ARTICLES

NOTES & COMMENTS

CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 22 SPRING – SUMMER 2023 NUMBER 2

CONTENTS

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Limiting Fundamental Rights to Only Those Founded Upon Longstanding History and Tradition Undermines the Court's Legitimacy and Disavows Individual Human Dignity

VINCENT J. SAMAR*

ABSTRACT

The Supreme Court's anti-abortion opinion in Dobbs v. Jackson Women's Health Org.*, which overruled* Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey, *on the one hand suggests that the Court may be moving toward eliminating all non-enumerated fundamental rights not deeply rooted in the Nation's longstanding history and tradition. On the other hand, it may suggest only that the Court might be just opening the door to overruling specific non-enumerated rights with which it no longer agrees. Either way, many long-recognized, non-enumerated, human rights, beyond abortion that are essential to individual autonomy and human dignity are now up for grabs. Such rights in the area of privacy law will most likely include not just abortion, but also contraception, interracial marriage, and the Court's more recent recognition of same-sex marriage, and possibly still other precedents, including whether states can criminalize adult consensual same-sex behavior in private. More importantly, the proposed foundation for this Court's potential departure from its past case precedents cannot be justified even by claiming such rights are not deeply rooted in the Nation's*

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history and tradition. As I hope to show in this article, neither from the point of view of looking to this Nation's longstanding history and traditions, if properly understood, nor from the point of view of allowing Equal Protection to aid in identifying forms of discrimination not previously recognized or afforded much attention, can departures from past human rights precedents based in autonomy be justified.

ARTICLE CONTENTS

I. INTRODUCTION

The Supreme Court's 5-4 majority opinion in *Dobbs v. Jackson Women's Health Org.*,[1] which overruled *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] the two main abortion decisions, when treated alongside its previous opinion in *Washington v.*

[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Chief Justice Roberts joined the majority concurring only in the judgment. *Id.* at 2310, 2317 (Roberts, C.J., concurring).

[2] Roe v. Wade, 410 U.S. 113 (1973).

[3] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

Glucksburg[4] gives rise to a serious concern. On the one-hand, it suggests that the Court may be moving toward eliminating all non-enumerated fundamental rights, except for those that are deeply rooted in the Nation's longstanding history and tradition while, on the other hand, it may suggest only that the Court might be just opening the door to overruling specific non-enumerated rights it no longer agrees with by claiming such rights to lack any real foundation in the Nation's history and tradition.[5] Either way, many recognized, non-enumerated human rights beyond abortion that are essential to individual autonomy and human dignity but were not recognized early in the Nation's history and tradition are now in grave jeopardy.

The difference between these two concerns need not reflect any substantial difference in the kind of argument the Court will draw upon when considering other non-enumerated fundamental rights in the future, just how far it may be willing to go. This does not mean that there could not arise other differences for consideration, only that the Alito majority opinion in *Dobbs* would not necessitate the presence of any other factors to overturn previously recognized unenumerated rights nor would it require the Court to consider any other forms of argument in their defense. Either way, this seemingly new direction for the Court will not likely be confined to only rights not previously recognized but, as with abortion, will likely affect other existing rights that, in some cases, have existed for more than fifty years. If this is indeed the new direction for the Court, as would seem likely given a close reading of the majority opinion (as will be explained below), it will most probably lead to overruling many well-recognized past Supreme Court precedents including, but not limited to, in the area of constitutional privacy law, contraception, interracial marriage, and the Court's more recent recognition of same-sex marriage, and possibly still other precedents, including whether states can criminalize adult consensual same-sex behavior in private.

More importantly, the proposed foundation for this Court's potential departure from its precedents cannot be justified even by claiming such rights are not deeply rooted in the Nation's history and tradition. As the article seeks to show below, neither from the point of view of looking to this country's longstanding history and traditions, if properly understood, nor from the point of view of allowing Equal Protection to aide in identifying forms of discrimination not previously recognized or afforded much attention, can departures from past human rights precedents based in autonomy be justified. The article points this out as an urgent call for immediate attention because the *Dobbs* analysis opens the door toward other rights being overruled that many in society rely heavily upon, think of as

[4] Washington v. Glucksberg, 521 U.S. 702, 725 (1997) (holding that physician assisted suicide was never part of this Nation's history and tradition).

[5] This second point I owe to Professor Mark Strasser of Capital University Law School.

basic human rights, and have relied on the Court to be their protector. Such an opening of the door should encourage others in the legal community, as well as the political branches, to do whatever they can to afford protection for basic human rights and to limit the impact of the *Dobbs* decision wherever possible. A key element in this process will be for the courts to reconsider what "deeply rooted in the Nation's history and tradition" means when discussing human rights cases.

Section II discusses how to read *Dobbs v. Jackson Women's Health*. Section III then discusses how justifications of non-enumerated fundamental constitutional rights came about. Section IV provides an argument for the constitutional right to privacy as a non-enumerated fundamental autonomy right. Section V continues the process of establishing fundamental rights by showing the relevance of the Ninth and Tenth Amendments. Section VI shows why leaving questions involving fundamental rights solely to the political branches is inadequate. Section VII discusses the roles of Due Process and Equal Protection in establishing fundamental rights. Section VIII addresses how the right to an abortion fits into the analysis. Finally, Section IX shows why the Court's seemingly narrow focus on history and tradition undermines its own legitimacy and disavows individual human dignity. A brief conclusion will then follow.

II. HOW TO READ *DOBBS V. JACKSON WOMEN'S HEALTH*

In this section the article takes up the Court's majority opinion in *Dobbs v. Jackson Women's Health*, written by Justice Alito, along with the concurring opinions of Justices Thomas, Kavanaugh, and Chief Justice Roberts concurring only in the judgment.[6] The article also points to various concerns regarding how broad the Alito opinion is, as expressed by the dissenting Justices Breyer, Kagan, and Sotomayor.

It is perhaps not surprising that Justice Alito's majority opinion opens by noting as a general principle that "[c]onstitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our fundamental document means . . . ."[7] The view represents a positive formulation of judicial philosophy in which decisions begin from some well-recognized legal text.[8] Justice Alito goes on to say, "[t]he Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must

[6] *Dobbs*, 142 S. Ct. 2228 (2022).

[7] *Id.* at 2244–45 (internal citations omitted).

[8] "Treating law as a system of rules whose validity is based on there having been enacted by a sovereign or derived from an authoritative source, rather than from any considerations of morality, natural law, etc." *Positivism*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/148321?redirectedFrom=positivism#eid (last visited May 27, 2022).

show that the right is somehow implicit in the constitutional text."[9] The Court is willing to at least acknowledge that constitutional law does provide some space where a connection might be made between what the case is about and the constitutional text that is to be the basis for any decision. Unfortunately, the only linkage Justice Alito's opinion seems to recognize, namely, that the right be "deeply rooted in the Nation's history and tradition," is one that would show the liberty was sought to be protected at the time the founding documents were ratified.[10] It would not include how the Fourteenth Amendment's precepts of liberty and equality have since come to be understood in the contemporary period. This will become evident shortly. Perhaps it is not surprising that Justice Alito, who views himself as a "practical originalist,"[11] should go on to state that "[i]n deciding whether [a non-enumerated] right" is implicit in the Constitution, "the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[12] "Deeply rooted" is the giveaway of how Justice Alito is analyzing the rights involved.

The idea of looking to what rights or principles are deeply rooted in this Nation's history and tradition can be traced back to Justice Harlan's dissent in *Poe v. Ullman*.[13] This was a case in which the United States Supreme Court held that plaintiffs lacked standing to challenge a Connecticut law prohibiting the use of contraceptives and physicians giving advice on their use under the liberty protection of the Fourteenth Amendment's Due Process Clause.[14] In his dissent in that case, Justice Harlan expresses a much broader understanding of "deeply rooted" than the Court there was willing to adopt and certainly a much broader understanding than what Justice Alito expresses. This is made clear where Harlan writes:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The

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[9] *Dobbs*, 142 S. Ct. at 2245.

[10] "*Viewing Justice Alito, in important part, as a traditionalist protecting majorities-turned-minorities in a period of cultural transition can account for his responses to a number of controversial cases."* Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L. J. FORUM 171 (2017) (emphasis added).

[11] "I start out with originalism," he says.

> I do think the Constitution means something and that that meaning does not change. Some of its provisions are broadly worded. Take the Fourth Amendment. We have to decide whether something is a reasonable search or seizure. That's really all the text of the Constitution tells us. We can look at what was understood to be reasonable at the time of the adoption of the Fourth Amendment. But when you have to apply that to things like a GPS that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.

Matthew Walther, *Sam Alito: A Civil Man*, THE AM. SPECTATOR (Apr. 21, 2014), https://spectator.org/58731_sam-alito-civil-man/.

[12] *Dobbs*, 142 S. Ct. at 2246.

[13] Poe v. Ullman, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting).

[14] *Id.* at 508.

> best that can be said is that, through the course of this Court's decisions, it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance by this country having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.[15]

The idea that one might begin by looking to history and tradition makes sense insofar as it provides an initial basis for believing that unelected justices should not be just imposing their own idiosyncratic idea of what the law should be onto society but rather trying to determine what the constitutional order (original document, Bill of Rights, and Fourteenth Amendment) requires. Such an interpretation of the constitutional order need neither be liberal nor conservative; it would just be one possibility for filling in the gaps the Framers of the Constitution left open by way of the language they used.[16] And it would require interpretation as often the language would be written abstractly and not concretely. Where a problem arises is when history and tradition are treated too narrowly to only unlock rights that may have been thought present at the time these documents were adopted.[17]

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[15] *Id.* at 542.

[16] Professor Ronald Dworkin criticizes Justice Scalia's use of "expectation originalism" in his interpretation of the Constitution contrary to his use of semantic originalism when saying how federal statutes should be understood. Dworkin asks,

> Why does the resolute text-reader, dictionary-minder, expectation scorner of the beginning of these lecturers [on federal statutory interpretation] change his mind when he comes to the most fundamental American statute of them all? He offers, in his final pages, an intriguing answer. He sees correctly that if we read the abstract clauses of the Bill of Rights as they were written--if we read them to say what their authors intended them to say rather than to deliver the consequences they expected them to have—then judges must read these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they *really* require. That does not mean ignoring precedent or textual or historical integrity or morphing the Constitution. It means, on the contrary, enforcing it in accordance with its text, in the only way this can be done.

RONALD DWORKIN, *COMMENT* ON ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 126 (1997). For an alternative approach not inconsistent with Dworkin's that provides a grounding for many of the rights cited in the Universal Declaration of Human Rights and subsequent Human Rights conventions, as well as our own American Bill of Rights, *see* Vincent J. Samar, *Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity*, 47 HASTINGS CONST. L. Q. 83, 123–41 (2019).

[17] Traditionally, originalism, as illustrated in Justice Scalia's majority opinion in the *Heller* Second Amendment case, "advises that we consult old dictionaries to ascertain the original meaning of the Constitution." Saul Cornell, *New Originalism: A Constitutional Scam*, DISSENT (May 3, 2011), https://www.dissentmagazine.org/online_articles/new-originalism-a-constitutional-scam. *See also* District of Columbia v. Heller, 554 U.S. 570, 581 (2008). "One problem with this approach is that the earliest American dictionaries were written after the

Here it is important to pay attention to the rhetoric used by Justice Alito versus Justice Harlan. For it contains, borrowing from Aristotle, "no special subject-matter" and therefore will not increase our understanding of "any particular class of things."[18] Instead, what it will do is allow for the dismantling of any past cases involving unenumerated rights with which a current majority of the Court may disagree, provided they are not part of some original understanding of the aforesaid documents with which the current majority agrees. Indeed, the approach opens the door to similar lines of attack in future cases, involving other non-enumerated fundamental rights, including but not limited to the right of married (*Griswold*[19]) and unmarried (*Eisenstadt*[20]) couples to use contraceptives, the right of non-married same-sex adults to engage in intimate sexual relations within the

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Constitution and were not produced according to the rules of modern lexicography . . . . [T]he Founders were themselves deeply divided over the nature of constitutional interpretation," suggesting the need today for a more careful investigation of American history before declaring any single understanding of these earlier documents as historically correct. Cornell, *supra*. Some scholars of the period wanted to interpret the Constitution "according to the rules of ordinary language." *Id.* Others preferred adopting "a formal set of rules gleaned from Anglo-American jurists such as Sir William Blackstone." *Id.* Exactly how to understand the language of the Founding-Era manifested itself in the *Heller* debate over what authority should be assigned the preamble to the Second Amendment, "which declares that the purpose of the Amendment is to protect a well-regulated militia." *Id.* Ought it to govern the language that follows it including the "right of the people to keep and bear Arms[?]" *Heller*, 554 U.S. at 577. Or should we treat the Founders incorporation of the preamble merely as a device only be used to clarify an ambiguity in the text? *Id.* at 577. If the latter, would not the interpretation be inconsistent with "the views of then-Chief Justice John Jay," who was also "one of the coauthors of the *Federalist*." Cornell, *supra*. *See Pre. 2 Historical Background on the Preamble*, CONSTITUTION ANNOTATED, footnoting FEDERALIST Nos. 2–5 (John Jay), https://constitution.congress.gov/browse/essay/pre-1-2/ALDE_00001234/ (last visited Mar. 9 2023). However, beginning with the Ronald Reagan administration, conservative scholars have apparently departed from the old style of originalism and have developed a "new originalism," which according to Cornell appears in Scalia's opinion in *Heller*. Cornell, *supra*. However, Cornell argues that this so-called "new originalism" is based on a "misunderstanding [of] the Founding-era history," which has caused these scholars to miss important matters of historical discussion perhaps to support their own points of view. *Id.* For example, scholars within this tradition often appear like the old "Anti-Federalist opponents of the Constitution" in trying to replace the power of lawyers and judges to say what the Constitution means by what the people would have understood it to mean. *Id.* This apparent trend is exhibited in *Heller* when Scalia cites "Dissent of the Pennsylvania Minority," an Anti-Federalist paper that he uses to argue against treating the preamble's reference to militias as in any way limiting the "peoples' right to keep and bear Arms." *Id.* However, Carroll warns not to be fooled by this seeming bend toward Anti-Federalism. *See id.* New originalists are not born-again Anti-Federalists. This is particularly apparent in new originalism's description of "public meaning" when interpreting the Constitution. John Yoo, a prominent new originalist legal scholar, who helped to frame the Bush administration's novel views on torture, seems to want to expand not lessen the role that lawyers and judges should play in interpreting the Constitution, provided these advocates adopt the agenda of the new originalist conservatives as their own. Cornell, *supra*. All this should provoke concern that originalism, both old and new, is at best an incomplete theory for understanding the Constitution, which up to now has been able to hold together in our ever changing social, economic, and cultural world. *See* Samar, *supra* note 16, at 103–17.

[18] ARISTOTLE, RHETORIC Bk. 1, Ch. 2, line 20.

[19] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[20] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

home (*Lawrence*[21]), and the right to same-sex marriage (*Obergefell*[22]), which the Court points to in *Dobbs* as also not deeply rooted in the Nation's history and tradition,[23] while at the same time as it tries to disavow any present goal to undermine these rights in the future.[24]

This is shown where Justice Alito writes, "*Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned."[25] Nor do his comments toward the end of the majority opinion provide much solace that other fundamental rights would not be similarly disturbed: For example, his reference to *Casey's* recognition that "'[a]bortion is a unique act' because it terminates 'life or potential life'" or when he then goes on to say, "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[26] But if the basis for why the right to abortion is to now be discounted is that it is not found in the Constitution or part of the concern for ordered liberty sought at the time the Constitution, Bill of Rights, and Fourteenth Amendment were adopted, how are any other non-enumerated fundamental rights, which may also have not been present at the time these documents were ratified (including, as will be shown below, most privacy rights), to be thought safe from similar attack in the future?

At least Justice Thomas was more honest in his concurring approval of the Court's opinion in *Dobbs*, when he challenged the whole field of substantive due process rights that go beyond protecting process to "forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided."[27] As he states it, "the Due Process Clause does not secure *any* substantive rights . . . ."[28] All that may hold us in waiting to overturn other so-called fundamental rights is that "no party has asked us to decide 'whether our entire Fourteenth Amendment jurisprudence must be preserved or revised.' . . . For that reason, in future cases, we should reconsider all this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[29] By contrast, Justice Kavanaugh was a bit less circumspect in his concurring opinion, stating rather unconvincingly, that "[o]verruling *Roe* does *not* mean the overruling of those precedents [including *Loving v. Virginia*, the interracial marriage case and *Eisenstadt v. Baird*, recognizing a privacy right for nonmarried couples

[21] *See* Lawrence v. Texas, 539 U.S. 558 (2003).
[22] *See* Obergefell v. Hodges, 576 U.S. 644 (2015).
[23] *Dobbs*, 142 S. Ct. at 2258.
[24] *Id.* at 2280.
[25] *Id.* at 2245.
[26] *Id.* at 2277–78 (alteration in original).
[27] *Id.* at 2301 (Thomas, J., concurring) (alteration in original) (emphasis in original).
[28] *Id.* (emphasis in original).
[29] *Dobbs*, 142 S. Ct. at 2301 (citation omitted).

to use contraceptives], and does not threaten or cast doubt on those precedents."[30]

Quite to the contrary, were one to give Justice Alito's majority opinion, which Justice Kavanaugh joined, the benefit of the doubt and say that the real goal of his opinion was just to challenge the abortion right, one would not only be assuming, without justification, a far more limited argument to be present than the one the majority opinion actually provides, but one would also be blinding themself to statements in the majority opinion such as

> [t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one in which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such rights must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[31]

Or, if that isn't obvious enough to raise concern over the status of other existing fundamental rights being struck down in the future, consider Alito's later remark:

> Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race;[32] the right to marry while in prison;[33] the right to obtain contraceptives;[34] the right to reside with relatives;[35] the right to make decisions about the education of one's children;[36] the right not to be sterilized without consent;[37] the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or substantially similar procedures.[38] Respondents and the Solicitor General also rely on post-*Casey* [cases]

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[30] *Id.* at 2309 (Kavanaugh, J., concurring) (emphasis in original) (citing *Griswold*, 381 U.S. at 479, *Eisenstadt*, 405 U.S. at 438, Loving v. Virginia, 388 U.S. 1 (1967), and *Obergefell*, 576 U.S. at 644).

[31] *Id.* at 2242 (majority opinion) (quoting *Glucksberg*, 521 U.S. at 721).

[32] *Id.* at 2257 (citing *Loving*, 388 U.S. at 1).

[33] *Id.* (citing Turner v. Safley, 482 U.S. 78 (1987)).

[34] *Id.* (citing *Griswold*, 381 U.S. at 479, *Eisenstadt*, 405 U.S. at 438, and Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)).

[35] *Dobbs*, 142 S. Ct. at 2257 (citing Moore v. E. Cleveland, 431 U.S. 494 (1977)).

[36] *Id.* (citing Pierce v. Soc'y Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923)).

[37] *Id.* (citing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)).

[38] *Id.* (citing Winston v. Lee, 470 U.S. 753 (1985), Washington v. Harper, 494 U.S. 210 (1990), and Rochin v. California, 342 U.S. 165 (1952)).

> like *Lawrence v. Texas*[39] and *Obergefell v. Hodges*[40] . . . . None of these rights has any claim to being deeply rooted in history.[41]

Even if it were the case that Alito's majority opinion is somehow only meant to direct attention to certain privacy claims that the majority currently disapproves of and not all constitutional privacy claims, that would be enough to raise a serious political concern as to whose rights the Court has chosen to now disavow. And similarly, whose rights may a different Court with a different membership choose to strike down in the future. For what is at stake in *Dobbs* is the taking away of a right that has been recognized to exist for close to fifty years with little or any reason for doing so. Chief Justice Roberts concurred, but only in the judgment that the state of Mississippi could prohibit abortions after 15 weeks, earlier than the *Roe/Casey* standard of viability, when the fetus would be able to survive outside the womb.[42] This he did because he found the prior *Roe* and *Casey* justifications for viability unpersuasive.[43] Still, even with holding this view, the Chief Justice nevertheless felt that the Court had gone further than necessary in overruling a woman's constitutional right to an abortion, which he saw as an unnecessary break from *stare decisis*; and for that reason, he chose not to join the majority opinion.[44]

Initially, it should be noted that the state of Mississippi had not even sought to overrule *Roe* and *Casey* when it filed for certiorari.[45] Only later, after certiorari was granted to resolve the viability question, did Mississippi then ask the Court to overrule *Roe* and *Casey* in its court brief,[46] perhaps sensing a desire by a majority of the Court's conservatives to now overrule *Roe* and *Casey*. This latter point is implied in the dissent authored by Justices Breyer, Kagan and Sotomayor: "[a]fter assessing the traditional *stare decisis* factors," including workability, reliance, and any legal or factual changes that may have popped up since *Roe* was decided nineteen years earlier, the *Casey* Court concluded, back in 1992, that *Roe* had been properly decided and is still properly decided under these same factors today.[47] The only thing that had changed is the makeup of the current Court.[48]

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[39] *Id*. (citing *Lawrence*, 539 U.S. at 558) (striking down a Texas statute that made it a crime for two people of the same sex to engage in adult consensual homosexual behavior as a violation of their liberty interest protected under the Fourteenth Amendment Due Process Clause).

[40] *Id.* (citing *Obergefell*, 576 U.S. at 644) (holding that the fundamental right to marry under the Fourteenth Amendment Due Process Clause applies in the same way to same-sex couples).

[41] *Dobbs*, 142 S. Ct. at 2258 (emphasis added).

[42] *Id.* at 2316–17 (Roberts, C. J., concurring).

[43] *Id.* at 2311–12.

[44] *Id.* at 2315–16.

[45] *Id.* at 2313.

[46] Brief for Petitioner at 11-38, Dobbs v. Jackson Women's Health, 142 S. Ct. 2228 (2022), No. 19-13292.

[47] *Dobbs*, 142 S. Ct. at 2334–35 (Breyer, Kagan, and Sotomayor JJ., dissenting).

[48] at 2350.

There comes a point in any analysis where one cannot escape the conclusion that the real motivation at stake is far broader than what may be being officially proclaimed, at least to the extent of opening the door to rights claims the majority no longer appreciates. In the *Dobbs* case, it appears that the real motivation behind the Court's approach is to begin a process of unraveling sequentially fundamental, non-enumerated rights, especially those involving personal autonomy, that the Court has recognized ever since it decided *United States v. Carolene Products*,[49] but which it may no longer agree with. In the now famous footnote four in that case, the Court opened the door to recognizing the existence of non-enumerated fundamental rights involving personal autonomy, including the right of a woman to choose whether to continue a pregnancy.[50] Is the Court now intending to close that door not just on abortion but more broadly to clear out any rights with which the majority disagrees? If that is the majority's position, as the Alito opinion would seem to suggest, then laying the groundwork for doing away with rights not *deeply* rooted in the Nation's history and traditions is exactly the approach one would expect the majority to take in preparation for future decisions. Could it be that the opinion assumes certain other rights the majority might agree with would survive because they would be sufficiently longstanding even if the claims they pose today may never have been previously recognized, or at least not mentioned in the same way?[51] Or could it be that the Court does not want to appear to be doing too much while, at the same time, it lays the groundwork for undercutting other fundamental rights not yet before it? If that is the case, then one should expect future grants of certiorari to include whether a current case poses a challenge to an earlier case the Court no longer finds satisfactory and is just waiting for a chance to overturn it, notwithstanding whether the earlier case may have achieved widespread social acceptance.[52]

III. JUSTIFYING NON-ENUMERATED RIGHTS

In Section IX below, the article will talk more specifically about why limiting fundamental rights to only those founded upon long-standing history and traditions undermines the Court's legitimacy and disavows

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[49] *See* United States v. Carolene Prod., 304 U.S. 144 (1938) (upholding the federal government's power prohibiting filled milk from being shipped in interstate commerce).

[50] *Id.* at 151–52, n.4 ("suggesting the Court would apply a stricter standard of review to laws that on their face violate the Constitution, especially the Bill of Rights; as well as laws that restrict the political process or discriminate against "discrete and insular minorities").

[51] For example, are our prior cases involving contraception really so different from those involving abortion, unless the Court is impliedly determining when a fetus becomes a person?

[52] *See* Laura Santhanam, *Majority of Americans Don't Want Roe Overturned,* PBS NEWS HOUR (May 19, 2022), https://www.pbs.org/newshour/politics/majority-of-americans-dont-want-roe-overturned; *see also* Marina Pitofsky, *America is Changing How it Views Accepting Gay and Lesbian People, New Poll Reveals,* USA TODAY (Feb. 4, 2022), https://www.usatoday.com/story/news/nation/2022/02/02/acceptance-gay-lesbian-gallup-poll/9292788002/.

individual human dignity. Before doing that, however, it is important to see how the Court has sustained non-enumerated constitutional rights by making them part of an interpretative tradition that focuses on the *whole* Constitution, preamble, articles, and amendments, as well as prior Court interpretations as to its overall meaning. Obviously, reasoning by analogy plays an important role in this process, but it plays no more a role than conceptual analysis and normative justifications. The result has been that a document originally ratified in 1788 has been largely sustained for over two hundred and thirty-four years, spanning more than nine generations of American society.[53] Obviously, there has been attached to the document a number of very important amendments, effectively altering some of its earlier assumptions about human dignity and human rights, especially the Reconstruction Amendments that ended slavery,[54] guaranteed the very important human right of equal protection of the laws,[55] added the right of the former slaves to vote,[56] and would come to be understood over time by the Supreme Court to also require state governments to recognize the same rights. Among the latter are those rights contained in the first, second, fourth, fifth, sixth, and eighth amendments of the Bill of Rights that previously had only applied to the federal government.[57] Unfortunately, the guarantee to former slaves of the right to vote would for some number of years be interrupted by Jim Crow laws.[58] Still, the overall number of amendments has been very small compared to the constitutions of other democratic countries.[59] This is in no small part due to the establishment of a federal judicial branch of government under the Constitution of 1788 and the Court's willingness, by way of judicial review, to slowly come to ensure, when a case or controversy arises, that the laws in question do not undermine the basic constitutional protections of all people.[60] From this it follows that a complete review of the history and traditions set by and since the ratification of the original Constitution, along with its various amendments, should be reviewed to ensure, especially where a non-enumerated fundamental right is at stake, that the Court has not failed to afford adequate

[53] The span of a generation is frequently described as 20–30 years. For purposes here, I am treating it as the average, 25 years. *See Generation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Generation (last visited May 18, 2022).

[54] U.S. CONST. amend. XIII.

[55] U.S. CONST. amend. XIV.

[56] U.S. CONST. amend. XV. (The right to vote would eventually be extended to women (U.S. CONST. amend. XIX) and citizens eighteen years old and older (U.S. CONST. amend. XXVI)).

[57] *Incorporation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited June 25, 2022).

[58] *Jim Crow Laws*, HISTORY (Jan. 11, 2023), https://www.history.com/topics/early-20th-century-us/jim-crow-laws.

[59] Kim Lane Scheppele, *Perspectives on the Constitution: Constitutions Around the World*, NAT'L CONST. CTR., https://constitutioncenter.org/learn/educational-resources/historical-documents/perspectives-on-the-constitution-constitutions-around-the-world (last visited May 24, 2022).

[60] *See id.*

attention to the individuals involved but rather expanded that protection to ensure that everyone's rights are truly being protected.[61]

Now there will be those who say that what the article has just suggested is a perverted way to consider history and tradition. That what one should be doing is asking when the Constitution and its various amendments were adopted, what rights did the country expect those documents to encompass? But this would confuse a piece of constitutional history with the whole of its history, a whole that includes creation of a Supreme Court in which the "judicial power shall extend to all Cases in Law and Equity, arising under this Constitution . . . ."[62] Furthermore, it would undermine the Article VI provision, which provides that "[t]his Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land."[63] Justice Alito's majority opinion would undercut several explicit provisions that support a wide-ranging authority assigned to the Supreme Court to ensure this constitutional provision is being met. It would undercut explicit provisions such as the Ninth Amendment, which provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people,"[64] by simply leaving any such further rights to be determined by the political branches. It would also leave out any responsibility to ensure that the government created under the Constitution actually conforms to the values expressed in the Preamble, since many of the Preamble phrases describe not specific rights or duties but the reason why the government under the Constitution was created at all.

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[65]

Unless there is reasonable certainty, such as would be within the authority of a Supreme Court to determine, that following these provisions would somehow undermine the values they proclaim, the Preamble should be considered not merely as an aspiration but as setting forth the legitimate boundary of governmental authority.

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[61] An example that operates in the opposite direction was the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 176 (1986), where the Court held constitutional a state law that criminalized adult, consensual same-sex sexual activities performed in private. That case would survive only seventeen years before being overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), another case criminalizing adult consensual same-sex behavior in private under the Due Process Clause of the Fourteenth Amendment.

[62] U.S. CONST. art III.

[63] U.S. CONST. art VI.

[64] U.S. CONST. amend. IX.

[65] U.S. CONST. pmbl.

Additionally, Justice Alito's opinion makes no room for the Framers' use of abstract language in the document, which operates as an opening to recognize changes in the social/political morality of the society that are likely to evolve, changes they themselves had experienced from previous periods.[66] Let alone does his majority opinion afford attention to the fact that many constitutional provisions, like Due Process and Equal Protection, seem to be directed toward limiting wrongful actions by the political branches where the citizens are likely to be either ill-equipped or politically powerless to prevent.[67] Clearly, the Framers were concerned against creating a government that would push them back to the tyranny they faced under the British crown.[68] And to prevent this part of their own history from repeating itself, perhaps in new ways in the future, the Framers established a Ninth Amendment to ensure the recognition of further rights as may become apparent.[69] All this too must be part of the history and tradition the Court is supposed to be considering when asked to engage in non-enumerated rights analysis. The Constitution is not meant to be a set of unbounded papers, each with its own select writings, with little to no connection between them. It is meant, as the Preamble makes clear, to be a charter of rightful government, setting forth what are its various parts and purposes, as seen at the time of its adoption, and how these parts might be best understood to operate together to meet the needs of a changing world.[70] Much the same can be said for the Amendments, which do not undermine the Preamble, but rather further other changes thought to be necessary for the Constitution to properly function with the values of the Preamble.

This Preamble idea is often given little attention.[71] Yet, one could venture that it is one of the most important parts of the Constitution, as it clearly lays out the purposes for the document. In this sense, the Preamble can be thought of as providing a set of higher-ordered values shaping the

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[66] For example, Anthony F. Granucci has argued that in the Framers' Day punishments under English Law that were thought to be cruel and unusual were those that were excessive in proportion to the crime, torture for example. *See* Anthony F. Granucci, *Nor Cruel or Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969). So, if the Framers wanted to limit certain kinds of punishments, they could have chosen more concrete language to specify the kind of punishments to be prohibited.

See Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 (last visited May 19, 2022).

[68] *See* Hans A von Spakovsky, *Constitution at 230: Separation of Powers Prevents a Democratic Tyranny*, THE HERITAGE FOUND. (Sept. 12, 2017), https://www.heritage.org/the-constitution/commentary/constitution-230-separation-powers-prevents-democratic-tyranny. *See also* THE FEDERALIST NO. 51 (James Madison or Alexander Hamilton).

[69] *Amdt9.2 Historical Background on the Ninth Amendment*, LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/constitution-conan/amendment-9/historical-background-on-the-ninth-amendment (last visited May 15, 2023).

[70] *See* U.S. CONST. pmbl.

[71] *U.S. Constitution: Preamble*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/us (last visited June 10, 2022).

more specific provisions set out in the articles and amendments. If that is true, and there is no reason to think it is not, serious harm could arise onto the American experiment if the document is merely treated as a collection of disassociated articles and amendments, without paying attention to how the Preamble operates to bring them together.

There is a serious misalignment in the usual debates between expectation originalists who would interpret the Constitution in terms of only what the Framers expected the document would do and those who consider it a living document open to almost any value-laden arguments, on a par with the kinds of arguments that become part of the common law.[72] Both approaches are inadequate; the first by affording too little power to the government; the second by offering too much. The Court should adopt a new approach to constitutional interpretation, a human rights approach.[73] This approach considers what had been recognized in the past while, at the same time, adapting the past to what we find to be our best understanding of political morality in the present.[74] Making use of this approach will likely afford society some new protections and governmental agencies, as occurred during the New Deal, and as may continue to be necessary to address matters the Framers could never have foreseen. By the same token, it won't be open to just any value-laden tendency that may gain momentary notoriety. This is not sophistry. It is not allowing any smashing together of values no matter how inconsistent they might appear with what the original document was trying to achieve. All it is doing is recognizing that the original document was meant to be a template for everything that comes after, not a barrier to

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[72] "Originalism" in the form being discussed here is of "recent vintage hatched in the network of conservative organizations that served as the intellectual incubators of the Reagan Revolution. Embraced by Robert Bork, the failed Supreme Court nominee, and Antonin Scalia who ascended to the Supreme Court . . . in 1986, the theory held that the only legitimate way to interpret the Constitution's words was according to their original meaning. Scalia was scathing about the notion that constitutional meaning might evolve as society arrived at new understanding of concepts like equality and liberty." LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT, xxvi (2021). *Contra* DAVID A. STRAUSS, THE LIVING CONSTITUTION 18, 21–23, 60 (2010), who notes "the differences between the framers' world and ours, and the difficulty of translating their views into our world," along with what to do "when circumstances have changed," and "[w]hy should we be required to follow decisions made hundreds of years ago by people who are no longer alive?"

[73] *See* Samar, *supra* note 16.

[74] Other scholars have similarly argued for the need not to confine substantive due process only to past understandings but, at the same time, not to just throughout the past without considering whether it still offers insights worth considering. *See, e.g.*, Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L. J. 535, 535 (2012) (arguing "that tradition does not deserve a place in substantive due process analysis simply because it represents a fixed truth from some distant past, nor should tradition be entirely rejected as a source of substantive due process rights simply because of its connection to the past"); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006) (arguing "that, on balance, the most defensible approach is the theory of evolving national values," after reviewing three competing theories of substantive due process decision making: historical tradition, reasoned judgment, and evolving national values).

the inclusion of new understandings to the nation's survival. This is especially true when the very values the original document set out to promote need adaption to create a government that truly is "of the people, by the people, and for the people."[75]

One of the typical kinds of arguments made in support of originalism, and, by extension, why courts should look to past history and traditions is that judges aren't elected; therefore, they should not be in a position where they might impose their personal views about law and morality onto the people.[76] Certainly it is true that federal judges and Supreme Court justices are not elected; they are appointed by the President with advice and consent from the Senate.[77] And if judges got into the habit of imposing their own personal beliefs on the people whom they are supposed to serve, they can be criticized. But judges are not like legislators either, who can choose how to vote on a bill for almost any reason, personal or political, so long as it is not part of a bribe.[78] The protection against legislators acting for their own purposes when not illegal is the next election.[79] Federal judges, by contrast, have life tenure and can only be removed by impeachment for treason, bribery or other high crimes and misdemeanors.[80] Additionally, federal judges are constitutionally barred from just making up a case to impose any personal idiosyncrasies they might have onto the public. The Court has interpreted Article III, Section 2 of the Constitution to disallow advisory opinions as are permitted by some state supreme courts of their state constitution and to require that the parties to any case shall have standing.[81] This latter element requires that the plaintiff be able to show before any legal action can be taken that he or she will suffer some "injury in fact," "which is (a) concrete and particularized and (b) actual or imminent."[82] Article III standing also requires "a causal connection between the injury and the conduct brought before the court," and the injury must be likely, not speculative.[83] Together these limitations on the federal courts, including the Supreme Court, prevent judges and justices from being able to too easily challenge a past case they may no longer agree with.

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[75] Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

[76] Ian Millhiser, *Originalism, Amy Coney Barrett's Approach to the Constitution, Explained*, VOX (Oct. 12, 2020), https://www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court.

[77] U.S. CONST. art. II, § 2, cl. 2.

[78] *See* Paul Stark, *The Difference Between Legislating and Judging--and Why it Matters for the Right to Life*, MINN. CITIZENS CONCERNED LIFE (Feb. 2, 2017) (reviewing a speech by then Judge Neil Gorsuch following the death of Justice Antonin Scalia), https://www.mccl.org/post/2017/02/02/the-difference-between-legislating-and-judging-and-why-it-matters-for-the-right-to-life.

[79] *Id.*

[80] United States v. Claiborne, 727 F.2d 842, 845 (9th Cir. 1984), citing U.S. CONST. art. 1I, § 4.

[81] *Case or Controversy Clause*, WIKIPEDIA, https://en.wikipedia.org/wiki/Case_or_Controversy_Clause (last visited May 19, 2022).

[82] *Standing*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/standing (last visited May 19, 2022).

[83] *Id.*

Additionally, what other factor controls federal judges and probably most state judges when deciding a case is the need to present well-reasoned opinions for their judgments.[84] These opinions form the intellectual justification for their decisions. If the opinions are controversial because the opinion appears insufficiently supported by reasoned arguments, other judges may dissent, lawyers will present new cases challenging the opinion, and law professors will write articles challenging the opinion.[85] Justice Alito admits this when he notes "[o]ne prominent scholar wrote that he 'would vote for a statute very much like the one the Court end[ed] up drafting' [in *Roe*] if he were 'a legislator . . . .'"[86] Alito's point being that this would then be a matter for a legislature not a court. But is it fair to say *Roe* was not constitutional law just because this scholar would have preferred a legislature to have made the determination of whether women should have a right to terminate a pregnancy? What if, for political reasons, the legislature is unable to afford such a right? Should such a personal decision be just a matter solely of legislative determination, especially when most legislators are men?[87] Justices Breyer, Kagan, and Sotomayor in their dissent take note of the fact that:

> we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within "the reach of majorities and [government] officials. We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices or chart their own futures. Or at least we did once."[88]

Nevertheless, it is not unreasonable to be concerned that unelected justices might impose their own idiosyncratic views on the population. Nor is it unreasonable to set out interpretative guidelines for making decisions. What is unreasonable is to blindly accept limitations on judicial authority that do not in fact protect the Constitution's broad purposes out of fear that some might mishandle that authority or that a prior decision might be wrong simply because some in the public do not like it and the right identified is not specifically mentioned in the Constitution, even though it might be

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[84] Michael C. Dorf and Orin Kerr, *Criticizing the Court: How Opinionated Should Opinions Be?* 105 JUDICATURE 3, 84 (2021).

[85] *See* RONALD DWORKIN, LAW'S EMPIRE 254–58 (1986) (discussing how legal reasoning should operate).

[86] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 926 (1973)).

[87] Nicole Gaudiano et al., *Behind a Looming Wave of State Abortion Bans, There Are a Lot of Men*, BUS. INSIDER (June 24, 2022), https://www.businessinsider.com/male-lawmakers-drove-trigger-law-abortion-bans-for-women-chart-2022-5.

[88] *Dobbs*, 142 S. Ct. at 2320 (Breyer, Kagan, and Sotomayor JJ., dissenting).

widely supported or of unique importance to the group represented. All such limitations do is ensure that no constitutional change will ever come forth, except by way of amendments, which, because of the difficult process necessary to establish such amendments, [89] is likely to leave unaddressed significant changes needed to support the Preamble's purpose to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ."[90]

IV. JUSTIFYING A RIGHT TO PRIVACY AS A NON-ENUMERATED CONSTITUTIONAL RIGHT

In 1965, following their arrest and conviction after opening a birth control clinic, Estelle Griswold, head of Planned Parenthood in Connecticut, and C. Lee Buxton, a gynecologist, joined in a case, *Griswold v. Connecticut*, challenging Connecticut's statute prohibiting the sale of contraceptives to married persons and physicians from advising on their use.[91] (It will be recalled from earlier that in *Poe v. Ullman* the Court dismissed a similar case, but there it was only a threatened application of the Connecticut law, not its actual application as in the *Griswold* case.) In a 6-3 decision, finding the statute to be unconstitutional, the Supreme Court for the first time advanced the thesis that what was violated was a constitutional privacy right of married persons to use contraceptives and physician to advise on the use.[92] Going forward, this new constitutional right to privacy would soon be extended to protect unmarried persons[93] and minors.[94] What is significant is how the Court attempted to justify its newly found recognition of this non-enumerated right. As it turned out, among the six justices in the majority who supported the right, there were not six in agreement as to where the right was located in the constitutional text. A plurality of three justices, led by Justice Douglas, believed the right might be located in the penumbras surrounding the First, Third, Fourth, Fifth, and Ninth Amendments of the Bill of Rights.[95] Justice Goldberg, in a separate concurring opinion, believed it could be found in the Ninth Amendment's reservation of rights "retained by the people."[96] Separately, Justice Harlan believed the right be "implicit in the concept of ordered liberty" protected by the Due Process Clause of the Fourteenth Amendment.[97] As it turned out, the question of where the right to privacy was located was not finally decided until the Court issued its abortion opinion in *Roe v. Wade*, holding that a

[89] U.S. CONST. art. V.
[90] U.S. CONST. pmbl.
[91] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
[92] 381 U.S. at 485–86.
[93] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
[94] *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).
[95] *Griswold*, 381 U.S. at 484.
[96] *Id.* at 499 (Goldberg, J., concurring).
[97] *Id.* at 500 (Harlan, J., concurring).

woman had a constitutional privacy right to choose whether to continue a pregnancy before the beginning of the third trimester.[98] In that case, the Court finally held that the right to privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action as we feel it is . . . ."[99]

The dissenters in *Griswold*, Justices Black and Stewart, argued that because no provision of the Constitution expressly mentions a general right to privacy, no such constitutional right exists.[100] Even the Ninth Amendment could not give rise to such a right, according to these justices, since that amendment was only meant to afford assurance that the federal government would be one of limited powers.[101] Whatever one may think about the Connecticut law, whether it is silly or not, these Justices did not believe it to be unconstitutional.[102] The dissent's position here is reminiscent of a position that would be later adopted by Supreme Court nominee, Robert Bork, whose nomination would be rejected by the U.S. Senate, at least in part, because of his widespread rejection of any individualistic centered non-enumerated, fundamental rights, like the right to privacy.[103] Interestingly, it would be in response to fear of an overarching government that some of these Justices would fight against the one thing that might have limited excessive government, at least with regard to interferences in the private lives of individuals.[104] Indeed, it is worth noting a statement written by Justice Goldberg in his concurring opinion in *Griswold*:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of

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[98] Roe v. Wade, 410 U.S. 113 (1973).

[99] *Id.* at 153.

[100] *Griswold*, 381 U.S. at 508 (Black, J., dissenting).

[101] *Id.* at 529–30 (Stewart, J., dissenting).

[102] *Id.* at 530–31 (Stewart, J., dissenting).

[103] ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 103 (1996) ("Radical individualism is the only explanation for the Supreme Court's creation, out of thin air, of a general and undefined right of privacy. The Court used the invented right, allegedly to protect the sanctity of the marital bedroom . . . . But marital privacy was shortly transformed into individual autonomy when the Court invalidated a Massachusetts law restricting access to contraceptives by single persons."). *Id.* at 103–04 (Bork was highly critical of the Supreme Court decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and of those justices who dissented in *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986)). *But see* DWORKIN, *supra* note 13, at 126–27 ("Justices whose methods seem closest to the moral reading of the Constitution [as opposed to only an Originalist view] have been champions, not enemies, of individual rights, and, as the political defeat of Robert Bork's nomination taught us, the people seem content not only with the moral reading but with its individualistic implications.").

[104] Both Justices Black and Stewart argued that the Ninth Amendment was intended to limit the powers of the federal government. *Griswold*, 381 U.S. at 520 (1965) (Black, J., dissenting); *id.* at 529–30 (Stewart, J., dissenting).

> such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" . . . "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." . . . I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live."[105]

Still, notwithstanding Justice Goldberg and the five other Justices who found a right to privacy of married persons to use contraceptives and physicians to advise on their use protected by the Constitution, Justice Alito in his majority opinion in *Dobbs* would argue: "[n]one of these rights has any claim to being deeply rooted in history."[106] My past work in this area presents a means for recognizing a non-enumerated fundamental constitutional right to privacy to be brought about by a careful analysis of what values really are deeply rooted in this Nation's history and traditions.

In the United States, the right to privacy had its initial formulation in three separate areas of the law. The oldest involved the Fourth Amendment's protection against unreasonable searches. The pertinent case is *Katz v. United States*.[107] That case involved a government surveillance through attachment of a listening device to a public phone booth to gain evidence of illegal gambling. The Court held that placement of a listening device on a public phone booth by law enforcement constituted a police search without a warrant, which violated the Fourth Amendment to the U.S. Constitution.[108] Moreover, Justice Harlan, in his concurring opinion, wrote that where "a person has a constitutionally protected reasonable expectation of privacy . . . electronic as well as physical intrusion into [that space] may constitute a violation of the Fourth Amendment."[109]

The next area of the law where privacy protections came into effect was the tort area and specifically concerned matters of seclusion and solitude,[110] being placed in a false light,[111] having embarrassing facts revealed,[112] and

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[105] *Id.* at 493–94 (Goldberg, J., concurring) (citations omitted).

[106] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022).

[107] Katz v. United States, 389 U.S. 347 (1967).

[108] *Id.* at 351.

[109] *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

[110] *See* Breard v Alexandria, 341 U.S. 622 (1951) (upholding a municipality's ordinance banning solicitations at private residents).

[111] Lord Byron v. Johnson, 2 Mer. 29, 35 Eng. Rep. 851 (1816) (finding that an alleged poem attributed to Lord Byron was so bad that even in a stupor, he could not have written it).

[112] Melvin v. Reid, 297 P. 91 (1931) (allowing a cause of action to be brought against the makers of a movie involving a former prostitute who, after being acquitted at a murder trial, had moved to a different part of the country).

commercial exploitation.[113] This area gained particular attention following many salacious publications in news media involving private persons at the turn of the nineteenth into the twentieth centuries leading to the publication by Samuel Warren and Louis Brandeis of the famous article, *The Right to Privacy* in the Harvard Law Review in which they argued for the existence of a tort right to privacy.[114]

Finally, the last area was the set of Supreme Court decisions beginning with *Griswold v. Connecticut* through *Roe v. Wade* involving intimate decisions. That set presented a different kind of limitation on government action. Now it was not whether evidence gathered by law enforcement in an illegal search could be introduced in a court of law, but whether government could restrict certain types of personal choices made by individuals. With the idea that privacy was beginning to take hold in each of these three areas, the legal community began to ask whether the cases were sufficiently alike such that they could all be referred to as privacy cases, as well as how a right to privacy, especially at the constitutional level, might be more definitely justified, and how conflicts of rights could be resolved.[115]

To answer these questions, first find a common denominator to the conceptual question: on what basis are the courts justified in holding any of the above types of cases as falling under the rubric of privacy? The question arises because on first reading it seems like very different types of privacy claims are involved. In the Fourth Amendment area (which, of course, is part of the Constitution) and what is sometimes just referred to as constitutional privacy both represent claims against the government, although not in the same way, since the Fourth Amendment is more about the police power being regulated, not what kinds of legislation can be enacted; whereas the tort area concerns claims against other people and would not usually involve claims brought against the government. Additionally, the Fourth Amendment and torts area focus on information and what can be learned; whereas the constitutional area focuses on actions what can be done. Still, what seems common among all these different claims is first, that they are all claims to negative freedom in the sense of the self to be let alone.[116] And second, they are self-regarding claims in that no other person's basic interest is involved.[117] "Basic" here is added to avoid overly broad views about interests, which would undermine any discussion about privacy from ever being initiated.

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[113] *See, e.g.,* Stern v. Delphi, 626 N.Y.S. 2d 694 (1995).

[114] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see* WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).

[115] VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION 47–49 (1991).

[116] *Id.* at 65.

[117] *Id.*

Using these two common characteristics of privacy cases, the following definition of a private act can be set out:

> *An action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interests of the actor and not on the interests of the specified class of actors.*[118]

Notice that the definition acknowledges the relevance of group interests.[119] Notice also that it focuses on private acts as opposed to information or states of affairs. This is because privacy of information or states of affairs can be shown to be in furtherance of the possibility of private acts, even though historically the Fourth Amendment and tort areas of the law preceded the constitutional area, nevertheless there is a sense in which private acts are logically prior to private information and states of affairs (to be explained below).[120] Two additional phrases relevant here to make this definition meaningful are "in the first instance" and "basic interests."

To avoid vagueness in allowing any act to be so constructed as to avoid a privacy conflict "in the first instance" means that the *mere* description of the act without the inclusion of any additional facts or causal theories does not give rise to a conflict.[121] And similarly, to avoid overly broad definitions of interest, the locution "basic interests" identifies only those interests that do not already contain conceptions about facts or causal theories.[122] Thus, a teacher testifying before a city council in favor of a human rights ordinance proscribing sexual orientation discrimination is asserting a privacy interest in the act itself, not about what is being spoken, but just about the act sought to be protected.[123] Whereas, the Supreme Court's decision in *Roe v. Wade* that acknowledged a woman's privacy interest to continue a pregnancy presupposed, what Justice Blackmun took pains to acknowledge, that the law had never before treated the fetus as a person, thereby making the interest in the first instance solely about the woman.[124]

From this definition of a private act, a second, corollary definition, can be ascertained that recognizes the relevance to individual psychology and personal behavior of what other people can learn about one's private actions. This corollary definition provides:

> *A state of affairs is private with respect to a group of other actors if and only if there is a convention, recognized by the members of the group, that defines, protects, preserves, or*

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[118] *Id.* at 68.
[119] *Id.* at 68–69.
[120] *Id.* at 75.
[121] SAMAR, *supra* note 115, at 66–67.
[122] *Id.* at 67.
[123] *Id.* at 68–69.
[124] *Id.* at 69; *see* Roe v. Wade, 410 U.S. 113, 151; *see also* Vincent J. Samar, *Personhood Under the Fourteenth Amendment,* 101 MARQ. L. REV. 287, 302–10, 317–29 (2017).

> *guards that state of affairs for the performance of private acts.*[125]

Examples of societal conventions recognized for the selective disclosure of information include, but are not limited to, closing shutters to one's home or apartment, labeling a space as private, restricting access to a social media or other online account, attaching a label "Confidential" to an envelope or file being mailed or transmitted, locking up one's personal papers; restricting access to one's bank account, or even posting a "Do Not Disturb" sign on one's hotel room.[126] Each of these various conventions, and there are many more, support performance of various acts deemed private, including the making of intimate decisions. All of these bits of information and states of affairs are private too, because the acts they support might not have been undertaken absent their protection.[127]

Having thus answered how privacy is defined, we can now turn to how a right to privacy might be justified. Justice Alito makes a serious error when he references the Solicitor General's brief that relies "on post-*Casey* decisions like *Lawrence v. Texas* . . . and *Obergefell v. Hodges*" in order "to justify abortion through appeals to a broader right to autonomy," and then states that "[n]one of these rights has any claim to being deeply rooted in history."[128] First, the fear that Justice Alito asserts is that such attempts to focus on autonomy, "at a high level of generality, could somehow license fundamental rights to illicit drug use, prostitution, and the like."[129] Yet, nowhere does he offer what this so-called "high level of generality" would consist of, let alone how it would operate to achieve the results he expresses. Fears should not be based just on personal whims but on actual harms caused to oneself or others. Additionally, if rights are limited to only those that were recognized at the time of the adoption of the Constitution or any of its

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[125] SAMAR, *supra* note 115, at 73.

[126] Stanley Benn points out:

> "Private" used in this second, immunity-claiming is both norm-dependent and norm-invoking. It is norm-dependent because *private affairs* and *private rooms* cannot be identified without some reference to norms. So any definition of the concept "private affairs" must presuppose the existence of *some* norms restricting unlicensed observation, reporting, or entry, even though no norm in particular is necessary to the concept. It is norm-invoking in that one need say no more than "This is a private matter" to claim that anyone not invited to concern himself with it ought to stay out of it. That Is why the normative implications of "Private" on a letter or a notice board do not need to be spelled out.

Stanley I. Benn, *Privacy, Freedom and Respect for Persons, in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 223–24 (Ferdinand D. Schoeman ed., 1984).

[127] The Fourth Amendment requirement states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. art. IV. It is also where much of the tort area of privacy law allowing individual lawsuits for intrusions into one's private affairs or disclosures of personal information is located.

[128] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).

[129] *Id.* at 2258.

amendments, there would be no non-enumerated rights for presumably they all would have been set forth when the Constitution and its amendments were adopted. But that is not the way the Constitution works, nor does it explain how it came to be that our Constitution should continue to exist as "the oldest written national framework of government in the world."[130] If Alito's view expressed how our Constitution really worked there would have been no need for creation of the Ninth and Tenth Amendments in the Bill of Rights.[131]

V. THE NINTH AND TENTH AMENDMENTS

Some conservative scholars have argued that the Ninth and Tenth Amendments were meant to only be a reminder that the federal government was a government of limited powers confined to operate no further than the powers specifically assigned to it by the Constitution.[132] Obviously, if this were true, then the preamble to the Bill of Rights already serves that purpose and these amendments would not have been necessary.[133] Now, the Ninth Amendment does not mention a specific right. Rather, it affirms that there are rights beyond those specifically enumerated in the Constitution so as not to limit the rights that may exist to only those specifically identified at the time the Constitution was adopted. Still, such rights, under the Ninth Amendment are stated to be held by the people just as there are non-enumerated powers under the Tenth Amendment, such as "running elections, creating [most] marriage laws, operating schools," held by the

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[130] Steven Mintz, *Historical Context: The Survival of the U.S. Constitution*, GILDER LEHRMAN INST. AM. HIST., https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-survival-us-constitution (last visited May 26, 2022):

> At the end of the Constitutional Convention, George Washington said, "I do not expect the Constitution to last for more than 20 years." Today, the United States has the oldest written constitution in the world. Why has the Constitution survived? The framers of the Constitution established the broad structure of government but also left the system flexible enough to adapt to changing conditions. A document of less than 6,000 words, the Constitution is not overly detailed. Over the years, Congresses, presidents, and the courts have reinterpreted the document to meet the needs of the moment.

[131] The Ninth Amendment states: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment says, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[132] *See* Gary Lawson & Robert Schapiro, *The Tenth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-x/interps/129 (last visited May 22, 2022).

[133] The Preamble to the Bill of Rights states:

> The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: and as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

U.S. CONST. pmbl.

states.[134] What exactly are these rights and powers is left to the Court to decide as part of its limited duty to only resolve Article III cases and controversies that come before it.[135] But that there are such non-enumerated rights seems pretty obvious, given the Bill of Rights Preamble, since there would be no other reason for the Ninth Amendment to exist, let alone exist as the second to last amendment of the Bill of Rights guaranteeing individual rights.

Additionally, Justice Alito's argument totally ignores the fact that autonomy rights are central to rights deeply part of this nation's history. The adoption of the Constitution in 1788 was itself premised on an agreement that, as the first order of business for the new Congress, a Bill of Rights would be proposed and sent to the states for ratification.[136] This compromise came about to resolve a serious concern raised by some states that the Constitution's creation of a strong central government over the previous, very weak, national congress that existed under the Articles of Confederation could possibly lead to undermining individual and state liberties.[137] Hence, as a compromise for adopting the federal Constitution, the Bill of Rights was to be proposed in the first Congress and after ratification by the states, according to the provisions of Article VII of the Constitution, would become the first ten amendments to the U.S. Constitution.

These aspects of Justice Alito's majority opinion are worth pointing out because the justification for a right to privacy is easily grounded in autonomy, as a value that has long been a part of the American ethos. Autonomy means self-rule.[138] From the very beginning of its history,

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[134] *The Tenth Amendment – Reserving Power for the States*, FIND LAW, JULY 27, 2022, https://constitution.findlaw.com/amendment10.html (last visited May 15, 2023).

[135] This point has a bearing on why the federal courts should not be in the business of affording advisory opinions and only in the business of resolving cases that meet the Article III standing requirement. Since to do otherwise could too easily afford the federal courts the power to limit rights that should be held by the people or expand the powers of the federal government, except where there are good interpretative reasons for doing so.

[136] *Creating the United States: Creating the Bill of Rights*, THE LIBR. CONG., https://www.loc.gov/exhibits/creating-the-united-states/creating-the-bill-of-rights.html (last visited May 20, 2022). At the time of the Constitution's adoption the Anti-Federalists believed that "'the powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government—[i]t reaches to everything which concerns human happiness—Life, liberty, and property, are under its control. There is the same reason, therefore, that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments.'" HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 66 (1981), (quoting Brutus II, *in Essays of Brutus*, NEW YORK J. 2.9.26 (Oct. 1787–Apr. 1788)). *See also* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, 438 (Adrienne Koch and William Peden eds., 1944).

[137] *See Creating the United States*, *supra* note 128.

[138] "By individual autonomy, I mean that the conditions that govern a person's participation in a rule-governed activity are only those conditions that are set by the activity itself. In this sense, individual

concern for self-rule had been a part of this Nation's history. In the Declaration of Independence, Thomas Jefferson notes the many abuses against self-rule by the British crown including, but not limited to, calling legislative bodies to distant meetings to fatigue them into compliance; dissolving non-compliant representative houses who opposed "invasions of the rights of the people"; denying elections of new representatives; obstructing the administration of justice; creating new administrations "to harass our people and eat out their substance"; requiring citizens, in times of peace, to quarter soldiers; rendering the military independent of civil authority; creating mock trials to hear the crimes of military personnel; cutting off trade "with all parts of the world"; imposing "taxes without our consent"; denying "the benefits of trial by jury"; "taking away our charters"; abolishing our most valuable laws"; "suspending our own legislatures"; "ravag[ing] our coasts"; "burn[ing] our towns"; transporting "foreign mercenaries to complete the works of death, desolation, and tyranny"; taking "our fellow citizens . . . captive on the high seas, to bear arms against their country"; and "excit[ing] domestic insurrections amongst us."[139] All these are examples of the colonists' concerns at the beginning of the American revolution over how their individual abilities to rule themselves were being threatened. And all are part of this country's deeply rooted history.

Additionally, if one previews the Bill of Rights, one finds present a set of personal liberty rights in the first eight amendments that can be traced directly back to the concerns in the Declaration and are specifically directed to the protection of individual autonomy. Those rights include rights to free exercise of religion; no establishment of religion by government; freedom of speech and the press; freedom of association; right to bear arms; right not to quarter soldiers in times of peace; "[t]he rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures"; "not to be held to answer for a capital offense, or otherwise infamous crime" . . . unless on presentment or indictment of a Grand Jury . . ."; no double jeopardy, or compulsion to be a witness against oneself; a right to a fair, "speedy and public trial, by an impartial jury"; to be informed of the charges and witnesses against one, and to have compulsory process to bring forth witnesses in one's favor; "the right to trial by jury"; and the right to not have excessive bail, excessive fines, or cruel and unusual punishments imposed.[140] Also to be eventually included here is the Fourteenth Amendment's Equal Protection Clause, adopted in 1868, which guaranteed to all persons the Equal Protection of the law and the Due Process Clause, which has been interpreted by the Supreme Court to apply most of the

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autonomy is to be understood always in relation to an activity . . . ." SAMAR, *supra* note 115, at 86–87. This contrasts with privacy, which is understood to "involve the nature of one's actions, because privacy is concerned with the effects one's actions have on other persons in the specified group." *Id.* at 87.

[139] THE DECLARATION OF INDEPENDENCE paras. 4–28 (U.S. 1776).

[140] U.S. CONST. amends. I–VIII.

protections of the Bill of Rights to the states.[141] The Fifth Amendment Due Process Clause has also been interpreted to reverse incorporate the Equal Protection Clause of the Fourteenth Amendment to apply against the federal government.[142]

Taken together what all these protections signify is not a view of autonomy that is arguably overly general as Justice Alito alludes to when he speaks of creating rights to drug use, etc., but rather one that is deeply involved with this Nation's commitment to upholding individual liberty from its very founding. Put another way, it is not whether the Founders had women, transgendered persons, or gay rights in mind when they adopted the various provisions in the Bill of Rights and Fourteenth Amendment. It is that they chose provisions, which on their face signaled a deep concern to protect individual freedom and well-being where no one else's interest was involved, a matter that previously had only been referred to generally in the Preamble to the Constitution. The specific interests the provisions focused upon simply represented the most prevalent examples in their day where autonomy was being challenged. They were not meant to be the only possible autonomy challenges, or the adoption of the Ninth Amendment would have been totally unnecessary.[143] The Bill of Rights and the Fourteenth Amendment weren't meant as a limitation but to keep a check on those in government who might seek too much power. Thus, for a right to privacy to apply where no interest of another is involved, it must be recognized as the ideal case example for protecting individual autonomy. Given the definitions stated earlier, if autonomy is a basic freedom, then certainly a right to privacy must exist to protect that basic freedom. In this sense, issues involving private acts, as described, give rise to cases where the ideal of autonomy will need to be protected. Similarly, issues concerning private information and states of affairs will also need protection to provide the necessary space for the performance of private acts and to allow voters space to discover what their real interests are.[144] That is why such protections are properly an end of democratic government.[145] They preserve the ability of the individual to make their own informed decisions.

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[141] *See Incorporation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited Mar. 19, 2023).

[142] *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[143] To offset the claim that Aristotle's virtues are relative to his time and locality, Professor Martha Nussbaum argues similarly that Aristotle intentionally offers a "thin account" of the virtues in context to various spheres of human experience like mortality, pleasure versus pain, and how to operate with limited resources, to name just a few. This allows him to avoid having to hold the virtues fixed to a specific conception or tradition that would "prevent ethical progress." Instead, it allows for critiquing the various conceptions offered in order to make them more inclusive to human needs. *See* Martha Nussbaum, *Non-Relative Virtues: An Aristotelean Approach*, *in* THE QUALITY LIFE 244–50 (Martha Nussbaum & Amartya Sen eds., 1988).

[144] *See* SAMAR, *supra* note 115, at 91–93.

[145] *See id.* at 102–03.

