U.N. HIGH COMM'R FOR REFUGEES, U.N. REFUGEE AGENCY, *Syria Refugee Crisis Explained*, (Feb. 5, 2021), https://www.unrefugees.org/news/syria-refugee-crisis-explained/.

[66] *See generally* U.S.A. FOR U.N. HIGH COMM'R FOR REFUGEES, *supra* note 65.

[67] Caroline Sweeney, *Accountability for Syria: Is the International Criminal Court Now a Realistic Option*?, 17 J. INT'L CRIM. JUST. 1083, 1087 (2019), https://doi.org /10.1093/jicj/mqz049.

[68] *Id.*

Syrian nationals holding prominent positions in ISIS.[69] Therefore, in order for accountability for the human rights abuses occurring in Syria to be pursued through the mechanism of the ICC, some changes must be made to the structure of the Court to address the jurisdictional issue.

In her paper "Accountability for Syria: Is the International Criminal Court Now a Realistic Option?" Dr. Caroline Sweeney argues that the Court's Pre-Trial Chamber ("PTC") decision involving the Rohingya people from Myanmar (a non-state party), and Bangladesh (a state party) could be adapted to work in the Syrian context.[70] The Court's decision found that the ICC may exercise jurisdiction on a territorial basis over the alleged deportation the Rohingya people from Myanmar to Bangladesh.[71] The legal support for the Court's decision was based largely on that fact that an element or part of the alleged crime took place on the territory of a state party.[72] This jurisdictional ruling could apply to the conflict in Syria because crimes under the purview of the ICC are being committed in Jordan (a state party to the ICC), but under the broader context of the Syrian conflict.[73]

Therefore, the ICC may be able to gain temporal jurisdiction over the forced deportation of Syrians into Jordan because Jordan ratified the ICC Statute in 2002, and the deportations started in 2011.[74] Based on the new Myanmar precedent the ICC Prosecutor may begin a *proprio mutu* preliminary investigation, and then must gain permission from the PTC before continuing a full investigation.[75] Before bringing the case to the PTC the Prosecutor must fulfill four requirements:

> there is a reasonable basis to believe that a crime within the jurisdiction of the court has been committed (jurisdiction ratione materiae and ratione temporis); (ii) a precondition to the exercise of jurisdiction exists; (iii) the admissibility requirements of gravity and complementarity have been fulfilled; and (iv) there are no substantial reasons to believe that an investigation would not serve the interests of justice.[76]

In regards to element of *ratione temporis*, it seems to be fulfilled easily; in June 2019, 660,330 Syrian refugees were registered in Jordan, and

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[69] *Id.*

[70] *Id.* at 1083.

[71] Prosecutor v. Bangladesh, ICC-RoC46(3)-01/18-37, Pre-Trial Chamber I, Decision on Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ¶1, 78 (Sept. 6, 2018), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF.

[72] *Id.*

[73] Sweeney, *supra* note 67, at 1086.

[74] *Id.* at 1089.

[75] *Id.* at 1088–89.

[76] *Id.* at 1089.

it is projected that over one million Syrians have been displaced to Jordan since 2011.[77] Additionally, in considering the complementarity principle, there is no evidence that either Syria or Jordan have domestic prosecutions that are attempting to bring accountability for the unscrupulous displacement of Syrians.[78] However, in bringing a case to the PTC, the Prosecutor might struggle to prove the *ratione materiae* element, the PTC's decision could still be challenged, and the case must be proven that pursuing the case is in the "interests of justice."[79]

Beginning with the issue of *ratione materiae*, "[a]rticle 7(1)(d) of the ICC Statute includes "[d]eportation or forcible transfer of population' amongst the crimes against humanity within the Court's subject matter jurisdiction.[80]" In its interpretation in the Myanmar decision, the PTC found that two independent crimes could be incorporated by this language, "(i) deportation and (ii) forcible transfer of population."[81] This is important as it means that deportation alone could constitute a crime against humanity, over which the ICC has jurisdiction.[82] This interpretation is subject to debate within the international community, and should be expected to arise as an issue to be litigated if a case of this nature was brought by Jordan.[83] The *mens rea* and *actus reus* of deportation also must be sufficiently alleged in order for the PTC to hear the case.[84] Additionally, due to the nature of the Syrian conflict, proving that there was a specific government-sponsored policy to forcibly displace Syrians to Jordan is likely going to be more challenging than it was to prove in the Rohingya context.[85] If the government-sponsored element cannot be sufficiently alleged then the court will run into an 12(2)(a)-1095 issue.[86]

