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HOWARD LAW JOURNAL

TABLE OF CONTENTS

LETTER FROM THE EDITOR-IN-CHIEF *Adrienne R. Parmis* vii

ARTICLES

WHO WANTS TO BE A PROSECUTOR?
AND WHY CARE? LAW STUDENTS'
CAREER ASPIRATIONS AND REFORM
PROSECUTORS' GOALS *Shih-Chun Steven Chien* 173
& Stephen Daniels

REBEL CITIES, BULLY STATES:
A NEW PREEMPTION DOCTRINE FOR
AN ANTI-RACIST, PRO-DEMOCRACY LOCALISM *Kathleen Morris* 225

NOTES

KILLER COPS, KILLER LAWS: FOURTH
AMENDMENT JURISPRUDENCE AND
SEPARATE, BUT EQUAL POLICING *Kufere Laing* 267

NONE BUT OURSELVES CAN FREE OUR MINDS:
ANALYZING BARRIERS TO THE INSTITUTIONALIZATION
AND OWNERSHIP OF AFRICAN TRADITIONAL
MEDICAL KNOWLEDGE AND PROPOSING A
PAN-AFRICAN APPROACH TO
NAGOYA PROTOCOL COMPLIANCE *Ashley Grey* 319

LETTER FROM THE EDITOR-IN-CHIEF

For the past 65 years, the *Howard Law Journal* has been at the forefront of addressing critical legal issues that impact minority communities. Through the articles that grace the following pages, we have included pieces that continue to further the *Journal's* mission of promoting the human and civil rights of all people. This issue challenges the status quo and provides solutions to significant legal and policy dilemmas. We hope that by reading our *Journal*, you are encouraged to not only learn about how the current laws may need to shift but are also empowered to take action in your own communities to make an impact. The scholars' and students' articles in this issue exemplify the meaningful and essential discussion this *Journal* seeks to highlight through our scholarship.

Issue 2 of Volume 65 begins with an article by researchers Shih-Chun Steven Chien and Stephen Daniels entitled, *Who Wants to Be a Prosecutor? And Why Care? Law Students' Career Aspirations and Reform Prosecutors' Goals*, which examines how to attract and hire new lawyers who can help shift the current legal landscape as a reform prosecutor. The article analyzes two sides of the challenge by looking at the potential connection between the prosecutors' goals and law students' career objectives. The article assesses the relationship between why students choose a career in law and their actual career aspirations after graduation. The authors also examine the policy implications of research for increasing applicant pools and the need for students to have opportunities to learn from and connect with reform prosecutors.

Next, we see a discussion on what Professor Kathleen Morris terms "the preemption crisis." In her article entitled, *Rebel Cities, Bully States: A New Preemption Doctrine for an Anti-Racist, Pro-Democracy Localism*, Professor Morris presents a new legal framework to resolve the preemption crisis when state governments diminish local government power. She argues that the outcome is usually a racialized attack and, as a result, proposes a new pro-democracy, anti-racist preemption doctrine.

We are excited to publish two student articles in Volume 65, Issue 2. In his article, *Killer Cops, Killer Laws: Fourth Amendment Jurisprudence and Separate, but Equal Policing*, Senior Staff Editor Kufere Laing discusses the need for police reform through a shift in our constitutional framework and legal system. He advocates for more accountability for police officers using citizen review boards with independent prosecutors who would have the autonomy to charge abusive officers. Mr. Laing believes the current structure of police oversight is ineffective and reinforces white supremacy. The article argues that America must recognize and protect

black humanity through a new legal lens to protect the future of our democracy.

We close Issue 2 with Senior Solicitations and Submissions Editor Ashley Grey's article, *None but Ourselves Can Free Our Minds: Analyzing Barriers to the Institutionalization and Ownership of African Traditional Medical Knowledge and Proposing a Pan-African Approach to Nagoya Protocol Compliance*. In her article, Ms. Grey explains the need for benefit sharing and African countries to protect the intellectual integrity of their traditional medicine and healing practices. By delving into the Nagoya Protocol's background and the traditional healing practices of African nations, Ms. Grey emphasizes the value traditional medicine plays in Western biomedicine. She argues that current global trade laws are inherently biased toward indigenous groups when these groups are the source of biomedical innovations. Her article provides a solution for more equitable benefits to traditional healers for their medical innovations.

On behalf of the *Howard Law Journal*, I thank you for your support and readership. We hope that this issue will enlighten you about current social, legal, and medical issues facing our communities and encourage you to continue exploring these topics within your own community. We proudly present Volume 65, Issue 2 of the *Howard Law Journal*.

ADRIENNE R. PARMS
EDITOR-IN-CHIEF
VOLUME 65

Who Wants to Be a Prosecutor? And Why Care? Law Students' Career Aspirations and Reform Prosecutors' Goals

SHIH-CHUN STEVEN CHIEN* & STEPHEN DANIELS**

ABSTRACT

Often called “progressive” or “reform” prosecutors, a number of reform-minded prosecutors have been elected recently across the United States—promising a distinctive vision of criminal justice and signaling that their role will be more attuned to issues of race and equity than “law and order.” Furthering this vision requires dramatic changes to the working cultures—the norms, practices, and even personnel—of their offices. Diversity plays a major role.