Finally, finding a grounding for a right to privacy based in autonomy does not address conflict of rights concerns where the claimed privacy right conflicts with another right or a compelling governmental interest. To address these issues, a further distinction is needed. For not all rights are alike. The right to privacy in an example of an *active* right. "Active rights are those that permit the holder of the right to perform an action, such as making a speech, publishing a news report, or practicing a particular religious belief."[146] "Active rights involve negative freedom in that the respondent has a duty not to interfere with the right holder."[147] Active rights also contrast with *passive* rights, which provide the holder of the right a benefit such as "trial by his or her peers, a speedy and public trial, the right to compulsory process to obtain the testimony of witnesses, and the right to the assistance of counsel."[148] "Passive rights involve positive freedom in the sense that the respondent of the right has the duty to afford the holder certain benefits,"[149] while negative rights by contrast restrict what others and especially the government may do. Why this distinction is important is because it provides a basis for resolving conflicts of rights. Given the definition of a private act, and its corollary definition of private information and states of affairs, any intrusion on a passive right automatically rules out a privacy claim because the privacy claim presupposes no basic interest of another has been interfered with.[150] The same would not be the case were the conflict to be with another important active right like freedom of religion or of the press. Because active rights set out the boundaries where the holder of the right might act, a court can draw upon the right's relation to autonomy, as the common dominator for resolving active rights conflicts.[151] Thus, to resolve conflicts of rights involving a valid privacy claim, the test is to determine which right better fosters autonomy in general.[152] As an example of this, consider freedom of the press to report on politicians and public figures. This should be upheld over the privacy claims of the politicians or public figures because it best supports the autonomy of citizens to decide who to elect to public office by learning how they think or act, or of the public to determine whose views should be paid attention to, or, as in the *Time, Inc. v. Hill* case,[153] whether a current event involving private citizens is newsworthy.[154] The same would not be true if the report were to involve

[146] *Id.* at 104.
[147] *Id.*
[148] *Id.*
[149] *Id.* at 104–05.
[150] SAMAR, *supra* note 115, at 105.
[151] *Id.* at 107.
[152] *Id.*
[153] *See* Time, Inc. v. Hill, 385 U.S. 374 (1967), where the Court held that Time, Inc.'s liability for misrepresentations required a showing that it knew the statements were false or were in reckless disregard of their truth.
[154] SAMAR, *supra* note 115, at 109–10.

a private citizen on a matter that is no longer newsworthy, as noted earlier in the *Melvin v. Reid* case.[155]

Before closing off the discussion of privacy, it is important to recognize that there will no doubt arise circumstances where a claim to privacy would undermine a compelling interest of the government. "Compelling interest" means one where there is no other reasonable way for the government to provide the protection it is obligated to do under the Constitution without undermining an individual's privacy. Take, for example, the claim to be free to travel where the person traveling is infected by a deadly airborne virus.[156] In this instance, the government's concern to protect the health and well-being of all people who may contact the infected individual overrides the individual's privacy right to travel. Why is this the case? The justification for the right to privacy is fundamentally grounded in protecting individual autonomy. That means that in instances where the government can show that the interest it seeks to protect is more essential to fostering autonomy generally than is protecting individual privacy, the right to privacy must yield to the government's compelling interest.[157] However, these situations require careful consideration. The fact that the state has adopted a particular method to secure its compelling interest may not be enough to justify overriding a privacy right unless the method is also the minimum necessary to achieve the state's compelling interest.[158] Consider, for example, the way this country came to deal with the AIDS crisis. It did not, as a general rule, quarantine those who were infected by HIV; rather, it put out the information that the public could use to protect itself, since the AIDS virus was not transmitted by an airborne virus but by human behavior, it did not warrant a more intrusive means such as a general quarantine.[159] In other words, when a compelling interest overrides a right to privacy, the concern to protect privacy is not removed from the table. Instead, one might think of it as being put on the back burner, as a kind of regulatory standard designed to ensure that the maximum intrusion on an individual's privacy is the minimum necessary for the state to meet its compelling interest. The relevance of this approach in the *Dobbs* case goes directly to the Chief Justice's concern of balancing Mississippi's interest to protect human life without at the same time undermining a woman's right to choose whether to continue her pregnancy. So, it is not surprising where two interests' conflict that something along the lines of a regulatory discussion involving viability, as *Roe* and *Casey* set forth, should be brought into the discussion. Below, the

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[155] Melvin v. Reid, 112 Cal. App. 285, 290 (1931).

[156] Gregg Gonsalves & Peter Staley, *Panic, Paranoia, and Public Health—The AIDS Epidemic's Lessons for Ebola*, 371 NEW ENG. J. MED 2348–49 (2014).

[157] SAMAR, *supra* note 115, at 112–13.

[158] *Id.* at 115.

[159] *See generally* Bayer & Fairchild-Carrino, *AIDS and the Limits of Control: Public Health Orders, Quarantine, and Recalcitrant Behavior*, 83 AM. J. PUB. HEALTH 1471–76 (1993).

article will discuss what should be the fetus' status to determine if a conflict of rights might also be present. For now, note that if the above-described test is followed along with the aforesaid test for resolving conflicts of rights, the right to privacy will not only be consistent with this Nation's deeply rooted history and traditions. It will help explain why the public continues to recognize the Constitution's authoritative role and the Supreme Court as a legitimate interpreter of its meaning.

VI. WHY LEAVING QUESTIONS CONCERNING NON-ENUMERATED RIGHTS SOLELY TO THE POLITICAL BRANCHES IS INADEQUATE AS A MATTER OF LAW

The concern that some important freedoms might not be protectable if simply left to democratic decision-making was noted in *Federalist 51* by James Madison when he wrote:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods in providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of the majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary of self-appointed authority. This, at best, is but a precarious security; because a power independent of society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States.[160]

Professor John Hart Ely, in his book, *Democracy and Distrust: A Theory of Judicial Review,* attempts to further Madison's concern by calling upon the judiciary to adopt "a participation-oriented, representation-reinforcing approach to judicial review" over "the standard characterization of the Constitution as 'an enduring but evolving statement of general values.'"[161]

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[160] THE FEDERALIST NO. 51 (James Madison or Alexander Hamilton).

[161] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980). Justice Alito references Professor Ely as having said he would have voted for a statute "like the one the Court end[ed] up drafting," supporting an intent against the constitutional right. *See also* Dworkin, *supra* note 80, at 19, n. 79.

This he does because he came to believe "that freedoms are more secure to the extent they find foundation in the theory that supports our entire government," which he sees at all levels as an attempt to ensure that everyone's interest will be represented without discrimination.[162] And while there is truth to the claim that participation and representation are certainly important, a problem arises when Justices, like Alito, cite Ely's argument to limit their judicial review of federal government cases only to challenges involving matters providing for adequate citizen participation and representation.

Take, for example, gerrymandering of congressional districts in which the Court has largely focused on one person/one vote[163] but, especially in the past twenty years, has more limitedly focused on impermissible uses of race.[164] Still, even with its more limited focus on race, given that it recently struck down a key provision in the Voting Rights Act, it does not appear minority representation will continue to be very much protected.[165] With the exception of race, and probably not even then, the Court's more recent approach has not proved very effective to overcome powerful local majorities from overcoming minority representation.[166] Moreover, given the current political climate involving "culture wars," one may seriously doubt whether past aspects of the Court's jurisprudence involving protection of fundamental rights will likely continue into the future. Take, for example, participation of gays, lesbians, transgendered, or non-binary individuals in the society's political branches.

In *Romer v. Evans*,[167] voters in the state of Colorado adopted Amendment 2 to their state constitution which barred the legislative, executive, and judicial branches, both at the state governmental level and its municipalities, from affording any protection against discrimination of "homosexual, lesbian, [or] bisexual orientation, conduct, practices or relationships." Following passage of Amendment 2, the only way

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[162] Ely, *supra* note 153, at 102.

[163] *One-Person One-Vote Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/one-person_one-vote_rule (last visited Mar. 14, 2023).

[164] *Redistricting and the Supreme Court: The Most Significant Cases*, NAT'L CONF. STATE LEGISLATURE (Sept. 14, 2021), https://www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx.

[165] The Court in Shelby Cnty. v. Holder, 570 U.S. 529 (2013), held unconstitutional use of Section 4(b) of the Voting Rights Act that specified which jurisdictions (mostly southern states) required preclearance under Section 5 by the Justice Department or the United States District Court for the District of Columbia before any changes can be made in the voting process in the state or its subdivisions to prevent discrimination based on race, color, or membership in a language minority group. *See About Section 5 of the Voting Rights Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/about-section-5-voting-rights-act (last visited Mar. 17, 2023).

[166] Annika Kim Constantino, *Gerrymandering Could Limit Minority Voters' Power Even Though Census Shows Population Gains*, CNBC (Aug. 13, 2021), https://www.cnbc.com/2021/08/13/gerrymandering-could-limit-minority-voters-power-even-after-census-gains.html.

[167] Romer v. Evans, 517 U.S. 620 (1996).

antidiscrimination protections could be achieved in these areas was if the group could pass an amendment to the state's constitution to allow such protections. In effect, Amendment 2 significantly limited access to the political branches by requiring gay, lesbian, and bisexual people to first obtain a constitutional amendment, itself requiring a much higher standard of attention than would be required of other actors, and only then obtain the antidiscrimination measure they may have hoped for. This was an obvious attempt by those opposed to the passage of such anti-discrimination measures to not only prohibit any further considerations by the state or its municipalities of such measures, but to undue ordinances that had already passed in Aspen and Boulder and the cities and counties of Denver that prohibited sexual orientation discrimination in "housing, employment, education, public accommodations, and health and welfare services."[168] In other words, the effort was to remove the participation and representation of these groups that had already been established within these particular communities.

In a 6-3 vote, the U.S. Supreme Court struck down Amendment 2 for violating the Fourteenth Amendment's Equal Protection Clause. The Court's opinion, written by Justice Kennedy, found that the Amendment could not be sustained even under the Court's lesser rational basis standard of review, since it was obviously based on animus against gay and lesbian people, which is not a legitimate governmental interest.[169] Kennedy then went on to note, "[i]f the constitutional conception of 'Equal Protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[170] The case raised a hackle from Justice Scalia, who in dissent, argued that "[t]he Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a 'bare . . . desire to harm' homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[171] What Justice Scalia goes on to write not only further shows his personal disregard for what the gay, lesbian and bisexual groups had achieved with the enactment of antidiscrimination laws, but how little he viewed an Equal Protection violation arising when a group "may not obtain *preferential* treatment without amending the State Constitution."[172] Note that his italicized use of "*preferential* treatment" suggests a bias against the group in question (lesbian, gay, and bisexual people) who would not be allowed to participate in seeking legislative change in the way *everyone else*

[168] *Id.* at 623–24.
[169] *Id.* at 633.
[170] *Id.* at 635.
[171] *Id.* at 636 (Scalia, J., dissenting) (emphasis in original).
[172] *Id.* at 638–39 (Scalia, J., dissenting) (citation omitted).

in the society could. Obviously, Justice Scalia regards groups, like gays and lesbians, and bisexuals who seek not to be discriminated against in the same way others would not want to be discriminated against to somehow be a call for preferential treatment. Apparently, he finds no problem with Colorado's attempt to change its constitution to make it significantly more difficult for these groups to participate and be represented in the political branches of the state from how it treats other groups. Only because at the time there existed on the Court a group of justices who were willing to find an Equal Protection violation in what Colorado had adopted with passage of Amendment 2 was the Court able to strike the state's attempt to write discrimination into its law. But that required the Court to look beyond whether some level of participation and representation was allowed to determine how significant was the representation.

Ely's focus is important, but by itself it may not provide as much security for individual freedom as he might have hoped to ensure unless fundamental rights are also recognized under the Due Process and Equal Protection clauses. Thus, what needs to be continued to provide an extra layer of security is what, based on past precedent, the Court had done in other cases to find that Fourteenth Amendment's Due Process and Equal Protection Clause applies.[173] That may not be so likely going forward if the Court begins to undue past case precedents, as with the *Dobbs* case, simply because they do not share what the Court believes to be a foundation deeply rooted in the Nation's history and tradition. Consider the Court's damage to the Voting Rights Act. Put another way, the enumeration of certain rights, both in the Bill of Rights and the Fourteenth Amendment, provides opportunities for the protection of individual liberty but only when afforded a sufficiently general level of application, not inconsistent with the broader purposes of the documents, and without which would serve little if any purpose whatsoever.

VII. HOW ARE DUE PROCESS AND EQUAL PROTECTION IMPLICATED IN ESTABLISHING NON-ENUMERATED RIGHTS

The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

[173] *See, e.g.*, City Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), in which a unanimous Court held that the denial of a special use permit for a living center for persons mentally challenged was based on prejudice in violation of the Fourteenth Amendment Equal Protection Clause. *But see, e.g.*, Heller v. Doe, 509 U.S. 312 (1993), upholding a Kentucky statute for involuntary commitment of "mentally retarded" persons under the Court's lowest level of scrutiny, the rational basis test.

> state deprive any person of life, liberty, or property, without Due Process of law; nor deny to any person within its jurisdiction the Equal Protection of the laws.[174]

Unenumerated rights under this Amendment are found mostly to fall within the scope of either the Due Process or the Equal Protection Clauses. This means that to understand what rights there are under the Fourteenth Amendment requires a close examination of how each of these two clauses are thought to operate.

It is worth noting that the Due Process Clause does not define the specific rights that are protected. Rather it states that no state shall "deprive any person of life, liberty, or property, without Due Process of law." An obvious procedural concern of this clause is the process requirement, that before life, liberty, or property are taken "the person must be given notice, the opportunity to be heard, and a decision [must be made] by a neutral decisionmaker."[175] But what should be the standards for determining whether life, liberty, or property are even involved is not stated.

This is an important question that the Court first acknowledged it had authority to decide in the *Carolene Products* case.[176] There, after holding that Congress had the power to restrict shipments of certain milk products, without restricting butter, to ensure public welfare, the Court went on to acknowledge in footnote 4 that

> [t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities. . . . [Or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which

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[174] U.S. CONST. amend. XIV.

[175] *Procedural Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/procedural_due_process (last visited Mar. 21, 2023).

[176] *See* United States v. Carolene Products Co., 304 U.S. 144 (1938).

> may call for a correspondingly more searching judicial inquiry.[177]

What this footnote makes clear is the Court's authority under the Fourteenth Amendment Due Process and Equal Protection clauses to set forth specific rights and obligations for clarity as necessary for it to carry forth its responsibility to ensure that the Preamble goals "to promote the general Welfare, and secure the Blessings of Liberty to ourselves and our prosperity" are indeed being met.[178] Professor Erwin Chemerinsky points out that "[t]he Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe upon them unless strict scrutiny is met."[179] On the Due Process side, these rights include "a constitutional right to refuse medical care as an aspect of the 'liberty' protected in the due process clause."[180] Other examples that have been protected under Equal Protection include the right to travel, to be free of governmental racial discrimination from voting (also under the Fifteenth Amendment), and most of the rights that have been founded under a right to privacy, such as access to contraception.[181] This later set of cases falls under both the Due Process and Equal Protection clauses.[182] Chemerinsky notes, for example, that "[i]n *Zablocki v. Redhail*," where the Court struck down a state court's denial of the right to marry to one who was behind in child support payments, that "the majority opinion found the right to marry to be a fundamental right protected under the liberty of the due process clause, but the concurring opinion by Justice Powell used an equal protection approach" suggesting that in some cases both approaches might be available.[183] He goes on to suggest that what distinguishes a fundamental right found under Due Process from one found under Equal Protection may be more than just semantics. "If a law denies the right to everyone, then due process would be the best grounds for analysis; but if a law denies the right to some, while allowing it to others, the discrimination can be challenged as offending equal protection, or the violation of the right can be objected to under due process."[184] This latter point shows that these two approaches are not so different. Although

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[177] *Id.* at 152 n.4.

[178] The focus on Equal Protection is how it supports fundament rights, not how it aids a determination of whether a governmental classification might be thought discriminatory. The latter is also a focus of Equal Protection separate from this discussion.

[179] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 792 (2006).

[180] *Id.* at 793 (citing Cruzan v. Director, Mo. Dep't Health, 497 U.S. 261 (1990)).

[181] *Id.*

[182] *Id.* (citing Harper v. Va. State Bd. Elections, 383 U.S. 663 (1966)).

[183] *Id.* (citing Zablocki v. Redhail, 434 U.S. 374 (1978) and 434 U.S. at 400 (Powell, J., concurring)).

[184] *Id.* at 793–94 (footnote omitted). Here it is worth noting that the Court's holding in *Loving v. Virginia*, 388 U.S. 1 (1967), found Virginia's miscegenation statute to violate both due process (because marriage was held to be a fundamental right) and equal protection (because whites could not marry non-whites) as a way to provide for "racial purity."

they may focus on somewhat different concerns, it is fair to say that in the right circumstances each can afford support for the conclusions of the other.

In the above examples, the rights falling under Due Process are often referred to as comprising an area of substantive versus procedural due process.[185] For the concern is not whether the holder of the right has been afforded proper process but whether there is a fundamental right in the holder to begin with. What constitutes fundamental rights has been a matter of great debate.[186] Elsewhere the argument was made that such rights cannot be solely decided by what the Founders may have intended; nor should it be an open-ended issue what rights exist to be left to current public opinion, which may not always be very well-founded.[187] Instead, they should be founded upon a set of human rights that may not have been fully recognized at the beginning of the Nation but which have, over time, gained both international status and exhibit a strong commitment to those values our founding documents could readily uphold.[188] The constitutional right to privacy fits these requirements.

Moreover, not to acknowledge the existence of such rights, leaves application of the procedural Due Process requirement solely to the determination of the political branches as the sole determiners of what liberties or property might exist, at least when no enumerated constitutional right is present. Alternatively, it leaves one wanting from having been able to only discover from some earlier understanding what these terms might have meant at the time the Constitution and the Fourteenth Amendment were adopted to where they might be placed in today's world. This latter, all too narrow, approach to what is meant by "deeply rooted in the history and traditions of the Nation" undermines not only what people have come to expect from past Supreme Court decisions,[189] but also provides very little hope going forward that the Constitution will offer much if any assistance toward meeting new challenges that could not have been imagined by the

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[185] *See Substantive Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process (last visited Mar, 21, 2022).

[186] *See* CHEMERINSKY, *supra* note 171, at 795 (footnotes omitted).

[187] *See* SAMAR, *supra* note 115, at 108–12, 114.

[188] *See id.* at 121–22.

[189] In Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833 (1992), Justice O'Connor, in her majority opinion, noted:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

(citations omitted).

Framers.[190] In short, the approach would seriously abridge the Preamble aspiration that the document would continue to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosperity . . . ."

Now, consider the role Equal Protection serves in our constitutional understanding of non-enumerated fundamental rights. What does it mean to say "nor [shall any state] deny to any person within its jurisdiction the Equal Protection of the laws[?]" Traditionally, it was thought that the Equal Protection Clause operated on a different track from the Due Process Clause. Professor Cass Sunstein has noted,

> From its inception, the Due Process Clause has been interpreted largely (although not exclusively) to protect traditional practices against long-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.
>
> The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. The Due Process Clause often looks backwards; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidated practices that were widespread at the time of its ratification and were expected to endure.[191]

Here, it is important to not provide too expansive a view of the distinction Professor Sunstein is making between a due process and an equal protection approach, as he is only pointing out how the two approaches have traditionally been viewed, not how they should continue to be viewed going forward.[192] His approach should not be understood, for example, in the way

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[190] See SAMAR, *supra* note 115, at 141.

[191] Cass R. Sunstein, *Sexual Orientation & the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (footnote omitted).

[192] Cass Sunstein goes on to argue, notwithstanding that the traditional approach associated with Due Process fitted the Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986), that an Equal Protection approach could be brought into the analysis "to forbid discrimination on the basis of sexual orientation." Sunstein, *supra* note 191. Exactly how such an Equal Protection approach might be brought into the analysis would wait until the Court's later decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers*, 478 U.S. at 578, where Justice Kennedy stated:

> Equality of treatment and the Due Process right to demand respect for conduct protected by substantive guarantees of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made

Justice Alito seems to adopt, that when a fundamental rights claim is raised under the Due Process Clause the only consideration permitted is backward looking to the founding, even when today that will not be sufficient to unpack forms of discrimination not previously recognized. Alito writes, "a fundamental right must be 'objectively, deeply rooted in this Nation's history and tradition.'"[193] He then goes on to state, after claiming that the word "liberty" provides little guidance in assisting courts in how to decide cases, that "[i]n interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy."[194] All this he does presumably to protect liberty, but does restricting what liberties there are to only what might have been thought to be present in 1868 when the Fourteenth Amendment was adopted really protect liberty today? Instead, the meaning he should have bound himself to is the one that was adopted by Justice Kennedy in *Obergefell v. Hodges*.[195] Kennedy writes, "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present."[196] If the Constitution, Bill of Rights, and the Fourteenth Amendment are going to be meaningful and have their authority relevant for today's generation, more needs to be said than what the various clauses may have meant at the time they were adopted.[197]

The Fourteenth Amendment was not meant to be just a short-term fix to be disregarded once the concerns that gave it rise were no longer relevant, not to say that those concerns may not still be relevant today.[198] If that was meant to be the framework for how future decisions would be decided it presumably would never have been possible to respond to new sets of issues that each generation encounters.[199] That is why, for example, although adopted at the end of slavery, the Fourteenth Amendment did not just refer

> criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.

Lawrence, 539 U.S. at 575.

[193] *Dobbs*, 142 S. Ct. at 2247.

[194] *Id.*

[195] *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

[196] *Id.* at 664 (citing Lawrence v. Texas, 539 U.S. 558, 572 (2003)).

[197] "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, 'has not been reduced to any formula.' Rather it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them respect." *Id.* at 663–64 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

[198] *See Fourteenth Amendment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fourteenth_amendment_0 (last visited Mar. 21, 2023) (illustrating the way the Court has or has not used the Fourteenth Amendment to address concerns long after it was adopted).

[199] *See 14th Amendment to the U.S. Constitution: Primary Documents in American History*, LIBR. CONGR., https://guides.loc.gov/14th-amendment (last visited Mar. 21, 2023).

to the former slaves having equal protection of the laws but "persons" having that protection. Certainly, in 1868 the word "person" was broader than former slaves even though, at the time, women and Native Americans did not have the right to vote.[200] In *Obergefell v. Hodges*, the Court was asked to decide "whether the Fourteenth Amendment requires a state to license a marriage between two people of the same-sex," as well as whether it "requires a State to recognize a same-sex marriage licensed and performed in a State which does not grant that right." In holding that the Fourteenth Amendment does require states to license and recognize same-sex marriages, Justice Kennedy, writing for the majority, first sought to "demonstrate that the reasons marriage is fundamental under the Constitution appl[ies] with equal force to same-sex couples."[201] His approach here was first to show "that the right to personal choice regarding marriage is inherent in the concept of individual autonomy;"[202] second, "that the right to marriage . . . supports a two-person union unlike any other in its importance to the committed individuals";[203] third, that the right to marriage "safeguards children and families and draws meaning from related rights of childbearing, procreation, and education;"[204] and finally, "that marriage is a keystone of our social order."[205] Together, these are all examples of a Due Process approach that looks to history and traditions without being bound by it in order to determine why marriage continues to be important, as opposed to asking whether same-sex couples were allowed to marry when the country was founded or the Fourteenth Amendment adopted. And that is because Justice Kennedy recognized that history and tradition by itself may not be enough, if treated too narrowly, to uncover deeply held biases that would otherwise be overlooked.

To this point, Justice Kennedy writes, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justifications and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."[206] With respect to the right to marry, the Court had rejected such an approach in *Loving v. Virginia*, when the state of Virginia criminally prohibited interracial marriage between a white person and a non-white person.[207] With respect to gays and lesbians, the

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[200] Women did not have the right to vote until the Nineteenth Amendment was adopted in 1920. *See* U.S. CONST. amend. XIX. Native Americans were not afforded the right to vote until Congress passed the Indian Citizenship Act, Pub. L. 68-175, 43 Stat. 253 (1924).

[201] *Obergefell*, 576 U.S. at 665.

[202] *Id.*

[203] *Id.* at 666.

[204] *Id.* at 667.

[205] *Id.* at 669.

[206] *Id.* at 671 (citations omitted).

[207] Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that marriage is a fundamental right and Virginia's law prohibiting whites from marrying non-whites violated the Equal Protection Clause because it served no legitimate purpose "independent of invidious racial discrimination").

Court had previously held in *Lawrence v. Texas* that Due Process prohibited a state from criminalizing adult consensual same-sex relationships.[208] What Kennedy is describing here is the need sometimes when determining whether a non-enumerated fundamental right exists to connect a Due Process approach with an Equal Protection approach to ensure that past biases are unlikely to have present effect. This will not always be the case. If all that is at stake in a case is whether a fundamental right is present, as was the situation in *Washington v. Glucksburg*,[209] where the Supreme Court had to decide whether there existed a right to physician assisted suicide, the lack of any history in support of such a right may be sufficient, as a Due Process matter, to determine that no such right exists. However, where the answer to the Due Process question is likely to be misdirected if a hidden bias may be operating, as with the marriage question in the *Obergefell* case, because marriage itself had been defined only to apply to opposite-sex couples, an investigation into whether the marriage definition itself bears a hidden bias needs to be investigated. This is what Kennedy found necessary to do in *Obergefell v. Hodges*. In that case, reliance only on history and traditions would not have uncovered a deeply held bias over who had the right to marry, since only opposite-sex couples had been previously recognized as suitable for marriage. To unravel whether a likely bias might lie behind the marriage right, Kennedy had to consider whether the needs of same-sex couples to marry was relatively different from opposite-sex couples, which it was not.[210] For our purposes, Kennedy's description of how the two clauses operated in this case is worth noting:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the

[208] Lawrence v. Texas, 539 U.S. 558 (2003) (holding unconstitutional under the Due Process Clause a Texas statute making it a crime for two adult persons of the same-sex to engage in sexual intercourse in the home).

[209] Washington v. Glucksberg, 521 U.S. 702 (1997).

[210] After going through the four principles and traditions that give rise to a fundamental right to marry and noting how the States have contributed to the fundamental character of marriage by placing that institution at the center of so many facets of the legal and social order," Kennedy concludes:

> There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

> Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[211]

Justice Kennedy's point here is not that due process and equal protection should operate in the same way. Rather, as Cass Sunstein had earlier suggested, they may pull in different directions.[212] Still, Kennedy's point goes further to state that sometimes due process and equal protection would need to overlap where a right that may be deeply rooted in the Nation's history and tradition encompasses within it scope a bias against certain groups, which was the case both in *Loving v. Virginia*[213] and *Obergefell v. Hodges*.[214] In those instances where Due Process is called upon to answer a question such as "[i]s there a right to same-sex marriage," if the answer would be "no" only because of a longstanding bias built into the definition of marriage, then Equal Protection must be brought in to unlink the bias. Otherwise, no better understanding of a right would be possible because no new group could ever be successful at invoking a right that had been previously denied.

VIII. HOW SHOULD THE RIGHT TO AN ABORTION FIT INTO THIS ANALYSIS?

At this point, it is important to take note of a distinction Justice Alito raises early in his majority opinion. Alito writes:

> The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of liberty. *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but *abortion* is fundamentally different, as both *Roe* and *Casey* acknowledge, because it destroys what those decisions

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[211] *Id.* at 672 (citations omitted).

[212] *See* Cass R. Sunstein, *Sexual Orientation & the Constitution: A Note on the Relationship Between Due Process and Equal Protection,* 55 U. CHI. L. REV. 1161, 1163 (1988).

[213] *See* Loving v. Virginia, 388 U.S. 1 (1997)

[214] *Obergefell*, 576 U.S. at 644.

> called "fetal life" and what the law now before us describes as an "unborn human being."[215]

One may hesitate to think these statements represent a narrowing of the question in Alito's draft to be only about abortion, since so much of what has already been said would suggest the view expressed to be much wider. Still, the issue before the Court is the abortion question. Therefore, consideration at this juncture is warranted for Justice Alito and Mississippi's point that this case might be different because "it destroys . . . what the law now before us describes as an 'unborn human life.'"[216]

Ever since the *Roe* decision came down, there has been a debate over the proper characterization of the fetus. And like many issues where a characterization is involved the answer is likely to depend on one's point of view. In an earlier piece, *Personhood Under the Fourteenth Amendment*, various understandings, especially religious understanding, of when "human life" begins were reviewed.[217] It was pointed out that no definite answer has ever been adopted among the various religious traditions as to how this question should be answered.[218] Indeed, even within the Catholic Church, it wasn't until the seventeenth century that the prohibition against abortion focused on life beginning at conception.[219] This is important because the Fourteenth Amendment does not prohibit simply the taking of life but rather it states "nor shall any State deprive any person of life, liberty, or property, without due process of law." The key requirement is the presence of a "person" for Fourteenth Amendment analysis. The abortion debate needs really to focus on how properly to interpret the presence of a person. And this should not be decided merely by the Court adopting the views of any one religion, or even several religions, nor just on subjective personal beliefs

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[215] Dobbs v. Jackson's Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (citing MISS. CODE ANN. § 41-41-191(4)(b) (West 2022)) (emphasis in original).

[216] *Dobbs*, 142 U.S. at 2243.

[217] Samar, *supra* note 124, at 305–10.

[218] *See id.* at 308.

[219] "[P]rior to that time, the Church accorded with the view of St. Thomas Aquinas, who, following Aristotle, held that an embryo is not ensouled 'until several weeks into the pregnancy.'" *Id.* at 307 (citing JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 57, 59–60 (Cynthia Ward, et al. eds., 2nd ed. 1993)). For it is at that time, the "soul is the 'substantial form' of man;" i.e., "has a recognizable human shape." *Id. See also* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 40–41 (1993). An interesting question is whether Aquinas has accustomed himself to forms without addressing the substance to which the forms apply or at least not addressing it adequately given what was known in his day. Today, we think of the fetus as possessing 46 chromosomes but perhaps much more needs to be added before we could properly say a new human being is present. If so, this raises interesting questions concerning our understanding of "potentiality" going back to Aristotle. How different scholars understand human development or even sometimes just ignore the impact that certain understandings might have on other stakeholders, including the mother, many feminist thinkers, those engaged in stem cell research, anthropologists, and even members of different religious (non-Catholic) traditions; let alone whether new research poses the question: whether any cell, by a highly developed technological process, could develop into a human being. *See* Lynn M. Morgan, *The Potentiality Principle from Aristotle to Abortion,* 54 CURRENT ANTHROPOLOGY 15 (2013).

alone,[220] if it is to avoid a First Amendment Establishment violation.[221] What is needed is something much more objective if the belief is not to be based on religion alone.

Professor Ronald Dworkin describes two very different ideas that appear at stake when people debate such phrases as "human life begins at conception."[222] One view, probably the one held by Justice Thomas, holds "that fetuses are creatures with interests of their own right from the start, including, preeminently, an interest in remaining alive, and that therefore they have rights that all human beings have to protect these basic interests, including a right not to be killed."[223] The other view, associated with the late Justice Scalia, claims "that human life has an intrinsic value; that human life is sacred just in itself; and that the sacred nature of human life begins when its biological life begins, even before the creature whose life it is has movement or interests, or rights of its own."[224] Both views afford a great deal of attention to the fetus, but very little attention to the woman carrying the fetus. This is important because where the interests of the woman are seriously threatened, as would be the case when continuing the pregnancy to term will cause either loss of her life or serious physical or mental harms, is it right to discount her interest in total?[225] In a sense, the limiting of abortions post-viability, the time after which the fetus could survive outside the womb, except where the woman's life or health were threatened, was an

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[220] *Dobbs*, 142 S. Ct. at 2256, arguing that many of the laws passed against abortions in the late nineteenth, early twentieth centuries were "spurred by a sincere belief that abortion kills a human being."

[221] U.S. CONST. amend. I. Recent caselaw, however, suggests a tendency by the conservative members of the Court to limit just how far the Establishment Clause can limit state involvement with religion by claiming such restrictions often undermine the Free Exercise Clause. In *Trinity Lutheran Church of Columbia, Inc. v. Conner*, 137 S. Ct. 2012 (2017), a majority of the Court agreed that exclusion of the church from an otherwise neutral secular grant program to obtain scrap tire surface materials to improve children's playgrounds violated the Free Exercise Clause because it discriminated against an otherwise qualified organization strictly because of its religious status. Justices Sotomayor and Ginsburg dissented arguing that the majority's position raised a serious establishment concern by providing state funding of a religious organization in a manner that would assist the spread of its religious message. *See id.* at 2028 (Sotomayor, J., dissenting). *See also* GREENHOUSE, *supra* note 67, at 217–19, suggesting that the conservative bloc on the Court is moving away from just having Free Exercise protect religious status toward a more inclusive protection of "religious activity, uses, and conduct." *Id.* at 219 (citing Espinoza v. Mont. Dep't Revenue, 140 S. Ct. 2246 (2020), holding that Montana's state constitution's "no-aid" to religious institutions provision violated the Free Exercise of parents to use their vouchers to send their children to religious schools). In his concurring opinion, Justice Gorsuch wrote, "[m]aybe it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say the State's discrimination focused on what religious parents and schools *do*—teach religion." *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). Justice Gorsuch did not seem to have a problem with the state supporting the teaching of religion.

[222] DWORKIN, *supra* note 207, at 11.

[223] *Id.*

[224] *Id.*

[225] Allison McCann & Taylor Johnston, *Where Abortion Could Be Banned Without Roe v. Wade*, N.Y. TIMES (May 3, 2022), https://www.nytimes.com/interactive/2022/us/abortion-bans-restrictons-roe-v-wade.html (discussing how the restrictions on abortion may vary if *Roe v. Wade* is overturned among the various states).

attempt to balance the interest of the state in affording human life with intrinsic value and the woman whose life already has such value and whose interests might be seriously harmed if forced to carry the child to term. And especially where the woman might die, can we really say that the fetus' "intrinsic value" outweighs the intrinsic value of the woman? This is an example of how the right to privacy continues to play a regulatory role even when the state may present a compelling interest for its being overridden.

It seems a bit much, especially with respect to the second idea Dworkin identifies, that the only person who should matter in the abortion decision is the fetus; even more does it seem unreasonable that the decision as to which life matters would be decided solely by a Court and set of state legislatures composed mostly of men.[226] If the government is to be the decider then that means that the government could decide either way depending on who the majority in the legislature would wish to protect. And this would seem very dangerous, even from the point of view of those who seek to preserve the sanctity of human life, since it essentially leaves that sanctity open to whichever candidate, the mother or the fetus, that the political will of the state legislature at the time might wish to protect. This is essentially what the *Dobbs* case has done by leaving out of the picture the Fourteenth Amendment's protection of persons.[227] Indeed, it is this very lack of certainty, on a matter so important to the woman's life and perhaps the fetus's, that is exactly why it should never be left to the shifting political whims of a legislature but to her own judgment, especially if the fetus itself cannot credibly be found to be a person, which gets us to the first of the two ideas regarding the abortion debate that Dworkin points to.

It is important here to begin noting what is and what is not in controversy. "Scientists disagree about exactly when biological life of any animal begins, but it seems undeniable that a human embryo is an identifiable living organism at least by its conception."[228] That reality does not address the abortion question, however. Every cell in a human skin contains forty-six chromosomes and is alive.[229] Does that mean that every time someone bites their finger, they are committing homicide because if they were able and allowed to clone their skin tissue, they might be able to create a human being? No, because that is not how the law currently would view the subject. But it comes closer to the more common-sense way of

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[226] The current Supreme Court at the time *Dobbs v. Jackson Women's Health* was decided was made up of six male and three female justices. *See* Ritu Prasad, *Alabama Abortion Ban: Should Men Have a Say in the Debate?* BBC (May 18, 2019), https://www.bbc.com/news/world-us-canada-48262238.

[227] Here it is worth noting that neither Congress nor the state legislatures can do more than enforce the provisions of the Fourteenth Amendment; they cannot decree the substance of the Fourteenth Amendment's provisions. That is something the Court must do. *See* City Boerne v. Flores, 521 U.S. 507, 519 (1997) (citation omitted).

[228] DWORKIN, *supra* note 207, at 21.

[229] *Genes & Health*, BLIZARD INST., https://www.genesandhealth.org/genes-your-health/46-%E2%80%93-magical-number (last visited May 31, 2022).

thinking if contraception were to be prohibited such that any fertilized egg would have to be allowed to continue to term. The only difference would be the lack of an intentional direction behind what the fertilized egg would be doing compared to my cloning example. Put another way, is the central distinguishing feature in the above skin cell example the fact that the cells on their own would not develop into a baby but the fertilized egg, all else being equal, would? [230] That doesn't seem right either because one's nature as a thinking human being is as much a part of one's evolution as the fertilized egg's nature into developing into a baby is a part of its evolution. In other words, wouldn't adoption of such an approach just be affording a special status to evolution that occurs outside the human mind as opposed to the evolution that is the cause of one's mental expansion?[231] It is known that skin cells can be cloned to become embryonic stem cells, which "can be

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[230] Robert George in *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L. J. 2475 (1997), argues against Jed Rubenfeld's claim that "[c]loning process give to nonzygotic cells the potential for development into distinct, self-integrating human beings, thus to recognize the zygote as a human being is to recognize all human cells as human beings, which is absurd." *Id.* at 2494 (citing Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 625–26 (1991)). George's response is "even assuming the possibility of cloning human beings from nonzygotic human cells, the nonzygotic cell must be activated by a process that effects substantial change and not mere development or maturation. Left to itself, apart from an activation process capable of effecting a change of substance or natures, the cell will mature and die as a human cell, not as a human being." *Id.* at 2494–95 (footnote omitted). But this presupposes that the process capable of effecting change can't be a human process; that it must be some part of nature independent of human capability. Why? As Bertrand Russell reminds us, "[o]ur nature is as much a fact of the existing world as anything, and there is no certainty that it will remain constant." BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 87 (1959). So why assume that the processes that bring about our biological reproduction would not over time change just as much as bringing about our skills at cloning? And, if that is the case, Jed Rubenfeld is correct that the cloning process might give to cells the possibility of becoming human beings. So, it cannot be the process that is the determining factor for who is a person, at least not absent "recogniz[ing] all human cells as human beings." George, *supra*, at 2494.

[231] Robert George argues for the importance of nature because he is a Natural Law theorist, who accepts the idea that "[t]he broad tradition of natural law thinking, for example, proposes what amounts to its own principle of public reason when it asserts that questions of fundamental law and basic matters of justice ought to be decided in accordance with natural law, natural right, natural rights, and/or natural justice." George, *supra* note 218, at 2482, arguing in a footnote that "[i]n Aquinas's natural law theory, something is good, right, or just 'by nature' insofar as it is reasonable. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 71, art. 2, translated in JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 35–36 (1980). Here one might want to be a bit more circumspect. David A.J. Richards, in his review of Finnis' book, notes several points of difficulty:

> It is important to be clear that there is an alternative conception of the good available, one much more sensitive to argument and evidence precisely at the points that Finnis' account suspiciously ignores. This conception is familiar from Aristotle to Kant to Sidgwick to Rawls, namely, that the good is the object of rational choice and deliberation. . . . In the case of basic goods, this conception would call for investigation of the facts of the aims of persons, the circumstances of their lives, and the ways rationally to realize their ends.

David A.J. Richards, *John Finnis's Natural Law and Natural Rights*, 93 ETHICS 169, 170–71 (Oct. 1982) (book review). Additionally, the ontological basis of Aristotelean-Thomist Natural Law theory is arguably "incapable of providing a determinate justificatory criterion for moral judgments, and that some of the moral judgments it tries to justify on this basis are morally unacceptable." Alan Gewirth, *The Ontological Basis of Natural Law: A Critique and an Alternative,* 29 AM. J. JURIS. 95, 95 (1984).

turned into any other cell type found in the human body."[232] But while there may be very good reasons to clone stem cells, it doesn't follow that whole human beings should be cloned.[233] Why? Because as independent thinkers humans perceive themselves capable of making judgments that fertilized eggs are not capable of and that the cloned creation of human beings could give rise not only to discriminatory practices but to genetic harms arising in future generations.[234] But if that is the distinction, then it is not the life, or even how the life evolves, but our ability to make judgments that seems most central to our personhood. So where is the mark for when a being with living tissue composed of forty-six human chromosomes should be deemed a person?[235]

Beginning with the work of Professor Alan Gewirth, who, in setting forth a foundation for a general theory of human rights, sought one that would not be question-begging but morally neutral in that it did not start from having to accept any particular religious or moral point of view.[236] Instead, it would be based strictly upon features of human action that all moral theories presuppose about the persons they address.[237] That is, that the persons addressed are voluntary human actors who, in some sense, are free to act for purposes of their own. The same can be said for pretty much all practical precepts, including legal ones, since law imposes obligations to perform either directly, as with individuals, or indirectly, as with institutions. Gewirth describes the features that comprise human action for moral and practical purposes as follows:

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[232] Michelle Castillo, *Scientists Successfully Clone Human Stem Cells via Skin Cells*, CBS NEWS (May 15, 2013), https://www.cbsnews.com/news/scientists-successfully-clone-human-stem-cells-via-skin-cells/.

[233] Satomi Angelika Murayama, *Op-Ed: The Dangers of Cloning*, FUNG INST. FOR ENG'G LEADERSHIP (May 11, 2020), https://funginstitute.berkeley.edu/news/op-ed-the-dangers-of-cloning/.

[234] *See id.*

[235] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2269 (2022), acknowledging "the characteristics that have been offered [by a number of scholars] as essential attributes of 'personhood' are sentience, self-awareness, the ability to reason, or some combination thereof" but then summarily dismissing the "open question" that this debate gives rise to.

[236] ALAN GEWIRTH, REASON AND MORALITY 25 (1978).

[237] I might point out that the Gewirthian framework can be seen as a modified Natural Law theory. Where traditional Aristotelian-Thomist Natural Law focuses on human nature as a necessary and sufficient condition of what we are to do, the Gewirthian theory focuses on human action as a development of our human nature, making human nature a *necessary* but not sufficient condition for human action. Gewirth, *supra* note 219, at 118. Additionally, traditional Natural Law theory sought a universalizable position that was not necessarily egalitarian as with Aristotle's "natural slavery" and Aquinas' "inequalities of freedom and well-being in political, legal, social, and economic rights"; by contrast, Gewirth's approach "establishes that every agent, on pain or self-contradiction, must accept that he and all other prospective purposive agents have equal rights to the necessary condition of action, freedom and well-being." *Id.* at 116, 118. Finally, where traditional Natural Law sees reason as "comparing men's good to their bodily qualities, [and] to good works of art" in Aristotle or as a means to an end of privileged "natural inclinations" in Aquinas, Gewirth's approach sees reason as proceeding by "logical necessities" along a line of "steps leading to the PGC." *Id.* at 110, 113–14, 120.

> [a]mid the immense variety of such precepts, they have in common that the intention of the persons who set them forth is to guide, advise, or urge the persons to whom they are directed so that these persons will more or less reflectively fashion their behavior along the lines indicated by the precepts. Hence, it is assumed that the hearers can control their behavior through their unforced choice so as to try to achieve the prescribed ends or contents, although they may also intentionally refrain from complying with the precepts. From this it follows that action, in the strict sense that is relevant to moral and other practical precepts, has two interrelated generic features: voluntariness or freedom and purposiveness or intentionality.[238]

Constitutional principles, like all legal rules and rights, fit within this standard. For whether one might be a lawmaker, prosecutor, or judge "it is still assumed even in social-role moral precepts that, within limits, action is under the control of the persons or groups addressed by the precepts—that they have knowledge of relevant circumstances and choose to act one way rather than another for purposes or reasons they accept."[239] Indeed, Gewirth states as much when he further says,

> [f]rom this it follows that action, in the strict sense that is relevant to moral and other practical precepts has two interrelated generic features: voluntariness or freedom and purposiveness or intentionality. By an action being voluntary I mean that its performance is under the agent's control in that he unforcedly chooses to act as he does, knowing the relevant proximate circumstances of his action. By an action being purposive or intentional I mean that the agent acts for some end or purpose that constitutes his reason for acting; this purpose may consist in the action itself or something to be achieved by the action. Voluntariness and purposiveness hence comprise . . . the generic features of action, since they are the most general features distinctively characteristic of the whole genus of action, where "action" consists of all possible objects of moral and other practical precepts in the respects just indicated.[240]

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[238] GEWIRTH, *supra* note 236, at 26–27.
[239] *Id.* at 27–28.
[240] *Id.* at 27.

Gewirth then goes on to show, by way of a dialectically necessary method,[241] that every agent logically must accept on pain of contradiction the moral precept that she has certain rights to freedom and well-being from the mere fact that certain objects are the proximate necessary conditions of human action.[242] And he also shows that every agent must also accept that every other agent also has these same rights.[243] It is the beginning in this argument that provides the objective basis for determining when a being with forty-six human chromosomes should be recognized as a person, namely when she can act with voluntariness and purposiveness, even if only to a minimal extent.

Gewirth describes how his approach applies to help resolve the abortion question by first distinguishing prospective from potential agency. He notes specifically that "[c]hildren are potential agents, in that with normal maturation, they will attain the characteristics of control, choice, knowledge, and reflective intention that enter into the generic features of action."[244] A potential agent is not a prospective agent since she does not yet possess the abilities, along with the knowledge of relevant circumstances, to be able to make even minimal decisions for their own purposes. Still, a child, even as a potential agent, is not like an unborn fetus. For it is developing memories and experiences that will bear on its abilities to satisfy its desires;

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[241] By "dialectical" Gewirth means "the method proceeds from within the standpoint of the agent," the agent's own point of view. This distinguishes it "from an assertoric method, which is not limited to such a purview" but may reflect different points of view that not all would share. His "dialectically necessary method propounds the contents of this relativity as necessary ones, since the statements it presents reflect judgments all agents necessarily make on the basis of what is necessarily involved in their actions." *Id.* at 44.

[242] Here we begin from the value-neutral position "I do X for purpose E," which marks the claim from my own point of view that, as an agent, I perform some action for some purpose. *Id.* at 49. Since I would not perform a voluntary act that was harmful in every way, I similarly claim "E is good"; whereby "good," all I mean is a reason or pro-attitude for performing the act. *Id.* at 49–52. Still, this is enough for me to further claim: "my freedom and well-being are necessary goods," since without freedom or well-being I would not be able to perform the act. GEWIRTH, *supra* note 236 at 52–54. Thus, from my own point of view, "I have rights to freedom and well-being." *Id.* at 65. Indeed, were I to deny this latter claim, I would have to admit that others could interfere with my freedom and well-being and, thus, I may not have freedom and well-being. *Id.* at 80. But given that freedom and well-being are necessary goods to my doing X for purpose E, if I now denied from within my own point of view that I have rights to freedom and well-being, I would be contradicting myself. *Id.*

[243] What makes the principle a moral principle (and indeed a human rights principle) and not just a prudential principle, given its derivation from the agent's own interest to do an act he regards as good, is its ability, by way of universalization, to require that:

> the agent logically must acknowledge that the generic rights he claims for himself are also had by all prospective purposive agents. For at that point he admits that the sufficient reason he must adduce as justifying his own having the generic rights also justifies that these rights are had by all other persons who fulfill that sufficient reason.

Id. at 64, 146. This final derivation of his moral precept Gewirth calls the Principle of Generic Consistency (PGC). *Id.* at 135. It states: "*[a]ct in accord with the generic rights [to freedom and well-being] of your recipients as well as yourself.*" GEWIRTH, *supra* note 236, at 135 (alteration in original). For Gewirth, this principle is the supreme principle of morality that determines how all human rights are to be understood.

[244] *Id.* at 141.

additionally, because it is not in comparable conflict with the mother; its right to proceed to develop to full agency should never be diminished.[245] In support of this development the parent can be most helpful, even if not acknowledging the child as a full agent. Hence a parent does not intrude on a child's freedom when telling the child, for example, to hold my hand while crossing the street since the child; early in its development, is not in a position to have relevant knowledge to know how to cross the street safely. "But insofar as children are potential agents, they have rights that are preparatory for their taking on the generic rights pertaining to full-fledged agency."[246] Similarly, persons with serious mental challenges, even as adults, may not be able "to exercise the kind of control over their behaviors that normal prospective agents do"; and, as such, they may "not have to the degree the right to freedom," a prospective agent has.[247] This will mean that in a proper context a guardian ad litem or health care provider may need to be appointed to protect the individual from various forms of harm. But here it is also important to note the extent to which a mentally challenged person has human potentialities, such that morality "requires both that they be protected and that efforts be made to effect whatever improvements may be possible in the direction of normal agency."[248]

In the case of abortion, morality combined with a Principle of Proportionality acknowledges that the justification for abortion varies as the fetus gets closer to term.[249] This is a moral evaluation that should be made by those most directly affected, the woman in consultation with her doctor who, more accurately than the state, is in a better position to grasp the potential harm to herself and the fetus for continuing the pregnancy. Here it needs to be understood that the fetus is not yet a prospective agent but only in the process of developing the abilities necessary to become a full-fledged agent.[250] Thus, like a seventeen year old child who does not yet have the right to vote, she does have a greater claim on her school to provide a civics education in anticipation of her forthcoming right to vote, more so than a sixteen or fifteen year old child. The fetus' right to continue to term can be seen to operate similarly imposing a greater claim on the woman as it continues to term. Still, its right to continue to term should never trump the woman's life, or physical and mental equilibrium, since it is not yet a full-fledged agent and, if in conflict with the mother's health, cannot be afforded greater protection than would be afforded the mother, who is a full-fledged agent.[251] At an earlier stage in a pregnancy, less salient reasons would justify

[245] *Id.* at 142–43.
[246] *Id.* at 141.
[247] *Id.* at 141–42.
[248] *Id.* at 142.
[249] GEWIRTH, *supra* note 236, at 143.
[250] *See id.*
[251] *See id.* at 121–22.

aborting a three-month fetus than a six-month fetus, given the fetus' more distant approach to having the "practical abilities and the corresponding purposes or desires."[252] But again this changes as the pregnancy evolves if the life or health of the mother falls into jeopardy. That is why something like viability or other appropriate approach makes sense, when in consultation with the physician, it provides the setting for when a pregnancy can be terminated.[253] Gewirth writes, if "[t]he conflict involves the mother's generic rights to the use of the abilities required for purpose-fulfillment are threatened by the fetus being carried to full term," as might be the case where she would suffer "death, or severe diminution of physical or mental health, or lesser but still sizable losses," then abortion would be allowed up to the time of birth.[254]

For the mother, as a purposive agent, already has the generic practical abilities and the purposes to which these are directed, and there being lost, endangered, or attacked for the sake of the fetus would involve the generic rights of someone who has them in full would be drastically subordinated to a minimal possessor of these rights.[255]

IX. WHY A NARROW FOCUS ON HISTORY AND TRADITION UNDERMINES THE COURT'S LEGITIMACY AND DISAVOWS INDIVIDUAL HUMAN DIGNITY

A lot has been said in this article about the dangers to individual fundamental rights that would likely be generated by Justice Alito's approach to the meaning of "deeply rooted in this Nation's history and tradition." But before bringing this article to an end it is important to also say how human dignity is likely to be affected.

In *Lawrence v. Texas*, the Supreme Court was asked to overrule its previous holding in *Bowers v. Hardwick* that held a state may constitutionally criminalize adult, consensual, same-sex behavior in private.[256] In so doing, the Court, per Justice Kennedy, noted that the Texas statute making adult same-sex sexual relations in private a crime violated

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[252] *See id.* at 143.

[253] For example,

> [s]ome European countries' laws set the time limit for abortion on request or broad social grounds between 18-24 weeks of pregnancy, whereas many set the limit around the first trimester of pregnancy. However, all these countries' laws also allow access later in pregnancy in specific circumstances, such as where a woman's health or life is at risk. The standard practice across Europe is to not impose time limits on these grounds.

CTR. FOR REPROD. RTS., EUROPEAN ABORTION LAWS: A COMPARATIVE OVERVIEW (Jul. 8, 2022), https://reproductiverights.org/wp-content/uploads/2022/10/15381_CRR_Europe_October_2022.pdf.

[254] GEWIRTH, *supra* note 236, at 143.

[255] *Id.*

[256] Lawrence v. Texas, 539 U.S. 558, 564 (2003) (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

the Due Process Clause of the Fourteenth Amendment.[257] In reaching that conclusion, Kennedy wrote:

> [i]t suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[258]

What Justice Kennedy is recognizing here is the role of human dignity in discussion of fundamental constitutional/human rights.[259] Human rights refer to those rights all humans have *qua* persons whether they are legally recognized or not.[260] That role comes about because human beings are the authors of their own actions with the capacity to choose what to believe, what to do, essentially how to live their own lives.[261] It is the same worth or dignity [that Gewirth states] the agent must also attribute to all other actual or prospective agents."[262] For the worth or dignity comes about not by the choice made, but by the acknowledgement that the person is in the position to make the choice.[263] That does not mean that someone who makes an immoral choice deserves dignity for his or her immoral choice. It means that he or she deserves acknowledgement for having made the choice, and if the choice violates human rights standards, the person should be held accountable for that choice.

Dignity arises "by distinguishing 'self-respect,' as a realistic assessment of having satisfied one's moral obligations, from 'self-esteem,' which is an affirmation of one's specific abilities to fulfill one's own desires and goals."[264] Only the former is a proper use of dignity as it points out the moral significance of human dignity. Dignity connects to human autonomy. It affirms the ownership each person has for their own choices. Consequently, dignity is not derived merely from having a right, although possession of a right might be a basis for believing the choice was reasonable. But this also

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[257] *Id.* at 578.

[258] *Id.* at 567.

[259] I have not said too much about human rights in this article, but suffice it to say, that such rights as should be recognized as applying to all people simply by being human are in the background to all the fundamental rights here described. *See generally* Samar, *supra* note 16, at 129–43.

[260] *What Are Human Rights?*, OFF. U.N. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/what-are-human-rights (last visited June 26, 2022).

[261] ALAN GEWIRTH, SELF-FULFILLMENT 169 (1998). This capacity, which Gewirth connects to our ability to engage in voluntary purposive choices, is the "locus and source" by which an agent attaches worth to himself. *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.* at 94–95.

suggests that where rights are not present or where human rights are taken away, a person's dignity may still be shown by protests if the non-presence of a right or the choice to remove it was improper.[265] Take, for example, those who protested the Vietnam war by throwing paper money on the floor of the New York Stock Exchange to illustrate the greed present in society.[266] Obviously, the protesters did not have a right to throw false money on the floor of the Stock Exchange. Still, as this was a reasonable way to draw attention to an otherwise unjust war which would cause little to no harm to any other person, dignity attaches. What illustrations such as this show is that dignity does not require the existence of a right to be present. It does require that the actions one takes not be seriously immoral or violate human rights generally, which one hopes to be present when fundamental constitutional rights are recognized. In this sense, dignity supervenes on the presence of human rights and the individual's willingness to maintain and protect these rights both for herself and others.[267]

This example also illustrates a further problem that Justice Alito's majority opinion runs into by taking away a fundamental constitutionally protected human right, namely, the denial of human dignity to those who will be most directly affected. But it also offers hope that even as fundamental rights come under attack, the society should not be stifled to believe all is lost. Our dignity as members of a mostly free society allows us to engage in debate, and protest threats to our basic human rights. This is not a meaningless task. It does not go away just because one or even a few Court cases are lost. It resides with us so long as we are willing to carry the mantle of our own self-respect. And it affords a hope for both current and future generations, the hope that even the short-term dislodges of the rights suffered today need not be lost forever. At the end of his opinion in *Lawrence*, following where the Court has overruled its previous holding in *Bowers v. Hardwick*, Kennedy writes that "[t]he petitioners are entitled to respect for their private lives."[268] The respect he is referring to here was presumably always due even if not publicly recognized. For it is at the very core of the values for which the Constitution was created, especially following the Reconstruction Amendments, that are also set forth in the original Preamble as fundamental for government action: "to promote the

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[265] This is the dignity owed to free persons that Justice Kennedy was talking about.

[266] Lorraine Boissoneault, *How the New York Stock Exchange Gave Abbie Hoffman His Start in Guerrilla Theater*, SMITHSONIAN MAG. (Aug. 24, 2017), https://www.smithsonianmag.com/history/how-new-york-stock-exchange-gave-abbie-hoffman-his-start-guerrilla-theater-180964612/.

[267] THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 891 (Robert Audi ed., 2d ed. 1999) ("The concept of supervenience, as relation between properties, is essentially this: Properties of type A are supervenient on properties of type B if and only if two objects cannot differ with respect to their A-properties without also differing with respect to their B-properties.").

[268] *Id.* at 578.

general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity."

X. CONCLUSION

If one takes Justice Alito's majority opinion and the view of the Court's conservatives as true, then some of the fundamental rights that have been recognized to be part of the Constitution, the Bill of Rights, and the Fourteenth Amendment, over the past fifty years, have not always been fully explained or well-defended. One may even accept that some of the rights being challenged had not been expressly stated in these earlier documents or in the public debates at the time of their ratification. Even if more explanation is needed, some of which has hopefully been provided in this article, one still needs to be careful to avoid throwing out basic human rights when what really should be done is just making clear the justifications upon which the rights are grounded. Appealing to past-history and tradition is certainly helpful in acknowledging rights that the Framers of the Constitution and its various Amendments were concerned with. But it is by no means the whole story of what that history and tradition teaches, or the whole story of what the Framers themselves meant for future generations to consider based on what they wrote.

The Framers would not have included abstract language or the ambiguities that appear, especially in the Bill of Rights and Fourteenth Amendment, if they meant the Constitution and its Amendments to be frozen in time. They would not have provided for a Supreme Court that early on in its history came to recognize its authority under the Constitution to say what these documents meant.[269] And most of all, they would not have succeeded in creating a system of government that would continue to remain authoritative for over six generations, if it were not for these documents being able to adapt to changing circumstances including changes in our understanding of political morality, and how the various parts of the government might meet new challenges.

Yes, look at past-history and tradition; that is a correct starting point. But it is not the end point, or even the whole starting point, let alone is it the whole story of what our Constitution is about. Especially is this the case when left only to identifying rights specifically recognized when these documents were ratified. It is impossible to search for a specific formula stating precisely what the Constitution and its Amendments require, because the formula itself will need to evolve, just as the protections the Fourth Amendment provided for persons, papers, and effects needed to evolve to include listening devices, and now in the computer age, will have to evolve further to include government use of spyware. What more is required is

[269] Marbury v. Madison, 5 U.S. 137, 177–79 (1803).

judgment that goes beyond a formulaic expression. To limit these documents as if they were just part of a formula is far too simple an approach to understanding their meanings and would discredit their ability to respond to changed circumstances in an ever-changing world. It would diminish the brilliance we assign to the Framers who left open the exact details of how various provisions of these documents might operate to confront new challenges and new issues, and it would seriously undermine how the form of government they did create would continue to survive into the future. THIS MUST NOT HAPPEN!

Furthering the Promise of Civil *Gideon* in Connecticut

John Ludtke[†]

In 2016, the Connecticut Task Force to Improve Access to Legal Counsel in Civil Matters published a report. In this report, the Task Force outlined three recommended civil litigation practices in which Connecticut should establish a right to counsel, or a civil Gideon *right. These three areas were restraining order applications under Connecticut General Statutes § 46b-15, proceedings concerning "family integrity," and residential evictions. Connecticut has made significant progress on these goals through implementing a restraining order pilot program that ran from 2018-2019, a restraining order program currently in place, and a current pilot program instituting a right to counsel in eviction cases; however, further policy changes are needed in order to establish permanent civil* Gideon *rights in the Task Force's areas of concern. This paper argues that Connecticut should explore civil rights to counsel in the three recommended areas the Task Force identified, either by extending pilot programs or instituting new programs, under the administration of either the state or local governments. This paper also discusses the various benefits and costs to these proposals, the effect of the COVID-19 pandemic on these areas of concern, and how the passage of six years since the Task Force recommendations has changed the landscape of each area.*

ARTICLE CONTENTS

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"Legal services come at a cost. But the lack of meaningful access costs more."

The Connecticut Task Force to Improve Access to Legal Counsel in Civil Matters in its Report to the Connecticut General Assembly, 2016[1]

I. INTRODUCTION

There is no single image of a courtroom or a court case in our collective imagination. Courtroom dramas often inaccurately portray the speed of the judicial process, the rules of procedure, and acceptable attorney behavior.[2]

If there was a single image of "the court," it would likely include a lawyer. Attorneys are, for better or worse, at the center of the American legal system. We assume that they are ever-present in our actual courtrooms as they are in our idealized ones; the idea that one has a "right to an attorney" is entrenched in how we think about law and justice, and will likely remain that way.[3] Given this fact, it may surprise many Americans, and many residents of Connecticut, that their right to an attorney is far from guaranteed in cases that often stem from normal life and quotidian unfairness: civil cases.

"A civil case is a private, non-criminal lawsuit, usually involving private property rights, including respecting rights stated under the Constitution or under federal or state law."[4] Civil cases make up a significant amount of the Connecticut court system's business every year. Between July 1, 2020 and June 30, 2021, 42,713 civil cases were added to Connecticut's judicial docket;[5] during that same period, 55,704 criminal cases were added to the state's criminal docket.[6] Even during the COVID-19 pandemic, where civil

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[1] JUD. COMM. CONN. GEN. ASSEMBLY, REPORT OF THE TASK FORCE TO IMPROVE ACCESS TO LEGAL COUNSEL IN CIVIL MATTERS 4 (Dec. 15, 2016), [hereinafter "Task Force Report"].

[2] *See, e.g.*, MIRACLE ON 34TH STREET (20th Century Fox 1947) (where a New York Superior Court judge rules expeditiously on evidence of questionable legal significance, likely for the sake of the narrative at issue in this piece of pop culture).

[3] *Cf.* Dickerson v. United States, 530 U.S. 428, 464–65 (2000) (Scalia, J. dissenting) ("I am not convinced by petitioner's argument that *Miranda* should be preserved because the decision occupies a special place in the 'public's consciousness.'" *Id.* at 464 (quoting Brief of Petitioner at 40, Dickerson v. United States, 530 U.S. 428 (2000)).

[4] *Civil Case*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/civil_case (last visited May 8, 2022). *Cf.* The definition of a criminal case; "[a] lawsuit brought by a prosecutor employed by the federal, state, or local government that charges a person with the commission of a crime. *Criminal Case Definition*, NOLO'S LEGAL DICTIONARY, https://www.nolo.com/dictionary/criminal-case-term.html (last visited May 8, 2022).

[5] *Civil Case Movement: July 1, 2020 to June 30, 2021*, STATE CONN. JUD. BRANCH, https://jud.ct.gov/statistics/civil/CaseDoc_2021.pdf (last visited May 8, 2022).