In considering the interests of justice, issues such as the gravity of the crimes, interests of the victims, and feasibility should be considered.[87] The gravity of the atrocities being committed to Syrian refuges reasonably suggest that it would be within the interests of justice to pursue ICC accountability. Additionally, while it is unlikely that Syrian authorities will cooperate with an investigation, Jordan can be compelled to cooperate as it is a state party to the ICC, and collecting evidence should not be a challenge due to the dedication of NGOs and activists within Syria and Jordan.[88] With all those considerations in mind, while there are currently substantial

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[77] *Id.*
[78] *Id.*
[79] Sweeney, *supra* note 67, at 1113–14.
[80] *Id.* at 1089.
[81] *Id.*
[82] *Id.* at 1090.
[83] *Id.*
[84] *Id.* at 1091.
[85] Sweeny, *supra* note 67, at 1093.
[86] *Id.* at 1093–94.
[87] *Id.* at 1105.
[88] *Id.* at 1106.

obstacles to the ICC's ability to provide accountability for the human rights abuses that have been and are currently occurring in Syria, the new framework developed by the PTC in Myanmar may provide an avenue for accountability.[89]

C. A Hybrid Tribunal

For the reasons discussed above, it is unlikely that a hybrid tribunal would be an effective mechanism for accountability for the human rights abuses occurring in Syria. Moreover, there has not been the attempt to establish one thus far. However, in 2016 the UN General Assembly did enact an "International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011" with the intention of it helping to promote investigations and prosecutions for Syrian human rights abuses.[90] While this institution has some quasi-judicial qualities, in order for it to be valid exercise of the Security Council's powers, the authors argue it is simply assisting other states that have prosecutorial powers, and in that way is comparable to hybrid tribunals.[91] The enabling resolution's language specifies that the Mechanism is intended to assist bodies that may have jurisdiction over the crimes being committed by collecting and sharing evidence in order to further cooperation by the international community.[92]

However, there were two main objections during the drafting of this Mechanism, that it violated both Article 2(7) and Article 12 of the UN Charter.[93] Addressing the Article 2(7) issue, the Mechanism does not seem to violate the clause because it does not expand state's jurisdiction nor restrict Syria's jurisdiction, it merely intends to assist those with existing jurisdiction with accountability measures.[94] Moreover, Syria argued that the Mechanism violated Article 12 because the Security Council was still discussing the war in Syria and therefore the General Assembly should be barred from acting on the same issue.[95] This issue was evaluated by the President of the General Assembly, who looked at various sources and ultimately determined that "exercising" under Article 12(1) requires the Security to be "simultaneously, actually and actively — considering the issue" in order for it to be a problem.[96]

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[89] *See id.* at 1114.

[90] Christian Wenaweser & James Cockayne, *Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice*, 15 J. INT'L CRIM. JUST. 211, 212 (2017), https://doi.org/10.1093/jicj/mqx010.

[91] *Id.* at 213.

[92] *Id.* at 216.

[93] *Id.* at 218, 220.

[94] *Id.* at 219.

[95] *Id.* at 220.

[96] Wenaweser, *supra* note 89, at 222–23.