One central challenge is identifying, attracting, and hiring newly-minted lawyers who can, over time, be socialized into and sustain a changing organizational culture. This article empirically examines that challenge, which involves two sides of an equation of sorts. That

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** Senior Research Professor, American Bar Foundation. We are grateful to the participants in an American Bar Foundation Faculty Workshop and the attendees at a panel at the 2021 Law & Society Association Annual Meeting for their comments on the earlier versions of this article and the broader research project of which it is a part. We received particularly valuable feedback from Swethaa Ballakrishnen, John Bliss, Bryon Fong, Tom Ginsburg, Robert Nelson, Anna Reosti, Christopher Schmidt, and David Wilkins. The authors gratefully acknowledge the help provided by LSSSE and the willingness to share survey data. The Cook County State's Attorney's Office (IL), the Dallas County District Attorney's Office (TX), the Los Angeles County District Attorney's Office (CA), the Nueces County District Attorney's Office (TX), the Office of the District Attorney for the Western Judicial Circuit (GA), the San Francisco District Attorney's Office (CA), the Santa Clara County District Attorney's Office (CA), and Fair and Just Prosecution provided valuable information for this project. We thank the following individuals for their detailed comments and suggestions: Emily Bloomenthal, John Butler, Angela Davis, Estela Dimas, George Fisher, Lawrence Friedman, Adam Geer, Lea Gutierrez, Ajay Mehrotra, Meredith Rountree, Deborah Merritt, Carole Silver, Jonathan Simon, Tandra Simon-ton, David Sklansky, Greg Srolestar, Jerry Varney, and Charles Weisselberg.

is, the potential fit or link between prosecutors' goals on one side and law students' aspirations on the other.

We argue that although the pool of candidates interested in criminal law has remained relatively small over the past years, reform prosecutors can expand the pool by adopting strategic approaches to encourage minority students to join the prosecution and reaching out to aspiring public defenders. Our empirical findings further suggest that law schools have a more prominent role in the success of criminal justice reforms through the type of students they accept and the experiential learning opportunities they offer.

The article is divided into four substantive sections. It begins by addressing the broad "Why Care?" question and the first side of the equation. It provides an overview of the progressive or reform prosecutor idea, with an emphasis on hiring in the context of changing culture. The next two sections of the article turn to the other question in the title and the student side of the equation. Using a unique set of questions from the 2010 Law School Survey of Student Engagement (LSSSE), which ask students about their motivations for attending law school and choosing law as a profession, our first inquiry considers motivations and connections to students' career aspirations; in particular, working as a prosecutor. Most students have a mixture of motivations for attending law school, and only some of these are more conducive to criminal law as an area of legal specialization; even fewer are conducive to working as a prosecutor. Relying on annual LSSSE survey data from 2007-2018, our second of two inquiries focuses on those students specifically interested in criminal law as an area of legal specialization. In effect, the article's third section looks at the size and nature of the pool (which is quite small), with an emphasis on race and gender (important given prosecutors' interest in diversity) along with debt. Our findings suggest that while debt appears not to be a deterrent, students of color (especially African American and Hispanic males) are the least likely to want to work as prosecutors.

The final section of the article explores policy implications of the findings for expanding the pool of potential hires and better managing applicants' expectations. It emphasizes collaborations between prosecutors and law schools, as well as other organizations, and the importance of experiential learning opportunities that connect students with reform prosecutors and the criminal justice system.

TABLE OF CONTENTS

I. INTRODUCTION 175

II. WHY CARE? THE REFORM/PROGRESSIVE
PROSECUTOR AND CHANGING
PROSECUTORIAL CULTURE 181

 A. Context 181

 B. The Two-Sided Equation: The Link..... 185

 C. The Challenge 187

III. THE OTHER SIDE OF THE EQUATION:
STUDENT MOTIVATION AND ASPIRATION 194

 A. The Importance of Motivation 194

 B. What *Do* Students Have to Say About
 Motivation? 197

 C. Connections for Students: Motivations to
 Aspirations 202

IV. THE POOL 206

 A. Criminal Law 206

 B. Criminal Law and Type of Work 209

 C. Criminal Law, Type of Work, Diversity, and Debt.. 211

V. POLICY IMPLICATIONS 216

VI. CONCLUSION..... 222

I. INTRODUCTION

Why would anyone choose a public service career in law?¹ The money is terrible compared to private practice.² To some observers,

1. Public administration and legal scholars have been seeking answers to this question through different lenses. *See generally* Jacqueline Carpenter, Dennis Doverspike & Rosanna F. Miguel, *Public Service Motivation as a Predictor of Attraction to the Public Sector*, 80 J. VOCATIONAL BEHAV. 509 (2012) (suggesting that the motivation to serve the public good is directly or indirectly related to individuals’ occupational choices); Robert K. Christensen & Bradley E. Wright, *The Effects of Public Service Motivation on Job Choice Decisions: Disentangling the Contributions of Person-Organization Fit and Person-Job Fit*, 21 J. PUB. ADMIN. RSCH. & THEORY 723, 738 (2011) (finding that individuals with stronger motivation to serve the public good are more likely to accept jobs that emphasize service to others whether that be private sector, public sector, or non-profit sector); *see also* Christa McGill, *Educational Debt and Law Student Failure to Enter Public Service Careers: Bringing Empirical Data to Bear*, 31 L. & SOC. INQUIRY 677, 700 (2006) (finding that debt did not have a significant impact on the likelihood that law students would enter the public sector). Instead, McGill argues that a more significant predictor is whether individuals came into law school with that desire. *Id.* at 699.