[6] *Geographic Area Criminal: July 1, 2020 to June 30, 2021*, STATE CONN. JUD. BRANCH (last visited May 8, 2022), https://www.jud.ct.gov/statistics/criminal/GA_crim_2021.pdf. Note that this is the number of cases filed in Geographic Area (GA) courts; this does not cover lower-level motor vehicle cases which are counted separately. There were over 103,000 motor vehicle cases that occurred during

cases were often deemed "non-essential" court business,[7] roughly forty-three percent of new, non-motor vehicle cases filed were civil disputes.[8]

Civil cases are often just as confusing as criminal cases and can have dire life consequences for the uninformed, the unrepresented, and those who are uninformed and unrepresented by virtue of their financial inability to hire counsel. There are myriad issues in framing this access to legal assistance issue solely in a legal lens, but from a legal representation point of view one possible solution is a "right to an attorney"—a *Gideon* right to counsel—in civil cases. Connecticut is among the many states (and, perhaps, at the forefront of these states) that have explored expanding a civil *Gideon* regime by proposing programs and solutions that would provide legal assistance to those unable to hire their own counsel, most notably in child custody cases.[9] Most recently in 2016, the Constitution State convened a Task Force charged with coming up with solutions in and around civil representation. The Task Force issued a report, and over a dozen recommendations were proposed.[10]

In the intervening six years, few permanent solutions have come to pass in light of these recommendations. Connecticut has pioneered some civil *Gideon* approaches. The state is one of the few that offers a right to counsel in all parental rights termination proceedings for both children and parents, and has done so since the 1990's.[11] In the last six years, however, Connecticut has piloted programs in areas of need and passed a limited, grant-based civil *Gideon* law.[12] That said, the state has a lot of work remaining if it is serious about providing fair and equitable representation to all of its citizens in the direst civil cases.

This article argues that this insufficient access to legal assistance must be addressed. Using the Task Force's report as a backdrop, this article argues that permanent civil *Gideon* must be installed in areas of identified greatest need (areas that remain just as dire as they were six years ago).[13] This article then goes on to weigh the pros and cons of these solutions. In doing so, this article concludes that the Connecticut General Assembly must continue the noble work of the Task Force it convened—it must come closer to furthering the promise of sustainable, impactful civil *Gideon* in Connecticut.

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the relevant time period, and are not included in this calculation. *Geographic Area Motor Vehicle: July 1, 2020 to June 30, 2021*, STATE CONN. JUD. BRANCH (last visited May 8, 2022), https://www.jud.ct.gov/statistics/criminal/GA_mv_2021.pdf.

[7] *See, e.g.*, *Statement from Judge Patrick L. Carroll III*, STATE CONN. JUD. BRANCH (Mar. 18, 2020), https://jud.ct.gov/HomePDFs/StatementChiefCourtAdministratorCarroll0320.pdf.

[8] *See Geographic Area Motor Vehicle*, *supra* note 6.

[9] CONN. GEN. STAT. ANN. §§ 45a-717(a)–(b) (2022), 46b-121(a)(1) (2022), 46b-136 (2019).

[10] TASK FORCE REPORT, *supra* note 1, at 4.

[11] CONN. GEN. STAT. ANN. §§ 45a-717(a)–(b) (2022), 46b-121(a)(1) (2022), 46b-136 (2019).

[12] *See* discussion *infra* section III.B.

[13] *See* discussion *infra* section IV.

II. CIVIL *GIDEON*, CONNECTICUT'S PROPOSED REFORMS, AND THE CURRENT STATUS OF RECOMMENDED AREAS OF REFORM

Any conversation concerning civil *Gideon* and addressing the issues that underlie inadequate civil representation must start with the ideas and constitutional underpinnings of current policies. Much of this discussion will seem repetitive to informed readers; this issue has been exhaustively analyzed. While this article is centered around furthering and echoing calls for civil representation reform, any paper with specific solutions must start with this historical analysis.

A. Civil Gideon *Overview*

Civil *Gideon* theory can be traced back to the Sixth Amendment of the Constitution, which guarantees in part the right, "to have the Assistance of Counsel for [one's] defence" in "all criminal prosecutions."[14] This right to counsel in criminal prosecutions, regardless of one's ability to pay for this assistance, was confirmed in *Gideon v. Wainwright*.[15] Writing for the majority, Justice Black noted that in, "our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[16] While the reality of criminal *Gideon* is far from ironclad—the line wherein parties are "too poor to hire a lawyer" is routinely debated and found wanting—this right has been more or less memorialized into the American legal canon through cases like *Miranda v. Arizona* over the past six decades.[17]

Universal civil *Gideon* would apply the right to the assistance of counsel in criminal prosecution to all civil cases; non-universal civil *Gideon* could apply these rights to individual kinds of civil cases.[18] While no person may

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

[15] Gideon v. Wainwright, 372 U.S. 335 (1963).

[16] *Id.* at 344.

[17] *Id.*; *see generally* Miranda v. Arizona, 384 U.S. 436 (1966) (where the Supreme Court memorializes several general admonitions police must make to detained individuals regarding, in part, their right to the assistance of counsel). *But see* Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984) (examples of cases that calls into question the "stickiness" of *Miranda* and provides two examples—the admissibility of a second statement when the first was elicited in violation of *Miranda* and the "public safety" *Miranda* exception, respectively—of exceptions to *Miranda's* (and therefore *Gideon's*) universal grant of a right to the assistance of counsel in all criminal prosecutions). *See also* Vega v. Tekoh, 142 S.Ct. 2095, 2106 (2022) (quoting 42 U.S.C. § 1983) (holding that a *Miranda* violation is not 'the deprivation of [a] right . . . secured by the Constitution'"). It is unclear whether warnings regarding an arrested party's right to a defendant will remain in the American legal canon after future Supreme Court terms; while *Vega* only refers specifically to the level of personal liability borne by police officers, the case represents methodology similar to that seen in Justice Scalia's *Dickerson* dissent. *See* Dickerson v. United States, 530 U.S. 428, 445–65 (2000).

[18] More plainly, "'Civil right to counsel', sometimes called 'Civil Gideon', refers to the idea that people who are unable to afford lawyers in legal matters involving basic human needs – such as shelter, sustenance, safety, health, and child custody – should have access to a lawyer at no charge." *Civil Right to Counsel*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEF., https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counsel1/.

be denied "life, liberty, or property, without due process of law," in both civil and criminal proceedings, the provision of assistance of counsel during a civil proceeding is not defined as "due process."[19]

This idea has been tested several times in *Gideon v. Wainwright*, and most famously in *Lassiter v. Department of Social Services*.[20] In addition to being critical to the civil *Gideon* canon, *Lassiter* is instructive precisely because it outlines strong, typical objections to civil *Gideon* in general.

Lassiter concerned a child custody civil process wherein the Petitioner mother objected to the termination of her rights as a parent as they related to her son by the state of North Carolina following her conviction of second-degree murder.[21] Having been denied the assistance of counsel through the latter part of the child custody proceedings, Petitioner argued that the Due Process clause "entitled her to the assistance of counsel, and that the trial court had therefore erred in not requiring the State to provide counsel for her."[22] The Court reasoned that due process "expresses the requirement of 'fundamental fairness,'" and analyzed whether Ms. Lassiter—an indigent *civil* litigant—had been denied this fairness.[23] The Court then applied its three-factor balancing test—balancing private (here, Lassiter's) interests, the risk of erroneous deprivation of these interests, and the Government's interests (including efficiency and financial burdens)—from *Mathews v. Eldridge* to determine whether this fairness-defined due process right had been denied.[24]

While the Court did find that "the companionship, care, custody and management of [one's] children . . . undeniably warrants deference and, absent a powerful countervailing interest, protection," therefore creating a powerful weighing in favor of the Petitioner, it went on to find that the "'almost infinite variation'" of facts within civil cases would make a constitutional right to counsel in such cases impossible.[25] The Petitioner's lack of counsel was ruled Constitutional as a result, though the Court did note that, "wise public policy . . . may require that higher standards be

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[19] U.S. CONST. amend. XIV, § 1.

[20] *See* Lassiter v. Dep't Soc. Servs. Durham Cnty., 452 U.S. 18 (1981).

[21] *Id.* at 21–22. While not relevant to the constitutional matters of this case, it should be noted that Lucille Lassiter, Ms. Lassiter's mother, had gained custody of Ms. Lassiter's other four children. The issue in this case was the custody of William, Ms. Lassiter's second-youngest child. *Lassiter v. Department of Social Services*, 5-4 POD, at 08:09–11:50 (Apr. 26, 2022), https://www.fivefourpod.com/episodes/lassiter-v-department-of-social-services/.

[22] *Lassiter*, 452 U.S. at 24.

[23] *Id.* at 24.

[24] Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (outlining financial costs of alternative procedures as one possible weighing factor that would later be adopted implicitly in the *Mathews* test). It should be noted that Justice John Paul Stevens' dissent excoriated the "balancing" framework in its entirety; he argued that the issue in *Lassiter* was not one of balancing but "one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits." *Lassiter*, 452 US. at 60 (Stevens, J., dissenting).

[25] *Lassiter*, 452 U.S. at 27 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)); *Id.* at 32 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

adopted than those minimally tolerable under the Constitution," and that "informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings . . ."[26]

Despite the Court's acknowledgement that indigent parents may be entitled the assistance of counsel, it has continually denied that civil *Gideon* rights are guaranteed by the constitution in this—or any—area of civil litigation over the last forty years, despite the intrusive nature of depriving indigent parents custodianship without representation.[27] Despite many state court[28] and federal court[29] decisions particularly concerning civil litigants' child support contempt cases, the Supreme Court has declined to extend these rights any further.[30]

The absence of a larger, federally-recognized civil *Gideon* right leaves a patchwork collection of state laws that occasionally fill the role of

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[26] *Lassiter*, 452 U.S. 28, 33–34 (1981). Justice Blackmun, writing in dissent, went one step farther and laid out why a constitutional right to counsel in cases such as this one went beyond "wise public policy," but mandated under *Mathews* balancing as well.

> If the Court . . . was able to perceive as constitutionally necessary the access to judicial resources required to dissolve a marriage at the behest of private parties, surely it should perceive as similarly necessary the requested access to legal resources when the State itself seeks to dissolve the intimate and personal family bonds between parent and child. It will not open the 'floodgates' that, I suspect, the Court fears.

Id. at 58–59 (Blackmun, J., dissenting).

[27] This is not a novel observation; decades of scholarship on this subject have noted the irony that, "the Court considers a one-day jail sentence to be more intrusive on liberty than a lifelong revocation of the parental right to the care, custody, and companionship of a child." Ericka Petersen, *Building a House for* Gideon*: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C. L. 63, 85 (2020) (quoting Anthony H. Trembley, *Alone Against the State:* Lassiter v. Department of Social Services, 15 U.C. DAVIS L. REV. 1123, 1136–37 (1982)).

[28] *See e.g.*, Pasqua v. Council, 892 A.2d 663 (2006) (where an indigent father in a criminal proceeding was found to be owed council for his civil child support claims under due process); Black v. Div. Child Support Enf't, 686 A.2d 164 (Del. 1996) (where an indigent criminal defendant father was found to be owed counsel in a civil, family court contempt case where the defendant requested a hearing); Mead v. Batchlor, 460 N.W.2d. 493 (Mich. 1990) (where an indigent criminal defendant father was found to be owed counsel on due process grounds in a civil contempt case for lapsed child support payments).

[29] *See, e.g.*, Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983) (where the government was found to have denied an indigent criminal defendant father his due process rights in denying him the assistance of counsel in a civil contempt to pay child support case); *In re* Grand Jury Proceedings, 468 F.2d 1368 (9th Cir. 1972) (where the state was to have violated a civil contempt proceeding litigant's due process rights by denying him the assistance of counsel).

[30] *See* Turner v. Rogers, 564 U.S. 431 (2011) (where the Court held that "the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order."). *Id.* at 448. It must be noted that the *Lassiter* decision has since faced considerable criticism not only for its positions on civil right to counsel matters, but its galling implicit racism against Ms. Lassiter and Ms. Lassiter's family, who were black. *See* 5-4 PODCAST, *supra* note 21. No conversation on civil *Gideon* is complete without acknowledging the issue's intersections with race, gender, and class; Ms. Lassiter is but one example of how a system without civil *Gideon* harms people who are marginalized on these three fronts.

guaranteeing the assistance of counsel in civil proceedings.[31] There are some areas in the modern age—such as cases, like *Lassiter*, where a state is terminating parental rights[32]—where there is widespread civil *Gideon*.[33] Connecticut is one state that has gone beyond the "minimally tolerable" bounds of the *Lassiter* line of cases and the explicit language of the Due Process clause by exploring and instituting some civil *Gideon* programs, such as the state's guarantee of counsel for indigent parents and children in both public and private termination proceedings.[34]

B. Connecticut and Civil Gideon

Connecticut is among the states at the forefront of civil *Gideon* work and legislation, and policies that increase access to legal assistance in civil matters have garnered interest, discussion, and real change from state legislators and the Connecticut Bar Association (CBA).[35] Connecticut's recent history with civil *Gideon* has been especially promising, as is its history with child custody cases.[36] Below, this section discusses Connecticut Special Act No. 16-19 and its creation of the Connecticut Task Force to Improve Access to Legal Counsel in Civil Matters, the Task Force's Report,

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[31] *See, e.g.*, *In re* Adoption by J.E.V., 141 A.3d 254 (N.J. 2016); Ashley Dejean, *New York Becomes First City to Guarantee Lawyers to Tenants Facing Evictions*, MOTHER JONES (Aug. 11, 2017), https://www.motherjones.com/politics/2017/08/new-york-becomes-first-city-to-guarantee-lawyers-to-tenants-facing-eviction/; Clare Pastore, *Gideon is my Co-Pilot: the Promise of Civil Right to Counsel Pilot Programs*, 17 U. D.C. L. REV. 75 (2014).

[32] The only five states with discretionary—not categorical—rights to counsel for birth parents in parental rights termination cases filed by the state (like *Lassiter*) are Nevada, Minnesota, Mississippi, Vermont, and Delaware. *See* Termination of Parental Rights (State) Right to Counsel Map, NAT'L COALITION FOR C.R. TO COUNS., http://civilrighttocounsel.org/map (follow "Right to Counsel Status" starting point field; and select "Termination of Parental Rights (State) – Birth Parents.").

[33] Other areas of widespread civil *Gideon* involve rights to counsel for accused parents in abuse cases (forty-six states have at least qualified right to counsel) and civil commitment (only one state—Indiana—only has a qualified right to counsel, and all other states have a categorical right). *Id.* (follow "Right to Counsel Status" starting point field; and select "Abuse/Neglect/Dependency – Accused Parents."); *Id.* (follow "Right to Counsel Status" starting point field; and select "Civil Commitment – Subject of Petition."); *see also* IND. CODE § 12-26-2-2-(b)(4) (2021) (which states that litigants have a right to counsel only in certain civil commitment cases rather than *all* civil commitment cases).

[34] Lassiter, 452 U.S. 28, 33–34 (1981); CONN. GEN. STAT. ANN. § 45a-717(a)–(b) (effective Jan. 1, 2022).

> If the respondent parent is unable to pay for such respondent's own counsel or if the child or the parent or guardian of the child is unable to pay for the child's counsel, in the case of a Superior Court matter, the reasonable compensation of counsel appointed for the respondent parent or the child shall be established by, and paid from funds appropriated to, the Judicial Department . . . .

CONN. GEN. STAT. ANN. 45a-717(b) (effective Jan. 1, 2022). *See also* NAT'L COALITION FOR C.R. TO COUNS., *supra* note 32 (follow "Right to Counsel Status" starting point field; and select "Termination of Parental Rights (State) – Birth Parents" and/or "Termination of Parental Rights (Private) – Birth Parents" and/or "Termination of Parental Rights (State) – Children" and/or "Termination of Parental Rights (Private) – Children.").

[35] *See, e.g.*, Cecil J. Thomas, *Investing in Justice: The Impact of Establishing Right to Counsel for Tenants Facing Eviction*, 31 CONN. LAW. 32, 33 (2021).

[36] *See generally* CONN. GEN. STAT. ANN. § 45a-717(a)–(b) (effective Jan. 1, 2022), § 46b-121(a)(1) (effective Jan. 1, 2022), § 46bb-136 (effective July 1, 2019).

and how this report has led to civil *Gideon* programs within the state. While many of the conclusions reached specifically relate to the pilot civil *Gideon* programs the final Task Force Report recommends, many of the symptoms, issues, and barriers to access identified provide valuable context for how permanent civil *Gideon* programs may help in these same areas.

1. Connecticut Special Act No. 16-19 and the Establishment of the Task Force

On June 10, 2016, the Connecticut Legislature passed Substitute Senate Bill No. 426, which enacted Special Act No. 16-19, *An Act Creating a Task Force to Improve Access to Legal Counsel in Civil Matters*.[37] The Act designated twenty-seven members of the task force, "to study the nature, extent and consequences of unmet legal needs of state residents in civil matters . . . [and to] examine, on a state-wide basis, the impact that the lack of access to legal counsel in civil matters is having on the ability of state residents to secure essential human needs."[38] The task force was later named the Connecticut Task Force to Improve Access to Legal Counsel in Civil Matters ("Task Force").

The Task Force was directed to "submit a report on its findings and recommendations to the joint standing committee of the General Assembly," in which recommendations would center on measures that would "[s]ecure access to justice and legal representation in civil matters by increasing the availability of legal assistance with civil matters throughout the state; and . . . encourage increased pro bono service by the state's legal community."[39] The Task Force met over the course of the summer and fall of 2016, split into various working groups, and published meeting agendas and resources used before the publication of their final report in December 2016.[40]

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[37] 2016 Conn. Spec. Acts. No. 16-19 (Spec. Sess.). Special Acts in Connecticut are "law[s] that [have] a limited application or [are] of limited duration, not incorporated into the Connecticut General Statutes." *Glossary – Legislative Terms and Definitions*, CONN. GEN. ASSEMB. (last visited May 8, 2022), https://www.cga.ct.gov/asp/content/Terms.asp. This is in contrast to public acts, which are bills "passed by both chambers of the legislature that amend[ ] the general Statutes. *Id.*

[38] 2016 Conn. Spec. Acts. No. 16-19 (Spec. Sess.), § 1(a)–(b). Interestingly, the sixteen through twenty-seven members of this committee—including the Dean of the University of Connecticut, Yale, and Quinnipiac Schools of Law, the chairs of several affinity bar associations, and representatives from several legal aid societies—were not initially a part of the proposed committee. An amendment later added these members before the bill's passage. S. Amend. 426, Gen. Assemb., Feb. Sess. (Conn. 2016).

[39] 2016 Conn. Spec. Acts. No. 16-19 (Spec. Sess.), § 1(f). This report is similar to one prepared by a Civil *Gideon* Task Force from Maryland in 2014. TASK FORCE TO STUDY IMPLEMENTING C.R. TO COUNS. MD., REPORT OF THE TASK FORCE TO STUDY IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND 20 (2014).

[40] *See generally* TASK FORCE TO IMPROVE ACCESS TO LEGAL COUNSEL IN CIVIL MATTERS, CONN. GEN. ASSEMB., https://www.cga.ct.gov/jud/taskforce.asp?TF=20160729_Task%20Force%20to%20Improve%20Access%20to%20Legal%20Counsel%20in%20Civil%20Matters (last visited May 8, 2022). The committee

The Task Force specifically narrowed in on three separate "key issues": (1) "the human consequences of unmet legal needs in civil matters"; (2) "the social impact of unmet legal needs in civil matters"; and (3) "the fiscal consequences of unmet legal needs in civil matters."[41]

2. The Report of the Connecticut Task Force to Improve Access to Legal Counsel in Civil Matters

On December 15, 2016, the Task Force issued its final report pursuant to Special Act No. 16-19, specifically recommending fifteen measures to improve Connecticut's provision of civil legal services.[42] The first measure called for the Connecticut General Assembly to "[e]stablish a statutory right to civil counsel in three crucial areas where the fiscal and social cost of likely injustice significantly outweighs the fiscal cost of civil counsel," and then specifically named restraining orders, child custody proceedings, deportation proceedings, and eviction defense.[43]

These three recommendations resulted from the committee identifying four areas of "most pressing need."[44] The first, "Physical Safety and Freedom from Domestic Violence," specifically centers around civil restraining orders in instances of domestic violence.[45] The Report referred back statistics indicating that the cost of domestic violence "exceed[ed] $5.8 billion" during the period analyzed by the committee.[46] The committee also

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was co-chaired by William H. Clendenen, Jr. of Clendenen & Shea, LLC and Dean Timothy Fisher of the University of Connecticut School of Law. TASK FORCE REPORT, *supra* note 1, at 1. *See also William H. Clendenen, Jr. Biography*, THE L. OFF. CLENDENEN & SHEA, LLC, https://www.clenlaw.com/william-h-clendenen (last visited May 8, 2022); *Biography of Dean Emeritus Timothy Fisher*, UNIV. CONN. SCH. L., https://law.uconn.edu/person/timothy-fisher/ (last accessed May 8, 2022).

[41] TASK FORCE REPORT, *supra* note 1, at 7–8.

[42] TASK FORCE REPORT, *supra* note 1, at 4. Nine of these recommendations called for the creation of specific statutes to combat the civil legal assistance gap. *Id*.

[43] TASK FORCE REPORT, *supra* note 1, at 4.

[44] *Id.* at 9.

[45] *Id.* at 9. Note that "restraining order(s)" for the purposes of Connecticut's Civil *Gideon* reforms and Civil *Gideon* in general refer to *civil* restraining orders *requested by a family or party directly*. *See* CONN. GEN. STAT. § 46b-15. These differ from civil orders of protection that may be issued by a court *sua sponte*, or criminal orders of protection. *See* CONN. GEN. STAT. § 46b-16a. These latter forms of civil/criminal orders of protection are more controversial because there is not necessarily a direct connection between the person theoretically at the center of a specific abuse requesting these orders and the orders themselves; courts (in both the latter civil and all criminal orders) and prosecutors (in criminal orders) can initiate these orders. Analyzing these latter forms of order as means of limiting domestic violence vs. potential harms to households merits further discussion. *See, e.g.*, Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039 (1991) (but is outside the scope of this paper). For the duration, "restraining order" for the purposes of this paper refers to restraining orders as defined under Connecticut General Statute § 46b-15. *See* CONN. GEN. STAT. § 46b-15.

[46] TASK FORCE REPORT, *supra* note 1, at 9–10. The "exceeds" language came from estimated losses of productivity; in 2013, some commentators speculated that lost productivity costs resulting from domestic violence may have ranged close to $2.5 billion nationally. Robert Pearl, *Domestic*

noted that "9,000 restraining orders applications" had been filed "annually from 2010 through 2013," and highlighted this metric as a distinct reason as to why freedom from domestic violence ought to be categorized as an area of greatest need.[47] This found area of most pressing need resulted in the civil *Gideon* recommendation concerning civil restraining orders.

The second, "Family Integrity and Relationships," reflects a wider and more general goal that could be considered as reflected in all of the Report's recommended civil *Gideon* measures, but most specifically in deportation and its relation to child custody. The report cites back to "the devastating impact of physical separation and loss of parental care, detained immigrants and their families," on children and implies that lack of counsel at these proceedings has a dramatic impact on the well-being of children in particular.[48] The Task Force referred back to parental rights cases in New York state case law, focusing particularly on *Matter of Ella B.*, and inferred that Connecticut ought to adopt a policy where parental rights could not be eliminated without counsel in cases beyond those covered by existing legislation.[49] In both deportation and child custody cases, a parent has a higher likelihood of being separated from a child than in most other civil suits; the Task Force highlighted these two proceedings accordingly despite Connecticut's comparatively strong civil *Gideon* record in parental rights termination proceedings.

The third and final area of need reflected in the three recommended civil *Gideon* pilot areas was "Housing Stability," which is reflected in the eviction proceeding program. The report notes that, "the impact of even short-term homelessness and housing insecurity can be devastating," and focuses specifically on the needs of children and their well-being in these areas.[50]

Violence: The Secret Killer That Costs $8.3 Billion Annually, FORBES (Dec. 5, 2013), https://www.forbes.com/sites/robertpearl/2013/12/05/domestic-violence-the-secret-killer-that-costs-8-3-billion-annually/?sh=262890fe4681.

[47] TASK FORCE REPORT, *supra* note 1, at 9–10. The Report also notes that many of these statistics in Connecticut are rather outdated since they are based on "Connecticut's last Legal Needs Study." *See* CTR. FOR SURVEY RES. & ANALYSIS, CIVIL LEGAL NEEDS AMONG LOW-INCOME HOUSEHOLDS IN CONNECTICUT, (2008). This report, deemed out of date in 2016, has not been updated; 2022 will mark *fourteen years* since the state has commissioned a legal needs report.

[48] TASK FORCE REPORT, *supra* note 1, at 9–11. Here, the Task Force report is perhaps indicating that Connecticut has a codified right to counsel for all custody cases not involving immigration. *See generally* CONN. GEN. STAT. ANN. §45a-717(a)–(b) (effective Jan. 1, 2022), § 46b-121(a)(1) (effective Jan. 1, 2022), § 46bb-136 (effective July 1, 2019).

[49] TASK FORCE REPORT, *supra* note 1, at 9–11; *see generally* In the Matter of Ella R. B., 30 N.Y.2d 352 (1972) (confirming that parental rights could not be terminated in New York state without a lawyer present); *see also* In the Matter of Jonathan N., 194 A.D.3d 815, 816 (2d Dept, 2021) (showing that, as of 2021, New York common law generally holds that "parental rights may not be curtailed without a meaningful opportunity to be heard, which includes the assistance of counsel," per *Ella B.*); *see also* CONN. GEN. STAT. ANN. § 45a-717(a)-(b) (effective Jan. 1, 2022).

[50] TASK FORCE REPORT, *supra* note 1, at 12. It should be noted that the disastrous effects of being unhoused have been widely analyzed and documented outside the scope of the Task Force. *See, e.g.*, RACHEL G. BRATT ET AL., WHY A RIGHT TO HOUSING IS NEEDED AND MAKES SENSE: EDITOR'S INTRODUCTION TO A RIGHT TO HOUSING 1, 3–4 (Rachel G. Bratt et al. eds., 2006); MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 5 (1st ed., 2016).

Again linking the report back to New York data, the Task Force took great pains to highlight possible economic savings from addressing the consequences of evictions (e.g., unhoused shelters) to eviction protections.[51]

It is worth exploring the fact that the Task Force identified "Consumer Protection and Fair Proceedings in Small Claims and Superior Court," namely, the large number of suits filed to collect small amounts of debt, as an additional area of need.[52] This area of need is not reflected in the three areas of recommended civil *Gideon* programs in Connecticut; further discussion on providing legal services to people affected by small-claims court is absolutely needed but outside the scope of this paper.

The Report went on to identify barriers to justice and the Task Force's other recommendations; all of these recommendations deserve further analysis and conversation, though are beyond the scope of this paper.

C. The Current State of Intimate Partner Violence, Family Integrity, and Housing Stability in Connecticut

The three areas of need directly reflected in the Task Force's recommendations regarding civil *Gideon* pilot programs—freedom from intimate partner/domestic violence, family integrity, and housing stability—remain critical points of emphasis. While each metric can and should be measured independent of each other, this section will demonstrate that each factor remains an issue or has worsened over the past six years most likely due in some part to the large-scale instability caused by the ongoing COVID-19 pandemic.

1. Intimate Partner Violence (IPV) and Restraining Orders

As covered above, civil restraining orders in Connecticut are governed by Connecticut General Statute § 46b-15 and are specifically referenced in the Task Force report as an area where counsel ought to be provided.[53] This statute provides general guidance on the administration of civil restraining orders, and specifically calls for the publication of an annual report documenting the past year in Connecticut restraining orders.[54]

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[51] TASK FORCE REPORT, *supra* note 1, at 13.

[52] *Id.* at 13.

[53] *See generally* CONN. GEN. STAT § 46b-15. It is critical to note that this paper does not cover a right to counsel in proceedings specifically regarding IPV cases; Connecticut does not offer any right to counsel—categorical or discretionary—to either accused perpetrators or alleged victims of IPV. New York is the only state with a categorical right to counsel in all IPV cases for all litigants. N.Y. Fam. Ct. Act §§ 262(a)(ii), 1120(a).

[54] CONN. GEN. STAT. § 46b-15e(b). The reports also contain details regarding civil protection orders, which are governed by Conn. Gen. Stat § 46b-16a; this paper does not discuss these orders, nor includes this data, since they are outside the scope of the Task Force's recommendations. *See, e.g.*, STATE CONN. JUD. BRANCH, RESTRAINING ORDERS (§ 46B-15) AND CIVIL PROTECTION ORDERS (§ 46B-16A): CALENDAR YEAR 2017, https://jud.ct.gov/statistics/prot_restrain/RestrainingOrderCPO2017.pdf (last visited May 8, 2022).

These reports show that the number of requested § 46b-15 restraining orders in Connecticut increased eighteen percent (from 6,280 orders to 7,407 orders) from calendar year 2020 to calendar year 2021.[55] While the number of reports has overall decreased slightly since calendar year 2017 (the first full year after the Task Force's report) from the 2017 amount of 7,252 orders in total, this at the very least shows that the literal level of need—restraining order cases appearing before the Connecticut court system—is at least the same as it was at the time of the report.[56]

The problem of IPV, however, extends far beyond the literal, defined bounds of restraining orders in Connecticut; restraining orders are only one method through which victims may seek refuge. The Centers for Disease Control (CDC) defines intimate partner violence as including, "physical violence, sexual violence, stalking and psychological aggression (including coercive tactics) by a current or former intimate partner (i.e., spouse, boyfriend/girlfriend, dating partner, or ongoing sexual partner)."[57]

Intimate partner violence undoubtedly increased during the COVID-19 pandemic. Domestic violence arrests increased as much as ten percent in New York City during the first wave of stay-at-home orders,[58] and general domestic violence incidences increased more than eight percent nationally "following the imposition of stay-at-home orders."[59] The Pan American Health Organization found calls to domestic violence hotlines increased by as much as forty percent during the pandemic in the Americas, and calls to

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[55] STATE CONN. JUD. BRANCH, RESTRAINING ORDERS (§ 46B-15) AND CIVIL PROTECTION ORDERS (§46B-16A): CALENDAR YEAR 2020, https://jud.ct.gov/statistics/prot_restrain/RestrainingOrderCPO2020.pdf (last visited May 8, 2022); STATE CONN. JUD. BRANCH, RESTRAINING ORDERS (§ 46B-15) AND CIVIL PROTECTION ORDERS (§ 46B-16A): CALENDAR YEAR 2021, https://jud.ct.gov/statistics/prot_restrain/RestrainingOrderCPO2021.pdf (last visited May 8, 2022). For the purposes of this piece, it is assumed that the number of restraining orders requested is a fair analogue for the amount of domestic/intimate partner violence over a given time period; while this is not a perfect metric, a recent study found that in California "between 84 and 92 percent" of protective orders filed are in connection to criminal domestic violence. Christopher T. Benitez et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHIATRY L. 376, 377 (2010).

[56] RESTRAINING ORDERS (§ 46B-15) AND CIVIL PROTECTION ORDERS (§ 46B-16A): CALENDAR YEAR 2017, *supra* note 54.

[57] NAT'L CTR. FOR INJURY PREVENTION & CONTROL, INTIMATE PARTNER VIOLENCE SURVEILLANCE 11 (2015), https://www.cdc.gov/violenceprevention/pdf/ipv/intimatepartnerviolence.pdf. "Domestic violence" and "intimate partner violence" are not interchangeable; domestic violence is defined more narrowly by the Department of Justice as the *criminal* act of violence whereas intimate partner violence is the incident—criminal or not—is the act of violence itself. *See* U.S. DEP'T JUST., DOMESTIC VIOLENCE (last visited May 8, 2022), https://www.justice.gov/ovw/domestic-violence. This article uses the term "intimate partner violence" (unless the term "domestic" is used in a quoted source) to capture the full scope of harm in this instance and as an acknowledgment that restraining orders (and legal services for those restraining orders) ought to extend beyond criminal cases.

[58] Brad Boserup, et al., *Alarming Trends in US Domestic Violence During the COVID-19 Pandemic*, 38 AM. J. EMERGENCY MED. 2753, 2753 (2020).

[59] ALEX R. PIQUERO ET AL., COUNCIL ON CRIM. JUST., *Domestic Violence During COVID-19*, 1, 3 (March 2021), https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/Domestic-Violence-During-COVID-19-February-2021.pdf.

EU member-state hotlines increased by sixty percent.[60] Especially early on in the pandemic, experts theorized that the imposition of necessary lockdown orders were worst-case scenarios for victims of IPV—situations where victims were at times *de facto* contained with their abusers—and "demonstrates a need for further research."[61] IPV victimizations increased by forty-two percent between 2016 and 2018, and COVID-19 lockdowns only encouraged this growth.[62] Even though COVID-19 lockdowns (or indeed, most to all substantive COVID-19 mandates) are no longer in place in Connecticut, that damage still exists and will always exist.[63]

It ought to be painfully obvious, however, that framing the conversation around COVID-19, increases in restraining orders, or on statutory analysis does not come close to capturing the full scope of IPV; it is important to recite the fact that intimate partner violence continues to exist in many forms to a degree that merits concrete, immediate action. In the United States alone, roughly one in four women and one in ten men have experienced "contact sexual violence."[64] Ten percent of women "report having been stalked by an intimate partner" in the United States.[65] Connecticut is not immune from this tragic prevalence of violence; the state self-reports that there are "approximately 20,000 family violence incidents annually resulting in at least one arrest," and that seventy-three of these incidents involve IPV.[66] Around 37,000 people "sought help" in Connecticut in domestic violence cases in 2020 alone.[67] It is clear that the issue of IPV has not lessened in the years since the Task Force's report.

2. Family Integrity

The Task Force's second recommended area of focus, "Family Integrity," is an amalgamation of two distinct kinds of civil action—child custody proceedings and deportation/removal proceedings. Both kinds of

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[60] *COVID-19 Pandemic Disproportionately Affected Women in the Americas*, PAN-AM. HEALTH ORG. (March 8, 2022), https://www.paho.org/en/news/8-3-2022-covid-19-pandemic-disproportionately-affected-women-americas; *Op-Ed: Violence against women: tackling the other pandemic*, THE LANCET (Jan. 2022, Vol. 7), https://www.thelancet.com/action/showPdf?pii=S2468-2667%2821%2900282-6.

[61] Boserup et al., *supra* note 58, at 2753.

[62] NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE 1 (last visited May 8, 2022), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457.

[63] For a full list of Connecticut's COVID-19 Emergency Orders, *see Connecticut COVID-19 Response*, CONN.GOV, https://portal.ct.gov/Coronavirus/Pages/Emergency-Orders-issued-by-the-Governor-and-State-Agencies (last visited May 8, 2022).

[64] VIOLENCE PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html (last visited May 8, 2022).

[65] *Id.*

[66] *Connecticut State Department of Children and Families*, CT.GOV, https://portal.ct.gov/DCF/Intimate-Partner-Violence/Home#CCADV (last visited May 8, 2022).

[67] Clare Dignan, *After almost 300 intimate partner violence deaths in Connecticut in 20 years, has enough changed?*, CT INSIDER (Dec. 8, 2021 at 6:00 AM), https://www.ctinsider.com/projects/2021/intimate-partner-violence/protective-restraining-orders/.

proceedings can implicate the foster care system; one 2019 study found that "on any given day, there are approximately 437,000 children in foster care" in the United States.[68] While there is "additional overlay" between these two issues (family integrity issues can often co-mingle immigration proceedings and child custody proceedings) this section examines both in turn below.[69]

a. Child Custody Proceedings Without Immigration Implications

Connecticut defines a child custody proceeding in Connecticut General Statute § 46b-115a(4) as a "proceeding in which legal custody, physical custody or visitation with respect to a child is an issue."[70] In Connecticut, "[t]he term includes a proceeding for dissolution of marriage, divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence, in which the issue may appear."[71] Connecticut's Family Courts fielded over 20,000 cases in 2020 through 2021, and over thirteen percent—2,709—were child custody cases.[72] While not all of these cases concern children entering foster care, there were 4,333 children in foster care in Connecticut alone in 2019.[73]

Even if one considers child custody proceedings in a vacuum—that is, simply as an isolated civil proceeding without the intersecting considerations of deportation or criminal legal proceedings—these proceedings fundamentally affect the structure and home life of children.[74] Custody battles can be emotionally charged, and the economics of having legal representation at these proceedings often serves as an additional exacerbating tension even if neither potentially-custodial party is at risk of imprisonment or deportation.[75] Providing legal counsel in these instances to both parents and children—especially in cases where a parent's rights are at risk of being terminated—can help alleviate possible due process concerns.

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[68] THE JUST. GOV. PROJ., KEY STUDIES AND DATA ABOUT HOW LEGAL AID HELPS KEEP FAMILIES TOGETHER AND OUT OF THE CHILD WELFARE SYSTEM, https://legalaidresourcesdotorg.files.wordpress.com/2021/04/foster-care.pdf (last updated March 23, 2021) (quoting, U.S. DEP'T HEALTH & HUM. SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES REPORT, THE AFCARS (2019), available at https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf).

[69] TASK FORCE REPORT, *supra* note 1, at 11.

[70] CONN. GEN. STAT. § 46b-115a(4).

[71] *Id.*

[72] STATE CONN. JUD. BRANCH, MOVEMENT OF ADDED FAMILY CASES BY CASE TYPES: FISCAL YEAR 1999-00 THROUGH 2020-21, https://jud.ct.gov/statistics/family/Fam_cases_added_2021.pdf (last visited May 8, 2022). This does not even include visitation decisions or Uniform Child Custody Jurisdiction actions; if those were included under a broader definition of "child custody" cases, that amount and percentage would be higher. *Id.*

[73] DEP'T HEALTH & HUM. SERVS., *Connecticut Child Welfare Outcomes*, https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/connecticut.html (last visited May 8, 2022).

[74] *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 108–09, 300 (1992).

[75] Kathie Mathis, CAL. COGNITIVE BEHAV. INST., *Psychological and Emotional Aspects of Child Custody Battles and Divorce* (Aug. 30, 2016), https://theccbi.com/psychological-and-emotional-aspects-of-child-custody-battles-and-divorce-by-kathie-mathis-psy-d/.

Fortunately, Connecticut is a national leader in providing a right to counsel in cases where immigration is not implicated, and has been since the early 1990's. This movement started before the Connecticut General Assembly codified this right into law; as the Connecticut Supreme Court wrote in *In re Baby Girl B.*, "[i]n future cases, the trial court should seriously consider the appointment of legal counsel to represent an absent parent in proceedings for the termination of parental rights in those cases in which the parent has received only constructive notice of the pendency of the proceedings."[76] Shortly thereafter, Connecticut passed General Statute 45a-717(b), which codified civil *Gideon* for indigent birth parents in such proceedings.[77] These rights were gradually extended to indigent children in both public and private proceedings in 2005.[78]

b. Removal Proceedings

The Task Force identifies removal proceedings as a category within "family integrity" because of its relative complexity and relative uncommon occurrence in Connecticut. Removal proceedings[79] are more complex than standard parental rights cases—state immigration policy often interacts in an unorthodox manner with federal institutions—and implicate policy that is outside the scope of state-level civil *Gideon*.[80] The Task Force does not address the issue of removal proceedings in general; while removal proceedings are technically civil actions,[81] the dictation of these proceedings may be outside the scope of what Connecticut could effectively legislate from a civil *Gideon* perspective since immigration courts are administered

[76] *In re* Baby Girl B., 618 A.2d 1, 11 n.22 (1992).

[77] CONN. GEN. STAT. § 46b-115a.

[78] *See In re* Christina M., 877 A.2d 941, 949–50 (Conn. App. 2005).

[79] "Removal proceedings" is the official name of what is often colloquially referred to as "deportation proceedings"; the former term replaced the latter in cases initiated after April 1997. 8 U.S.C. § 1229; *see generally 7.2 – Deportation Proceedings and Exclusion Proceedings*, U.S. DEP'T JUST., https://www.justice.gov/eoir/eoir-policy-manual/7/2 (last visited May 8, 2022). Deportation is "the removal from a country of an alien whose presence is unlawful or prejudicial," and is one possible consequence of a removal proceeding, but calling them "deportation proceedings" is technically incorrect. *Deportation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/deportation (last visited May 8, 2022).

[80] Only one state—New York—offers conditional rights to an attorney in any removal proceedings. *See* Jillian Jorgensen and Erin Durkin, *De Blasio, City Council reach deal limiting legal fund for immigrants facing deportation*, N. Y. DAILY NEWS (Aug. 1, 2017), https://www.nydailynews.com/new-york/de-blasio-city-council-reach-deal-immigrant-legal-aid-limits-article-1.3373228; *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, THE VERA INST. JUST., https://www.vera.org/newsroom/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation (last visited May 4, 2022). Florida offers a conditional right to an attorney to eligible "special immigrant juvenile status"—undocumented children—for some filing and immigration proceedings rather than custody cases. *See* FLA. STAT. ANN. § 39.5075.

[81] *Immigration Removal Proceedings and Criminal Law*, JUSTIA, https://www.justia.com/criminal/procedure/deportation/ (last reviewed Oct. 2021).

by the Federal government through the Department of Justice.[82] Instead, the Task Force focuses on the intersection of removal proceedings and child custody cases (i.e., cases where a parent's possible removal from the United States would have custody implications for any U.S.-born or non-removed dependent). For the purposes of the "family integrity" pillar of the report, removal proceedings take the place of an indigent criminal legal proceeding in a custody case like those seen in *Lassiter* or *Turner*.[83]

It makes more sense for Connecticut to approach removal proceedings as just another way custodial issues arise rather than a separate category because such proceedings are astronomically less common in Connecticut compared to states in the South and West of the United States. [84] 2,157 people have been removed from the United States following removal proceedings that specifically originated in Connecticut between 2003 and 2021; for context, 2,434,899 people were removed from the United States due to Texas-originating proceedings over that same period.[85] Since the Task Force issued its report in December 2016, twenty-six people have been removed from the United States due to proceedings arising in Connecticut.[86]

Immigration is a serious issue, and the issue of *Gideon* rights before immigration courts deserves far more attention. It is certainly a serious issue in Connecticut specifically; though there have been comparatively fewer deportations originating in Connecticut than many other states, Connecticut was "home to about 120,000 immigrants without documentation in 2016, accounting for about four percent of the state's total population."[87] The Task Force, however, avoided direct confrontation with this issue in its recommendation. Avoiding the topic of *Gideon* rights in immigration would allow a possible statute to incorporate custody issues resulting from removal

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[82] *1.4 – Jurisdiction and Authority*, U.S. DEP'T JUST., https://www.justice.gov/eoir/eoir-policy-manual/ii/1/4 (last visited May 8, 2022). That is not to say that there should not be a *Gideon*-like right to counsel at non-custodial removal proceedings in Connecticut. This merits further discussion but is outside the Task Force's recommendations and outside the scope of this paper. For further reading, *see generally Right to Counsel*, ACLU, https://www.aclu.org/sites/default/files/field_document/right_to_counsel_final.pdf (last visited May 8, 2022); INGRID EAGLY & STEVEN SHAFER, AM. IMM. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT, (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. That said, some local, Hartford initiatives merit consideration in this case. Alex Putterman, *'I don't have to worry': Initiative offers money for legal aid for those facing deportation*, THE HARTFORD COURANT, Apr. 10, 2022, at A1.

[83] *See generally* Lassiter v. Dep't Soc. Servs., 452 U.S. 18 (1981); Turner v. Rogers, 564 U.S. 431 (2011).

[84] *Latest Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGRATION PROJECT, https://trac.syr.edu/phptools/immigration/remove/.

[85] *Id.* (follow "State Departed From at Deportation" menu in the bottom left-hand corner; select "Texas.").

[86] *Id.* (follow "State Departed From at Deportation" menu in the bottom left-hand corner; select "Connecticut.").

[87] *See* Putterman, *supra* note 82, at A2.

proceedings as a part of the over 20,000 custody cases fielded in Connecticut every year.[88] This is itself a significant victory, albeit not an ultimate one.

3. Housing Stability

Housing policy has been at the heated center of debate since the publication of the Task Force's report and in the midst of the COVID-19 pandemic. Eviction policy has been a special focus; in May 2022, roughly 1,057,962 of Connecticut's estimated 3,605,597 total residents—slightly less than thirty percent of all residents—reside in a leased home.[89] While not every tenant is at serious risk of eviction, landlords continue to initiate eviction proceedings. From December 16, 2016—the day the Task Force published its report—through February 28, 2022, for example, 10,410 people were evicted from their homes in Hartford alone.[90] This problem existed before the COVID-19 pandemic even outside of Connecticut—in 2016, "2.3 million evictions were filed in the U.S.," or four evictions per minute,[91] and, to use Milwaukee, WI as an example, "landlords evict roughly 16,000 adults and children each year" despite the city only having merely 105,000 renter households.[92] Housing stability and eviction issues have only intensified as the proportion of income spent on housing has increased; "over 1 in 5 of *all* renting families . . . spends half its income on housing."[93]

COVID-19 affected evictions and housing stability greatly. On March 12, 2020, Judge Patrick L. Carroll III, Chief Court Administrator of the Connecticut Judicial Branch, announced that the court would only hear "Priority 1 Business Functions" until March 27, 2020.[94] These functions—which *did* include civil protection orders, orders of temporary custody, and termination of parental rights processes—*did not* include eviction processes,

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[88] MOVEMENT OF ADDED FAMILY CASES BY CASE TYPES: FISCAL YEAR 1999-00 THROUGH 2020-21, *supra* note 72.

[89] *Connecticut*, EVICTION LAB, https://evictionlab.org/covid-policy-scorecard/ct/ (for the renting population of CT) (last updated Jun. 30, 2021); *Connecticut Quick Facts*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/CT (last accessed May 9, 2022).

[90] *Connecticut Eviction*, CONN. FAIR HOUS. CTR., https://datastudio.google.com/u/0/reporting/ca1c60f5-0c9c-41ec-af87-4862e82e5ef4/page/KspPB?s=n8zkRH3NDV4 (last accessed May 8, 2022). This data point was gained using an interactive tool powered by the Connecticut Fair Housing Center and setting the date range to the period specified. For more information on the Connecticut Fair Housing Center, *see* CONN. FAIR HOUS. CTR., https://www.ctfairhousing.org (last accessed May 8, 2022).

[91] Terry Gross, *First-Ever Evictions Database Shows: 'We're in the Middle of A Housing Crisis,'* NPR, https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis (Apr. 12, 2018, 1:07 PM).

[92] DESMOND, *supra* note 50, at 4. Notably, this data dates from before this book's publication in 2016; it is now estimated that 50.6% of Milwaukee County households are rented. YAIDI CANCEL MARTINEZ ET AL., THE COST OF LIVING: MILWAUKEE COUNTY'S RENTAL HOUSING TRENDS AND CHALLENGES, WISC. POL'Y F. 3 (Aug. 2018), https://wispolicyforum.org/wp-content/uploads/2018/08/CostOfLiving_Full.pdf.

[93] DESMOND, *supra* note 50, at 303 (emphasis in original).

[94] CARROLL, *supra* note 7.

effectively establishing a procedural eviction moratorium in Connecticut.[95] A week later, the Connecticut Supreme Court announced that all civil trials and procedures—including evictions—would be cancelled until at least May 1, 2020.[96] While this court order was extended several times until the court resumed scheduling eviction hearings on September 14, 2020, Governor Ned Lamont issued Executive Order No. 7X, which in part modified Connecticut General Statute § 47a-23 to read "No landlord . . . shall, before July 1, 2020, deliver or cause to be delivered a notice to quit or serve or return a summary process action . . . except for serious nuisance . . ."[97]

While this eviction moratorium was in place, the number of eviction processes initiated plummeted; 264 evictions were filed in Connecticut between March 15 and March 22, 2020, 184 eviction processes were processed *in total, across the state* between April 15 and July 4, 2020.[98] Governor Lamont continued to extend increasingly less lenient eviction moratoriums until June 30, 2021; the total number of evictions per week in Connecticut did not exceed 200 during that entire timeframe.[99] Connecticut renters also benefitted from the CDC's eviction moratorium order that commenced on September 4, 2020 that stated that, "[u]nder 42 CFR 70.2, a landlord . . . shall not evict any covered person from any residential property."[100] Even though this order only extended until December 31, 2020, the CDC continued to extend the moratorium until the Supreme Court struck it down in *Alabama Association of Realtors v. Department of Health and Human Services* on August 26, 2021.[101]

Since the expiration of the CDC moratorium, evictions have increased markedly in Connecticut. Between September 5, 2021 and March 20, 2022, there were at least 200 evictions per week in the state, with 613 evictions in the state during the week of March 13, 2022.[102] While COVID-19 remains present in the United States, and likely will remain present for the foreseeable future, eviction moratoriums are unlikely to be re-enforced as the general public becomes more accepting of the pandemic's costs and

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[95] *Id.*

[96] EVICTION LAB, *supra* note 89.

[97] *Id.*; Office of the Governor Ned Lamont, Executive Order No. 7X (Apr. 10, 2020), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7X.pdf; *see generally* CONN. GEN. STAT. § 47a-23.

[98] EVICTION LAB, *supra* note 89.

[99] *Id.* (these less lenient moratoriums, for example, allowed a landlord to file "notice where there was 'serious nonpayment of rent,' or 'a rent arrearage equal to or greater than six months' worth of rent due on or after March 1, 2020.'")

[100] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,296 (Sept. 4, 2020), on file at https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf.

[101] *Id.*; Ala. Ass'n Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485 (2022). "[T]he CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts . . . ." *Id.* at 2486.

[102] *Id.*

presence in our lives.[103] It is unclear how evictions will move forward in the future, but in the immediate case there is a strong possibility that the "aftershocks" of COVID-19—including aftershocks in employment and inflation—will unsettle trends in housing generally.

III. THE EFFECT OF LEGAL REPRESENTATION AND CONNECTICUT'S PILOT PROGRAMS

Assume that the previous sections of this paper prove that intimate partner violence prevention, family integrity maintenance, and housing stability maintenance (and their proxy right to counsel procedures in restraining orders, immigration-driven custody defense, and eviction defense) are both: (1) existing problems that are at least unchanged since the Task Force report; and (2) areas generally worthy of reform. Even in this case, one final step before analyzing possible solutions concerns looking at the effects of legal representation in these areas, programs that already have been piloted in Connecticut, and seriously interrogating whether legal representation is even the best method of addressing these issues in the first place.

A. The Effects of Legal Representation in Each Practice Area

The presence of legal representation does not have a uniform effect on across different kinds of civil cases; however, most studies indicate that legal representation has net positive effects on the civil case outcomes that the Task Force identified.

1. Restraining Orders

The accompaniment of representation evidently helps in cases where spouses are seeking restraining orders. Victims of intimate partner violence often go into civil court without representation, especially when criminal domestic violence charges are pending.[104] This data dates back almost five decades after many states passed protective order legislation between 1976 and 1992.[105] One 2003 study, for example, found that eighty-three percent of women accompanied by representation were successful in seeking civil

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[103] One Monmouth University poll published on January 31, 2022 found that 7 in 10 Americans believe "it's time we accept that Covid is here to stay and we just need to get on with our lives." Patrick Murray, *National: Time to Accept COVID and Move On?*, MONMOUTH UNIV. 1, 6 (Jan. 31, 2022), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_013122.pdf/.

[104] Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 54 (2000).

[105] Jane C. Murphy, *Engaging With The Stat: The Growing Reliance on Lawyers and Judges To Protect Battered Women*, 11 AM. UNIV. J. GENDER, SOC. POL'Y & L. 499, 502 (May 13, 2003), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1404&context=jgspl (citing *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1529 (1993)).

protection orders, compared to thirty-two percent of women who were unaccompanied.[106] Even at this time, authors noted the effectiveness of providing counsel to victims of IPV, citing a twenty-one percent decrease in IPV between 1993 and 1998, and the role of counsel in that decline.[107]

A 2009 study found that both petitioners and respondents in protective order procedures were only represented by counsel in twenty percent and nineteen percent of the time, respectively, and that neither party had received "any kind of legal assistance" forty-six percent of the time.[108] This study found that protective orders were issued sixty-six percent of the time when petitioners were represented by counsel, compared to fifty-eight percent of petitioners without legal representation and/or assistance.[109] Counsel in these cases almost uniformly helped focus and clarify processes; *zero* percent of all instances where petitioners had a lawyer only "included . . . general details about abuse," alleged in the case.[110]

2. Family Integrity

Representation has proven equally vital in family integrity cases. First looking at legal custody battles where immigration status is not a factor, data show that representation remains "an important variable affecting case outcomes in the area of family law."[111] Specifically, representation helps lead to better solutions in civil custody cases where two guardians are working through the court system. In divorce cases where custody is an issue, one 1992 study found that representation was critical for achieving an amicable outcome; joint custody was an outcome only in fifty-one percent of cases where neither party had a lawyer, but increased to ninety-two percent of the time where each party had a lawyer.[112]

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[106] *Id.* at 511–12. It should be noted that the sample size for this study was relatively small; only 142 total women seeking protective orders were surveyed; of these women, only thirty-six had legal representation. *Id.* at 511.

[107] AMY FARMER & JILL TIEFENTHALER, EXPLAINING THE RECENT DECLINE IN DOMESTIC VIOLENCE 158 (2003).

[108] Alesha Durfee, *Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders*, 4 FEMINIST CRIMINOLOGY 7, 16 (2009).

[109] *Id.* It is important to note that this sample size is also small; only 101 cases in total were analyzed. *Id.*

[110] *Id.* at 17. Again, it is important to note that the sample size for this specific statistic was merely twenty petitioners.

[111] Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORD. URB. L. J. 37, 51 (2010); *see also* U.S. DEP'T HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ACYF-CB-IM-17-02, INFO. MEMORANDUM ON LEGAL REPRESENTATION FOR CHILDREN AND PARENTS (2017), (stating "The Children's Bureau (CB) strongly encourages all child welfare agencies and jurisdictions (including, state and county courts, administrative offices of the court, and Court Improvement Programs) to work together to ensure that high quality legal representation is provided to all parties in all stages of child welfare proceedings.").

[112] MACCOBY & MNOOKIN, *supra* note 74, at 300. This assumes that joint custody is a general indicator of a favorable outcome; of course, this may not be the case in every custody battle in the case of divorce. *Cf.* Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106, 2109–10

It is clear that the Task Force recommended the widespread provision of legal services, regardless of what kind of "family integrity" case was at issue. Its final report took particular care in outlining how proceedings pitting the state against immigration-effected indigent parties in custody cases required *Gideon* coverage as well.[113] This is likely due to the fact that Connecticut already has a robust civil *Gideon* legacy on providing counsel for indigent parties in custody cases without immigration implications.[114] Relying on a pilot program in New York City for detained immigrants, the Task Force highlighted statistics stating that similar programs providing counsel to indigent parties had increased successful outcomes by one thousand percent.[115] This same program also putatively saved New York State $1.9 million.[116]

Connecticut's civil *Gideon* program in custody cases is categorical, and legal aid organizations in the state do not target specific groups in most cases.[117] There is significant data that targeting populations in the greatest need could shore up Connecticut's existing custody *Gideon* laws.

For example, New York City's Center for Family Representation (CFR) "provide[s] legal and social work services to primarily Black and Brown families at risk of separation through foster care or juvenile incarceration," cases where New York City is attempting to remove guardianship from families due to incarceration or other allegations.[118] The CFR "works with the parent through the entire life of the child welfare case."[119] The organization had served over 3,000 families and 6,000 children between

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(2013) ([S]horter, simpler, cheaper, more personal, more collaborative and less adversarial" methods may be preferable in divorce proceedings when custody is at issue since a "lawyer-centric adversary system . . . does more harm than good for most domestic relations litigants.").

[113] TASK FORCE REPORT, *supra* note 1, at 20. Interestingly, the committee does not explicitly differentiate between different *kinds* of custody cases in its report; it instead more or less ignores existing laws granting counsel in custody battler during non-immigration cases.

[114] *See* CONN. GEN. STAT. §§ 45a-717(a)–(b) (2022), 46b-121(a)(1) (2022), 46bb-136 (2019).

[115] TASK FORCE REPORT, *supra* note 1, at 20 (citing NAT'L IMMIGR. L. CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 15 (2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf.).

[116] TASK FORCE REPORT, *supra* note 1, at 20. That said, it is also worth mentioning that New York-initiated deportation proceedings resulted in the removal of 3,267 people in fiscal year 2014. *See* Latest Data, *supra* note 84. Connecticut-initiated proceedings resulted in the removal of 45 people during that same time frame. *See* Connecticut Data, *supra* note 86. Still, a far more robust conversation is warranted on how any program regarding removal proceedings and custodianship—while Connecticut has a comparatively small immigration component to civil *Gideon* issues, any state with larger undocumented populations (e.g., Texas, California, and New York) may need to take a different approach with widespread family integrity civil *Gideon* solutions.

[117] Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 141 (Spring 2012), https://www-jstor-org.ezproxy.lib.uconn.edu/stable/23240377?refreqid%3Dexcelsior%253Aacaded0e492db31ca42d222c81dc3e83%26seq%3D1=&seq=3.

[118] *Mission & History*, CTR. FOR FAM. REPRESENTATION (last visited May 8, 2022), https://cfrny.org/mission-history/.

[119] Thornton & Gwin, *supra* note 117, at 143.

2002 and 2012[120]; according to data accessed on May 8, 2022, in 2020 alone, 2,654 families and over 5,000 children were served by the organization.[121] In addition to evident, direct cost savings for the cities,[122] "CFR's attorneys have anecdotally reported that they have fewer continuances as a result of attorneys being unprepared," therefore increasing judicial efficiency.[123] While there likely would not be a one-to-one comparison between a Connecticut system and this example from New York City, there are other examples of programs across the country that have shown that family integrity cases more often allow parents to retain custody of their children when all sides are represented and communities of greatest need are targeted for support.[124]

3. Eviction Defense

Eviction cases are notorious for especially disadvantaging tenants; "in many housing courts around the country, [ninety] percent of landlords are represented by attorneys, and [ninety percent of tenants] are not."[125] Much like lawyers in IPV or family integrity cases, lawyers in eviction cases have a greater familiarity with the housing system writ large, are able to raise technical legal defenses, and are less likely to be intimidated by the court system.[126] Even before considering outcomes, many homeowners would readily accept representation in eviction cases when offered.[127]

Tenants facing eviction are also more likely to face positive outcomes when represented by counsel. One 2013 study of eviction defense in Boston

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[120] *Id.*

[121] *Results & Reach*, CTR. FOR FAM. REPRESENTATION (last visited May 8, 2022), https://cfrny.org/results-reach/. Fifty-six percent of the CFR's 2020 clients "avoid[ed] foster care altogether," and the organization self-reports that the median length of stay of a client child in foster care has been 6.4 months, "compared to 11.5 months for all children citywide before CFR began working with parents in a high-volume capacity," since 2007. *Id.*

[122] Thornton & Gwin, *supra* note 117, at 144; *see also Results & Reach*, *supra* note 121 (where the CFR self-reports $50 million in government savings since 2007 and outlines the total cost of $7,100 per CFR team per client. The minimum cost of keeping one child in foster care in New York City in 2020 was $77,000). *Id.*

[123] Thornton & Gwin, *supra* note 117, at 144.

[124] *Id.* at 144–48 (covering the Detroit Center for Family Advocacy and the Washington State Office of Public Defense, Parents Representation Program). Specifically, the Washington program resulted in "10.4% more reunifications in filed cases (equaling a 39% rate increase) . . . [and] 10.6% more case resolutions within about 2.5 years." KEY STUDIES AND DATA, *supra* note 68 (quoting Washington State Office of Public Defense, 2010).

[125] DESMOND, *supra* note 50, at 303.

[126] *Id.* at 304. It is also worth noting that people facing evictions—often this country's least well-to-do and most harried—would be the parties that would most benefit from having another party take charge of their case; "[i]f tenants had lawyers, they wouldn't need to go to court. They could go to work or stay home with their children while their attorney made their case." *Id.*

[127] *See, e.g.*, ninety-seven percent (seventy-four out of seventy-six) of people offered eviction legal defense in one Boston study (discussed later in this section) accepted an offer of eviction defense from Greater Boston Legal Aid. D. James Grenier et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 908, 925 (2013).

shows just how effective legal assistance—in this case, provided by Greater Boston Legal Services (GBLS)—is in eliciting better outcomes for tenants.[128] Representation made tenants twenty-eight percent more likely to retain actual possession of their home.[129] Represented parties faced an adverse judgment of possession in merely seventeen percent of all cases.[130] Even if the observed population was small, "[l]arge differences in outcomes were indeed present," in the study, due to legal counsel displaying a confrontational legal style that better advocated for client outcomes, expert knowledge of applicable housing law, or legal counsel's use of evidentiary hearings to develop a more usable record.[131]

These kind of results are not limited to Boston; "a program that ran from 2005 to 2008 in the South Bronx provided more than 1,300 families with legal assistance and prevented eviction in 86 percent of cases."[132] This Housing Help Program, a collaboration between the United Way of New York City, the Civil Court of the City of New York, and the New York City Department of Homeless Services, allowed lawyers to pursue other positive housing outcomes for their clients; over four percent of participants were re-housed elsewhere and over one percent were granted sole possession of their domicile.[133] This left an over ninety-one percent positive outcome rate for all participants in the study.[134] Building on the success of this program, in 2017, New York City passed Local Law 136, phasing in a right to counsel in all eviction cases by July 31, 2022.[135] The program continues to be a success during the COVID-19 pandemic, as eighty-four percent of all represented tenants are able to remain in their homes.[136]

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[128] *Id.* at 908.

[129] *Id.* at 927 (specifically, represented parties retained occupancy of their home sixty-six percent of the time, compared to thirty-eight percent of the time for unrepresented parties). "Actual possession refers to whether the evictor ended up in possession, not whether any loss of possession by the occupant was voluntary or otherwise." *Id.* at 926.

[130] *Id.* at 927.

[131] *Id.* at 920 (there were only 129 participants studied in this case). *See also id.* at 941–42, 947 (elaborating how attorneys used different methods to reach a positive outcome for tenant).

[132] DESMOND, *supra* note 50, at 304; STRUCTURED EMP. ECON. DEV. CORP., HOMELESSNESS PREVENTION PILOT FINAL REPORT 2 (2010), https://cdn2.hubspot.net/hubfs/4408380/PDF/General-Housing-Homelessness/Housing-Help-Program.pdf [hereinafter SEEDCO].

[133] SEEDCO, *supra* note 132, at 1, 31.

[134] *Id.* at 31.

[135] N.Y.C., NY, N.Y.C. ADMIN. CODE § 26-1302 (2017). For more information on Local Law 136, *see* LEGAL REG. N. Y. CITY COUNCIL, PROVIDING LEGAL SERVICES FOR TENANTS WHO ARE SUBJECT TO EVICTION PROCEEDINGS HOMEPAGE, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=ID%7cText%7c&Search=214 (last accessed May 9, 2022); OFF. CIV. JUST. N.Y.C. HUM. RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR FOUR OF IMPLEMENTATION IN NEW YORK CITY 2 (2021), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2021.pdf.