The legitimacy and legality of this Mechanism being upheld has potentially strong implications for accountability measures in Syria.[97] If implemented properly and effectively the Mechanism could provide a helpful gap-filling mechanism in Syria, as human rights abuses could be prosecuted via other interested parties and not require Syria to consent to a tribunal.[98] This provides an interesting example of an international accountability measure that may be more effective because it was seemingly created with the specific nuances of a conflict in mind as opposed to applying a broad framework that would be ineffective. Additionally, it is significant to note that this action was taken in response to the Security Council's failure / inability to act in regard to the Syrian conflict.[99]

D. The Human Rights Council

Similarly, the UN Human Rights Council commissioned an independent body to create a report detailing the human rights violations occurring in Syria and to promote accountability.[100] The UN Human Rights Council expressly created an International Independent Commission of Inquiry on the Syrian Arab Republic (UNCOI) in March of 2011 to:

> investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic…and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.[101]

The UNCOI published its report on August 16, 2012, which found that egregious human rights violations were occurring in Syria, commissioned by government forces, the Shabbiha (a civilian militant group that supports Bashar al-Assad), and anti-government armed group.[102] The report pointed to crimes against humanity, war crimes, and other violations of international humanitarian law being committed in Syria with "rampant impunity."[103] After the UNCOI released the report there was extensive conversation between those on the Human Rights Council and Syria regarding the findings, whereby Syria largely rejected the findings.[104]

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[97] *Id.* at 229.
[98] *Id.*
[99] *Id.* at 212.
[100] *See generally* Hillary W. Amster, *Report of the Independent International Commission of Inquiry on the Arab Syrian Republic*, 51 INT'L LEGAL MATERIALS 1381 (2012) (the report cited is that which was commissioned by the U.N. Human Rights Council).
[101] *Id.* at 1381.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 1382.

In response, the Human Rights Council increased the UNCOI's mandate until December 2012 and further investigation was done into the alleged violations.[105] The updated report found additional human rights violations, as well as emphasized the severity of the earlier violations, painting a clear picture that accountability measures needed to be taken.[106] Some of the violations found were "crimes against humanity of murder and torture, war crimes, and gross violations of international human rights and humanitarian law, including unlawful killing, indiscriminate attacks against civilian populations, and acts of sexual violence."[107] However, the success of the report is unknown; while the UNCOI continues to report on the ongoing violations of human rights, the other UN bodies and international accountability institutions do not seem to be making any constructive progress in promoting accountability.[108]

V. APPLICATION IN THE CASE STUDY OF CHINA

A. Background on the Human Rights Abuses Occurring

China provides another example of an authoritarian regime that is committing human rights abuses against its civilian population.[109] Specifically, the Falun Gong people have been significantly repressed by the Chinese government, as the practice of Falun Gong was outlawed in 1999. Since then, those practicing the religion have experienced significant human rights abuses.[110] The practitioners of Falun Gong faced retaliation in the form of "torture, arbitrary detention, 're-education' through forced labor and forced psychiatric commitment, and possibly execution."[111] The Chinese government's rationale behind the persecution and repression of the followers of Falun Gong was the alleged threat they posed to the Communist Party.[112]

The mistreatment persisted past 2000 when the Chinese government signed the International Covenant on Civil and Political Rights, which was supposed to end the mistreatment, however, the agreement was never ratified and treatment of the people did not seem to improve.[113] The ratification of this agreement was arranged in part by an agreement made with the United Nations High Commissioner for Human Rights, and

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[105] *Id.*
[106] Amster, *supra* note 99, at 1382.
[107] *See generally id.* at 1381.
[108] *See generally id.* at 1382.
[109] *See generally* Mark J. Leavy, *Discrediting Human Rights Abuse as an "Act of State": A Case Study on the Repression of the Falun Gong in China and Commentary on International Human Rights Law in U.S. Courts*, 35 RUTGERS L. J. 749 (2004).
[110] *Id.* at 756.
[111] *Id.*
[112] *Id.* at 757.
[113] *Id.* at 762.

concerned parties from western countries traveled to China to take part in protest against the treatment of the Falun Gong.[114] This illustrates the international community's awareness of the human rights abuses occurring in China, as well as the lack of an adequate response.