[136] *All About the Right to Counsel for Evictions in NYC*, NAT'L COAL. FOR C.R. COUNS. (Apr. 17, 2022), http://civilrighttocounsel.org/major_developments/894.

These results are also not reserved for the largest cities in the United States. Sacramento, California, conducted an eviction representation pilot program in 2012 despite having only 466,000 residents at the time.[137] The program estimated that ninety to ninety-five percent of cases settled, and that half of all cases that went to trial were won by represented tenants.[138] This program had "a supervising attorney, four staff attorneys and an administrative support clerk," and served over 700 litigants in its first year of operation.[139] The success of this Sacramento program—and a similar program in neighboring Yolo County, CA[140]—may indicate the viability of such programs in areas less dense than other example cities, therefore indicating a chance that this program could succeed in a place like Connecticut.

B. Connecticut's Gideon *Pilot Programs*

Since the Task Force Report's publication in 2016, Connecticut has instituted two temporary programs designed to test civil *Gideon* viability in two of the three areas identified in this paper: 46b-15 restraining orders and eviction defense. It is unclear whether these programs were successful during their implementation or whether they will be successful; the "outcome" of the eviction defense program is not analyzed in this piece because its first report is set to be issued in January 2023, and the § 46b-15 Restraining Order programs have organizational weaknesses that render analysis inconclusive. This section briefly summarizes these programs and examines the stated results of the restraining order pilot program.[141]

1. Public Act 17-12 Waterbury Restraining Order Pilot Program (2018–2019)

In direct response to the Task Force Report, the Connecticut General Assembly "passed sections 150 and 151 of Public Act 17-2 . . . which established a yearlong pilot program to provide legal representation and respondents at any hearing on an application for a restraining order seeking relief from abuse brought under § 46b-15."[142] The original text of the law set the duration of this program as running from July 1, 2018 to June 30, 2019.[143] This program defined indigency in terms of annual gross income,

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[137] SACRAMENTO QUICK FACTS, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/sacramentocitycalifornia (last visited May 9, 2022).

[138] *See* Pastore, *supra* note 31, at 108.

[139] *Id.*

[140] *Id.* at 110. "Yolo is a mixed urban and rural county of 200,000," perhaps representing that these programs may help in even less dense communities. *Id.*

[141] 2021 CONN. ACTS 21-34 § 1(i) (Reg. Sess.).

[142] STATE CONN. JUD. BRANCH, CIVIL GIDEON PILOT PROGRAM: REPORT TO THE CONNECTICUT GENERAL ASSEMBLY 2 (2019), https://www.jud.ct.gov/HomePDFs/CivilGideon.pdf.

[143] 2021 CONN. ACTS 17-2 § 150(a) (Spec. Sess.).

and with "indigency"—and therefore eligibility for this program—defined as $23,760 for a litigant with no dependents, to $48,600 for litigants with three dependents.[144] Section 151 of the same law remitted $200,000 to the Connecticut Judicial Branch, and the Division of Public Defender Services from the State Attorney General's budget, officially funding the program for the duration of its life.[145]

The program commenced on time, and ran under the direction of Connecticut Legal Services, Inc. (CLS).[146] CLS provided "two full-time attorneys to represent qualified applicants who sought legal representation through the pilot program in the Waterbury Judicial District," which was the sole area where this pilot program was run.[147] CLS specifically provided services for *petitioners*; "[t]he act charged the Division of Public Defender Services with providing legal counsel to indigent respondents."[148] During the length of the program, 432 applications were filed by restraining order litigants, with roughly fifty percent of all restraining order applicants and one-third of all respondents filing for representation.[149] Roughly eighty percent of applicants were deemed eligible, and 347 litigants were represented in total.[150] The Judicial Branch collected statistics through its case management system, which mostly relied on litigant surveys after the cessation of the judicial process.[151]

This program was dogged by a structure that did not measure the program's effectiveness, relatively ineffective goal-setting, and a lack of target metrics for success. First, the program was not run with clinical trial structures that would allow policymakers to accurately compare outcomes of litigants with and without representation; the program just measured the outcomes of represented parties. Unlike randomized control trial (RCT) experiment structures, which allow for the comparison of individual variables, the pilot representation program only measured the satisfaction of represented parties rather than all § 46b-15 litigants in Waterbury over the program's execution.[152] While this reticence to use this methodology, or to

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[144] *Id.* at § 150(e). If a litigant had more than three dependents, the indigency threshold was increased by $8,320 for each additional dependent; this amount was equivalent to the threshold increases outlined earlier in § 150(e). *Id.*

[145] *Id.* at § 151.

[146] STATE CONN. JUD. BRANCH, *supra* note 142, at 4.

[147] *Id.* "CLS estimated it would serve approximately 500 clients in Waterbury at a price of $350 per client, resulting in a total program cost of approximately $175,000," or $25,000 under the total program allocation amount set out in Pub. Act 17-2, § 151. *Id.*; *see also* 2021 CONN. ACTS 17-2 § 151 (Spec. Sess.).

[148] STATE CONN. JUD. BRANCH, *supra* note 142, at 2.

[149] *Id.* at 5.

[150] *Id.* ("CLS filed appearances on behalf of 217 applicants and the Division of Public Defenders represented 130 respondents," for a total of 347 litigants.).

[151] *Id.* at 6–7. The sample size for this program was 339 litigant surveys—eight participants apparently did not complete surveys—114 family relations counselor surveys and 191 judge surveys. *Id.* at 7.

[152] *Id.*

collect more wide-ranging data to fully understand the effects of representation on litigants was perhaps in line with the legal profession's general lack of standardized policy implementation methods, it nevertheless lessened the ability for future policymakers to glean useful data from the exercise.[153]

Second, the program was not created with specific, actionable goals when enacted. Sections 150 and 151 of Public Act 17-2 did not outline goals beyond representation for all § 46b-15 litigants in Waterbury for one calendar year; while the program was impliedly founded under the auspices of the Task Force's recommendations of general access to civil representation, the program itself did not set any metrics that it would strive for over the course of its existence.[154] As the official Report on this program—mandated by Pub. Act 17-2, § 150(g)[155]—stated, "the legislation did not define what results would be considered a successful pilot program"; the lack of clarity on this point led to significant ambiguity in the program's outcomes.[156] The program could have perhaps been founded with the goal of increasing litigant satisfaction or understanding of the legal process. While both of these proposals also have shortcomings—in establishing goals, bias may be more easily introduced—but still could have provided a clearer guiding light for the program.

Third, there was relatively little data collected from participants in the program; the program relied solely on "(1) statistics that it regularly keeps, and (2) satisfaction surveys."[157] Both are needed metrics, but neither provide a full understanding of the effects this program had on its participants. Regularly-kept statistics or in-the-moment satisfaction surveys did not cover long-term satisfaction, or the rate at which participants required further representation at later times. Neither metric attempted to control for existing biases against the legal profession. Indeed, the program's final report seemed to concede that the program was designed to have *no real definitive outcome*; the program was structured, "so that individuals may draw their own conclusion as to the success of the pilot program."[158]

This program, perhaps due in part to these process inefficiencies, yielded results that are inconclusive at best and evince failure at worst. The program's metrics show that litigant satisfaction actually *slightly decreased* with representation; litigants reported that they were slightly more likely—eighty-two percent to seventy-nine percent—to be satisfied with the

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[153] For a critique of the legal profession's unwillingness to adopt RCT methodology, *see* D. James Grenier & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession*, 12 ANN. REV. L. SOC. SCI. 295, 296 (Apr. 29, 2016).

[154] 2021 CONN. ACTS 17-2 §§ 150–151 (Spec. Sess.).

[155] *Id.* at § 150(g).

[156] STATE CONN. JUD. BRANCH, *supra* note 142, at 5.

[157] *Id.*

[158] *Id.*

outcome of their case when self-represented.[159] The program evidently did not have a large effect on the actual amounts of restraining orders granted or dismissed.[160] The program's primary success from a litigant's perspective appeared to be in helping litigants feel more prepared for their proceedings; ninety percent of represented litigants said they felt prepared for their hearing, compared to seventy-five percent of those unrepresented.[161] Ninety-five percent of represented litigants said they understood the court process, and ninety-five percent said they believed that having an attorney helped them understand the court process.[162]

Waterbury court officials were noticeably more bullish on the program. Judges felt that parties that had been provided a free attorney through the pilot program were "prepared for their court hearing" thirteen percent more frequently, and understood the court process seven percent more frequently.[163] Family relations counselors saw an uptick in agreements during case conferences during the pilot program; agreements regarding restraining orders increased eighteen percent.[164] However, litigant outcomes may not have been aided by this evidently more lawyerly process; family relations counselors were evenly split on whether having lawyers present during case conferences had a positive (or any) effect on conference efficiency.[165]

Based on these metrics, the final report of the 17-12 program recommended against expanding the program further since "funding for legal representation might be more impactful if directed toward other court processes where there are greater unmet needs," such as residential evictions, noting that "a significant portion of the cases involve tenants who have limited resource and are unable to hire attorneys."[166] The final report pointed to resources available to self-represented § 46b-15 litigants that provide guidelines that may be commensurate to such litigants' needs.[167]

The Connecticut General Assembly, however, did memorialize a grant process similar to the restraining order pilot program in Connecticut General Statute § 46b-15(f) in June 2021.[168] This grant program allows the state to

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[159] *Id.* at 7.

[160] Before the pilot program, between July 1, 2017, and April 22, 2018, restraining orders were granted forty percent of the time and dismissed thirty-six percent of the time; this is compared to the pilot program's order granting rate of forty-two percent and dismissal rate of thirty-nine percent. *Id.* at 6.

[161] STATE CONN. JUD. BRANCH, *supra* note 142, at 7.

[162] *Id.* at 8–9.

[163] *Id.* at 9.

[164] *Id.* at 10.

[165] *Id.* at 11. "Family relations counselors were split as to whether they thought the presence of an attorney at the case conference created a more efficient conference: 34% agreed, while 34% disagreed." *Id.*

[166] STATE CONN. JUD. BRANCH, *supra* note 142, at 14–15.

[167] *Id.* at 14.

[168] *See generally* CONN. GEN. STAT. § 46b-15f (2016).

disburse funds through the Connecticut Judicial Branch[169] not exceeding $200,000 to legal aid organizations in the Fairfield, Hartford, New Haven, Stamford/Norwalk, or Waterbury judicial districts.[170] While this law represents a furthering of § 46b-15 restraining order representation (and does build upon some of the shortcomings of the 17-12 program),[171] it does so on a non-Statewide scale and in funding that will require yearly renewal. No data is currently available for this program, as the law mandated the manufacturing of its first annual report on July 1, 2022.[172] As of November 2022, no such report has been published.

2. Eviction Pilot Program

Eviction proceedings were identified in the Task Force Report as a critical area, as "the impact of even short-term homelessness and housing insecurity can be devastating," and was identified as an area of greatest need in the final report of the Waterbury Restraining Order Pilot Program.[173] The Task Force report even included a recommendation—unrelated to the pilot program—emphasizing the need for additional training for non-licensed professionals in order to address evictions.[174]

This call for eviction-centered help only increased after the Task Force's report. COVID-19 related pressure on the housing market and renters continued to increase, and notable voices in the Connecticut House of Representatives[175] and the Connecticut Bar Association pushed for increased

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[169] Interestingly, Connecticut administers this program through "the organization that administers the program for the use of interest earned on lawyers' clients' funds accounts" rather than the Connecticut Judicial Branch directly. *See id.* § 46b-15f(a).

[170] *Id.* at § 46b-15f(c).

[171] For example, subsection (f) of the new law sets aside office space for grant recipients, and mandates both programmatic advertising and notification of program eligibility to potential applicants. *Id.* § 46b-15f(f)(1)–(3).

[172] *Id.* at § 46b-15f(h). It is unclear what data this program does and will rely on; the relevant statute does not specify whether the data offerings will be expanded beyond surveys and regularly kept statistics. *Id.*

[173] TASK FORCE REPORT, *supra* note 1, at 12; CIVIL GIDEON PILOT PROGRAM: REPORT, *supra* note 142, at 14–15.

[174] The eleventh recommendation of the report specifically says, "Enact a statute establishing an accredited representative pilot program allowing trained non-lawyers to assist in matters ancillary to eviction defense proceedings and consumer debt cases in accordance with General Statutes § 51-81c." TASK FORCE REPORT, *supra* note 1, at 4.

[175] House Speaker Matthew Ritter (D-Hartford), for example, spoke at length about the need for the program and the possibility of its extension, saying,

> [w]hen this [eviction] moratorium goes away, you're gonna have a mass amount of chaos, and I think having lawyers and housing specialists be involved in the process will help a lot . . . . I think the continuation of this program in the future is a big deal, and we'll kind of see where we are after this tidal wave [that] unfortunatly [sic] is going to hit in the next couple of months.

Jacqueline Rabe Thomas, *CT House Votes to Provide Attorneys for Tenants Facing Eviction*, CT MIRROR (May 11, 2021), https://ctmirror.org/2021/05/11/ct-house-votes-to-provide-attorneys-for-tenants-facing-eviction/.

provision of counsel in evictions cases.[176] The Connecticut House of Representatives specifically commissioned favorability reports in March 2021, and prepared a draft bill (House Bill 6531) to memorialize this program.[177]

On June 10, 2021, the Connecticut General Assembly passed Public Act No. 21-34, which was in part "An Act Concerning the Right to Counsel in Eviction Proceedings," creating the Connecticut Right to Counsel Program (CT-RTC).[178] This program "established a right to counsel program for the purpose of providing any covered individual with legal representation at no cost," in covered eviction proceedings within the state.[179] In addition to providing legal counsel, the Public Act set up a working group to monitor the progress of the program,[180] required potential evictors to notify their tenants of their right to an attorney by October 1, 2021,[181] and the issuance of a report on the program's process no later than January 1, 2023.[182] This

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[176] Judge Cecil J. Thomas, former President of the Connecticut Bar Association, urged attorneys to get involved in advocating in favor of the right-to-counsel bill and to perform more *pro bono* work in the area, writing, "[t]he Connecticut Bar Association is supporting eviction right to counsel proposals before the Connecticut General Assembly in the upcoming legislative session." Thomas, *supra* note 35. *Cf.* Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1231 (2010).

> In sum, it is fair to be suspicious of courts and bar associations when they come to help the poor. Experience teaches that the most the poor can hope for is more lawyers or more process, with little of substance to show for it. Moreover, it is not clear that spending on poverty programs is not a zero sum game. If that is the case, the choice of process over substance was doubly destructive: paying for the layers of due process that now 'protect' the poor from losing various benefits may actually lower the absolute amount of those benefits.

Id. at 1269.

[177] *See* H.R. 6531, 2021 Gen. Assemb., 172th Sess. (Conn. 2021).

[178] *See generally* 2021 Conn. Acts. 21-34 (Reg. Sess.). The full name of the Act is "An Act Concerning the Right to Counsel in Eviction Proceedings, the Validity of Inland Wetlands Permits in Relation to Certain Other Land Use Approvals, and Extending the Time of Expiration of Certain Land Use Permits." *Id.* While the latter two topics are likely interesting and certainly important, neither are within the scope of this piece. Section 1 of the Act refers specifically to evictions and is directly relevant to this paper. *See also* CONNECTICUT RIGHT TO COUNSEL NOTICE, STATE CONN. JUD. BRANCH (Oct. 1, 2021), on file at https://www.jud.ct.gov/HomePDFs/RighttoCounselNotice093021.pdf?v1 (noting the program's name and abbreviation).

[179] 2021 Conn. Acts. 21-34 § 1(b) (Reg. Sess.). Specifically, "covered matter[s]" (i.e., evictions) are defined as

> any notice to quit delivered to, or any summary process action instituted against, a covered individual pursuant to chapter 832 or chapter 412 of the general statutes or any administrative proceeding against a covered individual necessary to preserve a state or federal housing subsidy or to prevent a proposed termination of the lease.

Id. § 1(2).

[180] *Id.* at § 1(e)(1).

[181] *Id.* at § 1(f)(1); *see also* CONNECTICUT RIGHT TO COUNSEL NOTICE, *supra* note 178. *See generally* EVICTIONHELPCT.ORG, https://www.evictionhelpct.org (an organization collating several access to counsel resources in this program area) (last visited May 3, 2022).

[182] 2021 Conn. Acts. 21-34 § 1(i) (Reg. Sess.).

bill made Connecticut the third state in the country to provide a categorical right to counsel in eviction cases.[183]

IV. THE QUESTION OF UNIVERSAL CIVIL *GIDEON* EFFECTIVENESS AND RECOMMENDED POLICY SOLUTIONS

A. The Effectiveness of Individualized Representation Under Universal Civil Gideon

A preliminary consideration for any policy change in this area is whether needed systemic change ought to begin with individualized legal representation. "Access to justice" is a term and field that usually implies the imposition of more robust legal processes into the lives of litigants—both actual and potential.[184] Looking at issues like IPV and housing stability through a solely legal lens is both myopic and fails to grasp the non-legal underpinnings of many issues. Lawyers and judges often are the driving force behind solutions that would create more arcane and labyrinthine processes within the legal system; however, any conversation around civil *Gideon* must query whether these processes would actually solve underlying problems or merely serve as a means of overcomplicating an already intimidating court system.[185] Thus far, this article assumed that increased representation tends to help litigant outcomes; this assumption deserves to be examined fully.

In short, this query has merit. "Resolving justice problems lawfully does not always require lawyers' assistance."[186] There are non-judicial means of settling nominally legal issues, therefore saving time, money, and manpower, both from the state and from litigants.[187] Furthermore, engaging with non-judicial resolution strategies—and moving away from civil *Gideon*—could reduce interactions between the legal system and the populations that are most inequitably affected by the legal system.[188]

The Task Force to Improve Access to Legal Counsel in Civil Matters directly considered the issue of additional process-caused bureaucracy; its recommendation section specifically called for Connecticut agencies to reduce the impact of bureaucracies on the judicial system,[189] and for regulated industries affected by recommended changes to measure the

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[183] Washington state and Maryland have provided all tenants with a right to counsel at eviction hearings. *See* S.B. 5160, 67th Leg., Reg. Sess. (Wa. 2021), on file at https://legiscan.com/WA/text/SB5160/2021; H.B. 18 (Md. 2021), on file at https://mgaleg.maryland.gov/2021RS/Chapters_noln/CH_746_hb0018e.pdf.

[184] *See generally* Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS J. AM. ACAD. ARTS & SCIS. 49 (2019).

[185] *Id.*

[186] *Id.* at 51.

[187] *Id.*

[188] *Id.*

[189] TASK FORCE REPORT, *supra* note 1, at 23 ("Recommendation 8").

burden of additional legal processes.[190] The Task Force even explicitly considered the merit of community-based legal solutions, building on the idea that hybrid legal- and community-based solutions may increase trust between underserved communities and legal systems.[191] These recommendations were presumably written to work in concert with the first recommendation, which set IPV, family integrity, and eviction defense as the three primary action areas for future laws, and indicate that the scope of legal solutions were considered. The Task Force, however, did not explicitly consider the more basic question of whether these problems could be best addressed with legal solutions in the first place.

Raising this question is necessary as it is perhaps uncomfortable for legal practitioners. Critics of total civil *Gideon* could rightfully point to such a system's philosophical shortcomings; not every issue that could involve lawyers would best be served with lawyers, and increased system interactions between an overtaxed system with an often-prejudiced population could create unneeded and expensive friction. The injection of lawyers into greater numbers of situations may smack of a paternalistic, quixotic, white-knight mindset that is centers (predominantly male,[192] predominantly white[193]) lawyers at the expense of the diverse communities they are supposed to serve when done improperly. In eviction defense specifically, individual-based legal representation may be less effective than collective action in the form of class action suits, injunctions, or other methods that would provide the greatest amount of aid to affected communities; such actions would maximize client benefits and more efficiently use court resources.[194] Lawyers must not, and cannot, get involved to simply get involved, especially when more effective solutions are available.—how could any solution that indiscriminately widens *legal* help avoid *legal* overreach?

In considering civil *Gideon*, any solutions should be crafted with these questions in mind; undoubtedly, there is a point where new legal solutions have diminishing returns despite greater investment. That said, declaring the entire project of increasing civil legal representation as ineffective is equally

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[190] *Id.* at 24 ("Recommendation 10").

[191] *Id.* at 31 ("Recommendation 11") (citing Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 731 (2015)).

[192] As of 2022, over sixty-one percent of all lawyers are male. AM. BAR. ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2022 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf (citing AM. BAR. ASS'N, THE ABA NATIONAL LAWYER POPULATION SURVEY (2022)).

[193] As of 2022, eighty-one percent of all lawyers are white. AM. BAR. ASS'N, THE ABA NATIONAL LAWYER POPULATION SURVEY (2022).

[194] *See generally* Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L. J. 2206 (2013). Professor Charn also warns against an over-reliance on legal services across an overwide breadth of problems; "Empirical research has shown that many consumers prefer alternatives to lawyers and that lawyers sometimes add cost, complexity, and delay without improving results." *Id.* at 2226.

myopic. Focusing only on the flaws of civil *Gideon* as seen in ineffective or over-aggressive civil *Gideon* programs masks the real, immediate benefits of an effectively designed and implemented program. Civil *Gideon* could be pursued only incrementally, in a manner backed by data, and in a manner that centers communities in need rather than policymakers, but should be pursued nonetheless. There are areas where the risks of lacking legal counsel in mandated legal processes merely exacerbate inequity. Quite simply, there is low-hanging fruit in preventing systemic inequity through greater legal representation, and Connecticut must seize upon it. While "the bar's account dominates discussion" of access to justice issues, and perhaps artificially narrows larger systemic issues into legal solutions, acknowledging these facts does not delegitimize the effort to widen civil representation.[195] Lawyers are "only part of the solution," but still remain a necessary part of the solution.[196]

B. Recommended Policy Solutions

Connecticut's history with civil *Gideon*, current and former pilot programs, and available data all have important roles in any future action. These recommendations below were formed under three guiding principles: (1) expanding civil *Gideon* in a manner appropriate with an underlying goal of centering communities rather than lawyers; (2) all proposals should be founded on the track record and available data from both Connecticut programs and related initiatives from across the country; and (3) solutions should not be unmoored from political reality even when considering the benefits of targeted civil *Gideon*. The final section of this article discusses these pillars; this section details specific recommendations.

1. Restraining Orders

Restraining Order civil *Gideon* has the most developed history of the three Task Force recommended areas in Connecticut. The state has conducted a pilot program, and passed a law designed to memorialize components of the pilot program.[197] That said, it is likely that attitudes surrounding Restraining Order civil *Gideon* are calcified; as indicated by the assertion in the final Waterbury pilot program report, it may be the case that legislators would be less likely to revisit this area. There is likely insufficient data at the present time to pursue total civil *Gideon* in the field of restraining orders; that said, there are several stopgap steps that should be taken to fortify § 46b-15 restraining order processes.

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[195] Sandefur, *supra* note 184, at 50.
[196] *Id.*
[197] *See* discussion *infra* section III.B.

First, legislators should under no circumstances roll back § 46b-15(f) as it is currently constructed. As of writing, this program has not existed for a full year, and more data should be collected before the new program has the chance to ameliorate or contradict existing doubts from the Waterbury program.

Second, the State should firmly commit to collecting relevant, usable data outside of the data collected during the Waterbury trial program. As established, the surveys used from 2018 to 2019 likely did not meet the scientific rigor of randomized control trials, and therefore provided unclear results from the program. In the current restraining order program, Connecticut must collect coherent data dating from before and after clients' interaction with the system, and endeavor to differentiate participant outcomes from "control," non-participant outcomes clearly.

Third, if the feedback from the first year of the program is positive, Connecticut should expand the grant process in both monetary amounts disbursed to the judicial districts, and in the number of judicial districts served. The current law caps all programs to individual districts at $200,000, and limits service to Fairfield, Hartford, New Haven, Stamford/Norwalk, and Waterbury judicial districts.[198] The initial Connecticut Legal Services proposal in the Waterbury pilot program estimated a $350 total cost per case.[199] Increasing the grant threshold even by $20,000—a ten percent funding increase—would allow a partner organization under this model to help over fifty additional clients per year. This increase would represent an incredibly small amount of the total state budget.[200] Furthermore, while the current law does target Connecticut's five most populous judicial districts, the state should expand this program to the remaining eight.[201] Excluding the Danbury, New London, and New Britain districts seems especially confounding since these districts encompass their titular cities, which themselves make up roughly five percent of the State's total population.[202]

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[198] CONN. GEN. STAT. § 46b-15f(c) (2016).

[199] CIVIL GIDEON PILOT PROGRAM: REPORT, *supra* note 142, at 4.

[200] For reference, the 2022–23 FY Connecticut state budget is $24 billion. Keith M. Phaneuf, *Lamont Will Finally Tap CT's Swelling Coffers with a New Budget*, CT MIRROR (Feb. 9, 2022), https://ctmirror.org/2022/02/09/lamont-will-finally-tap-cts-swelling-coffers-with-new-budget/. If all five judicial districts were given a § 46b-15f grant (which is not guaranteed), the $1 million spent by the state would be less than four one-hundredths of a percent of the total state budget (~0.0000417). *See id.* spending $1 million on this program from this amount would equate to roughly one-eighth of one percent of the total funding increase because total state funding was increased by $800 million year over year from 2021–22 (.00125). *Id.*

[201] CONN. JUD. BRANCH – JUDICIAL DISTRICTS https://www.jud.ct.gov/directory/maps/JD/default.htm. The Connecticut Judicial branches are divided as follows: Litchfield, Hartford, Tolland, Windham, Danbury, Waterbury, New Britain, Middlesex, New London, Stamford/Norwalk, Fairfield, Ansonia/Milford, and New Haven. *Id.*

[202] The total estimated populations of the cities of Danbury, New Britain, and New London are 84,751, 72,207, and 26,396, respectively, for a total of 183,354. DANBURY, CONN. POPULATION 2022, WORLD POPULATION REV., https://worldpopulationreview.com/us-cities/danbury-ct-

If these measures are successful, the State ought to then look into expanding these programs beyond a grant process and look to permanently funding a program that would grant counsel to all litigants in restraining order cases. However, at the current time, the state should coalesce efforts around eviction defense due to the apparent enthusiasm for greater eviction defense reform.

2. Family Integrity

Custody is arguably the most fundamental civil *Gideon* issue (*Lassiter* is, after all, a custody case), and Connecticut has provided a categorical right to counsel for parents and children in custody battles where all persons are citizens of the United States.[203] The cases that are not covered by these statues therefore represent a significant challenge that restraining orders and evictions do not—an established, mature civil *Gideon* framework may be tougher to change than one that must be established from scratch. Namely, Connecticut's work in this area must center around cases where immigration and custody intersect.

Connecticut would be wise to look to New York and other states for any first steps. Initiating a pilot program in a manner similar to the § 46b-15 and eviction program models for cases where custody may be lost by those the country is deporting would be a good first step. It may be wise to first engage Connecticut's large undocumented communities for the pilot program while using New York City's Center for Family Representation (CFR) as a model.[204] Starting in Bridgeport, New Haven, and Hartford might provide partner organizations some ability to gather data and build a civil *Gideon* case for parties that implicate both immigration and custody matters. Any data gathering process should focus on cost-savings in various subsidiary service areas in order to build a second-order, self-sustaining economic argument for the program.

If the State wanted to act more ambitiously, it could pass a statewide immigration custody defense program akin to the one in eviction defense. This may face some greater obstacles; the eviction defense program was

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population (last accessed May 9, 2022); NEW BRITAIN, CONN. POPULATION 2022, WORLD POPULATION REV., https://worldpopulationreview.com/us-cities/new-britain-ct-population (last accessed May 9, 2022); NEW LONDON, CONN. POPULATION 2022, WORLD POPULATION REV., https://worldpopulationreview.com/us-cities/new-london-ct-population (last accessed May 9, 2022). The total population of Connecticut is roughly 3,605,597. CONN. QUICK FACTS, *supra* note 89. The reasoning behind not including the New Britain judicial district might lie in the fact that it is situated between the Waterbury and Hartford judicial districts; even assuming that restraining order actions could be sought in a judicial district of one's choice, this fact still largely isolates New Britain and its surrounding metro area (i.e., Bristol). CONN. JUD. BRANCH – JUD. DIST., *supra* note 201.

[203] CONN. GEN. STAT. ANN. §§ 45a-717(b) (West 2022) (appointment of counsel in termination of parental rights cases), 46b-121(a)(1) (West 2022) (defining juvenile matters), 46bb-136 (West 2022) (appointment of counsel for juvenile matters).

[204] THORNTON & GWIN, *supra* note 117, at 142–43.

borne out of extraordinary conditions created by COVID-19, a healthy state budget, and a historic need. While counsel deprivation in immigration-driven custody proceedings remains a problem, it is perhaps the area of need least affected by the pandemic and one that would therefore benefit the most from a smaller rollout.[205]

Ironically, the State may be wise to examine the outcomes of one local program that tackles this thorniest family integrity issue. Hartford launched an initiative in 2021 to "provide legal representation for all residents facing deportation."[206] Utilizing lawyers from New Haven Legal Assistance, the program currently has fifteen clients and is one of the first programs of its kind in the country.[207] The program was allotted $100,000 by the Hartford municipal government, and could serve as a trial balloon for what wider custodial *Gideon* representation would look like in Connecticut.[208] Connecticut ought to also consider granting this program additional funding so that it may expand; building on existing infrastructures may be a more effective way to collect data.

This area specifically may require the greatest amount of caution because of its inherent interaction with at-risk populations; Connecticut must enter the foray of family integrity in immigration issues specifically once a coherent plan for data collection and program management can be established.

3. Eviction Defense

As shown by Connecticut's eviction defense pilot program, the General Assembly is willing to expend political capital, funding, and energy on further programs in this area. Foremost among the priorities in this area should be finishing the pilot program in a way that will put it in the best possible position to succeed and collect data. Data collection is paramount in this case; most directly relevant past solutions have dealt with eviction defense on a municipal rather than *statewide* level. Administering the pilot program may be instructive for identifying challenges that specifically come from helping a smaller population scattered over a larger area. For example, New York City's Local Law 136 directly governs a population of 8.1 million

[205] *See* discussion *infra* section II.C.ii.b.

[206] *See* Putterman, *supra* note 82, at A1.

[207] *Id.*

[208] *Id.* That said, it would be important for Connecticut to consider the intersecting needs of immigration *Gideon* and custodial *Gideon*. While the Task Force report considered the former a component of the latter, there are complexities in immigration law which would not apply to more common, citizen-versus-state custodial cases.

people[209] spread over 305 square miles,[210] and the RTC Eviction pilot program will govern Connecticut's 3.6 million residents[211] over 5,543 square miles.[212] This represents average population densities of roughly 26,500 people per square mile in New York City and 650 people per square mile in Connecticut; there may some efficiencies lost that the pilot program's data could capture.[213] While there are two other states—(Washington and Maryland) that have passed right to counsel legislation in eviction cases, these programs are so new that there is very little data regarding the success of these programs over a more disparate, statewide population.[214]

The Connecticut General Assembly should turn towards other states to gauge how elements of the pilot program, if successful, may be memorialized into the Connecticut General Statutes. New York City's Local Law 136 is a worthy place to start; the law did not itself mandate specific programs, but instead demanded that a program be founded by July 31, 2022, that would provide legal services to all covered individuals.[215] Adopting a deadline based on the pilot program's outcome may be a good way to further engage all stakeholders and create a statewide solution. San Francisco's Ordinance No. 45-12 of 2012—the "No Eviction Without Representation Act of 2018"—may be another place to find inspiration; [216] the ordinance mandated in part that the city's Board of Supervisors "shall consider recommendations regarding the creation of a San Francisco Right to Civil Counsel Pilot Program," and some other minor staffing guidelines.[217] Both the New York City and San Francisco laws called for data collection; Connecticut would be wise to include some evaluation mechanisms in any proposed solution.[218] Examining permanent programs that resulted from

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[209] N.Y.C., N.Y., POPULATION 2022, WORLD POPULATION REV., https://worldpopulationreview.com/us-cities/new-york-city-ny-population (last accessed May 9, 2022).

[210] *New York City*, ENCYC. BRITANNICA, https://www.britannica.com/place/New-York-City (last accessed May 9, 2022).

[211] CONN. QUICK FACTS, *supra* note 89.

[212] *Connecticut*, ENCYC. BRITANNICA, https://www.britannica.com/facts/Connecticut (last accessed May 9, 2022).

[213] These calculations assume that people are evenly distributed in New York City and Connecticut; they are not. There are areas in Connecticut and New York City (e.g., coastal counties and Manhattan, in particular) that have far greater population densities than other areas in the state and city. That said, these statistics still illustrate the important point that Connecticut has far fewer people spread over a far larger landmass; the pilot program would be wise to take population densities into account when collecting data in order to identify value in concentrating efforts towards specific areas.

[214] S.B. 5160, 67th Leg., Reg. Sess. (Wa. 2021); H.B. 18 (Md. 2021).

[215] N.Y.C., N.Y., Local Law No. 136, N.Y.C. ADMIN. CODE § 26-1302 (2017) (providing legal services for tenants who are subject to eviction proceedings); UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT, *supra* note 135.

[216] S.F., CAL., Ord. No. 45-12 (2018); S.F., CAL., ADMIN. CODE §§ 58.1–58.3 (2012).

[217] S.F., CAL. ADMIN. CODE § 58.3 (2012).

[218] N.Y.C., N.Y., ADMIN. CODE § 26-1304 (2023); S.F., CAL. ADMIN. CODE § 58.3(2012); *see generally* Pastore, *supra* note 31, at 84–86.

pilot programs and have years of data, such as San Francisco's No Eviction Without Representation Act of 2018,[219] may give Connecticut lawmakers a better understanding of what administering this program may cost and look like.[220]

Finally, Connecticut should take the data that will be released in January 2023 and the information from other cities, and permanently guarantee eviction litigants counsel. While family integrity and restraining order civil *Gideon* remain critical issues, the state would likely benefit from starting with universal civil *Gideon* in an area with a proven track record of providing results, a pilot program in place, and a COVID-19 housing environment that continues to send ripples through the renting market.

V. COSTS AND BENEFITS OF THE RECOMMENDED POLICY SOLUTIONS

No civil *Gideon* legislation will come without costs; however, these costs do not come close to overwhelming the beneficial cost savings, track record of judicial success, and ethical principles of providing legal representation in the direst civil cases. This section briefly outlines some likely costs and the very real benefits of these programs; this list is not meant to be exhaustive, and simply sketches the kind of debate that would likely unfold around these issues.

A. Costs and Challenges of Civil Gideon

1. Financial Costs and Funding

Funding and monetary considerations will likely be at the forefront of any civil *Gideon* debate; the Task Force report mentioned funding for all programs explicitly in its report.[221] Increased state-provided legal representation will require additional funding by the Connecticut legislature; every civil *Gideon* program required funds to get started. The San Francisco pilot program that preceded the No Eviction Without Representation Act had a price tag of $5.8 million over its first two years.[222] The Hartford Immigration program received its funding from the Hartford municipal government only after it failed to get a grant for the same amount from the Vera Institute.[223] In the Connecticut Restraining Order program,[224] only

[219] S.F., CAL. Ord. No. 45-12 (2018).

[220] San Francisco's 2018 Proposition F, which memorialized the No Eviction Without Representation Act of 2018, "earmark[ed] $5.8 million" for the program between 2018 and 2020. Laura Ernde, *Groundbreaking San Francisco Measure Guarantees Counsel to Tenants Facing Eviction*, S.F. BAR 18 (Fall 2018), https://www.sfbar.org/wp-content/uploads/2021/06/prop-f-right-to-housing-counsel-SFAM-Q318.pdf.

[221] The Task Force's fifteenth legislative recommendation is simply, "Funding for New Initiatives." Task Force Report, *supra* note 1, at 4.

[222] *See* Ernde, *supra* note 220.

[223] *See* Putterman, *supra* note 82, at A2.

[224] *See* discussion *infra* III.B.i.

seven percent of the 6,200 applications for the program were processed; "significant resources" would be required to expand Connecticut's restraining order regime farther.[225] Indeed, one of the primary reasons the Connecticut Restraining Order program was *not* made more widespread—not counting the passage of Connecticut General Statute § 46b-15f—was idea that funding would be better spent elsewhere.[226]

The initial costs of funding programs do not account for all the costs borne by the system in a civil *Gideon* regime; with more advanced legal representation, Connecticut would likely require further judicial resources. For example, even as representation outcomes improved for tenants in the Boston eviction study,[227] average case length increased by forty-eight days with representation and the number of total motions filed by renters eclipsed one per case.[228] In San Francisco, thirty-eight percent of tenants did not even contest their eviction notice before the No Eviction Without Representation Act—every one of those cases may now take up time from other judicial functions, representing an ancillary cost of increasing the number of legal cases in the system.[229]

It is hard to put a price tag on exactly *how much* civil *Gideon* would financially "cost"; providing this level of legal representation on a statewide level is a systemic change without much precedent. The Connecticut Office of Policy and Management's Budget and Financial Management Division—Connecticut's rough equivalent to the National Office of Management and Budget—would likely have to conduct a holistic appraisal of any program in order to estimate its total cost.[230] Regardless, cost is an element parties should keep in mind while advocating for this program; simply advocating on the basis of a program's unfettered societal benefits alone is probably a losing strategy.

2. The Necessity of Effective Advertising

Advertising and driving awareness of programs offered will be a key factor in their success, but also represents an additional issue. For example, the Hartford Immigration representation program has faced real hurdles in this regard; "[c]ity officials have attempted [to] raise awareness of the program through an information session at the Park Street branch of the Hartford Public Library," among other measures.[231] Other examples of advertising troubles and needed focus abound; Connecticut General Statute

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[225] CIVIL GIDEON PILOT PROGRAM: REPORT, *supra* note 142, at 13.
[226] *Id*. at 14.
[227] *See* discussion *infra* III.A.iii.
[228] Grenier et al., *supra* note 127, at 933.
[229] *See* Ernde, *supra* note 220, at 18.
[230] *See generally* BUDGET FIN. MGMT DIV., STATE CONN. OFF. POL'Y MGMT., https://portal.ct.gov/OPM/Bud-Division/Structure/Budget_Division_Home (last accessed May 9, 2022).
[231] *See* Putterman, *supra* note 82, at A2.

§ 46b-15(f) specifically mandates notification and advertising measures,[232] the Sacramento pilot program[233] did not initially advertise its e-filing services since the program was administered through a third-party company,[234] and the current Connecticut Eviction pilot program actually mandated notice to tenants of their rights.[235] Even robust, existing civil *Gideon* programs may require additional advertising pushes; currently, notices for right to counsel in custody removal cases that *don't* involve immigration—settled law in Connecticut since the early 1990's—often come in the form of small notices in physical newspapers.[236]

The Task Force report also identified this as a barrier to justice; "[f]orty-three percent of low-income households with a legal problem in Connecticut did not seek assistance because the households did not know about legal aid options."[237] The report attributes this lack of information partly to a non-recognition of problems by some people as legal issues in the first place,[238] but also the fact that "the legal profession fails to reflect or include members of their community."[239] While effective advertising can only address portions of this problem, such measures could still help blunt the harshest information gaps.

Programs are only as effective as their ability to reach populations in need; critics of civil *Gideon* reform might point to the level of required advertising as representing a real barrier. Any proposed legislation must have measures that are tailor-made to reach their target audience.

3. Counsel Bandwidth

Providing legal counsel to more litigants in more cases will naturally require more lawyers. Connecticut and the Connecticut Bar Association has already done a sterling job of encouraging lawyers to engage in *pro bono* work and would likely continue to do so in the event that wider civil *Gideon*

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[232] *See* CONN. GEN. STAT. §§ 46b-15f(f)(1)–(3) (2022).

[233] *See* discussion *infra* section III.A.iii.

[234] *See* Pastore, *supra* note 31, at 109.

[235] 2021 Conn. Acts No. 21-34 § 1(f)(i) (Reg. Sess.). Further follow-up will be needed at the conclusion of this program.

[236] *See, e.g.*, *Order of Notice: In re:* Shaniela L., HARTFORD COURANT (May 9, 2022), at A9. The text in the right to counsel notice specifically reads:

> Right to Counsel: Upon proof of inability to pay for a lawyer, the court will make sure an attorney is provided to you by the Chief Public Defender. Requests for an attorney should be made immediately in person, by mail, or by fax at the court office where your hearing is being held.

According to this notice, Shaniela L. is less than five months old as of writing. *Id.*

[237] Task Force Report, *supra* note 1, at 17.

[238] "Only 27% of low- income households surveyed in the 2008 study felt they had a serious legal problem in the previous year, yet when asked about 41 specific civil legal problems, 77% indicated they had experienced at least one legal problem." *Id.* (quoting CENTER SURVEY RESEARCH & ANALYSIS, CIVIL NEEDS AMONG LOW-INCOME HOUSEHOLDS IN CONNECTICUT 3 (2008), http://ctlegal.org/sites/default/files/files/2008ConnecticutLegalNeedsStudy.pdf).

[239] Task Force Report, *supra* note 1, at 17.

legislation is passed.[240] This alone will not make up the difference and does not address the fact that much of the needed legal assistance will require specialized training and expertise. As one San Francisco lawyer noted at the passage of the No Eviction Without Representation Act in 2018, eviction defense is "a specialized area of law, with an interplay between states laws and local rent ordinances. There can be federal regulations as well if the case involves subsidized housing."[241] Even if "it doesn't take very long for attorneys to become experienced because the cases go so quickly through court," it is an open question if there would be enough experienced attorneys across the Task Force's three areas of focus to accomplish the goals of civil *Gideon*.[242]

Lack of available counsel is perhaps the most serious issue that the state would contend with. Critics of civil *Gideon* often laud the intent of such reforms, but say that "[c]ourts would likely not require limits on caseloads or increased expenditures on a guaranteed right to civil Counsel," thus taxing lawyers beyond the point of actual competency (if not the legal definition of incompetency).[243] In many ways, this is a reflection of issues with *Gideon* itself rather than right to counsel applications in civil settings; one main critique of the current criminal legal system's regime is on the dramatic underfunding of supposedly constitutionally vital indigent defense.[244] This critique cannot be hand-waved; any solution proposed must have proper funding and have basic protections such that all legal counsel is far above the *Strickland* competency standard.

The State would likely have to play a significant role in encouraging and funding lawyers such that counsel bandwidth issues are minimized. Placing an outsized onus on the Connecticut Bar Association is not a plausible solution to this issue; while an important advocate for access to justice issues in the state, the CBA does not have the funding or the authority to

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[240] *See* Thomas, *supra* note 35, at 33. "The CBA is providing training support and case referral connections for pro bono attorneys interested in eviction defense through CBA Pro Bono Connect." *Id.*

[241] *See* Ernde, *supra* note 220, at 20.

[242] *Id.*

[243] Barton, *supra* note 176, at 1231. *See also* Strickland v. Washington, 466 U.S. 668 (1984). *Strickland* set the bar of constitutionally deficient assistance of counsel in two terms: the assistance falling below the standard of a reasonably competent lawyer, and that deficient counsel prejudiced the defendant. *Id.* at 687. This has proven to be a difficult standard to meet; lawyers that sleep during their client's trials have been found to not meet the standard of deficient counsel. *See, e.g.*, McFarland v. State, 928 S.W.2d 482, 505 (Tex. Crim. App. 1996).

[244] "The United States spends about a hundred billion dollars annually on criminal justice, but only about 2% to 3% goes to indigent defense. Over half is allocated to the police, and defendants receive only an eighth of the resources per case available to prosecutors." Barton, *supra* note 176, at 1251 (quoting DEBORAH L. RHODE, ACCESS TO JUSTICE 123 (2004)). *See generally* Lauren S. Lucas, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1735–36 (2005).

unilaterally marshal lawyers to this cause.[245] Connecticut, likely through its Judicial Branch, would have to play an outsized role in providing the supply of legal aid that could meet the likely legal need. The State should also look into the Task Force's recommended strategy of training non-lawyers to assist with various areas of need, likely starting with eviction defense.[246]

4. Effective Data Collection and Reporting

One Connecticut-specific challenge may be the lack of effective data collection and reporting infrastructure used to evaluate program outcomes. First, the data collected were insufficient. Relying on data that were already gathered, and existing survey results were unhelpful in the Waterbury § 46b-15 pilot program that ran from 2018-2019.[247] Randomized control trials or other evidence-based research methods will be needed in order to more accurately evaluate any given policy's success or failure. The state has not yet evinced an ability or a clear plan to collect data in § 46-15 trials, or any pilot program that has or will be set up. While this call for evidence-based evaluation is all too common,[248] there is little track record that shows Connecticut's ability to instill such systems. The success of any program that the state could hope to create will depend on its ability to determine whether it was successful in the first place—only coherent, comprehensive data will allow for accurate conclusions.

Furthermore, it is unclear whether third-parties will be charged with writing reports or evaluations of any individual pilot programs. The Waterbury pilot program report was authored by the Connecticut Judicial Branch. While there should not be any doubt that the Judicial Branch *could* write a sufficient report about a given program, there are serious questions about the possible stretching of limited Branch resources[249] and basic ethical

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[245] The Connecticut Bar Association, for example, was only able to "donate[ ] $8,000 to the Connecticut Bar Foundation to benefit their legal service grantees who provide pro bono civil legal services to Connecticut's low-income residents" in FY 2020–21. *Connecticut Bar Association 2020-21 Annual Report of Sections and Committees*, 11 (CONN. BAR ASS'N, 2021), https://www.ctbar.org/docs/default-source/publications/annual-reports/2020---2021-annual-report-(2).pdf?sfvrsn=15cda9f2_8. While helpful, this kind of financial support does not come close to addressing the need of the state writ large, nor is it possible for the CBA to support this initiative financially beyond this kind of grant work and perhaps some pilot program involvement.

[246] TASK FORCE REPORT, *supra* note 1, at 4.

[247] CIVIL GIDEON PILOT PROGRAM: REPORT, *supra* note 142, at 5.

[248] *See, e.g.*, Charn, *supra* note 194, at 2233; Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S. C. L. REV. 295, 296 (2016), ("One of the most striking facts about civil justice in the United States is how few solid representative facts we have about it."); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 61 (2010), ("[O]nly a modest amount of research effort has gone into investigating the question of how lawyers change what happens in courtrooms . . .").

[249] Simply put, the Connecticut Judicial Branch is, at the time of writing, possibly stretched thin. Following a long period of Connecticut State Employees Retirement System (SERS)

questions of whether the Judicial Branch should, effectively, evaluate a program that the Branch itself is charged with running.

The Task Force explicitly considered this issue in its report, and said "the people of Connecticut should learn what the 'return on investment' is for every dollar spent on access to justice."[250] However, the final report only calls for methodology such as randomized control trials, and does not provide a road map for how these procedures could actually be implemented in any future program.[251] Given the paucity of published data on past programs, and an evident lack of feasible data collection systems available in Connecticut, this issue represents perhaps the most challenging logistical hurdle for any civil representation program in the state. The state has proven conclusively that it can implement civil *Gideon* programming; it has not proven that it can evaluate any programming's effectiveness.

B. Benefits and Advantages of Civil Gideon

1. Principles of Equity and Justice

The first, simplest, and most obvious benefit of civil *Gideon* measures are the moral and ethical effects it has on the legal system. "The right to speedy and meaningful access to justice is one of the cornerstones of the American justice system," and providing counsel to the most vulnerable civil litigants can help further the promise of this cornerstone.[252] These philosophical benefits of civil rights to counsel is oft-stated in Connecticut,[253] and has historically been implicated by leading legal

collective bargaining ("SEBAC 2011" and "SEBAC 2017"), several benefits that had been available to long-tenured Judicial Branch employees retiring before July 31, 2022, would no longer be available to those same employees retiring after July 31, 2022. RET. SERV. DIV. MEMORANDUM 2021-03, OFF. STATE COMPTROLLER CONN. (July 2, 2021), https://osc.ct.gov/2022-retirement/memo.php. Included in these removed benefits would be a previous guarantee of cost-of-living adjustments (COLAs) even in years "for which the rate of inflation is less than 2%," and full reimbursement for Part B and D values on Medicare Income Related Monthly Adjustment Amounts. 2022 RET. CHANGES | FREQUENTLY ASKED QUESTIONS, OFF. STATE COMPTROLLER CONN. (July 2, 2021), https://osc.ct.gov/2022-retirement/docs/2022%20Retirement%20Changes%20FAQ_v3.pdf. Effectively, the state of Connecticut incentivized its most experienced state employees—including public defenders, State's attorneys, and other Judicial Branch employees—to retire *en masse* in the summer of 2022. There is no published data to support a connection between this pension change and a possible labor shortage, but the question of a distinct experience and staffing shortfall due to the July 31, 2022 retirement incentive remains.

[250] TASK FORCE REPORT, *supra* note 1, at 25.

[251] *Id.*

[252] *Id.* at 3.

[253] "[T]he justification for providing attorneys to low-income renters can be numerically quantified, [but] the real justification is in our country's bones: the guarantee to life and liberty." Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63 (quoting Sarah Free, Opinion, *Time to Confront Connecticut's Eviction Crisis – With Lawyers*, HARTFORD COURANT (Feb. 10, 2019) (alteration in original), https://perma.cc/4J2F-F9ML.

thinkers.[254] The social ethical effect of such representation defies measurement in many ways. In the criminal system, "[i]t is not possible to know the number of people who were acquitted who would have been convicted, or the number of cases not brought, or the length of the sentences not imposed. But nor can these benefits [of Gideon] be denied by anyone with even a passing familiarity with the criminal justice system."[255] The same could very well be said about our civil system; while the deprivation of "life, liberty, or property without due process of law," has only led to a constitutional right to counsel in most criminal cases, one could point to the benefits of the number of families that would not be broken up, the frivolous eviction cases not brought, or the length of time that IPV survivors would be protected had a civil right to counsel been in place.[256] It is true that lawyers must "shift their understanding of the access problem," and must not attempt to install overly-technocratic solutions, but there are still obvious inequities that may be addressed by wider civil representation.[257]

Helping people get a fair shake when interacting with the legal system—when a legal solution is needed—is a moral and ethical good at the beating heart of Connecticut and this country.[258] This fact must be stated plainly and without reservation; it is done so here.

2. Proven Track Record of Successful Litigant Outcomes

Amorphous principles of equity are not effective at convincing every person of civil *Gideon*'s value; there are some who would only memorialize these rights if, "access to, and administration of, justice [was] more evidence-based."[259] Fortunately, right to counsel programs have a long track record of success, and provide clear, convincing data that participants encounter more favorable outcomes.

Connecticut has a proven track record of civil *Gideon* working in custody settings; laws that guarantee counsel in custody hearings have been in effect since the 1990's with little change in this state.[260] While the Waterbury program evinced inconclusive or even negative results due to

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[254] *See, e.g.*, Justice Lewis Powell Jr., Address to the ABA Legal Services Program, ABA Annual Meeting, Aug. 10, 1976.

> Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.

[255] Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2678 (2013).

[256] U.S. CONST. amend. XIV, § 1.

[257] Sandefur, *supra* note 184, at 54.

[258] Even critics of civil *Gideon* agree that, "[t]he current treatment of persons too poor to afford counsel in America's civil courts is an embarrassment and is a serious and growing problem." Barton, *supra* note 176, at 1228.

[259] Grenier et al., *supra* note 127, at 959.

[260] The notable exception to this has been the expansion of a right to counsel in appellate custody settings. *See In re* Christina M., 877 A.2d 941, 949–50 (Conn. App. 2005).

lacking data collection methods, the survey-backed outcome of restraining order litigants understanding their process at a higher level of proficiency is a positive sign.[261] The General Assembly even codified some of the grant processes into law, signaling that the legislature felt that the program did help its participants.[262]

Outside Connecticut, right to counsel programs have proven successful in helping litigants secure positive outcomes in their cases. Eviction defense programs in Boston, Sacramento, and New York have elicited overwhelmingly positive outcomes for their clients.[263] Custody counsel programs in New York City that target marginalized groups have helped the most vulnerable communities maintain family bonds.[264] Studies and books dating back to the 1990's have shown that represented litigants in restraining order cases are more able to marshal specific facts and factors to their cause when represented.[265]

Even criticism of civil *Gideon* concedes that purportedly ineffective allocation of resources—not lawyer motivation—is the primary driver of any negative right to counsel measures.[266] If properly funded and supported, civil *Gideon* programs have proven effective. Connecticut's pilot program approach will allow it to identify which areas and strategies work best for this state and its population, therefore increasing the likelihood that any measures are so funded and supported.

3. Possible Future Cost Savings

Even if direct costs associated with longer and better-litigated civil proceedings would increase if civil *Gideon* was instituted across the Task Force's areas of focus, it is entirely possible that there would be consequential savings within the state's systems of healthcare, foster care, and unhoused shelters.

Health care costs, related both to eviction and IPV representation, are considered explicitly by the Task Force in its report. The report favorably cites studies from multiple states; in New York, "providing legal assistance to female domestic violence survivors would save the State $85 million

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[261] CIVIL GIDEON PILOT PROGRAM: REPORT, *supra* note 142, at 5.

[262] *See generally* CONN. GEN. STAT. § 46b-15f.

[263] *See* discussion *infra* section III.A.iii.

[264] *See* discussion *infra* section III.A.ii.

[265] *See generally* FARMER & TIEFENTHALER, *supra* note 107.

[266] In fact, lawyer motivation is often seen as one of the theoretical strengths of civil *Gideon* reform:

> Obviously, all else being equal, any litigant would prefer a fairer court procedure. When the cost of a civil *Gideon* is factored in, however, it becomes a harder question. For example, it would not be irrational for poor litigants to prefer that any money spent on their problems go to direct assistance, rather than a free lawyer. For example, if an indigent person facing eviction had a choice, she would often choose help with finding a new apartment or a few more weeks in her apartment over a free, but overburdened and underpaid, lawyer.

Barton, *supra* note 176, at 1268.

annually."[267] In Maryland, IPV defense funds saved the state upwards of $1.3 million in lost productivity and medical costs.[268] In Massachusetts, each dollar spent on civil legal services saved the state "at least" the same amount in Medicare reimbursement rates.[269] In housing, the Task Force considered savings in health care costs in eviction-related stress diseases and actions (e.g., depression, suicide, IPV), and the effects of diseases such as asthma and lead poisoning stemming from evicted persons moving to sub-standard housing.[270] Health care cost prevention is a major tenet of Connecticut's historic investment in right to counsel programs, and should be considered an absolute benefit to the state's right to counsel proposals.

Furthermore, Connecticut spent $62.8 million on foster care programs as recently as 2016.[271] Only eighteen percent of this funding in 2016 was actually directed towards preventative services—increasing the percentage of funding on preventative legal counsel in immigration proceedings could help this downstream costs.[272] There are only a small number of immigration removal cases in the state annually; providing targeted legal assistance would be less likely to tax Connecticut-based immigration lawyers more than a comparable policy would in states with more immigration removal cases.[273]

Directing costs towards legal representation can also effectively limit the amount of funding municipalities are later forced to spend on unhoused shelters.[274] For example, while the South Bronx program discussed earlier[275] "cost $450,000[, it] saved New York City more than $700,000 in estimated shelter costs."[276] The program likely accomplished this through the positive housing outcomes that its lawyers provided; the program "prevented shelter entry for 94.3% of clients."[277] Even short of unhoused shelters, there are several social costs that may be avoided with preventing eviction; the Task Force explicitly covered factors such as the costs of "remedial schooling,"

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[267] TASK FORCE REPORT, *supra* note 1, at 10.

[268] *Id.*

[269] *Id.* at 10–11.

[270] *Id.* at 12.

[271] CHILD TRENDS, CHILD WELFARE AGENCY SPENDING IN CONNECTICUT 2, https://www.childtrends.org/wp-content/uploads/2018/12/Connecticut_SFY2016-CWFS_12.13.2018.pdf (last accessed, May 9, 2022).

[272] *Id.* at 4.

[273] *See* discussion *infra* II.C.ii.b.

[274] DESMOND, *supra* note 50, at 304.

[275] *See* discussion *infra* III.A.iii.

[276] DESMOND, *supra* note 50, at 304 (citing HOMELESSNESS PREVENTION PILOT FINAL REPORT, *supra* note 132).

[277] HOMELESSNESS PREVENTION PILOT FINAL REPORT, *supra* note 132, at 28. "Entered Shelter" was defined in the data collection process as, "when a client goes to live in shelter before the court case is closed, or within a month after the case closing (in the instances where the HHP staff are aware). This includes decisions to enter domestic violence emergency shelters." *Id.* at 30.

"neighborhood deterioration," and "criminal justice enforcement," as costs that would be lowered if evictions were lowered through eviction defense.[278]

Limiting future costs by addressing the roots of subsidiary problems is a proactive, smart budgeting step. Even in instances where financial costs seem onerous, Connecticut simply must consider the literal costs that would be incurred down the road without these expenditures in the immediate term. Smart budgeting requires non-myopic thinking; civil *Gideon* spending now prevents higher costs later.

VI. CONCLUSION

This piece should lead a reader to understand that the eventual, laudable goal of these initiatives should not just be *furthering* the promise of civil *Gideon*, but *fulfilling* it—that is, providing competent, helpful legal assistance to litigants in a civil case when such representation is wanted and needed. These recommendations serve as a partial map rather than a finish line; it would be a grave error to assume that truly equitable access to justice could be achieved by these measures and these measures alone.

What's more, there are many societal issues that civil *Gideon* alone cannot correct; total civil rights to counsel will not stop IPV even if restraining orders are allocated more effectively, and it will not stop the forces that destroy family integrity. Eviction legal defense is a band-aid for a lack of affordable housing, stagnating wages, and rapid increase in housing costs.[279] Total civil Gideon would not fix all of the *legal* problems in the civil justice system; "[a] 'civil Gideon' program that relies on voluntary action by state legislatures for funding is likely to be inadequate for the same reasons that the implementation of Gideon has been insufficient."[280] Naysayers of civil *Gideon* reform may say that any program that Connecticut—or any state—could put in place would be mere palliative care on a diseased system. As covered, these concerns should not be tossed aside, and there are other solutions that must be examined; *pro se* litigant reform[281]

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[278] TASK FORCE REPORT, *supra* note 1, at 12 (citing DESMOND, *supra* note 50, at 304).

[279] Indeed, housing insecurity is intimately tied to all three; "[b]oosting poor people's incomes by increasing the minimum wage or public benefits . . . is absolutely critical. But not all of those extra dollars will stay in the pockets of the poor. Wage hikes are tempered if rents rise along with them . . . ." DESMOND, *supra* note 50, at 305.

[280] Chemerinsky, *supra* note 255, at 2692.

[281] For an excellent critique of civil *Gideon*, please read *Against Civil Gideon (And For Pro Se Court Reform)* by Benjamin H. Barton. The author offers many critiques of civil right to counsel programs, most of which are absolutely fair; however, the author's focus on the critiques of universal civil *Gideon* may be addressed by the implementation of targeted programs, such as Connecticut's various pilot programs. The author may be correct in stating that wholesale civil *Gideon* implementation is both legislatively unlikely and functionally inoperable at the current time; the author's opinion that furthering civil *Gideon* even incrementally is an unworthy goal is less certain. Barton, *supra* note 176.

and litigant supporting methods should be explored.[282] Indeed, the Task Force considered other methods in conjunction with increased civil representation; any future policymaker in Connecticut must do the same.[283]

That said, Connecticut is well on its way towards the most progressive civil *Gideon* regime in the United States. Connecticut's approach to right to counsel programs largely repudiates claims of ineffectiveness and funds wasted; well-funded, targeted implementation of right to counsel programs has immediate, positive impacts that increase satisfaction and the effectiveness of the legal system for civil litigants. Total civil *Gideon* is a valid goal, and Connecticut has taken many steps towards that goal.

The work, however, is not done. Connecticut must continue its critical work in its current eviction pilot program, it must strengthen the support of various grassroots legal aid movements and obtain additional funds to civil aid services. This state is in an excellent position to continue this work, and it must not take its proverbial foot off the pedal. There are further bounds to be pushed in this realm, and Connecticut must be at the forefront of that push—following up on the Task Force's recommendations in their totality is the best way to stand at this vanguard.

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[282] Another excellent examination of the limits of *Gideon* comes in *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services* by Professor Jeanne Charn. Professor Charn adroitly explores how there are limits to civil *Gideon*'s effectiveness in different civil litigation areas; however, like Professor Rebecca Sandefur, she does conclude that lawyers must remain a part of systemic solutions even as lawyers are not the solution in every instance of system inequity. Charn, *supra* note 194; Sandefur, *supra* note 184.

[283] The Task Force, for example, recommended that State agencies provide "computers at locations accessible to the public so that they have access to on-line (sic) resources for the protection of legal rights." TASK FORCE REPORT, *supra* note 1, at 22 ("Recommendation 6").

Hazardous Criminals: Prosecuting Individuals for Superfund Crimes

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ABSTRACT

Marginalized communities suffer disproportionate health burdens from living near toxic waste sites. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as Superfund, contains criminal provisions that allow prosecutors to seek stiff penalties for environmental crimes including significant harm or culpable conduct, yet we know little of how such crimes have been prosecuted under CERCLA historically, particularly the prosecution of individuals. Through content analysis of 2,728 prosecutions resulting from U.S. EPA criminal investigations, 1983-2021, we select all cases where individual defendants were prosecuted under CERCLA. Findings show that 36 prosecutions were adjudicated, resulting in over $1.8 million in monetary penalties, 137 years of probation, and 99 years of incarceration. Prosecutions centered on hazardous waste crimes (61 percent of prosecutions), asbestos crimes (33 percent), and chemical crimes (three percent). We conclude with a discussion of the need for added resources for enhanced criminal enforcement of environmental laws.

ARTICLE CONTENTS

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INTRODUCTION

Albert Tumin abandoned three fifty-five-gallon barrels of ethyl ether in an empty lot in a neighborhood in Rockaway Queens.[1] In the commission of his crime, Tumin disposed of the hazardous waste in a manner that put other persons in imminent danger of serious bodily injury or death and was charged with knowing endangerment, illegal transportation and disposal of hazardous waste without a permit under the Resource Conservation and Recovery Act (RCRA), and failure to notify officials of the release of a hazardous substance under the Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund.[2] Tumin was convicted of all charges and sentenced to sixty months of incarceration.[3]

The typical approach that environmental agencies take when individuals transgress the law is to attempt to return them to compliance, but in cases involving criminal violations of law, such as those by Albert Tumin, which tend to be "knowing" violations of law that involve significant harm and/or culpable conduct, criminal prosecution may be employed to punish the offender and deter future environmental violations.[4] When Congress amended federal environmental statutes to

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[1] *United States v. Tumin*, No. 87-CR-488 (E.D.N.Y. Apr. 13, 1988). Criminal liability for CERCLA violations is discussed in the context of the Tumin prosecution and otherwise, here: Steven Zipperman, *The Park Doctrine—Application of Strict Criminal Liability to Corporate Individuals for Violation of Environmental Crimes*, 10 UCLA J. ENV'T L. & POL'Y 123, 161 (1991).

[2] Throughout the manuscript CERCLA will be referred to as Superfund; the latter designation being widely used and arguably better understood by legal scholars and the general public.

This was the first prosecution of an individual, or in this case specifically a corporate officer for knowing endangerment under RCRA's criminal provisions, meaning his actions regarding the illegal dumping of hazardous waste put others in immediate danger of bodily harm or death, typically charged in the worst environmental crimes. RCRA was amended with criminal provisions in 1984 to deal with such issues. *See* Robert G. Schwartz, Jr, *Criminalizing Occupational Safety Violations: The Use of "Knowing Endangerment" Statutes to Punish Employers Who Maintain Toxic Working Conditions*, 14 HARV. ENV'T L. REV. 487, 487; Resource Conservation and Recovery Act of 1976 (42 U.S.C. §6901); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–57. Individuals or company designees are required to report the release of oil, chemical, radiological, or other discharges to the National Response Center (NRC), staffed by the U.S. Coast Guard. *See* U.S. COAST GUARD NAT'L RESPONSE CTR., https://nrc.uscg.mil/ (last visited Mar. 29, 2023). An owner of a company or corporate designee in charge of handling or managing hazardous wastes can be criminally punished under CERCLA, if they fail to report the release of a hazardous substance, provides false or misleading information to the NRC, fails to report a hazardous waste disposal site whether they currently or previously owned it, or fail to keep proper records of the site. *See* Roxanne R. Rapson & Scott R. Brown, *Mens Rea Requirements Under CERCLA: Implications for Corporate Directors, Officers and Employees*, 6 SANTA CLARA HIGH TECH. L. J. 377, 380–82 (1991).

[3] All but twenty-four months of incarceration were suspended. For a discussion of "knowing" violations in environmental criminal prosecutions. *See* Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 WM. MITCHELL L. REV. 987 (1990); *Resource Conservation and Recovery Act (RCRA)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/fedfacts/resource-conservation-and-recovery-act-rcra (Nov. 9, 2022).

[4] Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994),

include criminal provisions, it meant to send a deterrent message to prospective criminals, as those provisions contained significant penalties including incarceration for serious environmental crimes, such as placing people in danger of imminent harm or bodily injury.[5] Yet, the empirical knowledge of how CERCLA criminal provisions have been used to prosecute individual offenders and the outcomes of those prosecutions historically is still limited.[6]

This article addresses this shortcoming in the literature, through content analysis of 2,728 criminal investigations undertaken by the U.S. Environmental Protection Agency (EPA) from 1983-2021, selecting all related prosecutions of environmental crimes under CERCLA, and then selecting all prosecutions of individual defendants for the analysis. This approach allows one to take a three-fold path, including: showing broader themes in prosecutions and sentencing patterns over time since the federal environmental crime apparatus institutionalized in the early 1980s; analyzing outliers in sentencing patterns to illustrate large

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https://www.epa.gov/sites/production/files/documents/exercise.pdf; *Types of and Approaches to RCRA Corrective Action Enforcement Actions*, U.S. ENV'T PROT. AGENCY (Jan. 5, 2023), https://www.epa.gov/enforcement/types-and-approaches-rcra-corrective-action-enforcement-actions.

[5] The general implications for civil and criminal liability under CERCLA likely apply to companies and corporate officers. Yet individuals may also be held liable for such actions, including the cost of cleanup. Owners of companies are clearly liable for contaminated facilities or other hazardous waste spills. Under an "authority to control" standard, the courts have found CERCLA liabilities extend to those individuals, shareholders, parent corporations, if there was active, substantial control, but CERCLA was not clear enough on this front, leading to numerous court interpretations. *See* David R. Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENV'T AFFS. L. REV. 643, 657–58, 663–64, 671 (1986); Mark. R. McPhail, *Environmental Law: CERCLA Liability of Corporate Parents for Their Dissolved or Undercapitalized Subsidiaries*, 44 OKLA. L. REV. 345, 345–47, 363 (1991); Timothy Holly, *Potential Responsibility under CERCLA*: *Canadyne-Georgia Corp. v. Nationsbank, N.A. (South) — An Illustration of Why We Need a Common Federal Rule Defining Owned and Operated*, 12 VILL. ENV'T L. J. 119 (2001); Kathryn R. Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)*, 52 OHIO STATE L. J. 133 (1990); *Indirect Owner/Operator Liability Under CERCLA*, FINDLAW (Jan. 11, 2018), https://corporate.findlaw.com/law-library/indirect-owner-operator-liability-under-cercla.html; *Superfund Landowner Liability Protections*, U.S. ENV'T PROT. AGENCY (Dec. 9, 2022), https://www.epa.gov/enforcement/superfund-landowner-liability-protections. Corporate officers possess a burden of knowledge and obligation to safeguard their employees and the public from harm from hazardous waste. *See* Rita Cain, *Shareholder Liability under Superfund: Corporate Veil or Vale of Tears*, 17 J. LEGIS. 1, 4 n.26, 8 (1991); Barbara DiTata, *Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine*, 7 FORDHAM ENV'T L. REV. 795 (2011). When writing CERCLA, Congress also held liable responsible parties that "arranged for" the disposal of hazardous waste, leaving the courts to interpret such a standard for "arranger liability." *See* David W. Lannetti, *"Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent*, 40 WM. & MARY L. REV. 279, 279 (1998).

[6] For empirical research on CERCLA and RCRA criminal enforcement, *see* Joshua Ozymy & Melissa L. Jarrell, *Failure to Notify: Exploring Charging and Sentencing Patterns in Superfund Criminal Prosecutions*, 50 ENV'T L. REP. 10723 (2020). Joshua Ozymy & Melissa L. Jarrell, *Does the Criminal Enforcement of Federal Environmental Law Deter Environmental Crime? The Case of the U.S. Resource Conservation and Recovery Act*, 11 ENV'T & EARTH L. J. 65 (2021).

penalty prosecutions and their influence on overall trends; and finally, drawing out the broader themes that emerge in prosecutions historically to understand the types and prevalence of crimes prosecuted under CERCLA and to bring order to this universe. This article follows the introduction with an overview of CERCLA, discussion of criminal enforcement, sanctioning, the data and analytical approach employed, and then discussion and conclusions.

I. CERCLA OVERVIEW

Congress passed RCRA in the 1970s due to public concerns over hazardous waste, alongside a number of new or revised environmental statutes covering a wide variety of environmental media, including the Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Toxic Substances Control Act (TSCA), Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the Clean Air Act (CAA).[7] Superfund was passed into law in 1980 as a complementary law for managing hazardous waste, as it empowered the EPA to investigate, designate, and remediate contaminated sites throughout the United States.[8] Superfund acted as a master fund that allowed the EPA to charge the industry to pay for the cleanup and remediation of contamination, which includes chemical and other hazardous waste spills, industrial and other accidents, and emergency discharges or releases of pollution.

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[7] Clean Water Act, 33 U.S.C. §§ 1251–1389; Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135–136; Clean Air Act, 42 U.S.C. §§ 7401–7671q. Under RCRA, EPA is authorized to oversee 6,600 facilities and 20,000 processing units across the United States and oversees three billion tons of solid, industrial, and hazardous waste. While RCRA authorizes EPA to oversee the lifecycle of waste, CERCLA empower EPA to find responsible parties to remediate pollution or in the case such parties cannot be located or compelled to do so, to do so themselves or at least to prioritize doing so. *See* Thomas P. Eichler, *The Status of RCRA in the Mid-Atlantic States*, 26 ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV. 2, 2–3 (1984). Russell Phifer, *RCRA — The First 30 Years of Hazardous Waste Regulation*, 17 J. CHEM. HEALTH & SAFETY 4 (2010). Classifying a substance as hazardous waste is important for coming under RCRA rules. *See* Jim Ninkovich, *EPA Broadens RCRA Definition of "Hazardous Waste" to Include Mixtures and Derivatives*, 31 ECOLOGY L. Q. 781, 781, 784 (2004); Lynn L. Bergeson, *Re- Re- Re-Defining RCRA Solid Wastes*, POLLUTION ENG'G 32, 32 (2004). RCRA centers on permitting, rather than reducing hazardous waste or cleanup, the latter being the most important complement CERCLA provides for managing hazardous waste spills and other pollution effectively. *See* Casey Roberts, *D.C. Circuit Affirms EPA Trend Towards Reducing RCRA Requirements for Recycling of Hazardous Secondary Materials*, 32 ECOLOGY L. Q. 749 (2005). When CERCLA was passed 1980, Congress also passed the Hazardous and Solid Waste Disposal Amendments, effectively exempting the extractive industry from regulation under RCRA and thus the ability to manage these as hazardous waste is limited. *See* Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 7, 94 Stat. 2334, 3226 (codified as amended in 42 U.S.C. § 6921). These are also known as the Bentsen and Bevill amendments for their sponsors, Senators Lloyd Bentsen and Thomas Bevill. David L. Hippensteel, *The RCRA Exemption for Oil and Natural Gas Exploration and Production Wastes—What You May Not Know*, 6 ENV'T GEOSCIENCES 106, 106–09 (1999).

[8] *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENV'T PROT. AGENCY (Sept. 12, 2022), https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act.

Superfund grants the EPA the authority to find potentially responsible parties to remediate contaminated sites, as well as responsible parties for emergency releases of pollution. Sites that are prioritized for remediation are placed on the National Priorities List (NPL). The Office of Superfund Remediation and Technology (OSRTI) administers the NPL and the some 1,333 current sites that are current on the list. [9] While Superfund was originally funded with taxes on businesses that generated hazardous waste, Congress failed to renew it in 1995 and the EPA's ability to remediate orphan sites, where no responsible party can be acknowledged, has since been limited.[10] In 1986, Superfund was further amended with the Superfund Authorization and Reorganization Act (SARA) that reauthorized the legislation, created the Emergency Planning and Community Right-to-Know Act (EPCRA) that directs states to create State Emergency Response Commissions (SERC), and develops Local Emergency Planning Committees (LEPCs) to alert residents across the country for chemical spills and other hazardous emergencies.[11]

The EPA maintains a compliance monitoring strategy to focus enforcement efforts under CERCLA. Compliance monitoring focuses on finding companies or individuals responsible for contaminating a site and to either negotiate an agreement for a responsible party to remediate the problem, or to pay the EPA or a third party to remediate a hazardous waste contamination site.[12] The EPA monitors the progress of site remediation to ensure responsible parties are holding up their end of the agreement.[13] The tools the EPA may seek to use to enforce their authority under CERCLA may focus on administrative, civil, or criminal remedies.

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[9] Currently, there are 1,336 NPL sites, with forty proposed, and 453 since deleted. *See Superfund: National Priorities List (NPL)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/superfund/superfund-national-priorities-list-npl (last visited Feb. 21, 2023).

[10] The Superfund Trust fund is currently funded when EPA collects funds from responsible parties through litigation, settlements or other legal action and currently has collected about $8.5 billion in special accounts, with $5 billion spent on remediation or cleanup actions and $3.5 billion reserved for future issues. *See Superfund Special Accounts*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/superfund-special-accounts (last updated Feb. 8, 2023).

[11] Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §11001; *Summary of the Emergency Planning and Community Right-to-Know Act*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/laws-regulations/summary-emergency-planning-community-right-know-act (last updated Nov. 21, 2022).

[12] *Superfund (CERCLA) Compliance Monitoring*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/compliance/superfund-cercla-compliance-monitoring (last updated Sept. 13, 2022).

[13] Responsible parties may also be liable to maintain institutional controls, which "is a non-engineering measure intended to affect human activities in such a way as to prevent or reduce exposure to hazardous substances," thus being responsible for the lifecycle of the hazardous waste control method if the remediation requires persistent control. *See id.*

II. ENFORCING CERCLA

When an individual violates laws governing chemical spills, hazardous waste, or other violations regulated under Superfund, the EPA typically attempts to have the individual come back into compliance with the law by using administrative or civil remedies.[14] Administrative tools to remedy non-compliance may include the EPA or a state agency issuing a warning or notice of violation, an order of correction, issuing fines for those individuals that do not comply with the agency's orders, or in cases where these are insufficient to regain compliance, the EPA may seek a civil judicial remedy for the violation.[15] Civil remedies are broad and may take the form of temporary or injunctive relief to compel an individual to cease polluting temporarily or permanently, issuing administrative orders on consent that require the individual to remediate pollution, clean up a chemical or hazardous waste spill, or perform some other series of related actions. Remedies may also include creating an environmental monitoring plan or mitigation plan, or typically for companies or organizations, negotiating a supplemental environmental project that allows the entity to regain and then go beyond compliance.[16]

RCRA regulates the use, handling, and disposal of hazardous wastes, whereas CERCLA provides a liability structure for the clean-up and remediation of hazardous waste disposal sites and a basis for emergency actions to clean up spills and other situations of more immediate harm. A response action by a responsible party that satisfies a RCRA corrective action should also in most circumstances satisfy a CERCLA corrective action. A responsible party should seek to ensure they settle all CERCLA and RCRA claims in any settlement agreement with EPA to avoid any future claims of unknown liability.[17] If none of these civil remedies prove successful to compel or negotiate compliance

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[14] *Types of and Approaches to RCRA Corrective Action Enforcement Actions*, *supra* note 4. *Basic Information on Enforcement*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/basic-information-enforcement (last updated Nov. 2, 2022).

[15] Memorandum from Lawrence E. Starfield, Acting Assistant Adm'r, to Reg'l Couns. & Deputies, Enf't & Compliance Assurance Div. Dir's & Deputies, OECA Off. Dir's & Deputies, https://www.epa.gov/sites/default/files/2021-04/documents/usingallappropriateinjunctivereliefto olsincivilenforcementsettlement0426.pdf; Basic Information on Enforcement, *supra* note 14.

[16] Memorandum from Robert Van Heuvelen, Dir., Off. Regul. Enf't, to Reg'l Counsels, Regions I – X, Dir., Off. Env't. Stewardship, Region 1, Dir., Compliance Assurance & Enf't Div., Region VI, Dir., Off. Enf't, Compliance, & Env't Just., Region VIII, Reg'l Enf't Coordinators, Regions I–X, https://www.epa.gov/sites/default/files/documents/gpoladminlitig-mem.pdf; Memorandum from Susan Shinkman, Dir. Off. Civ. Enf't, to Reg'l Couns., Reg'l Enf't Div. Dirs., Reg'l Enf't Coordinators, Off. Civ. Enf't Div. Dirs., https://www.epa.gov/sites/default/files/2016-08/documents/2ndeditionsecuringmitigationemo.pdf; *Supplemental Environmental Projects (SEPs)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/supplemental-environmental-projects-seps (last updated Jan. 20, 2023).

[17] *RCRA Corrective Action versus Cercla Response*, CLIMATE POL'Y WATCHER, https://www.climate-policy-watcher.org/hazardous-wastes/rcra-corrective-action-versus-cercla-response.html (last updated Sept. 9, 2022).

with the law by themselves or in conjunction with other civil or administration remedies, a civil judicial remedy, including a civil lawsuit, may be pursued by the EPA, where an individual may be found guilty in court and liable for any damages or restitution incurred for pollution and/or costs involved by the EPA or a third party for cleaning up or remediating pollution.[18] An individual may also enter into a consent decree to avoid pleading guilty and to regain compliance.[19]

III. CRIMINAL ENFORCEMENT REMEDIES

Where civil and administrative remedies center on regaining compliance if an individual transgresses hazardous waste laws governed under RCRA or CERCLA, criminal remedies center on punishment and deterrence.[20] A global movement began in many countries in the 1970s that acknowledged the need to develop a criminal process for punishing serious environmental crimes, which required the institutionalization of criminal statutes in environmental law, policing resources, and prosecutorial specialization to properly punish serious crimes and offenders.[21]

Cleaning up hazardous waste is authorized under "imminent hazard" provisions of RCRA, so that a responsible party is subject to strict and severable liability for the costs incurred by cleanup, and EPA is authorized to clean up pollution in emergency situations via CERCLA as well. *See* Kenneth K. Kilbert, *Re-Exploring Contribution under RCRA's Imminent Hazard Provisions*, 87 NEB. L. REV. 420, 427 (2008).

[18] EPA is authorized to issue orders that on consent (i.e. with agreement) or they may issue unilateral orders on demand that compel an entity to comply with their permit. If a responsible party fails to comply or ignores EPA's order, EPA has authority to clean up and remediate pollution and seek reimbursement costs for their efforts, as well as civil penalties in federal court. Civil judicial actions tend to follow efforts to induce compliance via other civil or administrative channels and are reserved for serious cases of non-compliance with the law having significant effect or causing imminent endangerment. EPA also possesses the authority to have a federal court enforce their orders. Generally, EPA can choose to enforce the law and take correction actions for hazardous waste via RCRA or CERCLA and cleanup up actions may follow roughly the same course. *See* Types of and Approaches to RCRA Corrective Action Enforcement Actions, *supra* note 4; *See also* Timothy O. Schimpf, *Unleash RCRA! Letting Loose the Corrective Action Process of RCRA Can Change the World*, 29 WM. & MARY ENV'T L. & POL'Y REV. 481 (2005); Kundai Mufara, *RCRA Facts: An Overview of the Hazardous Waste Management Law*, ERA ENVIRONMENTAL (Feb. 3, 2021), https://www.era-environmental.com/blog/rcra-facts-an-overview-of-the-hazardous-waste-management-law; U.S. DEP'T ENERGY, OFF. ENV'T GUIDANCE, A COMPARISON OF THE RCRA CORRECTIVE ACTION AND CERCLA REMEDIAL ACTION PROCESSES (1994), https://www7.nau.edu/itep/main/HazSubMap/docs/RCRA-CERCLA/DOE_RCRAvsCERCLA%20Comparison.pdf.

[19] Starfield, *supra* note 15; Basic Information on Enforcement, *supra* note 14.

[20] *See* Devaney, *supra* note 4, at 3–4. Enforcement staff are more likely to pursue civil or administrative remedies for non-compliance with the law because the burden of proof is lower and the general approach at EPA prefers individuals regain compliance, seeking criminal prosecution only in the most serious of cases. Raymond W. Mushal, *Up from the Sewers: A Perspective on the Evolution of the Federal Environmental Crimes Program*, 2009 UTAH L. REV. 1103, 1105 n.8 (2009).

[21] Michael R. Pendleton, *Beyond the Threshold: The Criminalization of Logging*, 10 SOC'Y & NAT. RES. 181, 181 (1997). The trend was evident in some of the U.S. states at the time. *See* Anthony J.

In the United States, the Rivers and Harbors Act and the Lacy Act were the first statutes to criminalize environmental violations.[22] It was not until the early 1980s that Congress acted to enhance environmental statutes with criminal provisions, first with RCRA in 1984, followed by the CWA in 1987, and then the CAA in 1990, and other major statutes around this time.[23] While statutes were being upgraded, the EPA was given authority to institutionalize an environmental policing presence when the Office of Enforcement was organized in 1981, eventually becoming the modern Office of Compliance Assurance (OECA). The EPA initially hired two criminal investigative staff and then another twenty were hired after 1982.[24] With the passage of the Medical Waste Tracking Act of 1988, criminal investigators were granted full law enforcement authority, and in 1989 the U.S. Attorney General approved criminal investigators to carry firearms in their official capacity.[25] Further enhancements to policing abilities came in 1990, with the passage of the Pollution Prosecution Act, giving EPA authority to hire at least 200 criminal investigative staff, which were hired in the subsequent years and are now housed within the EPA's Criminal Investigation Division (EPA-CID).[26]

Celebrezze, Jr. et al., *Criminal Enforcement of State Environmental Laws: The Ohio Solution*, 14 HARV. ENV'T L. REV. 217 (1990).

[22] The Refuse Act, 33 U.S.C. § 407, was the first federal statute to criminalize environmental violations. The Rivers and Harbors Appropriation Act, 33 U.S.C. § 403, prohibits the unpermitted obstruction, alteration, or other such actions that impede in the navigable waters of the United States. The Lacey Act, 16 U.S.C §§ 3371–3378, bans the unpermitted, interstate trade in wildlife. Mushal, *supra* note 20, at 1104.

[23] EPA issued its first extensive agency guidelines for proceeding in criminal cases in 1976, largely based on the need to do so under the CAA at the time. In 1978, EPA and DOJ formed a Hazardous Waste Taskforce initiating fifty-two civil actions under RCRA. By the end of the Carter Administration, the DOJ was laying the groundwork for criminal enforcement resources. The development of criminal enforcement at EPA began in earnest when DOJ attorney, Peter Beeson, was assigned to EPA, leading to the creation of the Office of Enforcement, with Beeson as director. *See* Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1137–40 (1986); *Historical Development of Environmental Criminal Law*, U.S. DEP'T JUST. ENV'T CRIMES SECTION, https://www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law (last updated May 13, 2015).

[24] *About the Office of Enforcement and Compliance Assurance (OECA)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/aboutepa/about-office-enforcement-and-compliance-assurance-oeca (last updated Mar. 30, 2023); McMurry & Ramsey, *supra* note 23, at 1134.

[25] Mushal, *supra* note 20, at 1111; Medical Waste Tracking Act of 1988, Pub. L. 100-582, 102 Stat. 2950; Memorandum from John Peter Suarez, Assistant Adm'r to All-OCEFT, https://www.epa.gov/sites/production/files/documents/oceft-review03.pdf.

[26] Pollution Prosecution Act of 1990, Pub. L. 101-593, § 202(a), 104 Stat. 2962. Set a minimum of 200 investigative staff. The number of current criminal investigators varies from 145 to around 200 depending on source and whether one includes support staff. *See* U.S. ENV'T PROT. AGENCY CRIM. ENF'T PROGRAM, AMERICA'S ENVIRONMENTAL CRIME FIGHTERS, https://www.epa.gov/sites/production/files/documents/oceftbrochure.pdf (last visited Mar. 25, 2023); *EPA CID Agent Count*, PUB. EMPS. FOR ENV'T RESP., https://www.peer.org/wp-content/uploads/2019/11/11_21_19-Federal_Pollution_EPA_CID_Agent_Count.pdf (last visited Mar. 25, 2023).

Resources to prosecute federal environmental crimes were institutionalized in 1982, with the founding of the Environmental Crimes Section within the Department of Justice (DOJ-ECS), starting with a three attorney unit in the Environmental Enforcement Section and becoming its own organization unit by 1987, and housed within the Environmental and Natural Resources Division (ENRD) within DOJ.[27] The Environmental Crimes Section (DOJ-ECS), was founded in 1982, beginning as a three attorney unit within the Environmental Enforcement Section, and becoming an organizational unit in 1987 within ENRD, to specialize in the prosecution of environmental crimes.[28] Today, there are forty-three attorneys and a dozen support staff located within DOJ-ECS that focus on the prosecution of environmental crimes.[29]

The practical application of criminal enforcement tools for the environment is very collaborative in nature, as EPA criminal investigators tend to work with federal, state, and local law enforcement agents to build cases that may also include collaboration with prosecutions. Investigations may search for information from civil inspections and reports, regulatory filings, former employees, or whistleblowers, and once a case is developed, investigators may bring it to federal prosecutors to convene a grand jury or file a criminal information in federal court.[30] As state and federal environmental statutes may overlap and investigations tend to involve collaboration, cases built by investigators may also be forwarded to state or local authorities for prosecution.[31]

Criminal provisions in CERCLA focus on punishing offenders for failing to notify officials of the release of a hazardous substance and are often used in conjunction with other statutes, such as RCRA, to punish individuals for hazardous waste, chemical, and other crimes.[32] Since CERCLA violations may also involve charging individuals under RCRA for

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[27] The Public Lands Division was founded within DOJ in 1909, forming the early basis for organizing prosecutorial resources for the environment around the time of the Rivers and Harbors Act and other early statutes that penalized environmental crimes, with an important distinction here being those early acts provided for misdemeanor penalties for environmental crimes exclusively. *History*, U.S. DEP'T JUST. ENV'T & NAT. RES. DIV., https://www.justice.gov/enrd/history (last updated May 18, 2021); Historical Development of Environmental Criminal Law, *supra* note 23.

[28] Joseph G. Block, *Environmental Criminal Enforcement in the 1990's*, 3 VILL. ENV'T L. J. 33, 34 (1992); Historical Development of Environmental Criminal Law, *supra* note 23.

[29] *An Overview of Our Practice: EES*, U.S. DEP'T JUST. ENV'T & NAT. RES. DIV., https://www.justice.gov/enrd/overview-our-practice (last updated May 13, 2015).

[30] Joel A. Mintz, *Some Thoughts on the Interdisciplinary Aspects of Environmental Enforcement*, 36 ENV'T. L. REP. NEWS & ANALYSIS 10495, 10495–97 (2006).

[31] Joel A. Mintz, *"Treading Water": A Preliminary Assessment of EPA Enforcement during the Bush II Administration*, 34 ENV'T L. REP. NEWS & ANALYSIS 10912, 10923–24 (2004); David St. John et al., *Environmental Crimes*, 57 AM. CRIM. L. REV. 657, 662 (2020).

[32] *Criminal Provisions of the Comprehensive Environmental Response, Compensation – and Liability Act (CERCLA)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/criminal-provisions-comprehensive-environmental-response-compensation-and-liability-act (last updated Mar. 27, 2023); Kilbert, *supra* note 17, at 422.

hazardous waste crimes, related violations may include the illegal export, storage, treatment, or disposal of hazardous waste, transporting hazardous waste without a manifest or to an unpermitted facility, making false statements or omission of material information, knowing endangerment, or knowing destruction, concealment, or alternation of records.[33] The most serious of these violations involves knowing endangerment, when an individual's actions place another person in imminent danger of serious bodily injury or death.[34] Criminal provisions were added to RCRA in 1984, making it easier for prosecutors to charge corporate officers for hazardous waste crimes..[35]

Whether CERCLA criminal provisions deter environmental crime is debatable in the empirical literature.[36] Certainly, Congress intended criminal provisions to have a deterrent value, as they include significant penalties,

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[33] *Criminal Provisions of the Resource Conservation and Recovery Act (RCRA)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/criminal-provisions-resource-conservation-and-recovery-act-rcra (last updated Mar. 27, 2023).

[34] For a discussion of knowing endangerment, particularly as it applies to hazardous waste, chemicals, and other issues related to CERCLA enforcement, *see* Robert G. Schwartz, Jr., *Criminalizing Occupational Safety Violations: The Use of "Knowing Endangerment" Statutes to Punish Employers Who Maintain Toxic Working Conditions*, 14 HARV. ENV'T L. REV. 487 (1990); Turner T. Smith, Jr. et al., *Hazardous Wastes: The Knowing Endangerment Offence*, 2 J. ENV'T L. 262 (1990). Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 WM. MITCHELL L. REV. 987 (1990).

[35] Corporate officers are responsible for employee safety, particularly from hazardous waste and chemical wastes in this context, under the Responsible Corporate Officer Doctrine. *See* Robert T. McGovern, United States v. Johnson & Towers, Inc.*: Corporate Employee Criminal Liability under RCRA*, 2 PACE ENV'T L. REV. 316 (1985); David T. Barton, *Corporate Officer Liability Under RCRA: Stringent but Not Strict*, 1991 BYU L. REV. 1547, 1548–50 (1991); Ronald M. Broudy, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 KY. L.J. 1055 (1992); Sidney M. Wolf, *Finding an Environmental Felon Under the Corporate Veil: The Responsible Corporate Officer Doctrine and RCRA*, 9 J. LAND USE & ENV'T L. 1 (1993).

[36] For a general discussion of deterrence and the value environmental law enforcement, *see* Larry D. Wynne, *A Case for Criminal Enforcement of Federal Environmental Law*, 38 NAVAL L. REV. 105 (1989). For a discussion of deterrence and environmental/white collar crime, *see* Carole M. Billiet & Sandra Rousseau, *How Real is the Threat of Imprisonment for Environmental Crime?* 37 EUR. J. L. ECON. 183, 183–88 (2014). Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 765–68 (2010).

For a discussion of deterrence theory, *see Five Things About Deterrence*, NAT'L INST. JUST. (June 5, 2016), https://nij.ojp.gov/topics/articles/five-things-about-deterrence. Criticisms levied against criminal enforcement focus on the lack of significant penalties, and resources to police and prosecute criminals effectively, the degree that these efforts provide for sufficient deterrence. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1193–1200 (1985); Michael J. Lynch et al., *The Weak Probability of Punishment for Environmental Offenses and Deterrence of Environmental Offenders: A Discussion Based on USEPA Criminal Cases, 1983-2013*, 37 DEVIANT BEHAV. 1096, 1096–99 (2016); Michael J. Lynch, *The Sentencing/Punishment of Federal Environmental/Green Criminal Offenders, 2000-2013*, 38 DEVIANT BEHAV. 991, 991–95 (2017); Joshua Ozymy & Melissa L. Jarrell Ozymy, *Sub-Optimal Deterrence and Criminal Sanctioning under The U.S. Clean Water Act*, 24 UNIV. DENVER WATER L. REV. 159 (2021). For companies, low fines and penalties can create incentives to see compliance as the cost of doing business, *See* Daniel P. Fernandez et al., *Monetary Consequences of Environmental Regulations: Costs of Doing Business or Non-Deductible Penalties or Fines?*, 9 AM. U. BUS. L. REV. 123 (2020).

including incarceration, for serious violations of environmental law.[37] Research shows prosecutors are motivated to seek significant penalties for environmental crimes.[38] Studies also show aggravating factors tend to be a central element in the decision to pursue criminal charges.[39] Other studies show prosecutions have increased over time from the 1980s to modern times and significant penalties have been secured at sentencing.[40] Our understanding of how CERCLA criminal provisions have been used to charge individuals for environmental crimes and the broader themes in those crimes over time is still very limited.[41] We address this shortcoming, with an analysis that focuses exclusively on CERCLA criminal prosecutions of individuals, building out charging and sentencing themes, focusing on large penalty cases that impact those trends, and deriving general themes in prosecutions historically to help gain empirical traction on the types of crimes prosecuted over time in the United States.

IV. DATA AND METHOD

The data for the analysis are derived from the EPA's Summary of Criminal Prosecutions Database that provides prosecution's case summaries for all EPA-CID prosecutions that resulted in criminal prosecution.[42] The database was searched by fiscal year (FY) to capture all of the cases in the database, experimenting with a variety of search strategies, recording all prosecutions adjudicated in the database from the first case in 1983 until April 30, 2022. We captured data on a total of 2,728 criminal prosecutions. Once we developed a database of all

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[37] Mushal, *supra* note 20, at 1105 n.8.

[38] David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T L. REV. 159 (2014); David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005-2014*, 8 MICH. J. ENV'T & ADMIN. L. 297 (2019).

[39] Joshua Ozymy & Melissa Jarrell, *Why do Regulatory Agencies Punish? The Impact of Political Principals, Agency Culture, and Transaction Costs in Predicting Environmental Criminal Prosecution Outcomes in the United States*, 33 REV. POL. RSCH. 71, 71–73 (2016).

[40] *See* Joshua Ozymy et al., *Persistence or Partisanship: Exploring the Relationship between Presidential Administrations and Criminal Enforcement by the U.S. Environmental Protection Agency, 1983-2019*, 81 PUB. ADMIN. REV. 49 (2021). The following are examples of criminal enforcement at the local or state level, another area of related research in need of study: Matthew S. Crow et al., *Camouflage-Collar Crime: An Examination of Wildlife Crime and Characteristics of Offenders in Florida*, 34 DEVIANT BEHAV. 635 (2013); Joshua C. Cochran et al., *Court Sentencing Patterns for Environmental Crimes: Is there a "Green" Gap in Punishment?,* 34 J. QUANTITATIVE CRIMINOLOGY 37 (2018); Michael J. Lynch, *County-Level Environmental Crime Enforcement: A Case Study of Environmental/Green Crimes in Fulton County, Georgia, 1998-2014*, 40 DEVIANT BEHAV. 1090 (2019).

[41] For research here, *see* Joshua Ozymy & Melissa L. Jarrell, *Failure to Notify: Exploring Charging and Sentencing Patterns in Superfund Criminal Prosecutions*, 50 ENV'T L. REP. 10723 (2020).

[42] *Summary of Criminal Prosecutions*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/summary-criminal-prosecutions (last updated July 5, 2022).

prosecutions, we selected out all CERCLA prosecutions, and then further selected all prosecutions under CERCLA of individual defendants, excluding all companies for the analysis. Once we took this step a total of thirty-six prosecutions were left for the analysis herein. We then collected the following data from the prosecutions summaries: FY identifier, narrative summary of the case, primary defendant in the case, docket number, state identifier of the case, number of named defendants in the case that were individuals, charging statutes utilized in the case, whether a company was a named defendant, presence of other, non-environmental criminal violations, and all sentencing data parceled by individual and company defendants, including total probation in months, total incarceration in months, and total monetary penalties, such as fines, restitution, special fees and assessments, community payments, or other monetary fees assessed at sentencing.

Content analysis was the chosen analytical method for the article, and we used it to record, code, and interpret the data herein. Two coders were assigned to capture the data during a pilot phase for four weeks that gave us the opportunity to understand the data, derive the appropriate categories, and find issues in coding. Once we understood the data and were confident to move forward, we had both coders code independently of one another, with one author reviewing cases for disagreement, where we met to find consensus on values. Disagreements typically came with complex sentencing data and cases with multiple defendants or ambiguous text regarding sentencing or other issues in the case narratives. Our inter-coder reliability was very high for the analysis, at about ninety-five percent overall. [43]

V. RESULTS

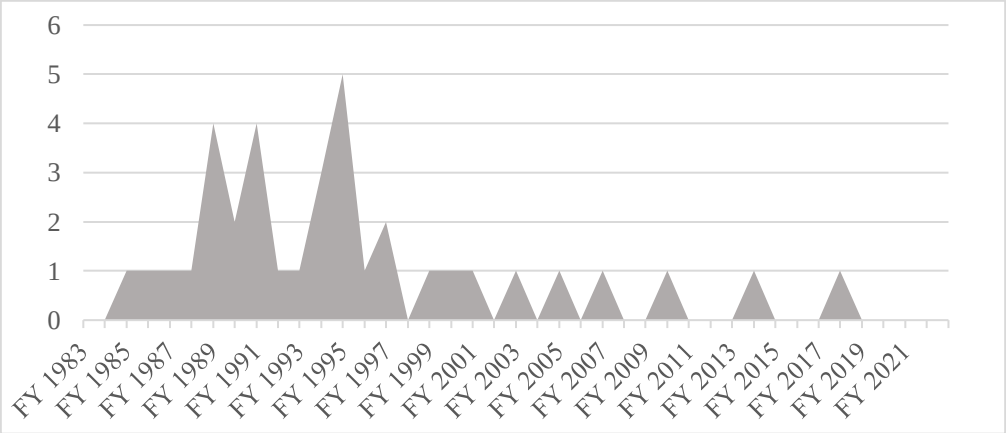
We break the analysis down into three parts. In the first section, we review broader sentencing trends for individuals prosecuted for CERCLA violations from 1983-2021. In the second section, we review large penalty cases that affect the overall patterns. In the final section, we derive general themes to categorize CERCLA prosecutions over time, in order to bring clarity and order to the types of crimes prosecuted under CERCLA since the institutionalization of the criminal enforcement apparatus in the early 1980s.

In Figure 1, we show annual CERCLA prosecutions of individual defendants, adjudicated by EPA fiscal year, from 1981-2021. Prosecutions emerge through the 1980s, with eight prosecutions adjudicated during the decade. By the 1990s, prosecutions increase

[43] The agreed upon items were divided by non-agreed items, see: OLE R. HOLSTI, CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES 140 (Addison-Wesley Publishing Company 1969).

significantly, with twenty prosecutions adjudicated during this time period. From 2000-2010, prosecutions decline dramatically to six during this period, and from 2011-2021, they decline further to two prosecutions. The pattern in the data here appears to show prosecutions rising through the 1980s and 1990s with the institutionalization of criminal enforcement and added resources and then dropping in the 2000s onward. A grand total of thirty-six prosecutions were adjudicated in our analysis.

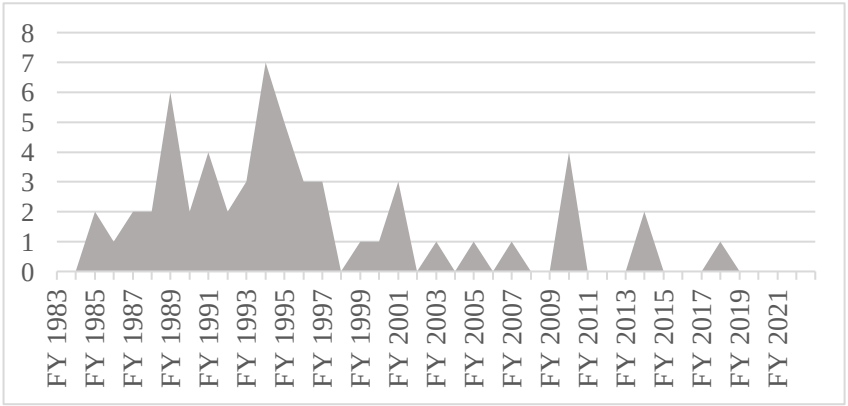
Figure 1. Total CERCLA Prosecutions of Individual Defendants, Adjudicated by Fiscal Year.



Source: *EPA Summary of Criminal Prosecutions Database*

In Figure 2, we explore total defendants prosecuted by fiscal year, from 1983-2021. As with prosecutions, total defendants rises over time in the 1980s, to close out the decade with thirteen defendants prosecuted. In the 1990s, this number increases significantly, with thirty defendants prosecuted during the decade. From 2000-2009, defendants prosecuted decreases significantly to seven prosecuted during the decade. From 2010-2021, a total of seven are prosecuted. As with prosecutions, the high point for defendants prosecuted seems to be in the late 1990s with a decline afterwards. We find a grand total of fifty-seven individuals prosecuted for CERCLA crimes in our analysis.

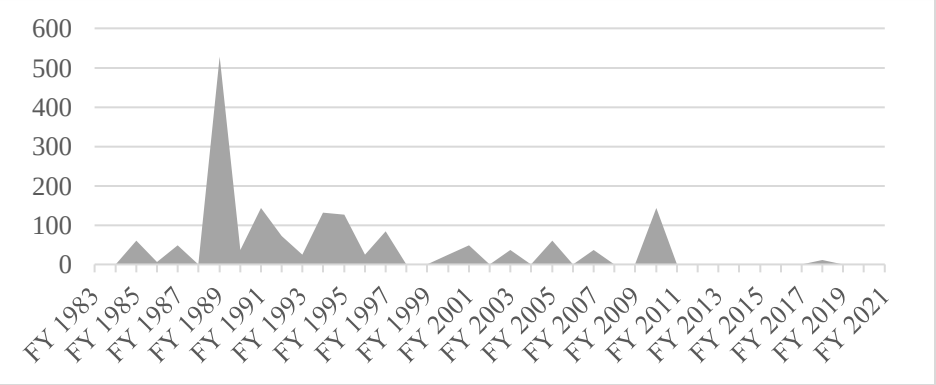
Figure 2. Number of Individual Defendants in CERCLA Prosecutions by Fiscal Year.



Source: *EPA Summary of Criminal Prosecutions Database*

In Figure 3, we explore sentencing patterns, beginning with total probation assessed to individual defendants annually in months, by EPA fiscal year, from 1983-2021. Total probation in the 1980s amounts to 642 months across all defendants. During the 1990s, total probation again by coincidence reached 642 months during the decade. From 2000-2009, total probation declines to 204 months, and from 2010-2021, declines again to 156 months during the decade.[44] A grand total of 1,644 months of probation were assessed to individual defendants at sentencing in our analysis.

Figure 3. Total Probation Time in Months Assessed to Individual Defendants in CERCLA Prosecutions by Fiscal Year.



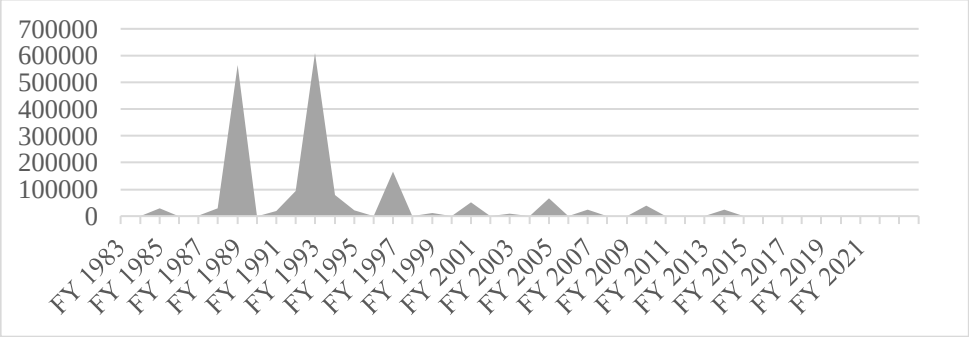
Source: *EPA Summary of Criminal Prosecutions Database*

In Figure 4, we explore total monetary penalties assessed to individual defendants at sentencing by EPA fiscal year, from 1983-

[44] The totals from the 1980s are affected by outliers. While this affects the overall trend, it also shows the presence of few large-penalty probation cases in CERCLA prosecutions. The main case of note was the prosecution of Charles Arcangelo (D. Connecticut N-88-43TFGD, 1989) and nine other co-defendants, who were arrested and charged in a fifteen court Racketeer Influenced and Corrupt Organizations (RIC) prosecution, involving mail fraud, harboring and transport of illegal aliens, interstate transportation of stolen property, disposal of hazardous waste without a permit in violation of RCRA, and failure to notify officials of the release of a hazardous substance (mercury) under CERCLA. The defendants were sentenced to collectively serve a grand total of 420 months' probation, or about twenty-six percent of total probation assessed to defendants at sentencing in our analysis.

2021. During the 1980s, penalties totaled over $628,000. By the 1990s, over $999,000 in penalties were assessed to individual defendants at sentencing. From 2000-2009, over $152,000 in penalties were assessed to defendants at sentencing and from 2011-2021, almost $63,000 in penalties were assessed to individual defendants at sentencing. A grand total exceeding $1.8 million in monetary penalties were assessed to individual defendants at sentencing in our data.

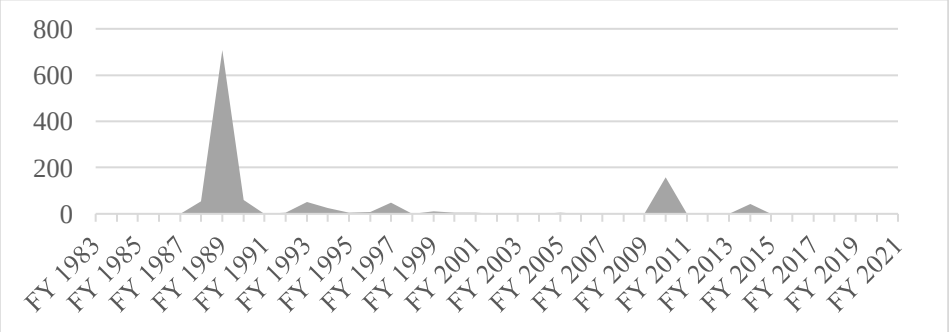
Figure 4. Total Monetary Penalties Assessed to Individual Defendants in CERCLA Prosecutions by Fiscal Year.



Source: *EPA Summary of Criminal Prosecutions Database*

In Figure 5, we show total prison time assessed to individual defendants (in months) in CERCLA prosecutions by EPA fiscal year, from 1983-2021. Prison time assessed at sentencing does not occur until 1988, when fifty-four months were assessed to defendants and 708 months in 1989, marking a cumulative total of 762 months during the decade. During the 1990s, a total of 213 months of incarceration were assessed at sentencing. From 2000-2009, a total of sixteen months of incarceration were assessed at sentencing and from 2010-2021, a total of 200 months of incarceration were assessed at sentencing. We find a grand total of 1,191 months of incarceration assessed at sentencing in our analysis.

Figure 5. Total Prison Time Assessed to Individual Defendants in CERCLA Prosecutions by Fiscal Year.



Source: *EPA Summary of Criminal Prosecutions Database*

In the second section of our analysis, we explore large penalty cases that affect broader trends from Section One, beginning with large incarceration cases in Table 1. By far the most severe prosecution of CERCLA crimes involved the previously cited prosecution of Charles Arcangelo, who along with nine co-defendants were collectively sentenced to 564 months of incarceration in our analysis.[45] With 1,191 total months of incarceration assessed at sentencing for individuals prosecuted for CERCLA crimes in our analysis, the Arcangelo prosecution makes up forty-seven percent of that total. Lester Mancuso was prosecuted, along with four family members as co-defendants, for a series of asbestos-related crimes in New York.[46] The prosecution of Albert Tumin for knowing endangerment resulted in sixty months of incarceration.[47] Given the first two prosecutions in the table make up sixty percent of overall incarceration time in our analysis, this shows that few cases involve large-penalty incarceration sentences in our data, but only two have a large impact on overall totals.

Table 1. Large Incarceration Sentences Assessed to Individual Defendants in CERCLA Prosecutions.

Defendant	*Fiscal Year*	*Crime*	*Total Incarceration (Months)*
Charles Arcangelo	1989	Hazardous Waste	564

[45] U.S. ENV'T PROT. AGENCY, NAT'L ENF'T INVESTIGATIONS CTR., SUMMARY OF CRIMINAL PROSECUTIONS RESULTING FROM ENVIRONMENTAL INVESTIGATIONS 85–87 (1989), https://nepis.epa.gov/Exe/ZyPDF.cgi/9101Y2G2.PDF?Dockey=9101Y2G2.PDF. Brothers Charles and James Arcangelo owned five junkyards in the State of Connecticut, a restaurant destroyed in an arson fire, and four scrap metal dealerships.

[46] *Summary of Criminal Prosecutions: Lester Mancuso*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2028 (last accessed Apr. 6, 2023). The defendants, Lester Mancuso and his sons were charged with conspiring to defraud the United States, illegally dumping asbestos, mail fraud, submitting false documents, and failure to notify officials of the release of a hazardous substance under CERCLA and were sentenced to a cumulative total of 158 months of incarceration. *Father, Sons Sentenced to Prison for Asbestos-Related Crimes in NY*, OCCUPATIONAL HEALTH & SAFETY (June 15, 2010), https://ohsonline.com/articles/2010/06/15/ny-father-and-sons-busted-on-asbestos-charges.aspx.

[47] *Summary of Criminal Prosecutions: Albert S. Tumin*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=345 (last accessed Apr. 8, 2023).

Lester Mancuso	2010	Asbestos	158
Albert S. Tumin	1989	Hazardous Waste	60

Source: *EPA Summary of Criminal Prosecutions Database*

In Table 2, we explore large monetary penalties assessed at sentencing in our data. The prosecution of John Donnelly and two co-defendants resulted in over $609,000 in penalties — the largest penalty in our analysis.[48] The prosecution of Charles Arcangelo mentioned previously resulted in over $542,000 in monetary penalties.[49] Raymond Feldman and a co-defendant were prosecuted for dumping hazardous waste into the Mississippi River, and were charged for unlawful transport, failure to notify, and conspiracy, resulting in $165,200 in fines and special assessments.[50] Marvin Mueller was prosecuted for unlawful storage and disposal of hazardous waste and failure to notify, and along with his co-defendant, John M. Hall, was sentenced to pay over $94,000 in penalties.[51] The Arcangelo and Mancuso prosecutions alone resulted in over $1.1 million in monetary penalties assessed at sentencing, and to put this in the greater context of penalties over time, these two cases make up about sixty-three percent of total monetary penalties in our data. The four cases discussed in Table 2, consisting of about $1.4 million in penalties, make up seventy-seven percent of the monetary penalties in our analysis. Placing monetary penalties in this context shows that prosecutors failed to obtain significant penalties overall historically, outside of these few cases.

[48] John Donnelly (N.D. New York 91-CR-59, 1993). The exact crime is unclear in the prosecution summary. It appears the crime centered on illegally releasing hazardous waste and an eighteen-count indictment for failure to notify under CERCLA and other charges. The defendants were collectively sentenced to fifty-two months of incarceration and other penalties.

[49] U.S. ENV'T PROT. AGENCY, NAT'L ENF'T INVESTIGATIONS CTR., *supra* note 45, at 86–87.

[50] *PA St. Louis Automotive Shop Owner Sentenced to 37 Months in Jail*, U.S. ENV'T PROT. AGENCY (May 5, 1997), https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/5624b90b4b7af9118525648e0052fb80.html; United States v. Feldman, Docket No. 4:96-cr-00311 (E.D. Mo. Oct 24, 1996). Feldman was sentenced to thirty-seven months of incarceration and three years' probation, as well as the monetary penalties.

[51] U.S. ENV'T PROT. AGENCY, ENF'T & COMPLIANCE ASSURANCE, SUMMARY OF CRIMINAL PROSECUTIONS RESULTING FROM ENVIRONMENTAL INVESTIGATIONS: FISCAL YEARS 1983 THROUGH 1992 170, https://nepis.epa.gov/Exe/ZyPDF.cgi/9101N6FX.PDF?Dockey=9101N6FX.PDF. Mueller was sentenced to four months incarceration and four months of home confinement to run concurrently and twenty-four months of supervised release. Hall was also sentenced to forty-eight months of probation and required to participate in a drug and alcohol rehabilitation program.

Table 2. Large Monetary Penalties Assessed to Individual Defendants in CERCLA Prosecutions.

Defendant	*Fiscal Year*	*Crime*	*Total Monetary Penalties*
John Donnelly	1993	Unknown	609,368
Charles Arcangelo	1989	Hazardous Waste	542,750
Raymond Feldman	1997	Hazardous Waste	165,200
Marvin Mueller	1992	Hazardous Waste	94,554

Source: *EPA Summary of Criminal Prosecutions Database*; * Numbers are rounded

In the final section of our analysis, we explore the primary themes that emerged when individuals were prosecuted for CERCLA crimes. CERCLA charges tended to come in conjunction with another charging statute, such as hazardous waste or chemical spills, so we attempted to use our best judgment to order each prosecution by what we felt was the primary crime that drove the prosecution in the case. We admit that in all cases this was difficult to know, based on the data in the case summaries, but we used the best judgment we could. Additionally, CERCLA prosecutions tended to revolve around a few basic crimes, making the categorization mostly straightforward. We found three primary themes that emerged, including hazardous waste crimes, asbestos crimes, and chemical crimes. In one prosecution, it was not possible to discern a primary theme in the case.[52]

By far the most common theme in the analysis we uncovered was the prevalence of hazardous waste crimes. In twenty-two prosecutions or sixty-one percent of total prosecutions in our analysis, the central crime centered around hazardous waste violations. This general finding also tends to show the prevalence of prosecutors charging under RCRA, given it governs the generation, storage, transport, and disposal of

[52] The unknown case was the previously discussed prosecution of John Donnelly. U.S. ENV'T PROT. AGENCY, ENF'T & COMPLIANCE ASSURANCE, *supra* note 51.

hazardous waste, used alongside failure to notify provisions in CERCLA as a central prosecutorial strategy over time.[53]

While hazardous waste crimes made up the bulk of CERCLA prosecutions in our data, we also found asbestos crimes to be the second most common crime in our analysis.[54] In twelve prosecutions, or thirty-three percent of cases, the primary crime in our judgement revolved around asbestos. These crimes typically centered on illegally removing asbestos without a permit, releasing asbestos into the ambient air without a permit, or improper disposal of asbestos.[55] While most crimes involved

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[53] Case examples in this category include the prosecution of Larry West. The defendant abandoned ninety-nine barrels of hazardous waste and was prosecuted for storing and disposing of hazardous waste without a permit under RCRA and failure to notify under CERCLA. West was sentenced to serve four months of home confinement, twenty-four months of supervised release, paid a $10,000 fine, and $40,000 in restitution to EPA. *Summary of Criminal Prosecutions: Larry West*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=538 (last visited Apr. 14, 2023). William Kirkpatrick was prosecuted for ordering employees (he was the superintendent of the City of Stafford, Kansas's power company) to illegally bury nine electrical capacitors containing polychlorinated biphenyls (PCBs) in the City's landfill. He was prosecuted under TSCA for improperly disposing of PCBs and under CERCLA for failure to notify and was sentenced to serve eighteen months of supervised probation, with six months on home confinement, fined $3,000, charged a $50 special assessment fee, and ordered to attend mandatory substance abuse counseling. *Summary of Criminal Prosecutions: William Kirkpatrick*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=601 (last visited Apr. 8, 2023); United States v. Kirkpatrick, Docket No. 6:94-cr-10094 (D. Kan. Aug. 24, 1994). Richard Fletcher was prosecuted for abandoning 200 pounds of chlorine gas in a parking lot. He was charged for failure to notify under CERCLA and was sentenced to six months of incarceration, twenty-four months of probation, and ordered to perform 100 hours of community service. *Maryland Businessman Pleads Guilty in Chlorine Case*, U.S. ENV'T PROT. AGENCY (Apr. 20, 2000), https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/e758e8d7b83885d7852568c70061e2e9.html; United States v. Fletcher, Docket No. 8:00-cr-00158 (D. Md. Mar. 24, 2000). PCBs are regulated under TSCA, and criminal provisions exist for knowingly or willfully failing to comply with PCB regulations. *See Criminal Provisions of the Toxic Substances Control Act (TSCA)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/criminal-provisions-toxic-substances-control-act-tsca (Jul. 1, 2022).

[54] The release of asbestos into the ambient air is a crime covered under the CAA. Prosecutors could typically charge individuals for removal or disposal of asbestos without a permit and/or charge them under CERCLA for failure to notify officials of the release of a hazardous substance—we see both instances in the data. These were generally cases of a criminal violations of asbestos NESHAP (National Emissions Standards for Hazardous Air Pollutants) during demolition/renovation. *See Criminal Provisions of the Clean Air Act*, U.S. ENV'T PROT. AGENCY (Jan. 20, 2023), https://www.epa.gov/enforcement/criminal-provisions-clean-air-act.

[55] Case examples in this category include the prosecution of Sam L. Story. U.S. ENV'T PROT. AGENCY, NAT'L ENF'T INVESTIGATIONS CTR, SUMMARY OF CRIMINAL PROSECUTIONS RESULTING FROM ENVIRONMENTAL INVESTIGATIONS 152 (1991), https://nepis.epa.gov/Exe/ZyPDF.cgi/900B0P00.PDF?Dockey=900B0P00.PDF. The defendant directed employees to dispose of 524 bags of asbestos-containing materials at various points in Jefferson County, Alabama. The defendant was charged with failure to notify under CERCLA and was sentenced to three months of home detention and thirty-six months of supervised release. Dennis Marchuk was prosecuted for the unpermitted removal of asbestos and failure to notify officials of the removal under CERCLA. The defendants were charged with conspiracy, failure to notify, and violations of the CAA. Marchuk was sentenced to serve twenty-four months of incarceration, thirty-six months of probation, and pay a $25,000

hazardous waste or asbestos crimes and were prosecuted under one or more statutes such as CERCLA, RCRA, or TSCA, and these crimes tended to involve illegal removal, transport, or disposal of hazardous wastes or asbestos, in one prosecution, the defendant failed to report a PCB spill at a warehouse, what we will label a chemical crime, and another is unclassifiable by the logic in the table.[56]

Table 3. Primary Themes that Emerge when Individuals are Prosecuted for CERCLA Crimes.

Theme	*Number of Prosecutions*	*Percentage of Total*
Hazardous Waste Crimes	22	61
Asbestos Crimes	12	33
Chemical Crimes	1	3
Unknown Crime	1	3
Total Prosecutions	36	

*Percentages are rounded

VI. DISCUSSION

The results of our analysis provide a few important insights into the prosecution of CERCLA crimes in the United States. Our first finding is that prosecutors were able to obtain significant penalties against criminals at sentencing. With 1,644 months of probation, 1,191 months of incarceration, and over $1.8 million in monetary penalties spread across thirty-six prosecutions, it appears they achieved significant results. When we place these findings in context of outliers, the results seem less robust. One case

fine. U.S. ENV'T PROT. AGENCY, ENF'T & COMPLIANCE ASSURANCE, SUMMARY OF CRIMINAL PROSECUTIONS RESULTING FROM ENVIRONMENTAL INVESTIGATIONS: FISCAL YEARS 1983 THROUGH 1992 174, https://nepis.epa.gov/Exe/ZyPDF.cgi/9101N6FX.PDF?Dockey=9101N6FX.PDF. Arthur Hilton, the owner of Hilton Industrial Park in Rensselaer, New York, was prosecuted for illegally hiring workers to remove and dispose of asbestos in various buildings he owned. He was charged with conspiracy, failure to notify under CERCA, and violations of the CAA and was sentenced to serve six months of incarceration, sixty months of probation, perform 200 hours of community service, pay a $30,000 fine, and pay $36,000 in restitution to EPA. United States v. Hilton, Docket No. 5:02-cr-00295 (N.D.N.Y. Aug. 8, 2002); *Summary of Criminal Prosecutions: Arthur Hilton*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=929 (last visited Apr. 8, 2023).

[56] Quin Million was prosecuted for failure to report a chemical spill of PCBs at a warehouse. He was charged with failure to notify under CERCLA and was sentenced to twelve months of incarceration and twelve months of probation. *Summary of Criminal Prosecutions: Quin Million*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=686 (last visited Apr. 8, 2023). U.S. ENV'T PROT. AGENCY, ENF'T & COMPLIANCE ASSURANCE, *supra* note 51.

makes up twenty-six percent of overall probation totals, two cases make up sixty percent of total incarceration, and seventy-seven percent of monetary penalties come down to four cases. The RICO prosecution of Charles Arcangelo alone contributed to a great deal of the penalties in the overall patterns in the sentencing data. It is important that prosecutors pursued complex cases against environmental offenders for CERCLA crimes, it just does not appear this was extremely frequent in a historical context, based on the results of our analysis.[57]

A second notable trend in our data is that it appears prosecutors pursued crimes involving aggregating factors and significant harm or culpable conduct. While difficult to capture empirically, we can examine the number of cases with non-environmental criminal charges, such as false statements, fraud, and conspiracy to denote criminal activity above and beyond environmental crimes. We find that in thirteen prosecutions, or thirty-six percent of the cases in our analysis, defendants committed one or more of these offenses, suggesting many involve culpable conduct and criminal behavior, as well as environmental crimes.[58]

A final finding of note is that we do not see a linear pattern with prosecutions over time. As expected, prosecutions rise through the 1980s as the criminal enforcement system institutionalizes and continues to rise through the 1990s. By the mid 2000s CERCLA prosecutions of individuals declines fairly significantly, and this trend persists to current times. This finding may be the result of prosecutors choosing to use resources in other areas to focus on different crimes or the lack of cases built by investigators but may speak to a broader trend in institutional disinvestment as well that could exacerbate such trends. We speak to this issue in more depth below.[59]

VII. CONCLUSION

Criminal enforcement was born in a hostile political environment under the Reagan Administration, but criminal provisions still made their way into environmental law. Policing resources were created, and prosecutorial resources were institutionalized to help develop a program for policing and prosecuting criminal violations of environmental law. The bipartisanship

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[57] It may be the case that a greater number of prosecutions under CERCLA involved companies, rather than individuals, which is likely, given how CERCLA is often used as a co-charging statute to RCRA and focused on companies and organizations, but showing this empirically is outside of the scope of our investigation herein and irrelevant to our conclusions regarding individuals.

[58] For studies showing the role of aggregating factors in prosecutions, *see* David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T L. REV. 159 (2014). David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005-2014*, 8 MICH. J. ENV'T & ADMIN. L. 297 (2019).

[59] For a solid discussion on this topic, *see* Joel A. Mintz, *Running on Fumes: The Development of New EPA Regulations in an Era of Scarcity*, 46 ENV'T L. REP. 10510 (2016).

that did exist drew from a deep well of support for further criminalizing a range of behaviors at the federal level, for standardizing punishments, and criminal enforcement benefitted from the United States Sentencing Guidelines in this respect.[60] The EPA in particular is used to operating under inconsistent political support and thus, while the Trump Administration was a serious obstacle to strong enforcement, it did not stop criminal enforcement for an agency born under such attacks.[61] As the movement to enhance sentencing waned through the 1990s, as did the political energy on both sides of the political isle for enhancing resources for criminal enforcement. Resources became stagnant in a real, nominal sense, attention to the enterprise diminished, and even concern and opposition that criminal prosecution had gone too far became a problem for these agencies.[62]

One might expect that as resources dwindled in a real sense and political support became increasingly erratic, prosecutions would likely decline over time, and we see this in our results herein. As support and resources begin to decline by the end of the 1990s, we find prosecutions declining by the mid 2000s and failing to recover, at least in the context of prosecuting individuals for CERCLA crimes.[63] The era of scarce resources for environmental law enforcement has been ongoing for years under structural disinvestment from both political parties.[64]

Examining this disinvestment for environmental law enforcement can be shown with staffing and funding at EPA and ENRD over time. If one examines EPA's long-term budget and considers inflation in the calculation, the high water mark was 1980, when it was appropriated $16 billion dollars and staffing peaked in 1999 at 18,110 total staff.[65] The budget for ENRD has failed to increase over time as well in a substantive sense.[66] The Biden Administration has pledged significant

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[60] *See* Mushal, *supra* note 20, at 1112.

[61] Cally Carswell, *How Reagan's EPA Chief Paved the Way for Trump's Assault on the Agency*, THE NEW REPUBLIC (Mar. 21, 2017), https://newrepublic.com/article/141471/reagans-epa-chief-paved-way-trumps-assault-agency.

[62] Timothy E. Shanley, *Applying a Strict Limitations Period to RCRA Enforcement: A Toxic Concept with Hazardous Results?*, 10 PACE ENV'T L. REV. 275, 289, 310 (1992). Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 869–71, 877 (1994).

[63] Enforcement received support during the George W. Bush Administration, but these resources became strained and redirected to the War on Terror. *See* David M. Uhlmann, *Strange Bedfellows*, ENV'T F., May–June 2008, at 40, 41, 43. Mushal, *supra* note 20, at 1117–18. Joel A. Mintz, *"Neither the Best of Times Nor the Worst of Times": EPA Enforcement During the Clinton Administration*, 35 ENV'T L. REP. 10390, 10398–99 (2005).

[64] Mintz, *supra* note 59, at 10511. A major drop occurred under President Trump, when 700 EPA employees left the agency and were not replaced*See 700+ Employees Have Left the EPA Under Trump: Loss of Scientists, Staffers Undermines Agency's Purpose*, ECOWATCH (Dec. 22, 2017), https://www.ecowatch.com/epa-employees-leaving-2519323571.html.