B. The ICC

Similarly to Syria in the case of China, the biggest barrier to accountability for the past and current violations of human rights via the International Criminal Court is that China is not a state party to the ICC.[115] While China actively participated in the negotiations during the ICC's founding, the country declined to sign the Rome Conference, and has not since become a member.[116] In expressing its opposition, China took issue with the jurisdiction of the ICC and the definition of the core crimes of the Court, especially that of the definition of crimes against humanity.[117] Specifically, China claimed that the element of crimes against humanity, which did not require the conduct to be committed in a nexus to armed conflict, was contrary to customary international law.[118] Since 1998, China has not changed its policy on the ICC and still has not ratified the statute, however the country has remained an active participant in international criminal justice mechanisms through its membership on the UN Security Council.[119]

This is an interesting contradiction, as China's involvement in the ICC process generally seems to suggest that they believe the Court is legitimate, however its refusal to ratify the statute illustrates the State's desire to keep ICC scrutiny away from its own territory. Without ratification of the ICC statute, China is theoretically able to avoid significant accountability for the human rights abuses occurring in the country as bringing a case against perpetrators under the jurisdiction of the ICC is nearly impossible. As previously discussed, if a state is not a party to the ICC, the Court is not able to gain jurisdiction over parties in the state unless jurisdiction is expressly granted.[120] Therefore, the international justice accountability measure of the ICC cannot be reasonably relied on to protect the human rights of those in China. Additionally, the factual background in

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[114] *See generally id.* at 762–63.

[115] *See generally Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INT'L CRIM. CT. (Mar. 2, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states. The Case Aginst china at the ICC, https://eurasianet.org/the-case-against-china-at-the-icc.

[116] *See generally* Dan Zhu, *China, Crimes Against Humanity and the International Criminal Court*, 16 J. INT'L CRIM. JUST. 1021, 1021–22 (2018).

[117] *Id.* at 1023.

[118] *Id.* at 1024–25.

[119] *See generally id.* at 1022.

[120] CRYER ET AL., *supra* note 23, at 149.

China is significantly different than Syria, i.e. the temporal jurisdictional pathway, and therefore other mechanisms to gain ICC jurisdiction do not seem to exist at this time.

C. Hybrid Tribunals

Considering the insufficiency of the ICC, hybrid tribunals can serve as a potential gap-filling mechanism in countries such as China. A state that has not agreed to ICC jurisdiction could still agree to a hybrid tribunal jurisdiction through regional organizations.[121] Examples of these are the African Union or Arab League.[122] Hybrid tribunals also have the ability to extend jurisdiction for more than the "three core international crimes namely genocide, crimes against humanity, [and] war crimes.[123]" This can have powerful implications especially in the context of China because accountability could be found for the human rights abuses that do not necessarily fit the context of one of the core crimes.

However, in order to establish a hybrid tribunal, China must affirmatively consent, which, considering their history of eluding such international accountability mechanisms, consent seems unlikely. Moreover, because the crimes being committed against the followers of Falun Gong were state sponsored, domestic measures would be inherently biased and unreliable.[124] However, the establishment of a hybrid tribunal with the integration of some international norms and jurists could counteract that domestic impartiality, and promote fairness in the trials and verdicts.[125] Nevertheless, even if China was to establish a hybrid tribunal, the aforementioned insufficiencies of hybrid tribunals must also be considered in order to analyze if it would even be a sustainable method for accountability.

D. The Human Rights Council

China's relationship to the third international justice mechanism, the UN Human Rights Council, provides an interesting case study of the UPR system.[126] Since the council's founding, China has experienced two separate UPR rotations in 2009 and 2013.[127] Other member states took extraordinary interest in the two UPR reports of China, with a jump from 47 to 124 states involvement from 2009 to 2013, and an increase of issues addressed from

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[121] *See generally* Mathias Holvoet & Paul de Hert, *International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals*, 17 TILLBURG L. REV. 228, 236 (2012).
[122] *Id.*
[123] *See generally id.*
[124] *Id.* at 239.
[125] *Id.* at 240.
[126] Mao & Sheng, *supra* note 48, at 2.
[127] *Id.* at 9.

39 to 41.[128] Moreover, both developed countries and developing countries participated in the review, and China was one of the member states that received the most recommendations.[129] The issues that attracted the most attention were similar from the first UPR on China to the second; implementation of international instruments and the International Covenant on Civil and Political Rights ("ICCPR").[130] Overall, the concerns of the state parties seemed to be with China's lack of protection for the civil and political rights of its citizens and how that impacted the human rights situation of the country.[131]

However, in the second review, member states became more interested in human rights issues related to "[r]ights of the child, the right to education, freedom of religion and belief, and economic, social, and cultural rights . . . ."[132] China received a total of 422 recommendations between both reviews, and accepted 259, which is a rate of 61.37%.[133] Notably, China accepted some recommendations in the second review that had been rejected in the first.[134] Conversely, China refused to accept some substantial recommendations that would have significant impacts on human rights. Some important examples include: (1) the ratification of core international human rights conventions such as the International Convention for the Protection of All Persons from Enforced Disappearance ("CPED") and the International Convention of Civil and Political Rights ("ICCPR"); (2) the reforming of China's political institutions to include the establishment of a National Human Rights Institution ("NHRI"); (3) extending a standing invitation to special procedures mandate holders; and (4) protecting ethnic minorities' rights.[135]

In regards to actual implementation of the recommendations, the MIA review found that "71 recommendations (51%) were not implemented, 19 recommendations (14%) were partially implemented, 4 recommendations (3%) were fully implemented, and no answer was received for 44 (32%) of the 138 recommendations in the first cycle of review."[136] In comparison to the MIA of all 165 countries that were evaluated in the first cycle, the percentages were 48%, 30%, 18%, and 4% respectively.[137] Simply looking at those figures after the first review, China was behind implementation in comparison to the international community at

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[128] *Id.* at 10.
[129] *Id.* at 10–11.
[130] *See generally id.* at 10.
[131] *See generally id.* at 12.
[132] Mao & Sheng, *supra* note 48, at 13.
[133] *See generally id.* at 22. For context, within the overall UPR process, there is a 74.2% acceptance rate of recommendations.
[134] *Id.* at 26.
[135] *Id.* at 27–28.
[136] *Id.* at 29.
[137] *Id.* at 30.

large.[138] However, there are some nuances to China's implementation of the UPR which must be considered when evaluating if the Council promoted substantial accountability for human rights abuses in the context of China. For example, China chose to implement in some capacity many recommendations that it had not actually accepted during the first review process, which illustrates some additional intention in meeting the expectations of the UPR.[139] Additionally, China is an active participant in the UPR process as a whole and offers extensive recommendations to other states, specifically in areas where China engages in best practices.[140]

Nevertheless, China's seemingly involved participation in the UPR is not without its flaws. First, China tends to only accept and recommend actions that are not "positive," meaning that states would not have to take active and concrete actions by accepting them.[141] This significantly undercuts the idea that state sponsored human rights abuses in China could be addressed through recommendations of a UPR. Similarly, China has a hard line rule that it will not accept recommendations that "specifically interfere with its own human rights policies."[142] This accounts for some of the explanation behind why China's rate of acceptance of recommendations is lower than the international average.[143]

China also avoids accepting recommendations that are precise, and opts to accept more general ones, allowing the country more leeway when adopting recommendations.[144] Finally, China's failure to give an implementation report on the recommendations raises a red flag, as it makes it practically impossible to determine if the human rights conditions have actually improved.[145] In conclusion, while China has been significantly involved in the U.N. Human Rights Council and subject to two separate UPR reports, the lack of review on the actual implementation of such reports undermines the accountability measure significantly.[146]

VI. COUNTER-ANALYSIS USING RUSSIA AS A CASE STUDY

The examination of Syria and China provided analysis on the intricacies of some of the main international justice mechanisms illustrating broader message of this paper, that these institutions are largely insufficient to protect human rights in authoritarian regimes. However, as discussed, there are elements of these institutions that can be effective, and with some reform, accountability can be more successfully pursued in the international