[65] *EPA's Budget and Spending*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/planandbudget/budget (Feb. 28, 2023). U.S. Inflation Calculator, *Inflation Calculator*, https://www.usinflationcalculator.com/ (last visited Apr. 8, 2023).

[66] *See generally*, *Budget and Performance*, U.S. DEP'T JUST., https://www.justice.gov/doj/budget-and-performance (Mar. 13, 2023).

funding for the environment, but on closer observation, falls short of the mark. The enacted budget for FY 2022 for EPA is $9.5 billion and funding for 14,581 staff and $133 million for ENRD, which is not a significant increase for either agency, particularly for EPA to reach staffing levels found decades ago.[67] While the Biden Administration has added funding for environmental justice enforcement, a long overdue mandate, this and forthcoming mandates likely to require these agencies to manage carbon emissions are important, but must be funded alongside the original mission to enforce a variety of environmental statutes via a criminal process, which becomes more difficult with new mandates and stagnant or declining resources. [68]

[67] *EPA's Budget and Spending*, *supra* note 65; U.S. DEP'T JUST., ENV'T & NAT. RES. DIV., GENERAL LEGAL ACTIVITIES 61 (2021), https://www.justice.gov/jmd/page/file/1399021/download.

[68] *Environmental Justice in Enforcement and Compliance Assurance*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/environmental-justice-enforcement-and-compliance-assurance (Nov. 28, 2022); *New Enforcement Strategy Advances President Biden's Environmental Justice Agenda*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/newsreleases/new-enforcement-strategy-advances-president-bidens-environmental-justice-agenda (May 5, 2022). Focusing on environmental justice enforcement has resulted in increased discussion of CERCLA enforcement strategies here, *see* Alexander Bullock et al., *CERCLA – EPA Sharpens CERCLA Enforcement Tools to Focus on Environmental Justice Communities*, JD SUPRA (last updated Sept. 15, 2021), https://www.jdsupra.com/legalnews/cercla-epa-sharpens-cercla-enforcement-5859476/. *Environment and Natural Resources Division Distributes Memorandum Summarizing Enforcement Policies and Priorities*, U.S. DEP'T JUST. (Jan. 19, 2021), https://www.justice.gov/opa/pr/environment-and-natural-resources-division-distributes-memorandum-summarizing-enforcement. Funding could also include greater support for state enforcement and environmental enforcement associations. *See* Mushal, *supra* note 20, at 1125.

Indignity Perpetuated: Race-based Housing Post-Reconstruction to the Fair Housing Act's Impact on the Digital Age: Where Do We Go from Here?

STEVIE J. SWANSON[†]

ARTICLE CONTENTS

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I. INTRODUCTION

Racially restrictive covenants are an abhorrent reminder of the checkered history of the United States. In the past sixteen years, I have had many law students ask why they need to learn about the ugly reminders of injustice and inequality in land ownership. My response is always the same: "What would you do if you represented real estate developers and one of the properties they wanted to develop contained a racially restrictive covenant?"

I share with my Property students a situation that occurred when I was in practice. My client, a non-profit housing development corporation in Detroit that was run by a Board of Directors with all African American members, asked me to help them acquire land to develop into affordable housing. The title search turned up a covenant in the chain of title for a piece of property that they wanted to purchase. The covenant stated that the property could only be owned by "members of the Caucasian race." My client contacted me and wondered if they could still purchase this piece of property given that neither they, nor their likely purchaser, were Caucasian.[1]

I ask my students whether they might expect to see such a covenant once they are in practice or when they are preparing to purchase their own homes. I share that there was one in the title to a home that I purchased in 2007. Most students are shocked to discover that race- based covenants are still on the books.

This article first explores the legal history behind the rise of race-based covenants in the United States. It looks at the use of race-based land use controls through municipal regulations and examines the Supreme Court's holding that race-based municipal regulations were unconstitutional in *Buchanan v. Warley* in 1917.[2] The article then explores the impact of *Corrigan v. Buckley* where the Supreme Court held that racially restrictive covenants were "individual invasion[s] of individual rights" and not the subject of the 13th and 14th Amendments.[3] *Corrigan* paved the way for the rise of race-based covenants.[4] Next, the article examines the end of the legal enforceability of race-based covenants with the Supreme Court's decision in

[1] The population of the City of Detroit was 81.2% black in the year 2000. *See* Kurt Metzger & Jason Booza, *African Americans in the United States, Michigan and Metropolitan Detroit*, CTR. FOR URB. STUD. WAYNE STATE UNIV. 1, 8 (2002).

[2] Buchanan v. Warley, 245 U.S. 60, 82 (1917).

[3] Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

[4] RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 3 (2013).

Shelley v. Kraemer.[5] It then explores the continuation of the use of racially restrictive covenants in America after *Shelley*.

Crucial to this article is the interplay between Section 3604(c) of the Federal Fair Housing Act[6] and the publishing of race-based covenants by local government offices through online searchable media. Section 3604(c) states that

> it shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[7]

The premise of this article is that local government offices are violating the Fair Housing Act through the publishing of racially restrictive covenants.

When the Register of Deeds (or other local government public records office) makes records searchable through an online database, this is a patent violation of Section 3604(c). By creating a searchable online database for land records (containing deeds with racially restrictive covenants) local governments are "publishing" statements which contain discriminatory language concerning a protected class. The court in *Mayers v. Ridley* held that "[t]he additional proscription against 'publication' should therefore be read more broadly to bar all devices for making public racial preferences in the sale of real estate, whether or not they involve the printing process."[8] Despite the fact that online searchable databases did not exist in 1972 when *Mayers* was decided, the Court was forward thinking regarding the application of Section 3604(c).[9]

This article looks at the application of § 3604(c) of the Fair Housing Act in terms of both when it would apply and when it could be used. Next, the article examines the intersection of the Fair Housing Act and the publication of racially restrictive covenants in searchable online databases. Then, it explores creative applications of § 3604(c) in conjunction with the opportunity for fair housing organizations to have standing to file suit. Later, it examines compensable damages for

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[5] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

[6] 42 U.S.C. § 3604(c).

[7] *Id.*

[8] Mayers v. Ridley, 465 F.2d 630, 633 (D.C. Cir. 1972).

[9] *See* History.com Editors, *World Wide Web (WWW) Launches in the Public Domain*, HISTORY, https://www.history.com/this-day-in-history/world-wide-web-launches-in-public-domain (last visited June 19, 2022) ("On April 30, 1993, four years after publishing a proposal for 'an idea of linked information systems,' computer scientist Tim Berners-Lee released the source code for the world's first web browser and editor").

distress suffered as a result of viewing housing advertisements with all White models. It examines who, other than just landlords and sellers, can violate the Fair Housing Act. The article explores the damages which have been found available in civil suits but also discusses possible recovery through actions of the Attorney General or the Secretary of Housing and Urban Development. Next, the article shifts to exploring whether or not public records offices have immunity under the Communications Decency Act. It analyzes whether or not federal law abrogates the States' rights and determines that the Fair Housing Act does apply to local government actors. It examines who has standing to file suit to allege a violation of § 3604 of the Fair Housing Act. Finally, it looks at the impact of inaction as it pertains to the existence of racially restrictive covenants remaining both on the books and in searchable online media.

The article concludes by examining the penalties proscribed by the Fair Housing Act, in addition to possible remediations for those injured by the republication of racially restrictive covenants. It explores remedies like compensable damages for aggrieved parties through analogy to the New York Times case where the Times was found to have violated the Fair Housing Act.[10] In *Ragin*, The Times violated the Fair Housing Act by using all White models in thousands of housing advertisements and plaintiffs were awarded damages.[11] It also weighs the feasibility, costs, and advantages of removing the racially restrictive covenants from recorded documents. It explores the alternative of attaching a disclaimer to racially restrictive covenants with either a trigger warning or statement indicating that that covenant is null and void and discusses locations where this technique is employed. It addresses statutory efforts to remediate racially restrictive covenants as well.

II. HISTORY OF RACE-BASED LAND OWNERSHIP

A. Jim Crow Laws

The Civil War in the United States ended on April 9, 1865, at Appomattox Court House in Virginia, and the Reconstruction era began shortly thereafter.[12] During the Reconstruction era the country brought "itself together and also trie[d] to come to terms with the consequences of the abolition of slavery."[13] The Reconstruction era was political; "it underpinned the Jim Crow system of the South, which lasted well into the

[10] Ragin v. N.Y. Times Co., 923 F.2d 995, 1004–05 (2d Cir. 1991).

[11] *Id.*

[12] JOYCE APPLEBY ET. AL., UNITED STATES HISTORY & GEOGRAPHY COLONIZATION TO RECONSTRUCTION 526, 527 (Teacher's ed. 2020).

[13] Terry Gross, *Historian Eric Foner on the 'Unresolved Legacy of Reconstruction'*, NPR, https://www.npr.org/2020/06/05/870459750/historian-eric-foner-on-the-unresolved-legacy-of-reconstruction (last visited July 5, 2022).

1960s."[14] Jim Crow laws legalized segregation in nearly every aspect of American life from the late 1870s to the 1960s; housing was no exception.[15] Initially, segregationist laws were not codified in the post-Reconstruction era.[16] As stated by Frederick Douglass, in a letter to an unknown recipient on November 23, 1887, "[o]ur wrongs are not so much now in written laws which all may see—but the hidden practices of a people who have not yet abandoned the idea of Mastery and dominion over their fellow man."[17]

As Reconstruction ended, "the small economic achievements with respect to land ownership were checked and partially reversed."[18] During the post-reconstruction era, "many towns across the country adopted policies forbidding African Americans from residing or even being within town borders after dark."[19] Racialized zoning emerged around 1910 in Baltimore, Maryland to divide up cities into regions based on color.[20] The codification of race-based zoning was infectious. It soon spread to "Atlanta, Birmingham, Dade County (Miami), Charleston, Dallas, Louisville, New Orleans, Oklahoma City, Richmond (Virginia), St. Louis, and others."[21] While there were racialized zoning ordinances across the nation, they were initially concentrated in the South because of the large percentages of African Americans living there.[22]

In 1917, the Supreme Court struck down race-based zoning in *Buchanan v. Warley*.[23] In *Buchanan*, a zoning ordinance in Louisville, Kentucky prohibited an African American person from buying and occupying a home on a block that was majority White (and the reverse also applied for Whites who could not purchase and occupy a dwelling on a block that was majority African American).[24] The Court held that the right abridged by the ordinance was "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such a disposition to a white person."[25] The Court further held that the ordinance "was not a legitimate exercise of the police power of the State, and is in direct violation of the

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[14] *Id.*

[15] C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 6–7 (2d ed. 1966).

[16] THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, *Frederick Douglass on Jim Crow, 1887*, https://www.gilderlehrman.org/history-resources/spotlight-primary-source/frederick-douglass-jim-crow-1887 (last visited June 19, 2022).

[17] *Id.*

[18] DAVID BRION DAVIS, INHUMAN BONDAGE 328 (Oxford Univ. Press ed. 2006).

[19] RICHARD ROTHSTEIN, THE COLOR OF LAW: THE FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 42 (Liveright Pub'g Corp. eds, 1st ed. 2017).

[20] CHRISTOPHER SILVER, THE RACIAL ORIGINS OF ZONING IN AMERICAN CITIES 24 (June Manning Thomas & Marsha Ritzdorf eds., Sage Publ'n Inc. 1997).

[21] ROTHSTEIN, *supra* note 19, at 45.

[22] SILVER, *supra* note 20, at 25.

[23] Buchanan v. Warley, 245 U.S. 60, 82 (1917).

[24] *Id.* at 71.

[25] *Id.* at 81.

fundamental law enacted by the Fourteenth Amendment to the Constitution preventing state interference with property rights except by due process of law."[26] The Supreme Court's decision in *Buchanan* was more of a reflection of its beliefs that a White man should be able to sell his property to whomever he chose than it was a demonstrative statement by the Court that segregation was unconstitutional.[27]

While the legality of race-based zoning was short-lived (1910-1917), its tenure was long-lasting and impactful. Race-based zoning was "not just an historical aberration of the pre-civil rights era, but a central feature of the American planning history throughout the twentieth century."[28] Government sanctioned segregation paved the way for privatized housing segregation efforts. It set the standard. Unfortunately, racial zoning did not end in 1917 with the Court's ruling in *Buchanan.* A full twelve years after *Buchanan*, West Palm Beach adopted a racial zoning ordinance which was maintained until 1960.[29] Through creative use of spot zoning, both Kansas City and Norfolk utilized racialized zoning until 1987.[30] "Racial zoning still operated in practice, if not in law, reinforced by a planning process that supported the creation of a racially bifurcated society."[31]

After *Buchanan*, local governments turned to urban planners to assist them in creating zoning plans that achieved the goals of race-based zoning, furthering segregation of the races, without the explicit use of racial terminology. Several urban planners made efforts to promote race-based planning as beneficial for bolstering and improving the African American community. Ultimately, this was ineffective and just succeeded in enhancing segregation.[32] Urban planners used zoning as a social control device.[33] Where urban planners left off with zoning to facilitate residential segregation, private individuals picked up with restrictive covenants in deeds as the next method of control.

Restrictive covenants that limited the individuals who could own or occupy a dwelling based upon race were used to discourage sales and rentals to African Americans.[34] Having outlawed racialized zoning in 1917 with *Buchanan*, the Supreme Court paved the way for private race-based restrictive covenants in 1926 with *Corrigan v. Buckley*.[35] In *Corrigan*, thirty White landowners in Washington, D.C. covenanted that no portion of their

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[26] *Id.* at 82.
[27] ROTHSTEIN, *supra* note 19, at 45.
[28] SILVER, *supra* note 20, at 27.
[29] ROTHSTEIN, *supra* note 19, at 47.
[30] *Id.* at 48.
[31] SILVER, *supra* note 20, at 32.
[32] *Id.* at 33.
[33] *Id.* at 35.
[34] Garrett Power, *Eugenics, Jim Crow, and Baltimore's Best*, 49 MD. BAR J. 4, 11 (2016).
[35] Corrigan v. Buckley, 271 U.S. 323, 323 (1926).

land should be sold or leased to an African American for a twenty-one year period.[36] When one of the White land owners (Corrigan) entered into a contract to sell her dwelling, which was subject to the restrictive covenant, to an African American woman (Curtis), a White neighbor (Buckley) sued to enforce the covenant seeking an injunction to prohibit the sale of Corrigan's home to an African American woman.[37] Corrigan alleged that the covenant denied Curtis equal protection of the law and was forbidden by the Constitution.[38] The Court held that the Constitution did not "in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."[39]

This case, more than any other, is credited with opening the floodgates for race-based land use controls in the form of restrictive covenants.[40] In fact, "the practice of using racial covenants became so socially acceptable that in '1937 a leading magazine of nationwide circulation awarded ten communities a shield of honor' for an umbrella of restrictions against the wrong kind of people."[41] Subsequent to *Corrigan*, courts across the nation upheld the use of private racially restrictive covenants and evicted African Americans from homes with race-based restrictive covenants.[42] "State supreme and appellate courts upheld the practice [of using racially restrictive covenants] when it was challenged—in Alabama, California, Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, West Virginia, and Wisconsin."[43]

Private individuals were not the only proponents of racially restrictive covenants. The use of racially restrictive covenants was "powerfully encouraged by real estate professionals, banking institutions, and an array of other institutions, including perhaps most importantly the New Deal's Federal Housing Administration."[44] The Federal Housing Administration ("FHA") advanced the notion that

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[36] *Id.* at 327.

[37] *Id.*

[38] *Id.* at 328–29.

[39] *Id.* at 331.

[40] *Historical Shift from Explicit Policies Affecting Housing Segregation in Eastern Massachusetts*, FAIR HOUS. CNTR. GREATER BOS., https://www.bostonfairhousing.org/timeline/1920s1948-Restrictive-Covenants.html (last visited Jun 28, 2022) ("Racially restrictive covenants became common after 1926 after the U.S. Supreme Court decision, Corrigan v. Buckley, which validated their use.").

[41] *Id.* (quoting *Understanding Fair Housing*, U.S. COMM'N ON C.R. CLEARINGHOUSE PUBLICATION 42, February 1973).

[42] ROTHSTEIN, *supra* note 19, at 81.

[43] *Id.* at 81–82. *See also* Meade v. Dennistone, 173 Md. 295 (Md. App. Ct. 1938).

[44] BROOKS & ROSE, *supra* note 4, at 4, 9. ("Some institutions, like the National Association of Real Estate Boards and its local branches, along with the Federal Housing Administration, actively promoted racially restrictive covenants.").

racially restrictive covenants would increase property values.[45] The "most powerful endorsement" of racially restrictive covenants came from the federal government in the form of redlining.[46] The FHA was confident that race-based covenants were not unconstitutional because they were "mere private agreements."[47]

The use of racially restrictive covenants in America also expanded because of the National Housing Act of 1934 ("Housing Act").[48] The Housing Act introduced the practice of redlining,[49] which occurs when lines are drawn on "city maps delineating the ideal geographic areas for bank investment and the sale of mortgages."[50] Redlining is problematic because redlined districts "were considered risky for mortgage support and lenders were discouraged from financing property in those areas . . . The Housing Act encouraged land developers, realtors, and community residents to write racial restrictive covenants to keep neighborhoods from being redlined."[51] This made homeownership increasingly difficult for non- Whites because mortgages were unavailable for the only dwellings not subject to racially restrictive covenants.[52] In fact, the FHA, through its underwriting manuals and appraisers, not only favored mortgage applications when there were no African Americans in the neighborhood, but they also were more likely to lend when properties had racially restrictive deed covenants.[53] The government's power and influence over the use of race-based deed restrictions did not stop there. After World War II, when the Veterans Administration ("VA") began to guarantee mortgages, it "recommended and frequently demanded that properties with VA mortgages have racial covenants in their deeds."[54]

B. Shelley v. Kraemer *and its Implications*

With the popularity and widespread government support of racially restrictive deed covenants metastasizing after *Corrigan*, it was a shock when the Supreme Court upended things with *Shelley v. Kraemer* in 1948.[55] In the 1930's, J.D. Shelley, an African American man, with his wife and six children, migrated north to St. Louis in an effort to leave the racial oppression

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[45] ROTHSTEIN, *supra* note 19, at 77.
[46] *Id.* at 82.
[47] *Id.* at 77.
[48] Catherine Silva, *Racial Restrictive Covenants History: Enforcing Neighborhood Segregation in Seattle*, SEATTLE C.R. & LAB. HIST. PROJECT, https://depts.washington.edu/civilr/covenants_report.htm (last visited June 25, 2022).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] ROTHSTEIN, *supra* note 19, at 83.
[54] *Id.* at 85.
[55] Shelley v. Kraemer, 334 U.S. 1 (1948).

of the South behind.[56] Louis Kramer, a White neighbor who lived ten blocks away from the Shelley house, sought to enforce the racially restrictive covenant in the deed.[57] After the Supreme Court of Missouri upheld the covenant, the U.S. Supreme Court held that "the Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."[58] Chief Justice Vinson said it best when he stated in the opinion that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities."[59] Equal protection under the Fourteenth Amendment had previously been extended to situations involving state action in *Strauder v. West Virginia*.[60] In *Strauder*, Justice Strong stated in the Opinion that the Fourteenth Amendment was designed to assure to the colored race the enjoyment of all of the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.[61]

The *Shelley* case was undoubtedly a huge victory in the war towards equal property rights for all, but it fell short of solving the problem of racially restrictive covenants permanently.

Racially restrictive covenants continued to illustrate preferences of real estate brokers and lenders, despite being unenforceable in court.[62] Even after the Court's ruling in *Shelley*, restrictive covenants continued to govern where minority individuals were able to reside.[63] Often, the approach to racially restrictive covenants in the period from 1948 (when *Shelley* was decided) to 1968 (when the Fair Housing Act was passed)

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[56] *Missouri: The Shelley House*, NAT'L PARK SERV., https://www.nps.gov/places/missouri-the-shelley-house-l.htm (last visited June 19, 2022) (Langston Hughes described the journey of those, like the Shelley family, who went North for a better life. His poem "The Kinder Mistress" speaks to the experience. Hughes writes, "The lazy laughing South, with blood on its mouth . . . passionate, cruel, honey-lipped, syphilitic—that is the South. And I, who am black, would love her but she spits in my face…so now I seek the North—the cold-faced North, for she, they say, is a kinder mistress." Quoted in ISOBEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION, 223 (Random House eds., 1st ed. 2011).).

[57] Erica Taylor, *Shelley vs. Kraemer*, BLACKAMERICAWEB.COM, https://blackamericaweb.com/2012/04/06/shelly-vs-kraemer/ (last visited June 19, 2022).

[58] *Shelley*, 334 U.S. at 38–39.

[59] *Id.* at 37–38. Many thanks to my research assistant, Tenaya Winkelman, for highlighting this quote.

[60] Strauder v. West Virginia, 100 U.S. 303 (1879), *quoted in* Shelley v. Kraemer, 334 U.S. 1 (1948).

[61] *Strauder*, 100 U.S. at 306–07.

[62] Carol Rose, *Shelley v. Kraemer Through the Lens of Property*, Yale Law School Public Law & Legal Theory Research Paper Series, Research Paper No. 66, 44 (2003), https://ssrn.com/abstract=477463.

[63] Silva, *supra* note 48, at 3.

was that the covenants were not legally enforceable but were still legal to establish and privately enforce.[64]

Racially restrictive covenants were utilized post-*Shelley* by the Federal Housing Administration, realtors, bankers, developers, and private landowners.[65] The FHA, since its establishment, had always preferred loans for homes with racially restrictive covenants.[66] For more than a year post-*Shelley*, the FHA insured homes in subdivisions that had new racially restrictive covenants.[67]

The Code of Ethics for the National Association of Realtors, which was enforced in some jurisdictions in the early 1950's, stated that a realtor "should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to the property values in that neighborhood."[68] "Real estate brokers through the 1950s and 1960s were almost universally convinced that minority entrance into a previously white neighborhood would lower property values."[69] Realtors continued to use racially restrictive covenants because segregation of the races was thought to maintain property values and make property more marketable.[70]

Nationwide, in the post-*Shelley* era, bankers advanced the notion that removing racially restrictive covenants would create a cloud in the chain of title.[71] "A cloud on title is a claim or encumbrance that affects the ownership of a property."[72] Cloudy title is undesirable because it impacts the marketability of title—making it harder for the property to be bought and sold. It is ironic that bankers successfully used an argument that taking out a restriction on alienability (to only one race of persons) would make property less alienable. Some bankers admitted that "the cloudy title warning was an excuse to refuse minority loans so as to protect white neighborhood values."[73]

Developers also used racially restrictive covenants post-*Shelley*. As suburbanization expanded housing away from city centers, suburban

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[64] *Id. See also* BROOKS & ROSE, *supra* note 4, at 171. ("As late as 1966, Edmund O. Belsheim, a well-respected lawyer and legal educator, included models of the standard Caucasian-only racial covenants in the book *Modern Legal Forms*, making the familiar observation that while covenants could not be enforced in court, they were legal if voluntarily followed." "Surprisingly, racial covenants of one sort and another continued to be written into title documents, until they were finally flatly outlawed by the Fair Housing Act of 1968.")

[65] BROOKS & ROSE, *supra* note 4, at 5–6.

[66] *Id.* at 5.

[67] *Id.*

[68] Silva, *supra* note 48, at 5.

[69] BROOKS & ROSE, *supra* note 4, at 183.

[70] Silva, *supra* note 48, at 5.

[71] BROOKS & ROSE, *supra* note 4, at 183.

[72] Wex Definitions Team, *Cloud on Title*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/cloud_on_title (last visited on June 19, 2022).

[73] BROOKS & ROSE, *supra* note 4, at 183.

developers utilized mechanisms to sell exclusively to White purchasers.[74] One successful developer, William Levitt, indicated in 1954 that his firm did not sell its large suburban tracts to African Americans because White purchasers would not buy his homes if he created integrated communities.[75] Ultimately, for some developers, it was a business decision to create segregated communities. Some felt that *Shelley* would be overturned quickly and thought that it was more efficient to get the racial restrictions in place at the outset of the development.[76]

Private landowners continued to create racially restrictive covenants post-*Shelley* because they "sent a signal to buyers about the racial preference of the neighbors."[77] While legally unenforceable, race-based covenants were a very public statement about local preferences.[78] In addition, not everyone in the post-*Shelley* pre-Fair Housing Act era (1948-1968) was aware that the covenants were unenforceable.[79] Even when potential non-White purchasers knew that the covenants were unenforceable, "there were still costs associated with knowing that one was moving to an area where the residents had recently attempted to keep one out by legal means, and where some might now resort to harassment or even violence."[80] The mere existence of the covenants on the public record was a reminder of the hatred and ostracism of the era and was thus an effective deterrent to integration.

One creative attempt at enforcing race-based covenants after the Supreme Court's decision in *Shelley* was for the disgruntled White neighbor to sue the White seller for money damages when they violated the race-based covenant by selling to a non-White buyer. The difference between this idea, litigated in *Barrows v. Jackson*,[81] and *Shelley* is that one seeks a money damage remedy and the other an injunction. The significance is that, traditionally, money damages were available for the breach of a real covenant and injunctive relief was available for the breach of an equitable servitude.[82] Historically, the primary difference in the elements necessary for the creation of the two was the absence of

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[74] *Id.*

[75] *Id.* at 185.

[76] *Id.* at 5.

[77] *Id.* at 6.

[78] Racially restrictive covenants were placed in deeds. Most deeds are recorded at public records offices where not only are they available to be viewed by the public, but the public is presumed to know about them through the legal doctrine of record notice.

[79] As noted in the introduction, I had a non-profit housing corporation for a client between 2002 and 2005 who was unaware.

[80] RICHARD W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD 189 (Harv. Univ. Press eds., 1st ed. 2013).

[81] *See* Barrows v. Jackson, 346 U.S. 249 (1953).

[82] JESSE DUKEMINIER ET AL., PROPERTY 842 (9th ed. 2018).

privity of estate.[83] The crux of the issue is that privity is not required for an equitable servitude, but it is for a real covenant. Practically, this means that two (or potentially more) neighbors can enforce an agreement made between them to run with the land by an injunction in equity but cannot enforce the same agreement at law through a money damage remedy.[84] Because there is no horizontal privity between the neighbor (benefitting from the covenant) and the purchaser (burdened by the covenant), traditionally, money damages would not have been available.

Barrows was not decided based upon fundamental property law principles. It looked at two primary issues: (1) "[w]hether judicial involvement in a damage suit against a white seller would count as state action," and (2) "whether the white seller could defend against the neighbors' claim by raising the issue of racial discrimination."[85] The Supreme Court held in *Barrows* that "[t]he action of a state court at law to sanction the validity of the restrictive covenants . . . would constitute state action as surely as it was state action to enforce such covenants in equity . . . ."[86] The Court further held that denying the right to "purchase, own, and enjoy property on the same terms as Caucasians" would violate the Equal Protection clause of the Fourteenth Amendment.[87] Finally, the Court departed from its typical rule denying standing to raise another's rights and allowed the White seller to defend against the White neighbors' claim because of the need to protect fundamental rights.[88] Quoting *Shelley*, the Court stated "[t]he Constitution confers upon no individual the rights to demand action by the State which results in the denial of equal protection of the laws to other individuals . . . ."[89] After *Shelley* and *Barrows*, it was not possible for racially restrictive covenants to be enforced at law (money damages) or in equity (injunctive relief), but technically they weren't illegal until the Fair Housing Act was passed in 1968.[90] "If Jim Crow was dead, however, his ghost still haunted a troubled people and the heritage he left

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[83] *Id.* at 836–37, 841–42.

[84] Note that today most states have merged courts of law and equity. *Id.* at 842.

[85] BROOKS & ROSE, *supra* note 4, at 173.

[86] *Barrows*, 346 U.S. at 254.

[87] *Id.* Much has been written about the extent of the application of the Equal Protection Clause of the Fourteenth Amendment. Perhaps one of the most illustrative and insightful documents on this topic is a letter written by Supreme Court Justice Joseph Bradley to Federal District Judge William Woods on March 12, 1871. Justice Bradley described to Judge Woods what he thought was the meaning of the Fourteenth Amendment in this letter. Justice Bradley stated, "Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights, against unfriendly or insufficient state legislation. I say unfriendly or insufficient for the XIVth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen; but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action. And denying the equal protection of the laws includes omission to protect, as well as the omission to pass laws for protection." RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT xv (Belknap Press Harvard Univ. Press, 1st ed. 2021).

[88] *Barrows*, 346 U.S. at 260.

[89] *Id.* at 260 (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).

[90] BROOKS & ROSE, *supra* note 4, at 177.

behind would remain with them for a long time to come."[91]

Numerous historical events pertaining to ending segregation in housing occurred in the Spring of 1968. First, Reverend Doctor Martin Luther King, Jr. was assassinated in Memphis, Tennessee on April 4.[92] On April 10, a day after Dr. King's funeral, the Civil Rights Act of 1968, better known as the Fair Housing Act, was passed.[93] A month later, the United States Supreme Court held, in *Jones v. Alfred H. Mayer Co.*, that 42 U.S.C. § 1982 "bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[94] 42 U.S.C. § 1982 was originally the Civil Rights Act of 1866.[95] The *Jones* case was over one hundred years in the making. It rarely gets its fair share of pomp and circumstance because it was decided about a month after the Fair Housing Act's passage. It was still an impactful decision though, as the Court "helpfully decided that the dusty old 1866 civil rights legislation, which bars racial discrimination in contractual matters—by individuals—could be supported under the Thirteenth Amendment's ban on slavery and 'badges' of slavery."[96]

In *Jones*, Joseph Lee Jones, an African American man, and Barbara Jo Jones, his White wife, were denied the opportunity to purchase a home in the Paddock Woods Community of St. Louis County for the sole reason of Mr. Jones's race.[97] The Paddock Woods Community was owned by the Alfred H. Mayer Co. The Court of Appeals for the Eighth Circuit affirmed the lower Court's decision to sustain Alfred H. Mayer Co.'s motion to dismiss.[98] The Court of Appeals had held that § 1982 only applied to state action.[99] Section 1982 states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[100] In *Jones*, the Supreme Court held that when Congress stated, in § 1982, that the right to buy and rent property was to be enjoyed equally by African Americans and Whites, "it plainly meant to secure that right against interference from

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[91] WOODWARD, *supra* note 15, at 191.

[92] DeNeen L. Brown, *The Fair Housing Act was languishing in Congress. Then Martin Luther King Jr. was killed* WASH. POST (Apr. 11, 2018, 12:28 PM), https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress- then-martin-luther-king-jr-was-killed/.

[93] *Id.*

[94] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

[95] *Civil Rights Act of 1866*, FAIRHOUSINGJUSTICE.ORG, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fairhousingjustice.org/wp-content/uploads/2021/01/Civil-Rights-Act-of-1866.pdf (last visited May 18, 2023).

[96] BROOKS & ROSE, *supra* note 4, at 208.

[97] *Jones*, 392 U.S. at 412.

[98] *Id.*

[99] *Id.*

[100] 42 U.S.C § 1982.

any source, whatever, whether governmental or private."[101]

The Supreme Court in *Jones* identified the primary constitutional issue in the case as whether "the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' included the power to eliminate all racial barriers to the acquisition of real and personal property."[102] The answer to that question was "plainly yes."[103] Justice Stewart said it best in the Spring of 1968

> [j]ust as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[104]

III. THE FAIR HOUSING ACT

A. Application of 3604(c):

1. Who does it apply to?

What new progress did the Fair Housing Act achieve and how was it applied? Section 3604(c) made it illegal to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[105]

This section of the Act is not subject to any of the exceptions of the Fair Housing Act.[106] This means that even if you were renting out a room in your own home, or your duplex (when you occupy the other half), or a unit in a small four-unit apartment which you also occupy you still cannot discriminate in terms of making, printing, publishing or causing to be made printed or published discriminatory statements based upon the protected classes under the act. This section of the Act also finally outlawed the creation of racially restrictive covenants.

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[101] *Jones*, 392 U.S. at 423–24.

[102] *Id.* at 439.

[103] *Id.*

[104] *Id.* at 441–43.

[105] 42 U.S.C. § 3604(c).

[106] In some circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker and housing operated by organizations and private clubs that limit occupancy to members. U.S. DEP'T HOUSING & URBAN DEV., FAIR HOUSING – EQUAL OPPORTUNITY FOR ALL (2011), https://www.hud.gov/sites/documents/FHEO_BOOKLET_ENG.PDF (last visited May 18 2023).

Now that discriminatory language regarding protected classes was illegal in many contexts, the application of § 3604(c) in case law would illustrate just how expansive the Fair Housing Act would be. In April of 1972, the U.S. Court of Appeals decided *United States v. Hunter*.[107] In *Hunter*, a local newspaper in Prince George's County, Maryland published an advertisement, in 1970, for a furnished apartment in a "white home."[108] The question, a novel one at this point in jurisprudence, was whether the Act extended beyond the actions of Landlords, and Sellers of real property, to others, namely newspapers. The Court of Appeals held that "the congressional prohibition of discriminatory advertisements was intended to apply to newspapers as well as any other publishing medium."[109] This article contends that § 3604(c) extends to online searchable databases at public records offices which "publish" deeds with racially restrictive covenants. In *Hunter*, the Court of Appeals extended the application of § 3604(c) to "any other publishing medium."[110] Certainly online searchable databases for public records offices qualify as "any other publishing medium."

2. Use of 3604(c) and Publication of Racially Restrictive Covenants

In June 1972, the landmark case *Mayers v. Ridley* was decided at the United States Court of Appeals.[111] In *Mayers*, a group of Washington, D.C. residents, whose property was burdened by racially restrictive covenants, filed suit to enjoin the Recorder of Deeds from accepting racially restrictive covenants for recording.[112] They also sought an injunction to prevent the Recorder of Deeds from providing copies of deeds containing racially restrictive covenants to anyone unless the deeds had an attached notice indicating that the racial restrictive covenants were null and void.[113] Finally, they sought to have the court require the Recorder of Deeds to attach a sticker on each liber (book volume) that indicated that the racially restrictive covenants located within the liber were null and void.[114]

Judge Skelly Wright, in his opinion in *Mayers*, stated that it is "too late in the day to argue that it is burdensome to correct these historic wrongs, or that government officials lack statutory authority to do so."[115]

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[107] United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).
[108] *Id.* at 209.
[109] *Id.* at 211.
[110] *Id.*
[111] Mayers v. Ridley, 465 F.2d 630, 630 (D.C. Cir. 1972).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 632.

Quoting *Jones*, Judge Wright reminded the country that racial discrimination in housing has "no place in the jurisprudence of a nation striving to rejoin the human race."[116]

Judge Wright found that racially restrictive covenants fell within the scope of § 3604(c) and that the Fair Housing Act was not limiting its prohibitions on discrimination to advertisements.[117] He further elaborated that when the public records office filed restrictive covenants it made, printed, or published them.[118] And when the public records office caused them to be reproduced for purposes of preservation and inspection, Judge Wright stated that an argument could be made that it printed and published them.[119] Judge Wright stated that the "additional proscription against 'publication' should therefore be read more broadly to bar all devices for making public racial preferences in the sale of real estate, whether or not they involve the printing process."[120] Since "most states and counties maintain online databases of public records in which you can easily search records," it is logical to extend § 3604(c) to online searchable databases for title records.[121]

One of the most interesting references made in *Mayers* is to a letter sent by Jerris Leonard, Assistant Attorney General, Civil Right Division, on November 26, 1969, to eighteen major title companies.[122] In this letter, Assistant Attorney General Leonard, on behalf of the Department of Justice ("DOJ"), stated that it was the view of the DOJ that the inclusion of racially restrictive covenants in deeds and title insurance violated § 3604(c) of the Fair Housing Act.[123] Assistant Attorney General Leonard situated in the letter that the DOJ believed that § 3604(c) had "broadened the *Shelley* prohibition to cover not only judicial enforcement of such covenants, but also their inclusion in public documents such as deeds or insurance policies."[124] General Leonard further stated in the letter that the Fair Housing Act eliminated "such vitality as racially restrictive covenants retained after *Shelley* and made all such covenants void and their inclusion in documents affecting title unlawful."[125] Moreover, he added that 42 U.S.C. § 1982, as construed in *Jones*, "also prohibits private discrimination in housing,

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[116] *Id.*
[117] *Id.* at 633.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] Carissa Rawson, *How to Do a Title Search*, THE BALANCE, https://www.thebalance.com/how-to-do-a-title- search-5221910 (June 29, 2022).
[122] Letter from Jerris Leonard, Former United States Assistant Att'y Gen., Dep't Just., to Herman Berniker, President, Title Guarantee Co. (Nov. 26, 1969) (on file with Lincoln Memorial Duncan Sch. of L. Libr.).
[123] *Id.* at 1–2.
[124] *Id.* at 2.
[125] *Id.*

including the use by individuals or companies of racial covenants and restrictions in deeds."[126]

Assistant Attorney General Leonard urged title companies to eliminate racial restrictions from future policies and take reasonable efforts to eliminate the continuing effect of racial restrictions in existing policies.[127] All eighteen of the title companies to whom the letter was addressed agreed to comply. Judge Wilkey stated in his concurring opinion in *Mayers* that if the § 3604 applied to title companies, it applied

> with even more obvious logic to the Recorder himself. If a deed can be considered a publication, it can only be an effective publication when it is recorded for the world to see. The title abstracts and recitals of restrictions in title insurance policies are but republications, taken from the Recorder's official records. If the title companies' publications are covered by § 3604(c), so must be the Recorder's publications. [128]

The DOJ effectively lobbied title companies to comply with § 3604(c) in the 1969 letter. Their interpretation of 3604(c) also extended to deeds and other public documents. Deeds recorded at the public records office are public documents and, when containing racially restrictive covenants, are in violation of the Fair Housing Act pursuant to the 1969 letter from General Leonard.

Judge Wright indicated that the public records office did not perform a merely ministerial task, but rather should be subject to judicial review.[129] The public records office "has not been invested with the authority to break the law."[130] Local statutes which set forth the powers of the public records office do not preempt the Fair Housing Act.[131] Section 3615 of the Fair Housing Act provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be discriminatory housing practice under this subchapter shall to that extent be invalid."[132] As a matter of public policy, Judge Wright pointed out that "the most outrageous deprivations of equal rights are those perpetrated by the state itself."[133] Judge Wright was "unwilling to believe that the legislators who voted for that Act intended to exempt the most serious offenses from its coverage."[134]

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[126] *Id.*

[127] *Id.* at 3.

[128] Mayers v. Ridley, 465 F.2d 630, 649–50 (D.C. Cir. 1972).

[129] *Id.* at 636.

[130] *Id.* at 637.

[131] *Id.* at 636.

[132] 42 U.S.C. § 3615. Section 3602 defines discriminatory housing practice as "an act that is unlawful under section 3604 . . ." 42 U.S.C. § 3602.

[133] *Mayers*, 465 F.2d at 635.

[134] *Id.*

A public records office is "no longer permitted to be a passive repository when it comes to recording—and thus publishing—racially restrictive covenants."[135] When the public records office publishes a deed containing a racially restrictive covenant, it is engaging in an unlawful act under § 3604(c) and is engaging in a discriminatory housing practice under § 3602.[136] This language from *Mayers* is applicable to the modern era regarding online searchable databases as well.

B. Creative Applications of § 3604(c)

In *Spann v. Colonial Village, Inc.*, a developer and an advertising agency were sued by an individual and two non-profit organizations dedicated to equal housing in Washington, D.C.[137] The defendants were "charged with running discriminatory ads regularly in *The Washington Post* from January 1985 through the spring of 1986."[138] The ads featured "repeated and continued depiction of white models and the complete absence of black models."[139] Judge Ginsburg (prior to her appointment to the Supreme Court), quoting *Havens Realty Corp. v. Coleman*[140] found sufficient standing for the non-profits to sue (alleging violation of § 3604(c) of the Fair Housing Act) if they were able to show that the "purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action."[141] The resources that were impacted by the "white models only" advertisements involved increased money, time, and effort devoted towards educating black buyers, the public, and the D.C. real estate industry that racial preferences in housing were illegal.[142] The court held that the interests of the plaintiffs and the public interest (in fair housing) overlapped and this allowed the plaintiffs to have standing to file suit.[143] The *Spann* case is an interesting interpretation of § 3604(c) because it broadens the range of potential plaintiffs. Section 3604 is more effective if a wide range of individuals and organizations can utilize it to seek justice.

The last creative approach to § 3604(c) to be examined comes from *Ragin v. N.Y. Times Co*., 923 F.2d 995 (1991). *Ragin* dealt with the opportunity for injured parties to receive compensation for damages suffered when looking at "white models only" advertisements.[144] *Ragin* is similar to *Spann* in that it is concerned with whether the use of advertisements

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[135] *Id.* at 650.
[136] *Id.*
[137] Spann v. Colonial Village, Inc., 899 F.2d 24, 26 (D.C. Cir. 1990).
[138] *Id.*
[139] *Id.* at 28.
[140] *Id.* at 27 (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)).
[141] *Id.*
[142] *Id.*
[143] *Id.* at 31.
[144] Ragin v. N.Y. Times Co., 923 F.2d 995, 999 (2d Cir. 1991).

featuring "all white models" violates § 3604(c) of the Fair Housing Act.[145] The court in *Ragin* held that the use of models (in a written advertisement–here the New York Times ran the ads) can be an expression of racial preference.[146] While expressing sympathy for The Times's predicament, the court acknowledged that it would be possible for a newspaper reader, of a race different from the models used, to establish a prima facie case for damages if the reader was sufficiently insulted and distressed.[147] This court encouraged future courts to exercise judicial control over the size of damage awards for emotional injury but did not find the possibility of damage awards to be a reason to immunize publishers from any liability under § 3604(c).[148]

The fact that damages are available to a newspaper reader who sees advertisements with all White models inspires hope that there could be an opportunity for damages for a homebuyer who discovers a racially restrictive covenant in the title search for the home they are trying to purchase. The purchase of a home is a deeply personal experience. The realization that past inhabitants of one's neighborhood did not historically (and may still not) embrace one's inclusion into the neighborhood seems like a highly compensable damage when compared to the injury suffered from looking at a newspaper advertisement.

How are damages and other types of relief obtained from violations of the Fair Housing Act? The Fair Housing Act can be enforced by the Secretary of Housing and Urban Development, private citizens, and the Attorney General.[149] In fact, an administrative law judge has determined that if discrimination has occurred, he has the power, as well as the duty, to use any available remedy to make good the wrong done.[150] As an example of damages awarded to aggrieved parties, in Richmond, Virginia, in 2005, a Black woman was awarded $4,500 in a bias lawsuit because a man refused to sell his home to her and the equal housing organization that worked with the woman was also awarded $7,500.[151] Given that Assistant Attorney General Jerris Leonard, in his November

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[145] *Id.* at 998.

[146] *Id.* at 1000.

[147] *Id.* at 1005.

[148] *Id.*

[149] Note that under the Fair Housing Act enforcement can come through the Secretary of Housing and Urban Development (where damages are capped at $10,000 for no prior discriminatory housing practice). 42 U.S.C. § 3612(3)(A). Relief under the Fair Housing Act can also come through enforcement by private persons (where actual and punitive damages as well as injunctive relief are available). 42 U.S.C. § 3613(c)(1). Finally, enforcement under the Fair Housing Act can come through the Attorney General when there is a pattern or practice of discriminatory housing practices (where injunctive relief and monetary damages are available to the aggrieved party as well as a civil penalty not exceeding $50,000 for the first violation of the Act). 42 U.S.C § 3614(d).

[150] Edward Jeffre, HUDALJ05-90-0258-1 (Dep't Hous. & Urb. Dev., Dec. 18, 1991) (Initial Decision).

[151] BROOKS & ROSE, *supra* note 4, at 282.

26, 1969 letter,[152] was so instrumental in persuading title companies across the country to cease "making, printing, or publishing" racially restrictive covenants, it seems logical that a similar initiative by the Department of Justice in the modern era might address the publishing of racially restrictive covenants in online searchable databases at public records offices. If the Department of Justice is disinclined to pursue such an initiative, the Fair Housing Act provides opportunities for relief of aggrieved parties through 42 U.S.C § 3612–14. Punitive damages are also available under the Fair Housing Act.[153] A $2,500 award of damages for emotional distress suffered by each African American plaintiff for viewing housing advertisements with only White models was deemed appropriate in *Ragin v. Harry Macklowe Real Est. Co.*[154] Relief can include compensable damages for emotional distress, embarrassment, humiliation, inconvenience, and tangible out-of-pocket losses, among other things.[155] There are also penalties for violations of the Fair Housing Act set forth in Section 3631, which include both fines and imprisonment.[156]

C. Extension of the Fair Housing Act to Online Searchable Databases

Public records offices are violating the Fair Housing Act when they upload or "publish"[157] deeds containing racially restrictive covenants to their online searchable databases. Most places allow for the searching of real property records online.[158] When the public records office publishes the racially restrictive covenant, it is "engaging in an act unlawful under § 3604(c)" and "is also engaging in a discriminatory housing practice as defined by § 3602 . . . ."[159] The Act extends to publishing deeds containing racially restrictive covenants in an online format. The court in *Ragin v. N.Y. Times Co.* held that the Act "did not limit the prohibition to racial messages conveyed through certain means."[160]

Reexamining the Department of Justice's interpretation of the Fair Housing Act's application to title companies in the Jerris Leonard letter,[161] the court in *Mayers v. Ridley* stated that if a deed can be considered a publication, it can only be an effective publication when it is recorded for the world to see. The title abstracts and recitals of restrictions in title insurance policies are but republications, taken from the Recorder's official

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[152] Leonard Letter, *supra* note 122, at 1–3.
[153] Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977).
[154] *See generally* Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993).
[155] Chris Hope, HUDALJ 04-99-3640-8; 04-99-3509-8 (Dep't of Hous. and Urb. Dev., May 8, 2002) (Initial Decision).
[156] 42 U.S.C. § 3631.
[157] 42 U.S.C. § 3604(c).
[158] Rawson, *supra* note 121.
[159] Mayers v. Ridley, 465 F.2d 630, 650 (D.C. Cir. 1972).
[160] Ragin v. N.Y. Times Co., 923 F.2d 995, 1000 (1991).
[161] Leonard Letter, *supra* note 122, at 1.

records. If the title companies' publications are covered by § 3604(c), so must be the Recorder's publications.[162]

This argument counteracts the notion that public records offices are a mere repository for information. The court in *Mayers* stated that the public records office is more than a mere repository. It is designed not so much to store deeds for posterity as to give them some legal effect. Such a purpose with respect to restrictive covenants is violative of both the Fair Housing Act and the Fourteenth Amendment. If the courts cannot enforce racial covenants, then surely the Recorder cannot effectuate them by administrative fiat.[163]

This argument does not imply any ill will, discriminatory intent, or malevolence upon the public records office or its employees, but it does acknowledge the illegality of their acts. The court in *Ragin v. N.Y. Times* stated that the Fair Housing Act "prohibits all ads that indicate a racial preference to an ordinary reader whatever the advertiser's intent."[164] Giving the public records offices, and their employees, the benefit of the doubt, and assuming that they are not intending to violate § 3604(c) of the Fair Housing Act when they publish deeds containing racially restrictive covenants on their online searchable databases, does not change the fact that they still break the law when they do so. The court in *Mayers* stated that "whether the Recorder's duties are viewed as discretionary or ministerial, it should at least be clear that he has not been invested with authority to break the law."[165]

1. Communications Decency Act

The Communications Decency Act does not provide immunity to public records offices who publish deeds containing racially restrictive covenants in their online searchable media. The Communications Decency Act ("CDA") "provides immunity only if the interactive computer service does not create or develop the information 'in whole or in part.'"[166] The CDA defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service."[167] The court in *Fair Housing Council* presents a definition of "development" as "making usable or available."[168] Public records offices are entirely responsible for

[162] *Mayers*, 465 F.2d at 649–50.
[163] *Id.* at 639.
[164] *Ragin*, 923 F.2d at 1000.
[165] *Mayers*, 465 F.2d at 636.
[166] *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008). *See also* 47 U.S.C. § 230(f)(3).
[167] 47 U.S.C. § 230(f)(3).
[168] *Roommates.com, LLC*, 521 F.3d at 1168.

publishing (making available) recorded information from the public record on their online searchable databases, and, as such, are not immune from liability.

"A website . . . falls within the exception to § 230, if it contributes materially to the alleged illegality of the conduct."[169] Section 3604(c) of the Fair Housing Act states that it is illegal to make, print, or publish a discriminatory statement related to one of the protected classes or cause such a statement to be made printed or published.[170] Race is a protected class.[171] Public records offices who publish deeds containing racially restrictive covenants are "contributing to the alleged illegality of the conduct" by disseminating the discriminatory statements in violation of § 3604(c).[172] "Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost."[173]

HUD has concluded, in the Greene Memo to Fair Housing and Equal Opportunity Regional Directors (dated 9/20/2006), that the "CDA does not make Web sites immune from liability under the [FHA] or from liability under state and local laws that HUD has certified as substantially equivalent to the [FHA]."[174] It is appropriate that HUD does not make websites immune from the FHA because § 3604 should be interpreted broadly to bar discrimination.[175]

D. Does the Fair Housing Act apply to local government actors?

Most of the case law that pertains to § 3604 deals with private actors, but local governments may be sued under the Fair Housing Act as well.[176] The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of

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[169] *Id.*

[170] 42 U.S.C. § 3604(c).

[171] 42 U.S.C. § 3604(a).

[172] The Communications Decency Act does not define "publish," but a case has defined publisher as "one that makes public, and reproducer of work intended for public consumption . . ." Klayman v. Zuckerburg, 753 F.2d 1354, 1359 (D.C. Cir. 2014). The publishing of deeds containing racially restrictive covenants in an online searchable database is distinguishable from *Woodward v. Bowers,* (where the U.S. District Court for the Middle District of Pennsylvania held that accepting a deed for recordation which contained a racially restrictive covenant was not a violation of § 3604(c) because a Recorder is merely a custodian of documents who does not publish), because the inclusion in the online searchable database is "disclosing" or "declaring publicly." The court in *Woodward* acknowledged that if the recorder were "to declare publicly" or "disclose" the racially restrictive covenant it would be publishing it. Woodward v. Bowers, 630 F. Supp. 1205, 1208 (M.D. Pa. 1986).

[173] *Roommates.com, LLC*, 521 F.3d at 1174.

[174] Memorandum from Bryan Greene on Fair Housing Act Application to Internet Advertising to FHEO Regional Directors (Sept. 20, 2006) (quoted in Chi. Laws.' Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 692 n.9 (N.D. Ill. 2006)).

[175] Residential Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976).

[176] *See generally* United States v. City Black Jack, 372 F. Supp. 319 (E.D. Mo. 1974).

another State, or by Citizens or Subjects of any Foreign State."[177] Congress can abrogate the immunity of the States if it "makes its intention unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment."[178]

Congress acted within its constitutional authority when it abrogated the States' immunity in the Fair Housing Act. Section 3615 of the Fair Housing Act states that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."[179]

Section 3615 was interpreted by the United States Court of Appeals for the Sixth Circuit in *United States v. City Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981). The court held that §3615 was "not self-executing and would require legal action against the offending state or political subdivision for its enforcement."[180] The *Parma* court also stated that they believed it was "the intent of Congress to provide for actions against states and political subdivisions" for violations of the Fair Housing Act.[181] The court further expounds upon the applicability of the Fair Housing Act to the States by reminding the country that the Fair Housing Act was enacted pursuant to § 2 of the Thirteenth Amendment and that Congress acted within its constitutional authority in making the Fair Housing Act applicable to the states and their political subdivisions.[182] The court in *Parma* agreed "with the courts which have applied Title VIII [Fair Housing Act] to municipalities" and concluded, "that the comprehensive purpose of the Act would be diluted if it were held to apply only to the actions of private individuals and entities."[183] The United States Court of Appeals for the Eighth Circuit affirmed part of the District court's holding in *United States v. City Black Jack* that found that local governments are not "immune from the proscriptions" of the Fair Housing Act.[184]

1. Standing

In order to successfully combat housing discrimination under the

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[177] U.S. CONST. amend. XI.

[178] Nev. Dep't Hum. Res. v. Hibbs, 538 U.S. 721, 726 (2003). "Two provisions of the Fourteenth Amendment are relevant here: Section 5 grants Congress the power 'to enforce' the substantive guarantees of § 1—among them equal protection of the laws—by enacting 'appropriate legislation.'" *Id.* at 727.

[179] 42 U.S.C. § 3615.

[180] United States v. City Parma, 661 F.2d 562, 572 (6th Cir. 1981).

[181] *Id.*

[182] *Id.* at 573. Section 2 of the Thirteenth Amendment states, "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

[183] *City Parma*, 661 F.2d at 572.

[184] United States v. City Black Jack, 508 F.2d 1179, 1183 (8th Cir. 1974).

Fair Housing Act, it is necessary to establish who is eligible to file suit and when. The court in *Unites States v. Space Hunters* pointed out that nothing in the Fair Housing Act "limits the statute's reach to owners or agents or to statements that directly effect a housing transaction."[185] The court in *Wentworth v. Hedson*, stated that "[a] plaintiff need not be a member of a protected class in order to bring suit" under § 3604(c) of the Fair Housing Act. It has long been held that whites have standing to sue under § 3604(c) for discriminatory statements made against non-whites."[186] *Space Hunters* and *Wentworth* add additional breadth to what *Spann*[187] illustrated earlier: that non-profit organizations dedicated to equal housing have standing to file suit under § 3604(c). In summary, people, entities, municipalities, and States can be sued under the Fair Housing Act by people who are and are not part of protected classes and by non-profit fair housing organizations.

Unfortunately, there have been some limits placed on who has standing to sue. In *Mason v. Adams Cty. Recorder*, 901 F.3d 753 (6th Cir. 2018), Darryl Mason, an African American resident of Ohio, sued all of the county public records offices in Ohio to compel them to "stop printing and publishing historical documents that contain racially restrictive covenants, to remove all such records from public view, and to permit the inspection and redaction of such documents."[188] Mr. Mason was unsuccessful because the court found that he lacked standing.[189] The court held that Mason's injury needed to have been particularized to him.[190] Mason did not allege that he intended to purchase, rent, or pursue any property in Ohio.[191] "Mason failed to allege that any racially restrictive covenant affected him in a personal way. Instead, he sued every county recorder in the state of Ohio, claiming generally that keeping such covenants on the books violates federal law."[192] The result in *Mason* is not as disheartening as it may seem, as the majority indicated that Mason could have established individualized injury through economic injury.[193] The court even offered a suggestion as to how future plaintiffs might succeed in a similar claim: "[t]o establish economic injury, it could have been sufficient for Mason to allege that he was interested in a property in a particular county, examined some records, and was discouraged from buying or renting a property by reading the restrictive covenants."[194] Here, Mason failed because he did not allege any economic

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[185] United States v. Space Hunters, Inc., 429 F.3d 416, 424 (2d Cir. 2005).

[186] Wentworth v. Hedson, 493 F. Supp. 2d 559, 566 (E.D.N.Y. 2007).

[187] Spann v. Colonial Village, Inc., 899 F.2d 24, 267 (1990) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)).

[188] Mason v. Adams Cnty. Recorder, 901 F.3d 753, 755 (6th Cir. 2018).

[189] *Id.*

[190] *Id.* at 757.

[191] *Id.* at 755.

[192] *Id.* at 757.

[193] *Id.* at 756.

[194] *Id.*

harm.[195] In the concurring opinion, Judge Clay added that he did not "read the majority opinion as foreclosing a properly pleaded claim arising out of such radically discriminatory language, especially under circumstances that implicate governmental instrumentalities."[196] Judge Clay further stated that if, and when, a plaintiff shows a cognizable injury, "this Court will have to reconcile the importance of maintaining our recorded history with our vision of government speech that promotes—not hinders—a free and equal society."[197] The guidance of both the majority and concurring opinions in *Mason* lend credibility to the premise of this article and the hope that it could be feasible.

While this author firmly believes that public records offices are violating § 3604(c) of the Fair Housing Act by publishing racially restrictive covenants, she acknowledges that finding suitable plaintiffs, with standing, to file suit in counties across the country would result in positive change with molasses-like speed. As Dr. King once wrote in *Why We Can't Wait*:

> We need a powerful sense of determination to banish the ugly blemish of racism scarring the image of America. We can, of course, try to temporize, negotiate small, inadequate changes, and prolong the timetable of freedom in the hope that the narcotics of delay will dull the pain of progress. We can try, but we shall certainly fail. The shape of the world will not permit us the luxury of gradualism and procrastination. Not only is it immoral, but it will also not work . . . It will not work because it retards the progress . . . of the nation as a whole.[198]

It is necessary to next address what happens if no progress is made.

IV. REMOVAL OF RACIALLY RESTRICTIVE COVENANTS/EXPLORATION OF BEST PRACTICES

A. Impact of Inaction

Now that this article has established that it is possible to sue local governments for violations of § 3604(c) of the Fair Housing Act, it turns to the impact of inaction. What happens if society sticks with the status quo? Imagine the status quo is defined as the presence of racially restrictive covenants in deeds readily available both in person and online at public records offices across America without trigger warnings, cover

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[195] *Id.*
[196] *Id.* at 758.
[197] *Id.*
[198] MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 129 (PENGUIN GROUP EDS.,1964).

sheets, or disclaimers.[199] The court in *Mayers* found that the presence of deeds containing racially restrictive covenants in public records offices "is likely to give them legitimacy and effectiveness in laymen which they do not have in the law."[200] So even though it is illegal to enforce the covenants, not everyone may be aware of it. The *Mayers* Court went on to state that "[i]t is certainly not beyond the realm of possibility that a black person might be reluctant to buy a home in a white neighborhood when government itself implicitly recognizes racially restrictive covenants as 'affecting the title or ownership of real estate.'"[201] Referencing Washington, D.C. in 1972, the *Mayers* court found that "the white character of that part of the District where recorded covenants abound stands as mute testimony to their continued effectiveness."[202]

While there is always a possibility that a homebuyer will not understand that racially restrictive covenants are legally unenforceable, "[a] certain percentage of blacks no doubt refuse to buy property burdened with such restrictive covenants . . . because they do not want to go where they appear to be unwanted."[203] If a prospective purchaser is unaware whether racial attitudes in the neighborhood where they are considering purchasing a home have changed, the covenant could be a strong deterrent. A home is likely to be the single largest purchase of one's lifetime. The idea of living next to people who do not want you as neighbors because of the color of your skin would likely impact most people's decision to purchase.

Racially restrictive covenants are additionally problematic because they hinder the marketability of the property. To the extent that any individuals (White or Non-White) decline to purchase property because of the existence of racial restrictive covenants in the chain of title, "the marketability of that property suffers."[204] According to ncrealtors.org, "the availability of buyers is one of the more important factors that affects marketability."[205] They also note that it is a buyer's "willingness to pay that is hands down the *most important factor* that drives value."[206] As a seller of real property, one's goal is to make the property as marketable as possible. Any negative impact on marketability can impact value.

The court in Mayers summed up the impact of the presence of racially restrictive covenants nicely when it found that

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[199] Of course, this is not entirely accurate, as the next section of this article will acknowledge. It is still the case in most jurisdictions, however.

[200] Mayers v. Ridley, 465 F.2d 630, 640 (D.C. Cir. 1972).

[201] *Id.*

[202] *Id.*

[203] *Id.* at 641.

[204] *Id.*

[205] Scott Wright, *Factors That Affect Marketability*, NC REALTORS, https://www.ncrealtors.org/factors-that-affect- marketability/ (last visited June 25, 2022).

[206] *Id.*

> [w]hile it is true that racially restrictive covenants cannot be enforced, and thus might be thought to be harmless, it is nevertheless true that it is the premises of the legislation [the Fair Housing Act] . . . that a mere 'notice, statement, or advertisement' indicating a racial preference . . . is *ipso facto* harmful.[207]

Given the harmfulness of racially restrictive covenants, States across the nation are slowly starting to take action to come to terms with them. There is not currently a nationwide uniform approach to dealing with racially restrictive covenants in deeds on the public record.[208] According to the American Land Title Standards Association ("ALTA"), there are four general types of techniques to lessen the harm of racially restrictive covenants: repudiation, notification, modification, and redaction. This article will assess and examine each technique to determine their efficacy.

B. Repudiation

ALTA describes the repudiation technique as "recording a declaration in the land records of the illegal and unenforceable nature of discriminatory covenant(s) associated with a particular property."[209] Repudiation was a technique sought by the appellants in *Mayers* who wanted "to require the Recorder to affix a sticker on each existing liber volume stating that restrictive covenants found therein are null and void."[210]

Indiana has a recently enacted law, July 2021, which allows for repudiation.[211] In Indiana, a person who discovers a recorded racially restrictive covenant may, if all parties to the transaction agree, include in the deed (or other document containing the covenant) the following language:

> [t]he chain of title for the real property described herein contains a racially restrictive covenant that, if enforced, would discriminate against individuals based upon their race, color, sex, religion, familial status, disability, or national origin. The covenant is invalid, unenforceable, and antithetical to American values of equal justice and equality

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[207] *Mayers*, 465 F.2d at 654. *See Ipso Facto Definition*, BLACK'S L. DICTIONARY (11th ed. 2019).

[208] Jeremy Yohe, American Land Trust Association, *Housing Discrimination: Addressing Illegal Covenants in Historic Land Records*, ALTA TITLE NEWS, Oct. 2021, at 15, https://www.alta.org/title-news/2021/october_2021.pdf.

[209] Wright, *supra* note 205.

[210] *Mayers*, 465 F.2d at 630. It is noteworthy that this was 1972. Little advancement has been made since then.