[138] *See generally* Mao & Sheng, *supra* note 48, at 30.
[139] *See generally id.*
[140] *See generally id.* at 33.
[141] *See generally id.* at 34.
[142] *Id.* at 37.
[143] *See generally id.* at 37.
[144] *See generally* Mao & Sheng, *supra* note 48, at 37.
[145] *See generally id.* at 38.
[146] *See generally id.*

context. Looking at this issue from a current and relevant example is helpful in the analysis: Russia's recent invasion into Ukraine. Russia can be properly categorized as an authoritarian regime. More specifically, it has been referred to as a "new authoritarian system" because it controls its opponents with "illiberal legislation" and not solely violence.[147] When Russia invaded Ukraine on February 24, 2022, the international community immediately took notice.[148]

A. The ICC

Starting with the ICC, as things stand there is some semblance of hope that some accountability could be obtained from the institution. But, the familiar issue of Russia not being a party to the ICC emerges. Additionally, Ukraine is not a party to the ICC.[149] However, Ukraine has extended jurisdiction to the ICC on two prior occasions, in April 2014, and September 2015, extending the jurisdiction of the ICC's examination with no stated end date.[150] Additionally, thirty-nine state parties to the ICC have referred the situation to the ICC Prosecutor and on February 28, he announced his intention to open an investigation.[151] The opening of the investigation is encouraging, however, the Prosecutor is going to have an uphill battle in proving a case and actually prosecuting perpetrators for the heinous crimes being committed in this conflict, especially considering Russia will very likely not be a cooperative party.

The relatively quick nature in which the Prosecutor announced he will be opening an investigation into Russia also begs the question why this instance is different from the cases of Syria and China. In those contexts, no ICC investigation was started, and the reasoning given was similar to the jurisdictional issues that exist with Russia and Ukraine. The difference it seems is the international attention and scrutiny that Russia is facing. Based on Russia's actions in Ukraine, the ICC Prosecutor has already gotten thirty-nine referrals and the world is calling for accountability – that is not something easily ignored. Therefore, the argument can be made that it is not due to some newfound strength of the ICC but rather the international outcry being funneled through the ICC mechanism that might lead to accountability.

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[147] Freek van der Vet, *When They Come for You: Legal Mobilization in New Authoritarian Russia*, 52 L. & SOC'Y REV. 301, 306 (2018).

[148] *See generally* The Visual Journalism Team, *Ukraine War in Maps: Tracking the Russian Invasion*, BBC NEWS (May 10, 2022), https://www.bbc.com/news/world-europe-60506682.

[149] Courtney Hillebrecht, *An International Court is Investigating Possible War Crimes in Ukraine. What Does that Mean, Exactly*?, WASH. POST (Mar. 21, 2022), https://www.washingtonpost.com/politics/2022/03/21/ukraine-russia-icc-investigation/.

[150] *Id.*

[151] *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, *supra* note 114.

B. Hybrid Tribunals

Next, the viability of the establishment of a hybrid tribunal to address this situation is worthy of consideration. The complex nature of this conflict may be better suited to be assessed by an individualized tribunal at the domestic level, which would not have the same jurisdictional concerns as the ICC.[152] Ukraine, working in conjunction with the Council of Europe, could ask that, pursuant to Article 15(a) of the Statute, the Committee of Ministers recommend the establishment of a hybrid tribunal to investigate the crimes connected with Russia's invasion of Ukraine.[153] The tribunal would be established via treaty with the other members states of the Council of Europe, and would be ingrained in the Ukraine judicial system, with international monetary, investigatory, and staffing assistance.[154]

This tribunal would have the advantages of domestic support as well as international resources, and could be established quickly so that the crimes occurring during the conflict could be investigated in a more timely fashion.[155] However, it is important to consider the feasibility of establishing a hybrid tribunal in Ukraine with the current severe conflict occurring; the infrastructure for such an undertaking would not seem to be a priority of the government.

C. The UN Human Rights Council

Finally, the potential for accountability to be obtained via the Human Rights Council is the least likely case in considering these three international justice institutions. The biggest reason for that contention is that Russia was suspended from the UN Human Rights Council as of April 7, 2022, as a response to Russia's war on Ukraine.[156] While the UN General Assembly claimed this suspension was done for the purpose of accountability, Russia's suspension from the Council means the country is no longer responsible for following the Council's mandates.[157] Moreover, Russia claimed it was already going to leave the Council before the vote, which means the country is seemingly unconcerned with the Council's disapproval of its actions in Ukraine.[158] Therefore this vote will mean that Russia is no longer responsible for conducting the UPR process, effectively lessening the international community's ability to promote accountability

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[152] Kevin J. Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022), https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/.

[153] *See generally id.*

[154] *Id.*

[155] *Id.*

[156] *See generally UN General Assembly Votes to Suspend Russia from the Human Rights Council*, *supra* note 44.

[157] *See generally id.*

[158] *See generally id.*

for Russia's human rights abuses. The ability, or inability, for each of the international justice mechanisms described above to respond to this conflict highlights that authoritarian regimes are not infallible, but Russia shows that the proper international attention to the atrocities needs to be brought in order for international institutions to be spurred into action.

VII. PROPOSED SOLUTIONS

As shown throughout this paper, none of these internal accountability institutions are fully capable of obtaining sufficient accountability for the human rights abuses occurring across the globe. However, there are some potential solutions worthy of discussion which could aid in closing this accountability gap. First, is the idea of global pressure making it impossible for the international institutions to ignore or fail to properly respond to human rights abuses. The potential success of this solution can be seen in the Russia-Ukraine conflict. Here, the world's attention was on the conflict and the human rights atrocities occurring in Ukraine, and the call for international action was swift and powerful. While this conflict is still ongoing, the response by international institutions so far has been relatively better compared to the response of the institutions in many cases, such as Syria and China.

The next proposed solution is a restructuring of current institutions to encourage more collaboration between the different institutions. Currently, each international accountability institution functions relatively independently – in relation to the other institutions. However, this lack of cooperation only perpetuates the inadequacies of different institutions because there is no support to help tackle those inadequacies. For example, Hybrid Tribunals commonly struggle with economic and structural deficiencies, whereas the ICC has an extensive budget and resources at its disposal. An alliance between these two institutions would both counteract some of the hybrid tribunals deficiencies as well as the jurisdictional issues common to the ICC.

Another example of inter-institutional cooperation that could provide many benefits would be the added ability for the Human Rights Council to bring a case before the ICC or a hybrid tribunal based upon a state's refusal to fulfill its requirements to the Council. This would allow the Council to have the added "bite" of enforcement, which would substantially increase the institution's ability to carry out its mission of protecting human rights. Additionally, this would give the ICC another means to bring a case, which would help offset the ICC's struggle to gain jurisdiction in uncooperative states. While these serve as just a few examples of potential solutions to the accountability gap, they are a reminder that international justice institutions do have the ability to enforce accountability, but action must be taken to provide the necessary reform.

VIII. CONCLUSION

While human rights abuses are occurring across the world and under all types of regimes – not just authoritarian – this paper focuses on the significant accountability gap that exists in the international justice context specifically in authoritarian regimes. This particular approach was taken to highlight how a lack of domestic accountability can be exacerbated by insufficient international mechanisms. While the institutions addressed cannot be completely discounted, to say they can be legitimately counted on to protect the fundamental human rights of the international community would be naïve. Each international justice institution has its own strengths and weaknesses, and while the collective force is aimed to promote sufficient accountability, the system often falls short.

The people of Syria, China, Russia, and Ukraine can attest to the consequences of that insufficiency, as well as many others around the world. This is a salient issue which has spiked a lot of conversation internationally, especially with the current conflict in Ukraine. Conversations about this issue are essential if there is hope to bring about the necessary reforms to all international justice institutions – not just those mentioned in this paper. Without reform and the building up of the international justice institutions, it is very likely that these egregious human rights violations will continue to occur, unchecked, in powerful authoritarian regimes across the world. As seen with the conflict in Ukraine, international pressure can prove to be an effective mechanism for the pursuance of accountability, but there needs to be strong institutions in place to be able to follow through. As the world continues to change and authoritarian regimes grow more common and more powerful, the international community must step up to protect the human rights of all peoples.