[211] IND. CODE § 32-21-15 (2021).

under the law.[212]

California uses an approach that combines repudiation with other method(s). The other method(s) will be discussed below. In California, a repudiation is mandatory, not optional like in Indiana.[213] California Code states that a county recorder, title company, escrow company, real-estate broker, real estate agent, or association that provides a copy of a declaration, governing document, or deed to any person shall place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following:

> If this document contains any restriction based upon age, race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, veteran or military status, genetic information, national origin, source of income as defined in subdivision (p) of Section 12955, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to Section 12956.2 of the Government Code by submitting a '***Restrictive Covenant Modification***' form, together with a copy of the attached document with the unlawful provision redacted to the county recorder's office.[214]

California's repudiation statute expands the number of protected classes beyond what the Fair Housing Act provides and requires a full slate of real estate professionals to comply. Repudiation of racially restrictive covenants is necessary. As referenced above, not all states repudiate in the same manner. California's approach is preferable because it is mandatory and requires the participation of a wider variety of real estate professionals. As Brooks and Rose concluded in *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms*,

> [r]epudiating racial covenants is a way of remembering the past but refusing to accept its constraints, sending a different signal to those to come. After all, racially restrictive covenants had a legal life, but they had an even more important life as signals, acting as rallying points for coordinating the segregation of neighborhoods. In their primary official life as legal requirements, but even more in the secondary life as signals, covenants did much damage. Changing the signals is a step toward repairing the

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[212] *Id.*
[213] CAL. GOV'T CODE §12956.1(b).
[214] *Id.* §12956.1(1)(b)(1) (emphasis added).

damage.[215]

The repudiation technique is essentially a "trigger warning" placed at the start of or, on the cover sheet for, individual documents that contain race-based covenants.

Identifying certain documents as containing null and void illegal racially restrictive covenants would be relatively simple and inexpensive. As the court held in *Mayers*, "relief could be effectuated by the purchase of a large rubber stamp—surely not too great a price to pay for vindication of constitutional rights."[216] If public records offices do not have the personnel to devote to reviewing and stamping documents, certainly there would be an abundance of attorneys looking for pro bono opportunities. This technique is perhaps not the most effective to remediate the harm of the covenants, but it is an inexpensive and relatively simple method that largely avoids controversy.

C. Notification

Notification is a lot like repudiation but is more general in nature. Notifications are posted on county "websites and at record access points indicating the historical land records may contain harmful content in illegal and unenforceable discriminatory covenants."[217] The difference between notification and repudiation is that notices "do not identify specific recorded instruments" and repudiation is tied directly to the document.[218] While this approach is low cost and less controversial than other methods, it is not as targeted as repudiation and other methods. If a potential homebuyer forgets about the notice by the time they get to the racially restrictive covenant, there is a risk that they will still be unsure of its enforceability. Additionally, the search process will still result in a shocking surprise if a race-based covenant is discovered. It is doubtful that an individual searching title will remain on high alert anticipating discovering a race-based covenant at any moment. Repudiation better prepares the person discovering the race- based covenant because the warning is directly attached to the offensive document.

Some states use statutes to notify the public generally about the illegality of discriminatory covenants. Florida utilizes the notification approach in this manner. Specifically, Section 712.065(1) of the Florida Statutes defines "discriminatory restrictions" as provisions in recorded

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[215] BROOKS & ROSE, *supra* note 4, at 230.

[216] Mayers v. Ridley, 465 F.2d 630, 642 (D.C. Cir. 1972).

[217] Yohe, *supra* note 208, at 16.

[218] Kevin Nincehelser, *Housing Discrimination: Addressing Illegal Covenants in Historic LandRecords*, ALTA TITLE NEWS, 16 (Oct. 2016), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.alta.org/title-news/2021/october_2021.pdf.

title transactions which restrict ownership, occupancy, or use of real property based upon a characteristic that is protected under the United States Supreme Court or the Florida Supreme Court.[219] Later, the Florida statute states in 712.065(2) that [a] discriminatory restriction is not enforceable in this state, and all discriminatory restrictions contained in any title transaction recorded in this state are unlawful, . . . unenforceable, and . . . null and void. [220]

Section (3) of the same statute allows for a modification of sorts, but only after approval of an amendment by the majority vote of the property owners' association.[221] Florida's notification approach is not as effective as repudiation because the notification is published in the Florida Statutes, a location that the average homebuyer is unlikely to see. A repudiation approach would have attached the null and void language to each offensive covenant document. There are many states that do not address racially restrictive covenants at all though, so notification is at least a step in the right direction.[222]

Virginia statutes have a notification provision as well at Va. Code Ann. § 36-96.6. It states: "Any restrictive covenant and any related reversionary interest, purporting to restrict occupancy or ownership of property on the basis of race, color . . . included in an instrument affecting title to real or leasehold property, are declared to be void and contrary to the public policy of the Commonwealth."[223] Virginia has expanded the protected classes beyond those of the Fair Housing Act, but its notification provision is less helpful to laypersons than a directly attached repudiation statement would be.

Georgia's approach to notification is brief and seemingly applies only to new restrictive covenants. It states "[n]o covenant that prohibits the use or ownership of property within the subdivision may discriminate based on race, creed, color, age, sex, or national origin."[224] While Georgia's statutory notification provision has less protected classes than other States and does not address historical race-based covenants, it does provide a general mechanism for terminating covenants if at least fifty-one percent of people owning land pertaining to the covenant agree.[225] The obvious challenge to

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[219] FLA. STAT. § 712.065(1) (2022).

[220] *Id.*

[221] *Id.*

[222] One of those states is Tennessee. In a telephone conversation on 6/27/2022 with Carl Dowdy, a Tennessee licensed attorney who specializes in title searches, Mr. Dowdy confirmed that he has searched title to real property both online and at public records offices in Tennessee. He stated that in neither location has he seen evidence of notification or repudiation regarding the racially restrictive covenants he has come across.

[223] VA. CODE ANN. § 36-96.6(A) (Lexis Advance through the 2022 Regular Session).

[224] GA. CODE ANN. § 44-5-60(d)(3) (Lexis Advance through the 2022 Regular Session of the General Assembly).

[225] *Id.* at (d)(2).

eradicating race-based covenant language where a majority of impacted landowners must consent is that some will not find the language offensive, and the covenant will remain.

D. Modification

Modification is a more progressive statutory approach to racially restrictive covenants because it does not just warn the public about the presence of the covenants, it actually removes the covenants. Modification is achieved "through judicial or public official action, of the land record(s) containing an identified discriminatory covenant, resulting in the creation of a superseding document without the discriminatory language."[226] Essentially, modification allows a property owner to amend their deed, on the public record, so that it no longer contains the discriminatory covenant. Modification is becoming an increasingly popular approach to deal with race-based covenants in the modern era. Illinois, Washington (State), California, Texas, South Carolina, Maryland, Missouri, and Massachusetts all have statutes or pending legislation which include modification provisions.[227]

Texas has a codified modification approach.[228] Section 5.026 of the Texas Property Code states:

> If a restriction that affects real property, or a provision in a deed that conveys real property or an interest in real property, whether express or incorporated by reference, prohibits the use by or the sale, lease, or transfer to a person because of race, color, religion, or national Origin, the provision or restriction is void.[229]

While this provision appears more like the notification approach, a subsequent section, § 5.0261, allows an owner, or someone with permission of the owner, to request the removal of the discriminatory provision from the instrument that contains it.[230] The statute sets forth a

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[226] Yohe, *supra* note 208, at 16.

[227] 55 ILL. COMP. STAT. 5/3-5048 (2022) (Illinois); WASH. REV. CODE § 49.60.224 (2020) and WASH. REV. CODE § 49.60.227 (2021) (Washington); A.B. 1466, 2021 Assemb., Reg. Sess. (Cal. 2021) (California); S.B.30, 2021 Legis. 87th Sess. (Tex. 2021) (Texas); H.B. 4517, 124th Sess. Gen. Assemb. (2021) (South Carolina); Md. Code Ann., Real Prop. 3-112 (Maryland); Rebecca Rivas, *Missouri poised to remove unenforceable discriminatory housing restrictions in deeds*, MISSOURI INDEPENDENT (June 9, 2022), https://news.stlpublicradio.org/government-politics-issues/2022-06-09/missouri-poised-to-remove-unenforceable-discriminatory-housing-restrictions-in-deeds (Missouri); Lauren Reznick, *Taking on Past Injustices: New Land Court Procedure Offers Solutions to Homeowners for Racially Restrictive Covenants in Land Records*, BOSTON BAR JOURNAL (Feb. 18, 2022), https://bostonbarjournal.com/2022/02/18/taking-on-past-injustices-new-land-court-procedure-offers-solutions-to-homeowners-for-racially-restrictive-covenants-in-land- records/ and House Docket, No. 1232 Filed on 2/3/21 (Massachusetts).

[228] S. 30, 87th R.S. ch. 532 §.0261(b) (codified as Tex. Prop. Code Ann. § 5.0261 (2021)).

[229] Tex. Prop. Code § 5.026 (West 2021).

[230] Tex. Prop. Code § 5.0261 (West 2021).

detailed procedure and suggested form to initiate the process.[231] Section 5.0261 also provides that no filing fee is to be collected for motions to remove discriminatory language.[232] This Act took effect September 1, 2021.[233] It is refreshing to see a southern state like Texas adopt a fairly streamlined process for modification. It's mind-blowing to think that it took seventy-three years post-Shelley for them to do it.

E. Redaction

Redaction is removal of discriminatory covenants in identified documents within the public land records through judicial or public action.[234] Redaction is different than modification in that the original documents containing offensive language are actually removed from the public record. One of the advantages to redaction is the "full elimination of the discriminatory covenants from the public land records."[235] Many feel that it is past time for this language to be eradicated. "'We don't need to maintain that language in a document to understand the history of where we've come from,' said Nikole Hannah-Jones, founder of The 1619 Project, which aims to reframe American history by including the contribution of black Americans."[236] Hector De La Torre, a former state lawmaker in California stated that leaving the racially restrictive covenants on the public record is "akin to leaving up in the South . . . the 'no coloreds' or the 'white only' signs at water fountains, bathrooms, other facilities and saying, 'Oh, just ignore the sign. You can drink out of either one. Just ignore it.'"[237]

Criticism for redaction usually takes the shape of preserving history.

The Court in *Mason*, supra, stated that [i]n ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed upon felons whose very existence, including the destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive covenants now found to be offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoraiae*, as those documents are part of our living history and witness to the evolution of our cultural norms.[238]

Historian Kirsten Delegard, is a founder of the Minneapolis-based Mapping Prejudice project, "which researches the covenants that barred

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[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] Yohe, *supra* note 208, at 16.

[235] *Id.* at 21.

[236] Nick Watt & Jack Hannah, *Racist language is still woven into home deeds across America. Erasing it isn't easy, and some don't want to*, CNN (Feb. 15, 2020, 12:21 PM), https://www.cnn.com/2020/02/15/us/racist-deeds- covenants/index.html.

[237] *Id.*

[238] Mason v. Adams Cnty. Recorder, 901 F.3d 753, 757 (6th Cir. 2018).

nonwhites from buying property in the city's most desirable neighborhoods."[239] Delegard feels that "[w]e need to know where these restrictions were put in place if we're ever going to dismantle the system of racism in a logical, consistent way."[240] Delegard doesn't want to redact the racially restrictive covenants, instead, she wants to "use this language as a launch pad for making restitution."[241] Additional criticism for redaction (removal of documents or information from the land records) involves creating "breaks in the chain of title, which can result in ownership disputes, a loss of property rights or an inability to buy, sell, or refinance property."[242]

Washington State has a redaction approach.[243] Like Texas, it has a notification provision and then outlines a procedure for removal of the discriminatory provision.[244] In its notification provision, Washington Code states:

> Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race, creed, color, sex, national origin, citizenship or immigration status, sexual orientation, families with children status, honorably discharged veteran or military status, or with any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person who is blind, deaf, or physically disabled, and every condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on the basis of race, creed, color, sex, national origin, citizenship or immigration status, sexual orientation, families with children status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person who is blind, deaf, or physically disabled is void.[245]

Washington's statute is among the most inclusive as it has significantly more protected classes and includes future interest provisions which could be triggered by a violation.[246]

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[239] Watt & Hannah, *supra* note 236.

[240] *Id.*

[241] *Id.*

[242] Yohe, *supra* note 208, at 15.

[243] Wash. Rev. Code Ann. § 49.60.224 (West 2022).

[244] *Id. See also* Wash. Rev. Code Ann. § 49.60.227 (West 2022).

[245] Wash. § 49.60.224 (West 2022).

[246] Possibilities of reverter and rights of entry are future interests retained by the grantor in the conveyance of a defeasible fee. Defeasible fees include the fee simple determinable and the fee simple subject to condition subsequent. The fee simple determinable's future interest in the grantor

The redaction provisions in the Washington statute were amended January 1, 2022, to resolve some statutory ambiguities that had resulted in litigation. The case, *In re That Portion of Lots 1 &2*, involved "the delicate balance required in addressing the elimination of morally repugnant covenants and the preservation of the documented history of the disenfranchisement of a people."[247] The Washington statute at issue, RCW 49.60.227, permits the court to strike a racially restrictive covenant from the public records and "eliminate the covenant from the title."[248] The question in the case was whether this language meant that the public records office actually had a duty to remove void provisions from the record, or whether a court order declaring the covenant void was sufficient.[249] The lower court and the Court of Appeals both held that there was no such duty.[250]

In between the Court of Appeals decision and the decision of the Supreme Court of Washington, the legislature amended the statute to clarify that there was a duty.[251] Specifically, the amended statute creates a multi-step process whereby: the court enters an ordering striking the void provision and eliminating the void provision from the title or lease; a copy of any document affected by the order is made an exhibit to the order and sets forth the void provision to be struck; the order also includes a certified copy of the document upon which the court has redacted the void provision; the public records office records the order and the corrected document(s) which contain the book and page number of the original document, a notation that it was corrected, the case number and the date the order was entered; the index is updated and indicates that the original record is no longer the primary official record and is removed from the chain of title; the original record is maintained separately in the county's records or can be sent to the state archive.[252] The Washington Supreme Court in *In re That portion of Lots 1 & 2* cited the Washington State Legislature which wrote "[t] the legislature

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is the possibility of reverter. The possibility of reverter functions automatically. The phrases typically designating a fee simple determinable are "so long as," "while," "during," and "until." If the fee is written in a manner that a transfer to a person of a certain race is prohibited, then the possibility of reverter will automatically transfer the property back to the grantor. The fee simple subject to condition subsequent's future interest in the grantor is the right of entry (called a power of termination in some States). The right of entry does not function automatically, but instead requires some affirmative action on the part of the grantor to re-enter and re-take the property. The phrases typically designating a fee simple subject to condition subsequent are "but if," "provided however that," and "on the condition that." If the fee is written in a manner that transfer to a person of a certain race is prohibited, then the right of entry will allow the grantor to take back the property if the condition is violated. It was important for Washington to include these future interests in their statute because if they had not been eliminated, they could have allowed a loophole for the continued use of racially restrictive covenants.

[247] *In re* That Portion of Lots 1 & 2, 199 Wash. 2d 389, 391 (2022).

[248] *Id.*

[249] *Id.* at 391, 394.

[250] *Id.* at 394.

[251] *Id.* at 399–400.

[252] WASH. REV. CODE. ANN. § 49.60.227 (West 2022).

finds that the existence of racial, religious, or ethnic-based property restrictions or covenants on a deed or chain of title for real property is like having a monument to racism on that property and is repugnant to the tenets of equality."[253] The court held that "[r]emoving all traces of these discriminatory covenants would not effectuate the legislature's intent to eradicate discrimination."[254] Quoting the Court of Appeals, the Washington Supreme Court stated "[a] policy of whitewashing public records and erasing historical evidence of racism would be dangerous. It would risk forgetting and ultimately denying the ugly truths of racism and racist housing practices."[255]

Washington's redaction approach has the benefit of eradicating visual reminders of the vestiges of racism while preserving the historical record in another, less public, location. The benefit of having the original document intact is that it eliminates the possibility of error in amending and deleting void provisions. With the court overseeing the elimination of the void covenants in what will become certified copies on the public record, there is less of a chance that inoffensive provisions in the covenants will be unintentionally deleted.[256] The downside to this approach it that it will likely take more time and be more burdensome to the courts and public records offices.

California also has a redaction approach. Their amended redaction approach took effect July 1, 2022.[257] It authorizes a "title company, escrow company, county recorder, real estate broker, real estate agent, or other person to record a Restrictive Covenant Modification."[258] The broad category of individuals allowed to record a modification makes this approach one of the most progressive in the nation. The California amended act also imposes a duty upon real estate professionals to notify homebuyers of the presence of a restrictive covenant and their ability to remove it.[259] The amended Act states:

> Beginning July 1, 2022, if a title company, escrow company, real estate broker, or real estate agent has actual knowledge that a declaration, governing document, or deed that is being directly delivered to a person who holds or is acquiring an ownership interest in property includes a possible unlawfully restrictive covenant, they shall notify

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[253] *In re* That Portion of Lots 1 & 2, 506 P.3d 1230, 1236 (2022).

[254] *Id.* at 401.

[255] *Id.*

[256] When I purchased a home subject to a racially restrictive covenant in 2007, there was a covenant that allowed Fred to pick apples on the property during apple season on the same document as the racially restrictive covenant. If improperly amended, that process could have cost Fred some apples.

[257] Cal. Assemb. Res. 1466 (2021).

[258] *Id.*

[259] *Id.*

> the person who holds or is acquiring the ownership interest in the property of the existence of that covenant and their ability to have it removed through the restrictive covenant modification process.[260]

While the actual procedural processes are still being ironed out by the local county public records offices, the California combination approach has the ability to effectuate widespread change. It involves repudiation (in the cover sheets attached to documents containing racially restrictive covenants), notification (in the statute), modification (which homebuyers are required to be informed about), and redaction (while still preserving the original documents in another location).[261]

V. CONCLUSION

This article began with over one hundred years of government-sponsored and endorsed legalized housing discrimination. It is going to take a very long time for the nation to recover from that history. Progress will have to take many forms. The form advocated here is a confrontation of racially restrictive covenants. The primary proposition of this article is that the government itself continues to violate § 3604(c) of the Fair Housing Act by making, printing, or publishing, or causing to be made printed or published discriminatory statements based on race.

There are a plethora of ways to confront racially restrictive covenants. The first, and most obvious, is to hold public records offices accountable for publishing racially restrictive covenants. The government could be held accountable through injunctive relief or payment of money damages. Precedent exists where damages were awarded to individuals who have suffered emotional distress from seeing advertisements for housing featuring White models only. This could and should be extended to the emotional distress suffered by potential homebuyers when they discover a race-based covenant in their deed.

This article has explored the four most utilized approaches to confronting race-based covenants. Notification could be achieved with almost no effort. A sign could be put on the wall of the public records office and a pop-up notification could appear on the homepage of the online searchable database. While not the most effective method, notification is cheap, easily accomplished, and simply states the obvious that "all racially restrictive covenants are null and void."

Repudiation requires more effort because the notification is physically attached to each document containing a racially restrictive covenant, but it is also more effective because it attaches the statement that the covenant is

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[260] *Id.*

[261] *Id. See also*, CAL. DISCRIMINATION PROHIBITED CODE § 12956.1 (West 1982).

null and void physically to the covenant itself.

Modification is gaining momentum and allows for a property owner to feel good about the fact that their deed does not include a race-based covenant, but it is an involved protocol to establish and maintain.

Redaction is impactful because it removes the offensive language from the public view throughout the chain of title, but it could be seen as "whitewashing" history. The processes necessary for redaction are even more extensive than for modification.

So, what should be done about race-based covenants? Many think that they should be unearthed, and their locations identified.[262] Efforts are underway in Minneapolis, Charlottesville, Seattle, and St. Louis to map out the locations of racially restrictive covenants.[263] The idea is that the mapping out racially restrictive covenants will "raise awareness of racist practices" that shaped the nation. At the federal level, Senate Bill 2549 has been introduced to provide grants "to institutions of higher education to analyze, digitize, and map historic housing discrimination records."[264] If passed, HUD will "use data submitted by institutions under the bill to create a publicly available national database of historic housing discrimination records."[265] Historic housing discrimination records are defined as either "deeds or historic property records that demonstrate housing discrimination," or "state or local ordinances that permitted housing discrimination." This is valuable information about the nation's past, but what will be done with it? Will children and young adults be allowed to learn about it in public schools across the nation? Could it be the basis for remedying income inequality through the form of some sort of reparations? It will be most useful if it can be effectively collected and then widely disseminated.

What's the ideal combination of remedies? Damages for those injured by discovering racially restrictive covenants in their chain of title; mandatory immediate notification at public records offices and on searchable online databases; funding established for a swift and efficient mandatory repudiation process; free streamlined modification and redaction processes for homeowners; and publicly available and widely publicized data on the location of racially restrictive covenants would be a great start. After all, as Dr. Cornel West once said, "you can't really move forward until you look back."[266]

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[262] Watt & Hannah, *supra* note 236.

[263] *Id.*

[264] Mapping Housing Discrimination Act, S. 2549, 117th Cong. § 1 (2021).

[265] *Id.*

[266] *Cornel West Quotable Quotes*, GOODREADS.COM, https://www.goodreads.com/quotes/486358-you-can-t-really-move-forward-until-you-look-back-from (last visited July 5, 2022).

Filial Responsibility Laws— Codifying a Qualified Quid Pro Quo of Care

DANIELLE ERICKSON[†*]

Parents are expected—rather, required—to provide for the basic care and needs of their minor children.[1] "All fifty states have statutes that obligate certain adults to care for or financially support certain other family members."[2] As parents grow older, there is a moral expectation that children will provide reciprocal care for their aging parents. This is evidenced by how two-thirds of older adults with disabilities receive care solely from family caregivers.[3] Family members also provide other types of reciprocal support on their own volition, "such as grocery shopping, cooking and transportation."[4] However, there is not always the same legal requirement for children to support their parents as there is for parents to support their minor children.[5] At common law, there is no duty for children to provide for their indigent parents.[6] The Elizabethan Poor Act of 1601 is cited as the first effort in Western culture to codify the moral obligation of children to care for their parents.[7] This system was imported to America and adopted by the colonies and later the individual states.[8]

Filial responsibility laws continue to be regulated at the state level, and there is no present federal statute.[9] As of 2023, twenty-five states plus Puerto Rico have statutes codifying a filial responsibility for children to provide care or support to their aging and indigent parents. That means there are

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[1] Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501, 501 (2002). Mari Park, *The Parent Trap: Health Care & Ret. Corp. of Am. v. Pittas, How it Reinforced Filial Responsibility Laws and Whether Filial Responsibility Laws Can Really Make You Pay*, 5 EST. PLAN. & CMTY. PROP. L.J. 441, 442 (2013). CHILD WELFARE INFO. GATEWAY, *State Laws on Child Abuse and Neglect*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.childwelfare.gov/topics/systemwide/laws-policies/can/ (last visited May 7, 2022).

[2] Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 ELDER L.J. 269, 270 (2013).

[3] *Id.* at 284; Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859, 864–65 (2005).

[4] Edelstone, *supra* note 1, at 506.

[5] Pakula, *supra* note 3, at 864–65.

[6] *Id.* at 861; Albert Einstein Med. Ctr. v. Forman, 212 Pa. Super. 450, 454 (1968).

[7] Daniel H. Brown, *Picking Up the Tab for Mom and Dad: The Clash of Filial Laws with Liberty, Morality, and Culture*, 11 J. INT'L AGING L. & POL'Y 1, 2 (2020); Park, *supra* note 1, at 444; Pakula, *supra* note 3, at 861.

[8] Brown, *supra* note 7, at 2–3.

[9] Pakula, *supra* note 3, at 860; Edelstone, *supra* note 1, at 502.

twenty-six different systems of filial duty laws, each with their own nuances. This paper seeks to review these statutes and relevant case law in a coherent manner, finding themes and commonalities in statutes while highlighting notable differences. Section I looks at upon whom the different state laws impose the responsibility. Section II considers the different situations when the responsibility arises, such as the condition of the parent and the situation of the child. Section III explores the different enforcement mechanisms that state statutes create. Section IV investigates whether filial responsibility statutes are enforceable, and if they are actually enforced. Last, in Section V, I make the argument that states should change their statutes and the filial responsibility laws should only be enforced when the indigent parent is under the age of sixty-five.

I. WHO HAS THE RESPONSIBILITY?

The word "filial" means "of or relating to a son or daughter."[10] It follows that filial responsibility laws place the duty of care on the child of indigent parents. The majority of states with filial duty statutes place the responsibility on the child of the indigent parent. Some states do this by creating a reciprocal responsibility of support for both parents and children.[11] Other states have specific statutes focusing on a situation where the adult child must provide support to the indigent parent.[12] Several states use the word "children" instead of or in addition to "child," indicating that if an indigent parent has multiple children, all of the children have this legal filial responsibility.[13] However, as discussed below, only a handful of states specifically provide means for how multiple children can be held liable. If a child becomes incapacitated and unable to provide for their indigent parent, the parent may be able to collect from that child's legal guardian or conservator. In an old Georgia case, the court held that where a bank was the guardian of her son's property, the mother could collect support payments from her son through the bank.[14]

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[10] *Filial*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/filial (last visited May 7, 2022).

[11] ALASKA STAT. ANN. § 25.20.030 (West 2022); CONN. GEN. STAT. ANN. § 53-304(a) (West 2022); GA. CODE ANN. § 36-12-3 (West 2022); KY. REV. STAT. ANN. § 530.050 (West 2022); NEV. REV. STAT. ANN. § 428.070 (West 2009); OHIO REV. CODE ANN. § 2919.21 (West 2019); 23 PA. STAT. AND CONS. STAT. § 4603 (West 2005); VT. STAT. ANN. tit. 15, § 202 (West 2022).

[12] CAL. FAM. CODE § 4400 (West 2020); IND. CODE ANN. § 31-16-17-1 (West 2022); LA. STAT. ANN. § 13:4731(2022); MASS. GEN. LAWS ch. 273, § 20 (West 2022); N.C. GEN. STAT. ANN. § 14-326.1 (West 2022); 15 R.I. GEN. LAWS ANN. § 15-10-1 (West 2022); S.D. CODIFIED LAWS § 25-7-27 (West 2000).

[13] ALASKA STAT. ANN. § 47.25.230 (West 2022); DEL. CODE ANN. tit. 13, § 503 (West 2022); LA. STAT. ANN. § 13:4731 (2022); N.J. STAT. ANN. § 44:4-102 (West 2022); N.D. CENT. CODE ANN. § 14-09-10 (West 2022); OR. REV. STAT. ANN. § 109.010 (West 2022); TENN. CODE ANN. § 71-5-103 (West 2022); UTAH CODE ANN. § 17-14-2 (West 2022); W. VA. CODE ANN. § 9-5-9 (West 2022).

[14] Citizens & S. Nat'l Bank v. Cook, 185 S.E. 318, 318 (Ga. 1936).

A handful of states specifically provide that if there are multiple children, the children are jointly and severally liable for the parent's care. A New Jersey statue provides that children are "severally and respectively" responsible for the maintenance of an indigent parent.[15] A North Carolina statute states: "If there be more than one person bound . . . to support the same parent or parents, they shall share equitably in the discharge of such duty."[16] Rhode Island and South Dakota each have a specific section establishing a right of contribution from siblings if one child is providing support to their parents.[17] Lastly, Virginia law states that children have a "joint and several duty" to provide support and maintenance for their parents.[18] In *Peyton v. Peyton*, this duty was enforced when the court held that the defendant had to pay $8,000 to his brother for costs of past care where the brother was paying monthly support payments to the mother.[19]

In addition, some states provide that other family members are responsible for the support of indigent adults. Alaska, Louisiana, Rhode Island, and Utah specify that grandchildren may have a filial responsibility in addition to the children of an indigent adult.[20] Utah specifically provides that children have the primary responsibility and grandchildren have a secondary responsibility.[21] Mississippi and Puerto Rico take a broader approach and place the filial duty on any descendant of the indigent adult.[22] Alaska, Mississippi, Utah, and West Virginia also place liability on the indigent adult's siblings; Utah and West Virginia provide that the siblings are secondarily liable to the children.[23] Notably, many of these states expanding the filial duty beyond just the children overlap, possibly reflecting certain values in those states. Once *who* holds the duty has been established, the next issue is to determine *when* the responsibility arises.

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[15] N.J. STAT. ANN. § 44:4-102 (West 2022).

[16] N.C. GEN. STAT. ANN. § 14-326.1 (West 2022).

[17] 15 R.I. GEN. LAWS ANN. § 15-10-7 (West 2022); "Any child making more than his or her share of a proper and reasonable contribution toward the support of his or her destitute parents shall have a right of contribution from other children over the age of eighteen (18) years of the parents, who have been supported by the parents, in a civil action . . . ." *Id.* S.D. CODIFIED LAWS § 25-7-28 (West 2022); "In the event necessary food, clothing, shelter, or medical attendance is provided for a parent by a child, he shall have the right of contribution from his adult brothers and sisters, who refuse or do not assist in such maintenance, on a pro rata share to the extent of their ability to so contribute to such support; provided that no right of contribution for support shall accrue except from and after notice in writing is given by the child so providing for his parent." *Id.*

[18] VA. CODE ANN. § 20-88 (West 2022).

[19] Peyton v. Peyton, 8 Va. Cir. 531, 534 (Va. Cir. Ct. 1978).

[20] ALASKA STAT. ANN. § 47.25.230 (West 2022); LA. STAT. ANN. § 13:4731 (2022); 40 R.I. GEN. LAWS ANN. § 40-5-13 (West 2022); UTAH CODE ANN. § 17-14-2 (West 2022).

[21] UTAH CODE ANN. § 17-14-2 (West 2022).

[22] MISS. CODE ANN. § 43-31-25 (West 2022); P.R. LAWS ANN. tit. 8, § 712 (2022).

[23] ALASKA STAT. ANN. § 47.25.230 (West 2022); MISS. CODE ANN. § 43-31-25 (West 2022); UTAH CODE ANN. § 17-14-2 (West 2022); W. VA. CODE ANN. § 9-5-9 (West 2022).

II. WHEN DOES THE RESPONSIBILITY ARISE?

Parents are required to care for their children throughout the first eighteen years of the child's life no matter the circumstance.[24] However, the same is not necessarily expected from children for their parents. While parents must care for their children in multiple ways with little regard to their means, there are limitations in place for when children are required to provide for their parents. These qualifications relate to the qualities of the children, the parent's needs and situation, and statutory defenses.

A. Qualities of the Children

Most states with filial duty laws specify that children are only required to provide support to the extent of their means. Some states provide that the obligation for support arises when the adult child has the general ability to offer support,[25] while others specify that the duty arises when the adult child has the financial means to provide support.[26] The fact that an adult child is gainfully employed may not be sufficient to establish that the child is capable of providing support.[27] Furthermore, in *Gluckman v. Gaines*, the California Appellate Court held that the adult child's capacity to support their indigent parent must be weighed against the adult child's other commitments, and that the adult child must be able to provide for their own necessities before being required to provide for their indigent parent.[28] Courts make "allowances for the special needs of the adult child, such as financing their [own] child's college education, and for contributions to the adult child's savings and retirement."[29] However, the fact that an adult child is unable to pay a parent's medical bill in full at one time does not release them from that responsibility; the child could be made to pay the bill in

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[24] Edelstone, *supra* note 1, at 501.

[25] ALASKA STAT. ANN. § 47.25.230 (West 2022); CAL. FAM. CODE § 4400 (West 2020); KY. REV. STAT. ANN. § 530.050 (West 2021); MASS. GEN. LAWS ANN. ch. 273, § 20 (West 2022); N.J. STAT. ANN. § 44:4-101 (West 2023); N.D. CENT. CODE ANN. § 14-09-10 (West 2019); P.R. LAWS ANN. tit. 8, § 712 2023); UTAH CODE ANN. § 17-14-2 (West 2022); W. VA. CODE ANN. § 9-5-9 (West 2018).

[26] ARK. CODE ANN. § 20-47-106 (West 2017); IND. CODE ANN. § 31-16-17-1 (West 2022); NEV. REV. STAT. ANN. § 428.070 (West 2009); N.C. GEN. STAT. ANN. § 14-326.1 (West 2022); OHIO REV. CODE ANN. § 2919.21 (West 2019) (issue of financial ability to support an affirmative defense); 23 PA. STAT. AND CONS. STAT. § 4603 (West 2005); S.D. CODIFIED LAWS § 25-7-27 (West 2023); VT. STAT. ANN. tit. 15, § 202 (West 2022); VA. CODE ANN. § 20-88 (West 2009).

[27] Davis v. State, 240 N.E.2d 54, 56 (Ind. 1968) (reversing the conviction of the defendant for failing to support his mother, reasoning that the mere fact that the defendant was gainfully employed did not establish that he was financially able to support his mother).

[28] Gluckman v. Gaines, 266 Cal. App. 2d 52, 59–60 (1968).

[29] Edelstone, *supra* note 1, at 503. Thornsberry v. State Dep't Pub. Health & Welfare, 295 S.W.2d 372, 376 (Mo. 1956) (holding that the adult child had a right to decide to provide for son's college education over providing for mother's support) (note that Missouri does not have a filial responsibility statute).

installments.[30] Connecticut and Vermont laws additionally provide that a child may not be liable if they can show that they have a physical incapacity or another good cause which prevents them from providing support.[31] This ability to provide support is balanced with the parent's needs, as discussed below.[32]

The age of the child is another quality that some states account for in their statutes. Several state statutes include something about the filial responsibility falling on an "adult child."[33] Ohio's statute does not provide any age limitation, but a case from Ohio concedes that the duty falls on an adult child.[34] North Carolina simply requires that the child be "of full age" without providing a specific age.[35] A handful of states require that the adult child be at least eighteen years of age.[36] Oddly, even though Connecticut does not have a minimum age requirement for the child, it is the only state that places an upper limit on the parent's age, requiring support only for parents under the age of sixty-five.[37]

There is a question of whether an adult child must pay for the support of a parent living in another state, and whether that state can compel the child to pay. The treatment of this question varies state by state. A case from New York—which does not have a filial responsibility statute—held that because New York does not have a parental support law, an action against a son for the support of his mother residing in another state could not be brought.[38] Kentucky's statute places the duty only on those adult children living in the state with parents living in the state.[39] On the other hand, a case from South Dakota held that even though a son did not live in that state, he could have an action for support brought against him in South Dakota because he had "numerous contacts with the state."[40] Other states only provide that either the parent or child need to reside in the state, but do not suggest whether the other party needs to live in the state.[41] It is unclear what will happen in these

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[30] Prairie Lake Health Care Sys. v. Wookey, 583 N.W.2d 405, 419 (S.D. 1998). "We recognize that Dwight has a compelling moral and legal duty to also support his wife and children, but the trial court reasoned, and we think correctly, that even if Dwight cannot pay the entire medical bill at one time, he could pay in installments." *Id.*

[31] CONN. GEN. STAT. ANN. § 53-304 (West 2022); VT. STAT. ANN. tit. 15, § 202 (West 2022).

[32] Edelstone, *supra* note 1, at 503. *See also* Pickett v. Pickett, 251 N.E.2d 684 (Ind. App. 1969). "The two basic concerns are the financial need of the parent and the ability of the child to pay." *Id.* at 687–88.

[33] CAL. FAM. CODE § 4400 (West 2020); N.D. CENT. CODE ANN. § 14-09-10 (West 2019); S.D. CODIFIED LAWS § 25-7-27 (West 2023); VT. STAT. ANN. tit. 15, § 202 (West 2022).

[34] State v. Flontek, 693 N.E.2d 767 (Ohio 1998).

[35] N.C. GEN. STAT. ANN. § 14-326.1 (West 2022).

[36] KY. REV. STAT. ANN. § 530.050 (West 2021); MASS. GEN. LAWS ANN. ch. 273, § 20 (West 2022); 15 R.I. GEN. LAWS ANN. § 15-10-1 (West 2022); VA. CODE ANN. § 20-88 (West 2009).

[37] CONN. GEN. STAT. ANN. § 53-304 (West 2022).

[38] State Welfare Comm'r v. Mintz, 280 N.Y.S.2d 1007 (N.Y. Sup. 1967).

[39] KY. REV. STAT. ANN. § 530.050 (West 2021).

[40] Americana Healthcare Ctr. v. Randall, 513 N.W.2d 566 (S.D. 1994).

[41] ARK. CODE ANN. § 20-47-106 (West 2017); MASS. GEN. LAWS ANN. ch. 273, § 20 (West 2022); 15 R.I. GEN. LAWS ANN. § 15-10-1 (West 2022); W. VA. CODE ANN. § 9-5-9 (West 2018).

states when the other party resides in a different state, and the outcome may depend upon which jurisdiction the action is brought under. There are federal statutes extending the Full Faith and Credit Clause to child support orders; however, these likely do not apply to filial duty laws.[42] Therefore, while obligation to support children can be enforced across state lines, this is not the case for filial support laws.

B. Support for What?

While parents are required to support their minor children in multiple ways, parental support laws do not require the same level of support from adult children. Most states with filial support laws create a duty for children to provide for the necessities of an indigent parent.[43] A Pennsylvania court held that "a person is indigent if her reasonable living expenses exceed her Social Security benefits, her sole source of income."[44] The language compelling support of an indigent parent varies between states, but generally statutes require something along the lines of "providing support"[45] or "relieving and maintaining the pauper."[46] South Dakota lists examples of the types of support to be provided, such as food, clothing, and shelter.[47] Another specific example of support is financial support. According to the Indiana Appellate Court, the financial need of the parent is determined on an individual basis, "according to the individual circumstances."[48] Pennsylvania law specifically provides for financial support in its statute, and case law supports this.[49] A Puerto Rico statute requires that the child provide financial support first, and if they are unable to provide financial assistance, that the child make non-financial contributions.[50] The Ohio

[42] 28 U.S.C.A. § 1738B (West 2017). Pearson, *supra* note 2, at 299.

[43] Edelstone, *supra* note 1, at 503.

[44] Savoy v. Savoy, 641 A.2d 596, 598 (Pa. Super. 1994).

[45] ALASKA STAT. ANN. § 47.25.230 (West 2022); CONN. GEN. STAT. ANN. § 53-304 (West 2022); DEL. CODE ANN. tit. 13, § 503 (West 2022); GA. CODE ANN. § 36-12-3 (West 2022); IND. CODE ANN. § 31-16-17-1 (West 2022); KY. REV. STAT. ANN. § 530.050 (West 2021); LA. STAT. ANN. § 13:4731 (West 2022); MASS. GEN. LAWS ANN. ch. 273, § 20 (West 2022); N.C. GEN. STAT. ANN. § 14-326.1 (West 2022); OHIO REV. CODE ANN. § 2919.21 (West 2019); P.R. LAWS ANN. tit. 8, § 712 (West 2023); UTAH CODE ANN. § 17-14-2 (West 2022); VT. STAT. ANN. tit. 15, § 202 (West 2022); W. VA. CODE ANN. § 9-5-9 (West 2018).

[46] MISS. CODE ANN. § 43-31-25 (West 2022); N.J. STAT. ANN. § 44:4-101 (West 2023); OR. REV. STAT. ANN. § 109.010 (West 2022); 23 PA. STAT. AND CONS. STAT. § 4603 (West 2005).

[47] S.D. CODIFIED LAWS § 25-7-27 (West 2022).

[48] Pickett v. Pickett, 251 N.E.2d 684, 688 (Ind. App. 1969).

[49] 23 PA. STAT. AND CONS. STAT. § 4603 (West 2005). Presbyterian Med. Ctr. v. Budd, 832 A.2d 1066 (Pa. Super. 2003). "[A] child . . . must maintain and financially assist an indigent parent." *Id.* at 1075.

[50] P.R. LAWS ANN. tit. 8, § 712(d) (West 2002).

Supreme Court, however, held that the support called for under the statute was only financial support, and not other means of non-financial support.[51]

A minority of states have a specific filial obligation for children to pay their parent's medical bills when the parent cannot pay. Arkansas only requires that a child support a parent in need of state mental health services.[52] Nevada law provides that a child could be liable for the payment of necessary health services.[53] To calculate the total amount that a child is liable for, Pennsylvania includes the cost of medical assistance (other than public nursing home care) provided to the parent.[54] Rhode Island's parental support law requires the child to pay the costs of care provided by a licensed nursing facility if the parent is unable to pay for it.[55] South Dakota, in addition to listing means for general support, includes in that list the "medical attendance for a parent who is unable to provide for oneself."[56] Tennessee only creates a financial filial responsibility in relation to medical assistance or benefits provided to a parent.[57]

Four states impose a filial obligation requiring children or other relatives to pay for an individual's burial expenses when that individual cannot pay. Alaska requires that every needy person be given a decent burial by the family members of that person.[58] Indiana requires that the child provide financial support for their parent's burial.[59] Nevada does not require general support of a parent, but provides that the child will reimburse the county for the amount paid by the county for the individual's burial, entombment, or cremation.[60] Lastly, West Virginia requires the relatives of an indigent person to pay for the expenses of the person's burial when he dies.[61]

C. Defenses

Some states further qualify the filial duty by creating defenses for adult children so that they are excused from providing support in certain situations. In general, these defenses lift the duty from children whose parent abandoned them for a period of time during childhood. In Massachusetts,

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[51] State v. Flontek, 693 N.E.2d 767 (Ohio 1998). "Furthermore, we agree with appellee that an expansive interpretation of R.C. 2919.21(A)(3), as urged by appellant, could result in continued unwarranted prosecutions of adult children who have elderly parents who may be in need of medical attention or care but have refused to seek treatment for their conditions.… Hence, we can only presume that the General Assembly, in enacting R.C. 2919.21(A)(3), was aware of the endless problems that could possibly arise if the term "support" was intended to include nonfinancial factors." *Id.* at 771.

[52] ARK. CODE ANN. § 20-47-106 (West 2017).

[53] NEV. REV. STAT. ANN. § 428.070 (West 2009).

[54] 23 PA. STAT AND CONS. STAT. § 4603 (West 2005).

[55] 15 R.I. GEN. LAWS ANN. § 15-10-1 (West 2004).

[56] S.D. CODIFIED LAWS § 25-7-27 (West 2000).

[57] TENN. CODE ANN. § 71-5-103 (West 2022).

[58] ALASKA STAT. ANN. § 47.25.230 (West 2022).

[59] IND. CODE ANN. § 31-16-17-1 (West 2022).

[60] NEV. REV. STAT. ANN. § 428.070 (West 2009).

[61] W. VA. CODE ANN. § 9-5-9(g)–(h) (West 2018).

New Jersey, and Rhode Island, an adult child does not violate the filial duty when they fail to provide support if they were not supported by their parent during childhood.[62] California's exception requires that (1) when the child was a minor, they were abandoned by the parent, (2) this abandonment lasted for two or more years before the child turned eighteen, and (3) that during this period of abandonment, the parent was otherwise physically and mentally able to provide support for the child.[63] Indiana's filial obligation only arises if the parent provided the child "with necessary food, shelter, clothing, medical attention, and education" before the child turned sixteen.[64] Indiana also creates an affirmative defense for the child to not provide support if the child was not supported by the parent for any time before the child turned eighteen, "unless the parent was unable to provide support."[65] An Indiana court has implemented this defense in a case where the father abandoned his wife and children; the court held that the filial responsibility statute did not apply to the children for this reason.[66] Ohio has an affirmative defense for nonsupport if "the parent abandoned the [child] or failed to support the [child] as required by law, while the [child] was under age eighteen, or was mentally and physically handicapped and under age twenty-one."[67] Pennsylvania's defense requires that the parent abandoned the child for at least ten years during the child's minority.[68] Virginia law provides that their filial duty does not apply "if there is substantial evidence of desertion, neglect, abuse or willful failure to support any such child."[69] By not requiring the child to support the parent if they were abandoned by the parent, this reinforces the notion that a filial responsibility is a reciprocal responsibility.

III. HOW IS THIS RESPONSIBILITY ENFORCED?

There are several different means of enforcement that state laws provide to enforce the filial responsibility. The most commonly provided for enforcement mechanism is civil action by the state. Thirteen states use this method of enforcement, and there is some variation where either the state seeks reimbursement from the child,[70] or where the state brings an action

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[62] MASS. GEN. LAWS ANN. ch. 273, § 20 (West 2023); N.J. STAT. ANN. § 44:4-102 (West 2023); 15 R.I. GEN. ANN. § 15-10-1 (West 2023).

[63] CAL. FAM. CODE § 4411 (West 2022).

[64] IND. CODE ANN. § 31-16-17-1 (West 2022).

[65] IND. CODE ANN. § 35-46-1-7 (West 2022).

[66] Lanham v. State, 194 N.E. 625, 627 (Ind. 1935).

[67] OHIO REV. CODE ANN. § 2919.21 (West 2019).

[68] 23 PA. STAT AND CONS. STAT. § 4603 (West 2005).

[69] VA. CODE ANN. § 20-88 (West 2009).

[70] ALASKA STAT. Ann. § 47.25.230 (West 2022); CAL. FAM. CODE § 4403 (West 2020); GA. CODE ANN. § 36-12-3 (West 2022); MISS. CODE ANN. § 43-31-25 (West 2022); NEV. REV. STAT. ANN. § 428.070 (West 2009).

against the child to pay the parent or a medical provider directly.[71] Mississippi requires that the child pay the county directly each month if they refuse to provide for their parent.[72] Puerto Rico allows a public official to file a petition for support.[73]

Another method to enforce parental support is through civil action brought by the indigent parents themselves. California, Indiana, Pennsylvania, Puerto Rico, and Rhode Island provide that a parent may bring an action against the child in addition to giving the state standing to bring a claim.[74] Louisiana law only allows a parent to bring an enforcement action against the child.[75] This method of enforcement—allowing or requiring the parent to bring an action—makes logical sense because the support is for the parent's benefit, but may add to family contention or hinder an action from being brought in an effort to avoid further turmoil.[76]

In addition, a handful of states provide that a third party can bring a civil action against a child for the payment or reimbursement of support already provided. New Jersey allows two residents of the county in which the parent resides to bring an action against the child to compel support.[77] North Dakota law provides that a creditor may recover financially from the child for medical services delivered to the indigent parent.[78] Specifically, a court in North Dakota allowed a medical center to bring an action against a child where the parent could not pay for their care and services.[79] Pennsylvania provides broadly that any other person or public body, "having any interest in the care, maintenance or assistance of such indigent person," may file a petition for support with the court.[80] There is a question of who has sufficient interest under this statute to file a petition. A Pennsylvania court shed some light on this issue in *Presbyterian Medical Center v. Budd*, where the court held that a "nursing home providing an indigent parent with shelter, sustenance, and care has sufficient 'interest'" under the statute.[81] Rhode Island allows a licensed nursing facility to bring an action to recover the

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[71] IND. CODE ANN. § 31-16-17-2 (West 2022); IND. CODE ANN. § 31-16-17-4 (West 2022); N.J. STAT. ANN. § 44:4-100 (West 2022); 23 PA. STAT AND CONS. STAT. § 4603 (West 2005); 15 R.I. GEN. LAWS § 15-10-2 (West 2022); S.D. CODIFIED LAWS § 25-7-27; TENN. CODE ANN. § 71-5-103(7)–(8) (West 2022); VA. CODE ANN. § 20-88 (West 2009); W. VA. CODE § 9-5-9(e) (West 2018).

[72] MISS. CODE ANN. § 43-31-25 (West 2022).

[73] P.R. LAWS ANN. tit. 8, § 712 (West 2002).

[74] CAL. FAM. CODE ANN. § 4403 (West 2022); IND. CODE ANN. § 31-16-17-2 (West 2022); IND. CODE ANN. § 31-16-17-4 (West 2022); 23 PA. STAT. AND CONS. STAT. § 4603 (West 2005); P.R. LAWS ANN. tit. 8, § 712 (2022); 15 R.I. GEN. LAWS § 15-10-4 (2022).

[75] LA. STAT. ANN. § 13:4731 (2022).

[76] Edelstone, *supra* note 1, at 506.

[77] N.J. STAT. ANN. § 44:4-102 (West 2023).

[78] N.D. CENT. CODE ANN. § 14-09-10 (West 2022).

[79] Trinity Med. Ctr. v. Rubbelke, 389 N.W.2d 805 (N.D. 1986). Although the medical center could bring an action against the child, the action in this case was unsuccessful because the medical center, in a stipulated settlement, released the parents from the original obligation; because the parents were released from this obligation, the children were also released from any liability under state statute. *Id.*

[80] 23 PA. STAT. AND CONS. STAT. § 4603 (West 2005).

[81] Presbyterian Med. Ctr. v. Budd, 832 A.2d 1066 (Pa. Super. 2003).

uncompensated costs of care.[82] Rhode Island also allows the director of any licensed private charity to be a party to a lawsuit brought by an indigent parent or the state against the child.[83] While not specifically permitted in the state statute, a South Dakota court allowed a nursing home to bring an action against the child of an indigent parent to recover the costs of care.[84]

The last enforcement mechanism provided for in state statutes is criminal liability, which does not actually enforce the filial responsibility, but rather creates an incentive to fulfill the duty by threatening punishment. Ten states create criminal liability or provide for criminal punishment as a part of their parental support statutes. Connecticut law only provides for criminal liability and the sentence for nonsupport is imprisonment of one year or less.[85] Indiana, in addition to creating civil liability, also makes nonsupport of a parent a Class A misdemeanor.[86] Kentucky only provides for criminal liability for nonsupport; a first offense for nonsupport is a Class A misdemeanor with subsequent offenses carrying longer sentencing time.[87] Kentucky also has a separate charge of flagrant nonsupport, which is a Class D felony.[88] Massachusetts and Rhode Island also make nonsupport a crime punishable by a fine of no more than $200 and/or imprisonment of no more than one year.[89] North Carolina provides that nonsupport is a Class 2 misdemeanor for the first offense, and a Class 1 misdemeanor for any subsequent offense.[90] In Ohio, nonsupport is a misdemeanor of the first degree, with subsequent offenses being a felony of the fifth degree.[91] Pennsylvania punishes intentional nonsupport with up to six months imprisonment.[92] In Vermont, the penalty for criminal nonsupport is imprisonment of no more than two years and/or a fine of up to $300.[93] Lastly, in addition to providing civil liability for nonsupport, Virginia makes

[82] 40 R.I. GEN. LAWS ANN. § 40-5-13 (West 2022).

[83] 15 R.I. GEN. LAWS ANN. § 15-10-4 (West 2022).

[84] Americana Healthcare Ctr. v. Randall, 513 N.W.2d 566 (S.D. 1994).

[85] CONN. GEN. STAT. ANN. § 53-304(a) (West 2022). There have been arguments that CONN. GEN. STAT. § 46b-215 imposes a civil liability for children to provide support for their aging parents. *See* Katherine C. Clark, *A Duty to Reform: Updating Connecticut's Filial Responsibility Statutes*, 29 QUINNIPIAC PROB. L.J. 45, 58–59 (2015). However, a judge in a recent Connecticut case rejected this argument, recognizing that § 46b-215 only creates a duty for spousal and child support, not parental support. *See* Sechler-Hoar v. Tr. U/W of Gladys G. Hoart, 3:17-CV-01968 (KAD), 2020 WL 292314 (D. Conn. Jan. 21, 2020).

[86] IND. CODE ANN. § 35-46-1-7 (West 2022).

[87] KY. REV. STAT. ANN. § 530.050 (West 2021). "For a second offense, the person shall receive a minimum sentence of seven (7) days in jail. For a third or any subsequent offense, the person shall receive a minimum sentence of thirty (30) days in jail." *Id.*

[88] *Id.*

[89] MASS. GEN. LAWS ch. 273, § 20 (West 2022); 15 R.I. GEN. LAWS § 15-10-1 (West 2022).

[90] N.C. GEN. STAT. ANN. § 14-326.1 (West 2022).

[91] OHIO REV. CODE ANN. § 2919.21 (West 2019).

[92] 23 PA. STAT. AND CONS. STAT. § 4603 (West 2005).

[93] VT. STAT. ANN. tit. 15, § 202 (West 2022).

nonsupport a misdemeanor punishable by a fine of up to $500 and/or a jail sentence of no more than twelve months.[94]

IV. IS THE RESPONSIBILITY ENFORCEABLE? IS IT ACTUALLY ENFORCED?

Filial responsibility laws are enforceable, yet states and courts rarely enforce them. Filial duty laws have been challenged on Equal Protection and Due Process grounds, and courts have rejected these arguments and upheld the constitutionality of filial duty laws. In one California case, a son and his parents brought a suit against the government alleging a violation of their equal protection rights; they argued that the statute created suspect classifications by distinguishing between people on the basis of wealth and on the basis of ancestry.[95] The court rejected these arguments and upheld the statute creating a duty for children to support their indigent parents under rational basis review.[96] In a South Dakota case, the court rejected both the equal protection and due process arguments of a son challenging the statute's enforcement because he lived in a different state.[97] The court rejected both of these arguments and held that an action could be brought against him because he had numerous contacts with the state.[98]

Even though filial responsibility statutes are enforceable, that does not mean that they are enforced. First, it is difficult to determine whether these laws are being enforced because cases are not always reported and there are no uniform labels to find filial duty cases.[99] However, it appears that parental support laws are rarely enforced, especially when compared to child or spousal support laws.[100] Second, enforcing these statutes would be an "administrative nightmare" because authorities would need to make individualized assessments for each case based on a myriad of factors.[101] Third, the lack of enforcement against adult children is also due to the rise of federal and state support for older adults through Social Security and Medicare.[102] These social programs not only give support to indigent older adults, but their rules also create issues such that if a child provides financial support, the older parent risks losing the federal funding because their income is over the statutory limit.[103]

Pennsylvania and South Dakota are the two states where parental support laws are enforced most frequently.[104] However, the driving force

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[94] VA. CODE ANN. § 20-88 (West 2022).
[95] Swoap v. Super. Ct., 10 Cal.3d 490, 504 (1973).
[96] *Id.*
[97] Americana Healthcare Ctr. v. Randall, 513 N.W.2d 566 (S.D. 1994).
[98] *Id.*
[99] Pearson, *supra* note 2, at 279–80.
[100] *Id.* at 272.
[101] Edelstone, *supra* note 1, at 510.
[102] Pearson, *supra* note 2, at 285–86.
[103] Edelstone, *supra* note 1, at 508.
[104] Pearson, *supra* note 2, at 273.

behind this enforcement is third-party creditors or nursing facilities seeking reimbursement for care already provided to the indigent parent.[105] Three cases arising out of Pennsylvania from the past thirty years required that the child of an indigent parent pay the medical center or nursing home for the cost of care of the parent.[106] Two South Dakota cases from the 1990s required the child of an indigent parent to pay either a hospital or nursing home for the costs of care for the parent under the state's filial duty statute.[107]

V. SHOULD FILIAL RESPONSIBILITY LAWS BE ENFORCED ONCE THE PARENT REACHES THE AGE OF SIXTY-FIVE?

As noted above, Connecticut is the only state to restrict its filial responsibility law based on the age of the parent.[108] Section 53-304 of the Connecticut General Statutes only makes failure to support a parent a crime if that parent is under the age of sixty-five.[109] This age limitation was added in 1967 under Public Act 746, Section 6.[110] The passage of this amendment to the Connecticut statute came only two years after the federal enactment of Medicare, which provides medical insurance coverage to Americans aged sixty-five and older.[111] In discussions by the Connecticut Joint Standing Committee on Public Welfare and Humane Institutions, there were conversations about adding this age limitation for parents because those over sixty-five would be receiving state aid.[112] Concern was expressed about the interests of the adult children and how this requirement to provide financial support to their indigent parents would take away from their ability to provide for their own families.[113] Furthermore, at that time the state was spending large amounts of money to enforce this parental support requirement with negligible returns on that investment.[114] This begs the

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[105] *Id.*

[106] Savoy v. Savoy, 641 A.2d 596, 598 (Pa. Super. 1994) (requiring the son to provide monthly payments to cover his mother's past medical expenses; even though the mother brought the suit, the son had to make payments to the hospital). Presbyterian Med. Ctr. v. Budd, 832 A.2d 1066 (Pa. Super. 2003) (holding that a nursing home could recover against a daughter for the costs of the mother's care under the filial responsibility laws because the daughter failed to apply for Medicaid coverage after promising to do so). Health Care & Ret. Corp. Am. v. Pittas, 46 A.3d 719 (Pa. Super. Ct. 2012) (holding the son conditionally liable—pending Medicaid approval—for his mother's $93,000 cost of care from a nursing home).

[107] Americana Healthcare Ctr. v. Randall, 513 N.W.2d 566 (S.D. 1994) (requiring the son to pay for the costs of his mother's medical care from trust funds inherited from his mother). Prairie Lakes Health Care Sys., Inc. v. Wookey, 583 N.W.2d 405 (S.D. 1998) (holding that the hospital could collect for the costs of care provided to the father from the son under the filial responsibility law).

[108] CONN. GEN. STAT. ANN. § 53-304 (West 2022).

[109] *Id.*

[110] 1967 Conn. Pub. Acts 19.

[111] *50 Years of Medicare: How Did We Get Here?*, THE COMMONWEALTH FUND, https://interactives.commonwealthfund.org/medicare-timeline/ (last visited Nov. 4, 2022).

[112] CONN. JOINT STANDING COMM. ON PUB. WELFARE & HUMANE INSTS., STENOGRAPHER'S NOTES, at 208 (1967).

[113] *Id.*

[114] *Id.* at 209–10.

question of whether there should be a parental age limit for the filial responsibility, and whether other states should change their statutes to create an age limit, or whether courts should refuse to enforce these laws after the parent reaches the age of sixty-five.

Filial responsibility laws should only apply to indigent parents under the age of sixty-five. As shown by all of the state statutes on filial support, this responsibility is a qualified quid pro quo duty; adult children only need to provide care and support when the parent cannot provide it for themselves. Thus, another qualification to this duty would not be too far of a departure from the current statutory schemes. By placing an age limitation on the indigent parent, this guarantees that the adult child's interests will be protected as they themselves grow older, while accounting for state assistance to the elderly.

First, filial responsibility laws can impose undue burdens on the family members who are made to provide money and other support to their indigent parents.[115] While state laws may condition support on the child's ability to pay and state courts are supposed to take ability to pay into consideration, this is not always the case.[116] Additionally, as the parents get older, they are more likely to have older adult children who are nearing or already at retirement age and on a limited income. On the other hand, under some laws, if a child cannot pay for the medical care of the parent, they may be required to provide the care themselves.[117] This disrupts the adult child's ability to earn income and has a gendered impact so that adult female children bear the burden more frequently.[118] Thus, while it could be beneficial to indigent parents to require their adult children to provide some support, the interests of the adult children must also be weighed. While some state statutes try to impose a balancing requirement, they do not always work and may place other non-financial burdens on adult children. Therefore, once the parent reaches sixty-five and is eligible to receive Social Security and Medicare, any statutory requirement on the adult child to provide support should be lifted. Adult children are obviously free to continue providing support on their own volition, but the state should not impose a burden once the parent is receiving state financial support.

Second, on the rare occasion that filial responsibility laws are enforced, the parent is not a party to the action and is not receiving a direct benefit from the lawsuit. Rather, the recent trend is that the action is brought by a nursing home or third-party creditor.[119] Cases such as *Pittas*, *Budd*, and

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[115] Clark, *supra* note 85, at 50; Kara Wenzl, *Losing Loved Ones and Your Livelihood: Re-Evaluating Filial Responsibility Laws*, 29 LOY. CONSUMER L. REV. 391, 391 (2017).

[116] Wenzl, *supra* note 115 (discussing Health Care & Ret. Corp. Am. v. Pittas, 46 A.3d 719 (Pa. Super. Ct. 2012) (where the son was made to pay for his mother's nursing home bill despite not having the financial means to pay).

[117] Clark, *supra* note 85, at 50.

[118] Wenzl, *supra* note 115, at 400–01.

[119] *See supra* notes 106–09 and accompanying text.

Wookey should be concerning to adult children because in those cases it was the nursing homes, not the indigent parents, collecting from the children. This trend of nursing homes and other third-parties bringing lawsuits against adult children will continue so long as long-term care costs continue to rise and adults are ill-prepared for these costs.[120] Adult children should not continue to bear these costs because they need to save for their own retirement and long-term care for when they are elderly. Thus, as noted above, legislatures should amend their filial responsibility statutes to relieve the adult child of liability once the parent reaches sixty-five. However, this alone will not solve the issue. Something must be done to control the skyrocketing costs of long-term care in America, and Medicaid programs should be strengthened to provide better coverage for long-term care. Alternatively, Medicare could be improved to provide long-term care coverage to all elder adults in America, thus lifting the financial burden off of them and their families.

VI. CONCLUSION

The filial responsibly placed on children of indigent parents is not the same responsibility that parents have when raising their children. Only twenty-five states, plus Puerto Rico, have laws creating a legal duty for support of an indigent parent. Under these laws, filial obligations only arise when the child meets certain conditions, such as having sufficient means to provide support, being of sufficient age, or living in the same state as the parent. Furthermore, while children are generally required to provide for the general support of their indigent parents, some states limit this to only require children to pay for medical or burial expenses. On top of these statutory qualifications to the duty to provide care, these laws are rarely enforced. Only two states, Pennsylvania and South Dakota, have recently enforced their filial duty laws to make children pay for the care of their parents. However, the payments did not go to the parents; they went to the medical center providing the care. This reflects the trend of allowing the state or third parties to bring claims against the child, while parents only have a civil cause of action in six states. Therefore, states should amend their filial responsibility statutes to only impose a duty on adult children whose parents are under sixty-five; this provides a solution so that the needs and interests of the parents and children are weighed and balanced.

[120] Wenzl, *supra* note 115, at 397.

Deflategate Revisited: Over-Inflated Commissioner Authority Undermines the NFL's Disciplinary Process

FORREST A. NOIROT[†*]

I. INTRODUCTION

Arbitration provides labor unions and employers several benefits. It offers an expedient, less expensive, and private method for settling internal disputes between a labor union and business.[1] Crucially, it delivers finality for the parties.[2] Arbitration proceedings also aid in ensuring that courts, which lack subject matter expertise, do not intervene.[3] The "Deflategate" debacle—which is still receiving media attention[4]—provides an excellent avenue to examine the importance of collective bargaining in professional athletics. More specifically, the need to bargain for a fair disciplinary process for athletes accused of wrongdoing. Such a simple allegation—the under-inflation of footballs—led to a public legal battle that cost the National Football League (NFL), NFL Players Association (NFLPA), and New England Patriots an estimated $22.5 million collectively.[5]

Quarterback Tom Brady's (Brady) case served as an illuminating spotlight on the deficiencies of the NFL's disciplinary process, a process which the NFLPA quite literally bargained for. It could have led to meaningful change, but it did not. More broadly, the entire Deflategate debacle is informative for all unions engaged in collective bargaining. Despite its team of lawyers, the NFLPA chose not to focus on the disciplinary procedures, helping to create an unfair process. As a result, the

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[1] Steve J. Ahn, *The "Industrial Law of the (NFL) Shop": How Arbitration Advantages Played Out in the "Deflategate" Controversy*, 71 DISP. RESOL. J. 147, 148 (2016).

[2] *Id.*

[3] *Id.*

[4] *See* Tyler Sullivan, *New Deflategate revelations paint the NFL in a bad light during infamous saga with Tom Brady and Patriots*, CBS SPORTS (Feb. 7, 2022, 11:40 AM), https://www.cbssports.com/nfl/news/new-deflategate-revelations-paint-the-nfl-in-a-bad-light-during-infamous-saga-with-tom-brady-and-patriots/; Kevin Seifert, *What really happened during Deflategate? Five Years Later, the NFL's 'Scandal' Aged Poorly*, ESPN (Jan. 18, 2020), https://www.espn.com/nfl/story/_/id/28502507/what-really-happened-deflategate-five-years-later-nfl-scandal-aged-poorly; Darren Hartwell, *Report: NFL Covered Up Key Deflategate Evidence that Favored Pats*, NBCSPORTS.COM (Feb. 7, 2022), https://www.nbcsports.com/boston/patriots/report-nfl-covered-key-deflategate-evidence-favored-patriots.

[5] Darren Rovell, *Estimated Deflategate Cost: $22.5 Million*, ESPN (June 1, 2016), https://www.espn.com/nfl/story/_/id/15873396/nfl-estimated-deflategate-cost-22-million-tom-brady-new-england-patriots-roger-goodell.

Commissioner can dictate what punishment will be ordered and preside over any appeals of his decision. Further he has the authority, *inter alia*, to determine what evidence may be brought and the scope of discovery. Meanwhile, any appeals to the court system inevitably result in affirmation of the Commissioner's decision because of the judicial deference to arbitration agreements as bargained for by the parties. If an unfair disciplinary process can be accepted by the parties in the NFL, it can happen in collective bargaining agreements for any labor organization.

This note aims to examine the role of arbitration in the NFL's disciplinary process. Specifically, how the NFL Collective Bargaining Agreement (CBA) grants the Commissioner (Goodell) broad authority to determine punishment and hear any appeals concerning that punishment. Deflategate should have served as a lesson to the NFLPA that the disciplinary process it agreed to was fundamentally flawed in that it granted the Commissioner broad power to discipline players as he saw fit, with little to no review of his decisions. Yet, the organization still failed to advocate for improvements to that process in the recently approved CBA that took effect at the start of the 2022 season. This note will examine the controlling law around arbitration of disputes under CBAs, the NFL's process under the old CBA (which was in force from 2011-2021), the facts of Brady's case, the reasoning of the Court of Appeals for the Second Circuit for refusing to vacate Brady's suspension, the disciplinary process for other professional sports leagues, and the process under the new NFL CBA. With this foundation, the note will provide critical recommendations that the NFLPA can bargain for in the next iteration of the NFL CBA that will enhance fairness and minimize negative public perception that damages the players and the league.

II. LEGAL BACKGROUND

A. Labor Management Relations Act

In 1947, the Labor Management Relations Act[6] (LMRA, also known as the Taft-Hartley Act) amended the National Labor Relations Act[7] (NLRA).[8] The LMRA governs disputes involving the assertion of rights under a collective bargaining agreement.[9] It promotes "industrial stabilization through the collective bargaining agreement," and emphasizes the private arbitration of grievances.[10] Further, it seeks to avoid government

[6] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141–44, 167, 171–75, 175a, 176–83, 185–87.

[7] National Labor Relations Act, 29 U.S.C. §§ 151–69.

[8] *1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited May 12, 2022).

[9] Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001).

[10] United Steelworkers Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

intervention in labor disputes, instead preferring private resolution by the parties.[11]

Arbitration agreements are the result of negotiations between parties, and therefore reflect their "priorities, expectations, and experience."[12] Arbitrators are selected by the parties because of their expertise and ability to "interpret and apply [the] agreement in accordance with the 'industrial common law of the shop.'"[13] The careful bargaining of the parties to draft a CBA and select an arbitrator results in courts reviewing arbitration awards in a very limited manner.[14] Further, courts are not permitted to review arbitrator decisions on the merits, even if there are allegations that the decision is based on factual errors or misinterpretations of a party's arguments. Instead, courts only look to see if the arbitrator acted within the scope—as defined in the CBA—of his authority. So long as the award "'draws its essence from the collective bargaining agreement' and is not merely the arbitrator's 'own brand of industrial justice,'" the courts must affirm it.[15] When the arbitrator acts within the scope of his authority, and one of the parties is unsatisfied with his decision, the solution is not judicial intervention. Instead, the parties need to draft their agreement to reflect the scope of power they wish the arbitrator to have.[16]

This standard for judicial review of arbitration awards—whether the arbitrator acted within the scope of his authority, and whether the award draws its essence from the CBA and is not the arbitrator's own brand of industrial justice—is an appropriate standard for determining if vacatur is awarded. Labor arbitration is a substitute for industrial strife, and finality is crucial in fostering peaceful settlements of disputes between union leaders (NFLPA) and management leaders (NFL) who are locked into a contractual relationship that cannot end because neither side can function without the other.[17] If unions or companies could seek judicial review of arbitration awards more easily, the incentive to resolve disputes quickly and privately would be lost, which would increase the risk of labor strife and disrupt commerce (e.g., the NFL Lockout of 2011).[18] Therefore, courts should be deferential, and vacate awards on a limited basis.

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[11] 29 U.S.C. § 171. *See also* Int'l Brotherhood Elec. Workers, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 714 (2d Cir. 1998).

[12] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 536 (2d Cir. 2016).

[13] Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).

[14] *Major League Baseball Players Ass'n*, 532 U.S. at 1728.

[15] *Int'l Brotherhood Elec. Workers*, 143 F.3d at 714 (quoting United Steelworkers Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

[16] United Bhd. Carpenters & Joiners Am. V. Tappan Zee Constructors, LLC, 804 F.3d 270, 275 (2d Cir. 2015).

[17] Stephen A. Plass, *Federal Arbitration Law and the Preservation of Legal Remedies*, 90 TEMP. L. REV. 213, 256 (2018).

[18] *Id.*

B. Federal Arbitration Act

Questions that come up during arbitration that are procedural in nature (what evidence to include or exclude, which witnesses to hear) are left to the discretion of the arbitrator and are not ordinarily scrutinized by courts.[19] However, under the Federal Arbitration Act (FAA), there is an exception that grants courts the authority to vacate an arbitration award. Under § 10 of the FAA, the court can vacate an award where:

> (1) the award was procured by corruption, fraud, or undue means; (2) . . . there was evident partiality or corruption in the arbitrators, or either of them; **(**3) . . . the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) . . . the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[20]

While this limitation does exist, the FAA does not apply to arbitrations conducted pursuant to the LMRA, but federal courts have looked to the FAA for guidance.[21] Further, the circuit courts have been divided on whether the requirement of "fundamental fairness" applies to arbitration awards under the LMRA.[22] The Second Circuit (which had jurisdiction in Brady's case) previously held that an arbitration determination will be subject to evidentiary review only if "fundamental fairness is violated."[23] The court did not decide whether the "free-floating procedural fairness standard" of the FAA needed to be imported into its review of arbitration awards conducted pursuant to the LMRA.[24] Instead, the court determined that the Commissioner's procedural decisions did not violate the CBA, which made the fundamental fairness question a moot point that they did not need to address.[25]

C. NFL CBA (2011–21)

The older version of the CBA, which governed the disciplinary process during Deflategate, was entered into by the NFLPA and the NFL on August

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[19] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 (1987).

[20] 9 U.S.C. § 10.

[21] *United Paperworkers Int'l Union*, 484 U.S. at 40 n.9.

[22] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 545 n.13 (2d Cir. 2016).

[23] Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997).

[24] *Nat'l Football League Mgmt. Council*, 820 F.3d at 545 n.13.

[25] *Id.* at 532.

4, 2011.[26] After a contentious and drawn-out bargaining process, which lasted from 2008 to 2011, the two sides agreed to a deal. The major area of contention was how revenue would be shared, and although the players received the share they desired, one of the concessions they made was for broad power over player discipline to remain with the Commissioner.[27]

The relevant portions of the CBA that were at the center of the Deflategate saga are contained in Article 46, titled "Commissioner Discipline," which consists of two pages.[28] The Commissioner has the ability to fine or suspend a player (discipline) for conduct on the field, and for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."[29] The Commissioner will send written notice of the discipline to the player and the NFLPA.[30] The player, or the NFLPA with the player's approval, may appeal the decision within three days of the written notification.[31]

When an appeal arises, the Commissioner must consult with the Executive Director of the NFLPA and may appoint one or more individuals to serve as the hearing officer.[32] However, the Commissioner may, at his discretion, serve as the hearing officer of any appeal.[33] In essence, this caveat not only grants the Commissioner the power to hand out the initial punishment, but also gives him the power to uphold that punishment on appeal. Further, this appeal process governs punishments that are issued pursuant to the CBA and the Personal Conduct Policy,[34] which only bolsters the Commissioner's disciplinary strength.

The CBA also provides a limited explanation of how the discovery process will work. In an appeal, the parties are required to "exchange copies of any exhibits upon which they intend to rely," at least three days before the hearing.[35] Any exhibits that are not produced to the other side before

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[26] NFL & NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT, Preamble (2011), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf [hereinafter 2011 NFL CBA].

[27] *See* Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 14–27 (2012).

[28] *See* 2011 NFL CBA, *supra* note 26, at Art. 46.

[29] *Id.* at Art. 46 § 1(a).

[30] *Id.*

[31] *Id.*

[32] *Id.* at Art. 46 § 2(a).

[33] *Id.*

[34] 2011 NFL CBA, *supra* note 26, at Art. 46 § 2(a); *see also* NFL, PERSONAL CONDUCT POLICY 7 (2015), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/PersonalConductPolicy2015.pdf [hereinafter 2015 PCP] (stating that "[a]ppeals of any disciplinary decision will be processed pursuant to Article 46 of the Collective Bargaining Agreement . . ."). The Personal Conduct Policy, which was unilaterally imposed by Goodell and the NFL, acts as a supplement to the CBA. It elaborates on what players can be punished for.

[35] 2011 NFL CBA, *supra* note 26, at Art. 46, § 2(g)(i).

those three days will not be allowed to be introduced at the hearing.[36] The players are given a significantly greater right of discovery in other proceedings under the CBA, specifically in Article 15 and Article 16. Those both allow "reasonable and expedited discovery."[37]

The limited nature of discovery under the CBA makes it even harder to challenge an arbitral award involving conduct detrimental because, as stated above, the courts treat CBAs deferentially, and the fact that the discovery provision in Article 46 is limited is unlikely to be enough for vacatur because the parties bargained for its limited scope. Thus, in situations such as Brady's, where he sought vacatur because of the Commissioner's refusal to permit discovery of internal notes from the investigation following Deflategate, courts are unlikely to rule that the arbitration award violated "fundamental fairness."

III. DEFLATEGATE

A. Facts of Deflategate

At the end of the 2014–15 regular season, the New England Patriots, led by Tom Brady, entered the playoffs with the number one overall seed in the AFC (American Football Conference) after completing their season with twelve wins and four losses.[38] In the divisional round of the playoffs, the Patriots defeated the Baltimore Ravens in a close game (thirty-five to thirty-one).[39] Their next opponent was the Indianapolis Colts in the AFC Championship Game. The teams met at Gillete Stadium—New England's home-field in Foxborough, Massachusetts—on January 18, 2015.[40] The temperature during the game hovered around forty-eight degrees.[41]

The game was close in the first half, but New England was up by ten points going into halftime (seventeen to seven).[42] However, prior to half-time, Colts' linebacker D'Qwell Jackson intercepted a Tom Brady pass.

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[36] *Id.*

[37] *See id.* at Arts. 15, 16. Article 15, titled "System Arbitrator" outlines the jurisdiction of the System Arbitrator, who has authority to enforce articles 1, 4, 6–19, 26–28, 31, and 65–67, none of which specifically cover player discipline. *Id.* at Art. 15, §1. Article 16, titled "Impartial Arbitrator" expresses that the impartial arbitrator has the exclusive jurisdiction to "determine disputes that are specifically referred to the Impartial Arbitrator pursuant to the express terms of this Agreement." *Id.* at Art. 16, §1. None of those disputes that expressly referred to the impartial arbitrator deal with player discipline or, most notably, commissioner discipline as discussed in this note. *See id.* at § 2.

[38] *2014 NFL Standings & Team Stats*, PRO FOOTBALL REFERENCE, https://www.pro-football-reference.com/years/2014/#all_AFC (last visited Apr. 11, 2022).

[39] *Pats erase two 14-point deficits vs. Ravens, into AFC title game again*, ESPN (Jan. 11, 2015), https://www.espn.com/nfl/recap/_/gameId/400749515.

[40] *Colts vs. Patriots – Game Summary*, ESPN, https://www.espn.com/nfl/game/_/gameId/400749520 (last visited Apr. 2, 2022).

[41] *Past Weather in Foxborough, Massachusetts, USA – January 2015*, TIME&DATE, https://www.timeanddate.com/weather/@4937222/historic?month=1&year=2015 (last visited Mar. 31, 2022).

[42] *Colts vs. Patriots*, *supra* note 40.

After the play, he believed that the football felt under-inflated (below the minimum pressure of 12.5 pounds per square inch), and he reported this to Colts' personnel on the sideline.[43] The Colts' personnel informed NFL officials, who tested all Patriots and Colts footballs at halftime with two air gauges.[44] The court stated that all of the Patriots' balls tested were found to be below 12.5 pounds per square inch on both gauges.[45] After their slow start in the first half, the Patriots played their best in the second half, scoring twenty-eight points en route to a forty-five to seven victory.[46] They would later play the Seattle Seahawks in Superbowl XLIX, winning twenty-eight to twenty-four.[47]

During the initial stages of Deflategate, it was reported by Chris Mortenson that eleven of the twelve Patriots' game balls were underinflated, but this report later turned out to be incorrect.[48] It was also reported that Mortenson got this information from NFL Executive Vice President of Football Operations Troy Vincent.[49] Additionally, the NFL, on direct orders from NFL general counsel Jeff Pash, "expunged" records of PSI (pounds per square inch) numbers taken during the 2015 season to determine the impact of weather on pressure in footballs.[50] Under the Ideal Gas Law, air pressure in balls can rise during warm days, and drop during cold days.[51] The measurements taken during the 2015 season produced numbers that were outside of the range allowed by the NFL (12.5–13.5 PSI),[52] meaning that footballs used by the Patriots were consistent with the Ideal Gas Law, and the loss of air pressure could have been due to the cold temperature.

On January 23, 2015, the NFL announced that it had retained Ted Wells, and the law firm of Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") to conduct an independent investigation into whether the balls had been tampered with before or during the game.[53] The ensuing 139-page report (referred to as the "Wells Report") was released on May 6, and concluded that it was "more probable than not" that two Patriots' equipment officials (Jim McNally and John Jastremski) had "participated in a deliberate

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[43] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016).

[44] *Id.* at 532–33.

[45] *Id.* at 533.

[46] *See Patriots Take AFC Championship over Colts 45-7*, CBS NEWS (Jan. 18, 2015, 10:07 PM), https://www.cbsnews.com/news/patriots-take-afc-championship-over-colts-45-7/.

[47] *Patriots vs. Seahawks – Game Summary*, ESPN, https://www.espn.com/nfl/game/_/gameId/400749027 (last visited Apr. 3, 2022).

[48] Hartwell, *supra* note 4.

[49] Sullivan, *supra* note 4.

[50] Hartwell, *supra* note 4. These psi measurements, which were taken during halftime of 2015 regular season games "generated numbers beyond the permitted range of 12.5 to 13.5 psi, with the reading showing a direct correlation between temperature and air pressure." *Id.*

[51] Sullivan, *supra* note 4.

[52] *Id.*

[53] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 533 (2d Cir. 2016).

effort to release air from Patriot[s'] game balls after the balls were examined by the referee."[54] The report specifically found that McNally had obtained the game balls from the Officials Locker Room before the game, and had taken them to a single-toilet bathroom where he used a needle to deflate the footballs before bringing them to the field.[55]

The investigation team examined videotape evidence, witness interviews, and text messages between McNally and Jastremski months before the AFC Championship game.[56] The two discussed Brady's preference for less-inflated footballs.[57] McNally also referred to himself as the "deflator," and Jastremski agreed to provide McNally with a "needle" in exchange for "cash," "newkicks," and autographed Brady memorabilia.[58] The report also relied on Exponent, an "engineering and scientific consulting firm," which found that the under-inflated footballs could not "be explained completely by basic scientific principles, such as the Ideal Gas Law."[59] In a footnote in the Second Circuit's opinion, Judge Barrington stated that the Wells Report "concluded that the evidence did not establish that any other Patriots' personnel participated in or had knowledge of these actions," when referring to the actual deflation of footballs in the bathroom.[60]

The investigation also examined Brady's role.[61] The Report concluded that it was "more probable than not" that Brady had been "at least generally aware" of McNally and Jastremski's actions, and it was "unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady's," "knowledge," "approval," "awareness," and "consent."[62] The report also cited to a text message conversation between McNally and Jastremski, in which McNally complained about Brady and threatened to overinflate the game balls.[63] Jastremski explained that he had spoken to Brady the night before and "[Tom] actually brought you up and said you must have a lot of stress trying to get them done."[64] The investigation also pointed out that Brady had publicly stated he preferred less-inflated footballs in the past, been personally involved in a rule change in 2006 that permitted visiting teams to prepare game balls in accordance with the preferences of

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 533 (2d Cir. 2016).
[60] *Id.* at 552 n.3.
[61] *Id.* at 533.
[62] *Id.*
[63] *Id.*
[64] *Id.*

their quarterbacks, and had been a "constant reference point" in McNally and Jastremski's discussions.[65]

The report also found that Brady and Jastremski spoke on the phone for approximately twenty-five minutes on January 19 after more than six months of not communicating by phone or message.[66] Brady had also invited Jastremski to the quarterback room and had sent him several text messages that were designed to "calm him."[67] Brady also refused to make available "any documents or electronic information (including text messages and emails)."[68]

On May 11, 2015, NFL Executive Vice President Troy Vincent, Sr., sent Brady a letter notifying him that Goodell had authorized a four-game suspension.[69] Pursuant to Article 46 of the Collective Bargaining Agreement between the NFL and the NFL Players Association (NFLPA), Goodell suspended Brady for engaging in "conduct detrimental to the integrity of and public confidence in the game of professional football."[70] The letter cited to the Wells Report's conclusions regarding Brady's awareness and knowledge of the scheme, and his "failure to cooperate fully and candidly with the investigation," (e.g., refusing to produce electronic evidence such as emails and texts).[71]

Through the NFLPA, Brady filed an appeal of the suspension.[72] The Commissioner used the discretion granted to him by the CBA to serve as the hearing officer. The NFLPA wanted to challenge the conclusions of the Wells report and argued that Goodell had improperly delegated his authority to discipline players under the CBA.[73] The NFLPA also filed motions prior to the hearing seeking to recuse the Commissioner, compel NFL General Counsel Jeff Pash to testify about his role in the preparation of the Wells report, and to compel the production of Paul, Weiss's internal investigation notes.[74]

Goodell denied these motions on June 2, and June 22, 2015.[75] He determined that he should not recuse himself because he did not "delegate [his] disciplinary authority to Mr. Vincent" and did "not have any first-hand knowledge of any of the events at issue."[76] Goodell also refused to compel

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[65] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 533–34 (2d Cir. 2016).

[66] *Id.* at 534.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 534 (2d Cir. 2016).

[72] *Id.*

[73] *Id.* at 534.

[74] *Id.*

[75] *Id.* at 534–35.

[76] *Id.* at 535.

Pash's testimony because he did not "play a substantive role in the investigation," and the Wells report made it clear that it was prepared by the Paul, Weiss investigative team, and no one else.[77] The Commissioner also ruled that the CBA did not require the production of the Paul, Weiss investigation notes, and stated the notes did not play a role in the disciplinary decision.[78]

The Commissioner held a hearing on June 23, involving approximately ten hours of testimony and argument.[79] Before the hearing, it was revealed that Brady had—on March 6—instructed his assistant to destroy the cellphone that he had been using since November 2014.[80] Brady testified that he was disposing of the phone as he normally would, in order to protect his privacy.[81]

Goodell affirmed the four-game suspension in his final decision on July 28.[82] The Commissioner relied on the new evidence concerning the destroyed cell phone, finding that Brady had failed to cooperate with the investigation, but also "made a deliberate effort to ensure that investigators would never have access to information that he had been asked to produce."[83] The Commissioner used this phone incident to draw an inference that the cell phone would have contained inculpatory evidence.[84] The Commissioner stated:

> (1) Mr. Brady participated in a scheme to tamper with the game balls after they had been approved by the game officials for use in the AFC Championship Game and (2) Mr. Brady willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators.[85]

Goodell also compared Brady's conduct to that of a steroid user.[86] He argued steroid users seek to gain a similar systematic competitive advantage.[87] Thus, he affirmed the four-game suspension as appropriate here because it was similar to the suspension imposed on first time steroid users in the NFL.[88]

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[77] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 535 (2d Cir. 2016).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 535 (2d Cir. 2016).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

B. The Second Circuit's Decision

On the same day that Goodell affirmed Brady's suspension, the NFL sought confirmation of the award under the LMRA.[89] The NFLPA sought to vacate the suspension.[90] The District Court for the Southern District of New York vacated the award, holding that Brady lacked notice that he could be suspended for four games because the provisions that were relevant to his conduct only stated that fines could be imposed.[91] The district court also held that Brady was deprived of fundamental fairness by the Commissioner when he denied the NFLPA's motion to compel the production of the internal notes of Paul, Weiss, and excluded Pash's testimony about his role with the Well's report.[92] The Second Circuit then reversed the district court's holding and remanded it for affirmation of the arbitration award.[93]

The court noted that the "law of the shop" requires that the NFL provide players with notice of "prohibited conduct and potential discipline."[94] The main argument that the NFLPA and Brady made was that the suspension was improper because Brady was only on notice that his alleged conduct could lead to a fine.[95] The court concluded that the Commissioner's decision was "'plausibly grounded in the parties' agreement,' which is all the law requires."[96] The court reasoned that the reference to steroids was perfectly fine because the arbitrator is "entitled to generous latitude in phrasing conclusions," and that Brady was not deprived of notice.[97] The Commissioner was also, according to the court, within his discretion when he concluded that Brady had participated in the scheme to deflate footballs, rather than just being generally aware.[98] This shift, according to the court, was a reasonable assessment of the facts along with new information presented at the hearing.[99] The court also held that Brady did not lack notice that the NFL could discipline him for non-cooperation (destruction of his cell-phone) because the initial letter sent to Brady indicated that he was being punished for failing to cooperate (not providing electronic data).[100]

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[89] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 535 (2d Cir. 2016).

[90] *Id.* Though the NFLPA filed in Minnesota and the NFL filed in New York, the cases were consolidated and heard in New York. *Id.*

[91] *Id.* at 536.

[92] *Id.*

[93] *Id.* at 532.

[94] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 538 (2d Cir. 2016).

[95] *Id.*

[96] *Id.* at 539.

[97] *Id.* at 540.

[98] *Id.* at 542.

[99] *Id.*

[100] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 542–44 (2d Cir. 2016).

Further, the court emphasized that Article 46 does not limit the Commissioner's ability to reexamine the basis for a suspension.[101]

The court reiterated that procedural questions, like that of the exclusion of Jeff Pash's testimony, are left to the arbitrator to decide and was not "fundamentally unfair."[102] It noted that the League and NFLPA agreed to the CBA structure that granted responsibility for the "investigation and adjudication" to the Commissioner.[103]

In terms of the discovery argument, the Second Circuit reiterated that if the parties "wished to allow for more expansive discovery, they could have bargained for [it]."[104] The League argued that because the CBA did not require the exchange of investigatory notes, the exclusion of those notes should not permit vacatur of the award.[105] Further, the Commissioner determined that Brady was not deprived of fundamental fairness because the Commissioner did not review any of the notes or documents that were made by Paul, Weiss (except for the final report).[106]

Thus, the court (the majority) in Brady's case largely chose to defer to the Commissioner's authority under the CBA to interpret Article 46. The court held that any displeasure with the outcome of the Commissioner's disciplinary process must be resolved by the NFL and NFLPA; the court would not intervene.

The dissent in Brady's case appears more compelling for a number of reasons, and ultimately the Second Circuit was incorrect in its decision to reverse the district court. To begin, judicial review of an arbitration award consists of a two-step process: (1) whether the arbitrator acted within the scope of his authority under the CBA; and (2) whether the arbitral award "draws its essence from the agreement" and does not reflect an example of the arbitrator's own brand of justice.[107] The dissent pointed out that in deciding an appeal for conduct detrimental, the arbitrator can decide whether the misconduct *charged* actually occurred, the conduct was actually detrimental to the league, and if the penalty is permissible under the CBA.[108] The crucial point is that the arbitrator cannot base a decision on misconduct that is different from what was originally charged.

The Commissioner did exactly that in Brady's case. There are differences between what was found in the Wells report and the findings of the Commissioner in his final written decision. The Wells report, as noted

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[101] *Id.* at 544.
[102] *Id.* at 545.
[103] *Id.* at 546.
[104] *Id.* at 547.
[105] *Id.* at 546.
[106] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 546–47 (2d Cir. 2016).
[107] *See* Local 1199, Drug, Hosp. & Health Care Emp. Union v. Brooks Drug Co., 956 F.2d 22, 25 (2d Cir. 1992).
[108] Nat'l Football League Mgmt. Council, 820 F.3d at 549–50 (Katzmann, C.J., dissenting).

above, concluded that it was "more probable than not" that Tom Brady was "at least generally aware" of the Patriots' assistants release of air from the game balls, and that it was "unlikely" that they deflated the balls without Brady's "knowledge," "approval," "awareness," and "consent."[109] The Commissioner's final decision went further.[110] The decision found that Brady "knew about, approved of, consented to, and provided inducements and rewards in support of a scheme" that tampered with game balls.[111] While the Wells Report provided evidence that Brady provided the assistants (Jastremski and McNally) with memorabilia, there was never a conclusion that it was "more probable than not" that the gifts given by Brady to them were intended as a reward or payment specifically for deflating the footballs.[112] Thus, the Commissioner exceeded his authority under the CBA by basing his disciplinary decision on findings not made in the Wells report, and by not giving Brady adequate notice that this gift-giving would play a major role in the Commissioner's discipline.

The Commissioner's decision—to suspend Brady without pay for four games—also fails the second step of the analysis because it does not "draw its essence" from the CBA. This punishment was unprecedented and ignored a similar penalty. The NFL prohibits the use of "stickum,"[113] a violation of which results in a $8,268 fine.[114] The use of stickum and the deflation of footballs both encompass attempts to improve a player's grip and would seemingly make the prohibition of stickum as a good starting point for the Commissioner to determine appropriate discipline. Further, the NFL's justification for outlawing stickum—that it negatively impacts the integrity of the game and can provide an unfair advantage—is almost identical to what the Commissioner indicated about deflation of game balls—that they are an improper effort to gain a competitive advantage and threatens the integrity of the game.[115] The Commissioner ignored the stickum penalty (and all of its similarities), and relied on the penalty for violations of the NFL's steroid policy (discussed above). His fluctuating reasoning for Brady's discipline indicate that Commissioner Goodell did not base the discipline imposed on his interpretation of the CBA but was instead his own brand of "industrial justice."

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[109] *Id.* at 550.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Stickum is a "thick, dark yellow, glue-like material" that players would apply to their hands and arms which helped them grip and catch footballs. It was banned by the NFL in 1981. *Equipment Innovation: Sticky Gloves/Stickum*, NFL, https://www.nfl.com/100/originals/100-greatest/game-changers-77#:~:text=In%20the%201970s%20and%20early,their%20hands%2C%20like%20a%20magnet (last visited May 12, 2022).

[114] Nat'l Football League Mgmt. Council, 820 F.3d at 552 (Katzmann, C.J., dissenting).

[115] *Id.*

Regardless of the outcome in Brady's case, and his overall guilt, the only way to ensure that the process is fair requires the NFLPA to bargain for a more robust disciplinary process that proscribes what the Commissioner's authority is in disciplinary appeals that result in arbitration. To understand further how the NFLPA and NFL can improve their process, a review of how other professional sports league CBAs have limited Commissioner power and improved fairness is crucial.

IV. DISCIPLINARY PROCESSES IN OTHER CBAS

While the CBAs of the other major sports leagues give their respective commissioners broad disciplinary authority, they have more procedures built in that help to ensure that the disciplinary process is not dictated entirely by their commissioners. In the organized industrial-labor setting (e.g., motor vehicle manufacturing), there are procedures in place that also ensure appeals are not heard by the individual who initially imposed discipline.

A. Major League Baseball

The heart of the Major League Baseball ("MLB") Commissioner's power to discipline players is found in its CBA (referred to as the "Basic Agreement" by MLB), and its Constitution and Bylaws.[116] The Commissioner's power is laid out in Article XII, and is similar to the wording in the NFL CBA.[117] Article XII states, "a Player may be subjected to disciplinary action for just cause by his Club, the Chief Baseball Officer or the Commissioner. Therefore, in Grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed."[118] Further, it also establishes that, "[p]layers may be disciplined for just cause for conduct that is materially detrimental or materially prejudicial to the best interests of Baseball including, but not limited to, engaging in conduct in violation of federal, state or local law."[119] MLB is also required to give written notice to the player and the MLBPA when discipline is being imposed.[120]

Upon learning that the Commissioner is investigating the player, the player and MLBPA are required to provide "reasonable cooperation" with

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[116] *See* MAJOR LEAGUE BASEBALL CLUBS & MAJOR LEAGUE BASEBALL PLAYERS ASS'N, 2017–21 BASIC AGREEMENT Art. XII (2016), https://www.mlbplayers.com/_files/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf [hereinafter MLB CBA]. At the time of authoring this note, the MLB recently agreed to a new CBA, it has not yet been made public by the MLB or the MLBPA. Thus, the information contained herein involves the CBA that was in effect from 2017–21. Nevertheless, it still provides an excellent comparison to the NFL CBA.

[117] *Id.*

[118] *Id.* at Art. XII § A.

[119] *Id.* at Art. XII § B.

[120] *Id.* at Art. XII § C.

the investigation.[121] However, the player still retains the right to assert that he need not comply with the investigatory request because it is "unreasonable, irrelevant, overbroad, or ambiguous, or the requested information is covered by a recognized privilege."[122] Disputes of this nature are resolved by the Arbitration Panel (discussed further below), as expeditiously as possible.[123] In comparison, the 2011 NFL CBA did not require any sort of investigation by the NFL prior to imposing punishment.[124]

The MLB Commissioner can also conduct interviews of players in order to investigate, and the player and MLBPA are due "reasonable advance notice" of any interview.[125] Once the Commissioner's investigation is complete, and before any discipline is imposed, the parties conduct a "pre-discipline conference."[126] Any conversations at this conference are considered confidential and inadmissible in any grievance that challenges any discipline that is imposed on the player.[127] Before, or during this conference, the Commissioner is required to "describe the results of the investigation and the evidence supporting discipline."[128]

If the player is disciplined, he has the right to discover all documents and evidence "adduced during any investigation of the charges involved, including but not limited to [any] . . . that tend to negate a Player's guilt, . . . mitigate punishment, or . . . impeach any witness who will appear at any hearing challenging discipline."[129] These discovery procedures give baseball players an advantage as compared to their NFL counterparts. As explained above, Goodell retains the ability to decide what documents are discoverable for the disciplined player and NFLPA.

The actual procedures for grievance disputes in MLB are unique to each source of punishment. Players can challenge punishment that results from on-field conduct, or off-field conduct.[130] For on-field conduct (such as a fight), the grievance would be heard in front of the Special Assistant to the Commissioner, Chief Baseball Officer, or the Commissioner himself.[131]

The grievance procedure for off-field conduct discipline is different from discipline resulting from on-field conduct. The grievance has to first be brought up to the player's club, next to the League's Labor Relations Department, and then finally it is heard in front of the Arbitration Panel.[132]

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[121] *Id.* at Art. XII § D.
[122] MLB CBA, *supra* note 116, at Art. XII § D.
[123] *Id.*
[124] *See* 2011 NFL CBA, *supra* note 26, at Art. 46.
[125] MLB CBA, *supra* note 116, at Art. XII § D.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at Art. XI §§ B–C.
[131] *See* MLB CBA, *supra* note 116, at Art. XI § C (1)–(4).
[132] *See id.* at Art. XI § B.

The Arbitration Panel is a three-person panel, formed by each party selecting one arbitrator, and then agreeing on an impartial third arbitrator.[133] Most notably, as compared to the NFL[134], the MLB CBA does not give the Commissioner authority to appoint himself as the arbitrator to hear, and decide the appeal.[135]

The MLB procedures do not allow for the Commissioner to hear appeals for off-field discipline, instead requiring a three-person arbitration panel where the players have a say in who sits on the panel. As stated above, the NFL Commissioner in comparison can hear the appeals himself. Further, even when he does appoint a hearing officer, he only needs to "consult" with the NFLPA Executive Director before appointing a hearing officer. The NFL Commissioner has the sole ability to determine who will hear the case, whereas the MLB gives more control to the players regarding the appeal process by allowing them a say in the arbitration panel. The MLB also outlines the discovery procedures, whereas the NFL remains silent, leaving those decisions to the Commissioner.

B. National Basketball Association

The NBA Commissioner's authority to impose discipline on players is found in the NBA's Constitution and Bylaws, and that power is limited by the League's CBA.[136] The NBA's current CBA was ratified by the National Basketball Players Association ("NBPA") in December of 2016, went into effect on July 1, 2017, and will run through the 2023–24 NBA season.[137] In contrast, the most recent iteration of the NBA Constitution and Bylaws was agreed on in 2019.[138]

The Commissioner is empowered to discipline a player who, in the Commissioner's opinion, made a statement that has "an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member," or if the player is, "guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association."[139] This language is similar to that of the NFL and MLB, in that it gives the Commissioner broad discretionary power in issuing punishment.

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[133] *See id.* at Art. XI § A (9). If the MLBPA and MLB cannot agree on the third arbitrator, a list from the American Arbitration Association is provided, and the parties then narrow that list down to one. *Id*. In proceedings that go before an arbitrator and not the three-person panel, the Impartial Arbitrator presides. *Id.*

[134] *See supra* notes 32–33; *see infra* note 214.

[135] *See id.* at Art. XI.

[136] *See* NAT'L BASKETBALL ASS'N, CONSTITUTION AND BYLAWS Art. 35 §§ (b)–(f) (2019), https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2019/09/NBA-Constitution-By-Laws-September-2019-1.pdf [hereinafter NBA CONSTITUTION].

[137] *Collective Bargaining Agreement*, NAT'L BASKETBALL PLAYERS ASS'N, https://nbpa.com/cba (last visited March 29, 2022).

[138] *See* NBA CONSTITUTION, *supra* note 136.

[139] *Id.* at Art. 35 § (d).

This "best interests" clause is much the same as the NFL's "conduct detrimental" clause.

The grievance procedure under the NBA CBA is markedly different from the NFL's. The NBA uses a Grievance Arbitrator and a Player Discipline Arbitrator.[140] The Grievance Arbitrator is responsible for resolving disputes "involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract, including any dispute concerning the validity of a Player Contract or any dispute arising under the Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse."[141] The CBA also explains that any dispute that falls under the jurisdiction of the Grievance Arbitrator is referred to as a "Grievance."[142] However, whether a player's appeal of discipline goes to the Grievance Arbitrator, or the Player Discipline Arbitrator, is based on the severity of the punishment.[143] There is no distinct arbitrator for disputes involving actions taken by the Commissioner concerning the integrity of the game.

If the discipline imposed is a fine that is less than $50,000, a suspension that is less than twelve games, or a combination of both, then the player must first appeal to the Commissioner.[144] After the Commissioner reviews the appeal and makes a decision, the player can then file another appeal to the Player Discipline Arbitrator.[145] Once the Player Discipline Arbitrator makes a determination, the decision is final and binding.[146] This Arbitrator is a single person, who is agreed on by the NBA and the NBPA, and who has experience in professional basketball or is an attorney with experience as an arbitrator or mediator.[147] The CBA also outlines when and why the Player Discipline Arbitrator can be dismissed from his role.[148]

If the suspension is longer than twelve games, the fine exceeds $50,000, or both, then the Grievance Arbitrator handles the appeal.[149] The arbitrator is mutually agreed on by both parties at the beginning of the CBA and remains the arbitrator for the entirety of the CBA.[150]

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[140] NAT'L BASKETBALL ASS'N & NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT Art. XXXI §§ 1(a)(i), 9(a) (2017), https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf [hereinafter NBA CBA].

[141] *Id.* at Art. XXXI § 1 (a)(i).

[142] *Id.*

[143] *See id.* at Art. XXXI § 9.

[144] *Id.* at Art. XXXI § 9(a)(1).

[145] *Id.* at Art. XXXI § 9(a)(5).

[146] NBA CBA, *supra* note 140, at Art. XXXI § 9(a)(5)(c).

[147] *Id.* at Art. XXXI § 9(a)(5)(d). Further, the CBA gives some examples of a "person with experience in professional basketball (such as a former NBA coach, general manager, or player)." *Id.*

[148] *Id.* at Art. XXXI § 9(a)(5)(e).

[149] *Id.* at Art. XXXI § 9(b).

[150] *Id.* at Art. XXXI § 7(a). The NBA CBA also provides that the Grievance Arbitrator may be removed by either party during a six-day window (July 27 until August 1) of each year. NBA CBA, *supra* note 140, at Art. XXXI § 7(a).

While the NBA Commissioner can hear an appeal of his disciplinary decision, it is only for smaller punishments. Even when the Commissioner can hear the appeal to his decision, the player has another avenue—an appeal to the Player Discipline Arbitrator—which is not possible in the NFL. Rather than positioning the ultimate authority in the Commissioner, the NBA places considerable control in the hands of neutral arbitrators selected by both sides.

C. National Hockey League

The National Hockey League ("NHL") CBA, which is between the National Hockey League Players Association ("NHLPA") and the NHL, was ratified by the NHLPA on January 12, 2013,[151] and would have ended on September 15, 2022.[152] Most recently, the NHL and NHLPA ratified a four-year extension to the CBA on July 10, 2020, with the deal running through the 2025–26 season.[153] The NHL's discipline process is laid out in Articles 17, 18, and 18-A of its CBA.[154] Like the CBAs of the NFL, MLB, and NBA, the NHL CBA provides for discipline of players for their on-ice conduct[155] as well as conduct that occurs off-ice.[156] The NHL also lays out its procedure in a clear manner, and requires that the NHL and NHLPA distribute a copy of Article 18 (or a summary, agreed upon by the parties) to the players, coaches, and general managers when the regular season begins.[157] Each team is required to confirm—in writing—that it received Article 18, distributed it to all of its players, and each player provide a written acknowledgment that they received it.[158]

1. On-Ice Conduct

As its name suggests, "supplementary discipline for on-ice conduct" means any supplementary discipline imposed by the Commissioner (or his designee) for conduct of a player towards another player, coach, or on-ice official that occurred either on the ice or in the player bench or penalty bench area.[159] After an incident occurs, the NHL conducts a preliminary review of

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[151] *Collective Bargaining Agreement*, NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, https://www.nhlpa.com/the-pa/cba (last visited Apr. 8, 2022).

[152] *See* NAT'L HOCKEY LEAGUE & NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT (2012), https://www.nhlpa.com/the-pa/cba [hereinafter NHL CBA].

[153] NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, *supra* note 151.

[154] *See* NHL CBA, *supra* note 152, at Arts. 17, 18, 18-A.

[155] *Id.* at Art. 18.

[156] *Id.* at Art. 18-A.

[157] *Id.* at Art. 18 § 18.21. While this "explanatory notice" given to the players includes all of the information contained in Article 18 (which covers discipline for on-ice conduct) there is no requirement that Article 18-A, or a summary of 18-A, be provided to the players. *See id.* at Art. 18-A. Article 18-A outlines the process for player discipline involving off-ice conduct that the league seeks to punish. *Id.*

[158] NHL CBA, *supra* note 152, at Art. 18 § 18.21.

[159] *Id.* at Art. §18.1.

video footage, reports of on-ice officials, Officiating Managers, and written medical information from the teams (e.g., if two or more players were involved in a fight.)[160]

If the preliminary review indicates that a suspension between zero and five games might be appropriate, the League can continue with Supplementary Discipline via a telephonic hearing.[161] If a suspension of six games or more is warranted, then an in-person hearing must occur.[162] Before any hearing, the League is required to provide the NHLPA with the evidence outlined above.[163] Once the League makes its determination it must inform the player, team, and NHLPA before the league announces the decision to the media.[164]

The NHL may then file an appeal on the player's behalf directly to the Commissioner.[165] He must determine whether the initial decision was supported by "clear and convincing evidence."[166] The Commissioner has the authority to consider any and all evidence relating to the incident, even if that evidence was not available at the time of the initial discipline. If the decision appealed is a suspension for five games or fewer, the Commissioner has sole discretion to decide whether a hearing is required, and any decision he makes regarding the appeal is final and not subject to further review.[167] If the player discipline was for a suspension of six games or more, the Commissioner must conduct a hearing before rendering a decision.[168]
If the Commissioner affirms the six games or more suspension, the NHLPA can file an appeal of the Commissioner's determination to the "Neutral Discipline Arbitrator ("NDA")."[169] The NDA considers any evidence relating to the on-ice incident, and then determines whether the Commissioner's decision was supported by "substantial evidence."[170] Any decision by the NDA (whether affirming the suspension or vacating) is final and not subject to further review.[171] Notably, the NDA is jointly appointed by the NHL and NHLPA (and must have "substantial experience as an arbitrator or judge"[172]), and serves for the duration of the CBA.[173]

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[160] *Id.* at Art. 18 § 18.3(a). After the preliminary review, the League can choose to impose: no discipline, a fine, a suspension of five games or fewer, or a suspension of six games or more. *Id.* at Art. 18 § 18.5.

[161] *Id.* at Art. 18 § 18.8.

[162] *Id.* at Art. 18 § 18.9.

[163] NHL CBA, *supra* note 152, at Art. 18 § 18.8(c).

[164] *Id.* at Art. 18 § 18.11.

[165] *Id.* at Art. 18 § 18.12.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] NHL CBA, *supra* note 152, at Art. 18 § 18.13(a).

[170] *Id.* at Art. 18 § 18.13(c). The NDA also can consider additional evidence that was not available at the time of the initial hearing, or at the Commissioner's hearing. *Id.*

[171] NHL CBA, *supra* note 152, at Art. 18 § 18.13(c).

[172] *Id.* at Art. 18 §§ 18.14(a), (c).

[173] *Id.* at Art. 18 § 18.14(a).

2. Off-Ice Conduct

The Commissioner's authority for disciplining players for off-ice conduct is housed in Article 18-A of the CBA.[174] Similar to the NFL's "conduct detrimental" provision, the NHL Commissioner may impose discipline[175] for "conduct . . . that is detrimental to or against the welfare of the League or the game of hockey."[176] Once the League decides to begin an investigation, it must immediately notify the NHLPA.[177] Further, no interviews of players (whether they are subject to discipline, or not) may be conducted without notice to the NHLPA that gives reasonable time for it to participate.[178] The CBA further stipulates that the NHL will provide advance notice for interviews of non-players, and if the NHLPA cannot participate, the NHL must provide its notes and "other recording[s]" that relate to the interview.[179]

Before the hearing, the NHL is required to provide the player with the specifics of the allegations against the player, and why the league believes the player's actions rise to the level of requiring discipline.[180] Both parties are also required to disclose all evidence and witnesses that will be presented at the hearing.[181] The CBA also notably prohibits any discussion of the case between those involved with the "prosecution" and those who are involved in deciding the case (league officials, such as the Commissioner).[182] The Commissioner cannot impose discipline against a player without holding a hearing except in situations where the player's off-ice conduct may be the subject of criminal investigation.[183] In those situations, the league can suspend the player, without conducting any formal review as outlined above, if not suspending the player would "create a substantial risk of material harm to the legitimate interests and/or reputation of the League."[184] Thus, if a player is charged with a crime, and the League does nothing, it may negatively impact public perception of the NHL. Rather than suffering negative perception, the league may suspend the player without following the usual process.

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[174] *See id.* at Art. 18-A.

[175] Discipline can be either expulsion from the league or suspension, cancelling the players contract, or imposition of a fine. *Id.* at Art. 18-A §§ 18-A.2(a)–(c).

[176] *Id.* at Art. 18-A § 18-A.2.

[177] NHL CBA, *supra* note 152, at Art. 18-A § 18-A.3(a)(i).

[178] *Id.* at Art. 18-A §§ 18-A.3(a)(ii)–(iii).

[179] *Id.* at Art. 18-A § 18-A.3(a)(v).

[180] *Id.* at Art. 18-A § 18-A.3(b).

[181] *Id.*

[182] *Id.* at Art. 18-A § 18-A.3(f).

[183] NHL CBA, *supra* note 152, at Art. 18-A §§ 18-A.3(d), 18-A.5.

[184] *Id.* at Art. 18-A § 18-A.5.

After the Commissioner determines whether to impose discipline, the player may file an appeal to the Impartial Arbitrator[185] ("IA"), which then requires the proceeding be governed by the Grievance process found in Article 17 of the CBA.[186] Unlike in the NFL—which does not even have a requirement for an impartial arbitrator—the IA is agreed upon by both parties.[187] The IA then considers whether the Commissioner's determination was supported by "substantial evidence" and was not unreasonable based on: "(i) the facts and circumstances surrounding the conduct at issue; (ii) whether the penalty was proportionate to the gravity of the offense; and (iii) the legitimate interests of both the Player and the League."[188]

Prior to the hearing in front of the IA, the parties must exchange disclosure statements that contain the relevant documents that will be presented as evidence, and what they are being used to establish.[189] The NHL CBA also requires that both parties use their best efforts to ensure that witnesses are present at the arbitration hearing in order to testify.[190] After the hearing, the IA will then issue a written decision that is final and binding on the player, NHL, and NHLPA.[191]

The disciplinary process as outlined in the NHL CBA is more thorough than the NFL CBA. It has robust evidentiary procedures that require both sides to share information and ensures that appeals are heard by neutral parties. While the NHL CBA still rests great power in the Commissioner to discipline players, any appeal of the Commissioner's decision goes to another individual who is not subject to the control of the owners and is also experienced in arbitration.

D. CBA Between United Auto Workers Union & Ford Motor Company

Comparing the NFL's disciplinary process to how the auto industry disciplines its employees also provides a non-sports example that the NFL could look to for guidance. To do so, the agreement between the Ford Motor Company ("Ford") and the United Auto Workers Union ("UAW") will be examined. Ford needs no introduction; the automobile manufacturer has been churning out vehicles since 1903.[192] The UAW, on the other hand, is

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[185] Once the appeal is filed, Article 17 of the CBA kicks in, requiring that the NHL and NHLPA discuss potential resolutions or settlement of the grievance. *Id.* at Art. 17 § 17.4(a). If the parties cannot resolve the issue, the player who sought the appeal can then choose to arbitrate before the Impartial Arbitrator. *Id.* at Art. 17 § 17.5. However, the need for expediency can be enough to circumvent the grievance committee procedure just outlined. *Id.* at Art. 17 § 17.17.

[186] *Id.* at Art. 18-A § 18-A.4.

[187] NHL CBA, *supra* note 152, at Art. 17 § 17.6.

[188] *Id.* at Art. 18-A § 18-A.4.

[189] *Id.* at Art. 17 § 17.8.

[190] *Id.* at Art. 17, § 17.9(a).

[191] *Id.* at Art. 17, § 17.13.

[192] *Our History*, FORD, https://corporate.ford.com/about/history.html (last visited Oct. 20, 2022).

one of the primary labor organizations representing employees of the automotive industry.[193]

In the CBA (UAW CBA) between Ford and UAW the power to discipline employees can be found in the "Discipline and Discharge" section under "Company Responsibility."[194] It explains that Ford has the right to discipline and discharge employees "for cause, provided that in the exercise of this right it will not act wrongfully or unjustly or in violation of the terms of this Agreement."[195] When imposing discipline, any prior infractions that occurred more than eighteen months previously will not be taken into account.[196] Importantly, the UAW CBA never offers a more concrete definition of what exactly constitutes "cause."

Once an employee is disciplined—either by a discharge, layoff, reprimand, or warning—the employee's District Committeeperson is notified in writing.[197] The District Committeeperson represents employees at disciplinary hearings and during the grievance process.[198] The disciplinary action is final unless the Committeeperson—on the employee's behalf—files a written grievance within three days of the written disciplinary notice explained above.[199]

The Grievance Procedure has four stages. The first stage grievance hearing is basically an informal meeting between the employee and the employer to settle the issue, if possible.[200] If it cannot be settled orally and informally, the grievance can move to the second stage by referring the grievance to the Unit Committee.[201] At the second stage, a formal written account of the action is presented to the company's representative prior to a weekly held grievance meeting.[202] Members of the unit committee (representing the union) and representatives of Ford meet to consider the grievance.[203] The representative(s) of the company have the authority to adjust the discipline, and must give its decision in writing to the Union representative within one week of the last meeting.[204] At the third stage, the Unit Committee Chairperson writes a formal and complete account and appeal to the Plant Review Board.[205] The Plant Review Board then renders

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[193] *See* Joel Cutcher-Gershenfeld et al., *The Decline and Resurgence of the U.S. Auto Industry*, ECON. POL'Y INST. (May 6, 2015), https://www.epi.org/publication/the-decline-and-resurgence-of-the-u-s-auto-industry/.

[194] AGREEMENTS BETWEEN UAW AND THE FORD MOTOR COMPANY VOLUME I (2019), at Art. IV, § 3, https://uaw.org/uaw-auto-bargaining/fordcontract/ [hereinafter UAW-Ford CBA].

[195] *Id.*

[196] *Id.*

[197] *Id.* at Art. VII § 5(a).

[198] *Id.* at Art. VI § 11(a).

[199] *Id.* at Art. VII § 5(c).

[200] UAW-Ford CBA *supra* note 194, at Art. VII § 2.

[201] *Id.* at Art, VII § 2(d).

[202] *Id.* at Art. VII § 3(a), (c).

[203] *Id.* at Art. VII § 3(c).

[204] *Id.* at Art. VII §§ 3(e)–(f).

[205] *Id.* at Art. VII § 4(a).

a decision on behalf of Ford. The Review Board is composed of three people representing the UAW and three people representing Ford.[206]

In the fourth stage, which is the last, the appeal is to an impartial "Umpire" who is selected by both sides.[207] To get to that point, the National Ford Department of the International Union must appeal the decision that was made at the third stage. The Umpire can conduct investigations he or she deems proper, hold hearings open to the parties, and examine the witnesses of each party.[208] Further, each party can cross-examine all witnesses.[209] The Umpire's decision, after hearing and ruling on the grievance, is final and binding.[210] Further, the union is required to not encourage or accompany the employee in pursuing the appeal of the Umpire's decision in court.[211]

While appeals under the NFL's CBA are heard either by officers selected by the Commissioner or himself, the UAW-Ford CBA does not even allow for the possibility of the initial disciplinarian also presiding over the appeal. Moreover, there are more steps for an employee to go through that involve different individuals to hear the appeal. Lastly, it ends with an impartial arbitrator, which the NFL does not provide at the highest level of disciplinary review. The UAW-Ford CBA is far from perfect. Its largest flaw is the lack of a clear definition of what constitutes discipline for "cause."

V. PROCESS UNDER THE NEW NFL CBA

A. More of the Same

The NFL's current CBA was entered into by the NFL and NFLPA on March 15, 2020.[212] Similar to the 2011 version, the 2020 CBA grants power to the Commissioner to fine or suspend a player for his actions on the field or for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."[213] If Brady's suspension for Deflategate were to happen today, it would proceed in the exact same manner that it did back in 2015. The process for appealing the Commissioner's discipline remains the same for offenses that are punished for being "conduct detrimental" to the League. The Commissioner has the authority to personally select the hearing officer, or, at his discretion, he can serve as the

[206] UAW-Ford CBA, *supra* note 194, at Art. VII § 4(d).
[207] *Id.* at Art. VII § 21.
[208] *Id.* at Art. VII § 13(b).
[209] *Id.*
[210] *Id.* at Art. VII § 19.
[211] *Id.*
[212] NATIONAL FOOTBALL LEAGUE PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT, Preamble (2020), https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [hereinafter 2020 NFL CBA].
[213] *Id.* at Art. 46 § 1(a).

hearing officer himself.[214] The discovery process remains the same as well, requiring only that the parties exchange copies of "exhibits upon which they intend to rely."[215] These discovery restrictions ensured that Brady's requests for internal investigative notes related to the subsequent independent investigation would not be disclosed. Thus, the League can continue to rely on evidence it wants to use for the hearing, which would presumably help the League's case, and deprive the player of potential exculpatory evidence. As in the Brady case, the player will not be able to argue that the denial of evidence deprives him of a fair arbitration because the players agreed to these discovery rules. The new CBA also remains silent on requests for witness testimony[216] (e.g., Goodell's refusal to compel Jeff Pash's testimony per Brady's request[217]).

B. What Has Changed?

The most notable changes to the CBA involve the disciplinary process for violations of the League's Personal Conduct Policy ("PCP"), which the 2011 iteration of the CBA was completely silent on.[218] Now, violations of the PCP—as well as disputes over whether a PCP violation was proven by the NFL—will be initially determined by a Disciplinary Officer[219] ("DO") that is jointly selected by the parties.[220] The DO is responsible for conducting evidentiary hearings, issuing binding findings of fact, and determining what, if any, discipline should be imposed.[221] The CBA also now explicitly states that the NFL has the "burden of establishing that the player violated the [PCP]."[222] Noticeably absent is what that burden of proof is. Is it "beyond a reasonable doubt," "preponderance of the evidence," "clear and convincing evidence," or another standard?

While the Disciplinary Officer's decision is subject to appeal by either party to the Commissioner, it is limited to "why, based on the evidentiary record below, the amount of discipline, if any, should be modified."[223] Before, the player could challenge the decision on the merits. However, that

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[214] *Id.* at Art. 46 § 2(a).

[215] *Id.* at Art. 46 § 2(f)(ii)(A).

[216] *See id.* at Art. 46.

[217] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 535 (2d Cir. 2016).

[218] *See* 2011 NFL CBA, *supra* note 26, at Art. 46.

[219] The Disciplinary Officer serves a minimum two-year term (unless the NFLPA and NFL decide otherwise), after which either party may discharge the Disciplinary Officer with 120 days written notice. 2020 NFL CBA, *supra* note 212, at Art. 46 § 1(e)(i). If the officer is dismissed, the parties will each then identify two successor candidates at minimum. *Id.* Then, "[a]ll timely candidates will . . . be promptly ranked by the parties. Within sixty days, the top two candidates will be interviewed by the parties. Absent agreement on a successor, the parties will alternately strike names from said list, with the party striking first to be determined by the flip of a coin." *Id.*

[220] *Id.*

[221] *Id.* at Art. 46 § 1(e)(ii).

[222] *Id.* at Art. 46 § 1(e)(iv).

[223] 2020 NFL CBA, *supra* note 212, at Art. 46 § 1(e)(v).

right no longer exists. The Commissioner (or his designee) then issues a written decision that is final and binding.[224] If a player seeks to reduce the suspension, he would only be able to rely on the evidence that was already put in front of the Disciplinary Officer. Thus, he cannot advance arguments concerning the fairness of the hearing, the exclusion of evidence, or the existence of arbitrator bias.

The new CBA also outlines that the NFL, in hearings conducted for PCP violations, must produce any "transcripts or audio recordings of witness interviews, any expert reports and court documents obtained or prepared by the NFL as part of its investigation, and any evidentiary material referenced in the investigative report that was not included as an exhibit."[225] These discovery requirements for PCP violations are stark in comparison to discovery requirements for cases based on conduct detrimental to the league, where there is no mention of what the NFL is required to turn over other than "exhibits" on which the NFL "intend[s] to rely."[226]

VI. CRITICAL RECOMMENDATIONS TO IMPROVE THE NFL'S DISCIPLINARY PROCESS

Despite the NFLPA and the players indicating that player discipline was a crucial issue ahead of talks between the two prior to agreeing to the current CBA,[227] it remains largely the same as it was when Deflategate was decided. It appears that the NFLPA made the decision that there were more important issues than player discipline because only a handful of players have found themselves in the appeals process.[228] While it may be true that not many players find themselves entangled in the appeals process for player discipline, Brady's case conveys that the federal courts will not intervene in the NFL's arbitration process. Any shortcomings are the result of the NFLPA bargaining for them and agreeing to them. Thus, it is crucial for the NFLPA to bargain for changes to Article 46 to ensure that the disciplinary process is fair to players.

The number one priority for the NFLPA should be to limit the Commissioner's power to preside over appeals to his initial suspensions and fines. The recent change that enables a DO to be the first person to hear the appeal for discipline imposed for conduct violative of the PCP is a step in the right direction, but it is not enough. A disciplinary system similar to the

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[224] *Id.*

[225] *Id.* at Art. 46 § 2(f)(ii)(B).

[226] *See id.* at Art. 46 § 2(f)(ii)(A).

[227] Kevin Seifert, *DeMaurice Smith: NFLPA Will Approach 2021 Talks Like 'War'*, ESPN (Feb. 2, 2018, 9:57 AM), https://www.espn.com.sg/nfl/story/_/id/22291292/demaurice-smith-nflpa-approach-2021-cba-talks-war.

[228] *See* Daniel Kaplan, *Ten Important Changes in the New NFL CBA*, THE ATHLETIC (Mar. 15, 2020), https://theathletic.com/1676849/2020/03/15/ten-important-changes-in-the-new-nfl-cba/.

NHL,[229] NBA,[230] and MLB,[231] which allows an impartial arbitrator to hear the final appeal, would ensure that even the perception of partiality could be avoided. The NFL should also include a provision that prohibits communication about a case between those who are "prosecuting" the player and those who ultimately decide, similar to the NHL.[232] Proscribing communication between investigators and arbitrators (the Commissioner, or others) would limit the Commissioner's involvement with any investigations and ensure his impartiality. The court in Brady's case determined that whether or not the Commissioner was partial was not really a concern because arbitration is a creature of contract, and the parties to an arbitration cannot ask for more impartiality than "inheres in the method they have chosen."[233] The NFLPA and NFL specifically contracted to allow the Commissioner to preside as arbitrator over appeals, and knew he would have a stake in the underlying discipline and in every arbitration brought.[234] Thus, the court determined that even if the arbitrator is partial to one side, or has an interest, that partiality will not be enough to vacate an award under the "evident partiality" prong under the FAA if the parties bargained for it. The only way to avoid having a partial Commissioner as arbitrator, is to remove him from the appeals process as a whole.

The NFL and NFLPA should seek to clarify what the standard of proof is for disciplinary proceedings. This was not directly addressed by the court in Brady's case, but it remains an unanswered question. The NHL has a "clear and convincing evidence standard" for the Commissioner when considering appeals for on-ice conduct discipline, and a "substantial evidence" standard for the Impartial Arbitrator in reviewing the Commissioner's imposed discipline for off-ice conduct. The NFLPA should begin by advocating for a standard in the first place. Currently, there is nothing in the NFL CBA that indicates the standard of proof. Courts, as outlined above, are highly deferential to CBAs and thus will not vacate an award on evidentiary grounds simply because a standard has not been bargained for. Rather, courts will defer to the Commissioner's interpretation of the CBA. The NFLPA should advocate for a similar standard to that of the NHL.

Directly at issue in Brady's case was limited discovery. The MLB provides that a disciplined player has the right to discover all documents related to the investigation, including those that are exculpatory.[235] The NFLPA and NFL should implement a similar provision because, as noted

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[229] *See* NHL CBA, *supra* note 152, at Art. 18 § 18.13(a).
[230] *See* NBA CBA, *supra* note 140.
[231] *See* MLB CBA, *supra* note 116, at Art. XI.
[232] NHL CBA, supra note 152, at Art 18-A § 18-A.3(f).
[233] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016).
[234] *Id.*
[235] MLB CBA, *supra* note 116, at Art XII § D.

above, the courts will not vacate an award for fairness concerns simply because the NFLPA agreed to a truncated discovery provision. The 2020 CBA remains silent on the players right to cross-examine accusing witnesses and those involved in any investigation. Even if a firm requirement compelling witnesses to testify is not possible, a provision that requires the league to try its best to get voluntary participation in an arbitration hearing would ensure that the Commissioner does not exercise his authority to waive off requests to cross-examine witnesses. Commissioner Goodell refused such a request in Brady's case. The NHL's process is an excellent example of how this could be done. There, the CBA requires that the NHL and NHLPA use their best efforts to ensure that witnesses are present at the arbitration hearing, so they are able to testify.[236] MLB also provides that the player has a right to evidence that may impeach any witnesses that appear at hearings.[237]

These recommendations will not only aid the NFL in conducting a fair arbitration process, but they will also help to ensure that disputes do not bubble over into drawn out and expensive battles in federal courts.

VII. CONCLUSION

Without significant changes to the CBA, the players will remain subject to the Commissioner's discipline with very little in terms of recourse. The Commissioner continues to wield immense control over the investigatory process—who is disciplined and why; the appeal procedures; what evidence is discoverable; and whether a punishment is affirmed. The control of the Commissioner can lead to punishments that have the appearance of being unfair from the start, leading to dissatisfaction and mistrust from the players and fans. Further, federal courts are unlikely to vacate any discipline that the Commissioner imposes—see Brady, Adrian Peterson, and Ezekiel Elliott's respective cases.[238] The Deflategate saga is not just impactful in the realm of professional sports, it is also informative for unionized labor as a whole. If an individual is not an athlete who has already made millions of dollars, the impact of being dismissed from a job is much more severe. Inattention to detail when crafting and negotiating a labor agreement is detrimental to all, not just high-profile athletes. As demonstrated in the section above regarding the CBA between Ford and the UAW, unartful drafting of CBAs can leave employees with uncertainties about what they can be disciplined for.

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[236] NHL CBA, *supra* note 152, at Art. 17 § 17.9.

[237] MLB CBA, *supra* note 116, at Art XII § D.

[238] *See* Nat'l Football League Players Ass'n on behalf Peterson v. Nat'l Football League, 831 F.3d 985 (8th Cir. 2016); Nat'l Football League Players Ass'n v. Nat'l Football League, 874 F.3d 222 (5th Cir. 2017).

Tom Brady's actual guilt or innocence, while important, is not the focus or issue. Rather, the issue is the system that was used to punish him. Instead of fostering a system that resolves disputes quickly via arbitration, the NFL's CBA fails to ensure that players receive a fair disciplinary process. While the current rendition of the NFL CBA runs through the 2030 season—that might be just enough time for the NFLPA to determine what its priorities are, and to advocate for them. The disciplinary process under the CBA should be at the top.