2. According to a recent survey by the National Association for Law Placement, the median entry-level salary for public defenders is \$58,300, while for local prosecutors, it is \$56,200. *Findings on First-Year Salaries from the 2018 Public Service Attorney Salary Survey*, NAT’L ASS’N FOR L. PLACEMENT (June 2018), <https://www.nalp.org/0618research>. The median entry-level salary for an associate at a law firm of 50 or fewer attorneys was about \$90,000 and for “BigLaw”

these students seem to be irrational actors given the investment made and debt incurred to become a lawyer.³ The prestige or status is problematic at best, and probably worse. One commentator even argued that one cannot work in a prosecutor's office and be a "good person" or be on the "right side of history."⁴ So, for aspiring line prosecutors at the local level, one may be valorized in the view of some for their service to the community, but still may be considered as being at the bottom of the professional hierarchy.⁵

Still, some do aspire to public service in frontline positions, perhaps most importantly in prosecutors' offices and public defenders' offices. These lawyers work at the legal system's enforcement frontline, an arena fraught with tension, especially so now, amid the renewed concerns over social and racial justice.⁶ It is where the law's ideals and principles face the everyday real world and are tested daily. Right away, this draws our attention to public defenders — the lawyers trying to hold that frontline. There is a constant need for law

firms with more than 700 attorneys the median is about \$180,000, an amount that is beyond what even the most experienced public service attorneys make. See *Findings on First-Year Salaries from the 2019 Associate Salary Survey*, NAT'L ASS'N FOR L. PLACEMENT (June 2019), <https://www.nalp.org/0619research>; *Findings on First-Year Salaries from the 2018 Public Service Attorney Salary Survey*, NAT'L ASS'N FOR L. PLACEMENT (June 2018), <https://www.nalp.org/0618research>.

3. The possible impact of debt on whether students would choose public service work was a major concern of The American Bar Association Task Force on Financing Legal Education [hereinafter *Task Force*]. See Memorandum from Dennis W. Archer, Chair, American Bar Association, Task Force on the Financing of Legal Education Report, Separate Statement of Philip Shrag 57–62 (June 17, 2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.pdf. One of us, Daniels, was the consultant to the *Task Force*, *id.* at 43.

4. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?* 14 GEO. J. LEGAL ETHICS 355, 396 (2001) [hereinafter *Good Prosecutor*]; Abbe Smith, *Are Prosecutors Born or Made?* 25 GEO. J. LEGAL ETHICS 943, 958 (2012) [hereinafter *Born or Made*].

5. A classic study done in the 1970s found prosecutors near the bottom of the prestige scale. Edward Laumann & John Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, AM. BAR FOUND. RSCH. J. 155, 166, 177, 199 (1977).

6. See generally PAUL BUTLER, *CHOKe HOLD: POLICING BLACK MEN* (2017); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013); Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS IN PSYCH. SCI. 183 (2018); Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949 (2014) (finding that exposure to extreme disparities can cause people to become more, not less, supportive of the punitive criminal-justice policies that create those disparities); Anne Coughlin, *The Cosby Case Shows That We Don't Have Rule of Law. We Have Rule by Prosecutor*, WASH. POST (July 8, 2021, 9:53 AM), https://www.washingtonpost.com/outlook/bill-cosby-bruce-castor-prosecutor/2021/07/08/f4dfc59c-df51-11eb-ae31-6b7c5c34f0d6_story.html (arguing that prosecutors have unchecked authority).

students to become skilled and dedicated public defenders to do just that, even if the reality falls short.⁷

Our main interest, however, is in prosecutors. For good or bad, they “are the gatekeepers of America’s criminal justice system.”⁸ They put the law into action and determine under what circumstances defendants will be held accountable.⁹ In particular, it is reform-minded prosecutors, what some may call “progressive prosecutors,” that interest us.¹⁰ We discovered, however, there is no apparent consensus on the most appropriate adjective for characterizing these prosecutors in general or which is most appropriate for the prosecutor in question (in the view of that prosecutor, their supporters, or their critics). Nor is there a consensus on what *exactly* makes one “progressive.” As one observer noted, “‘progressive prosecutor’ has clearly become a buzzword . . . [t]he exact semantics . . . can also vary depending on the jurisdiction.”¹¹

Not needing to enter what is a lively definitional debate, for stylistic reasons we will use the terms “reform” and “progressive” interchangeably. We assume for the purposes of this article that a range of prosecutors exists wanting to make changes in their offices and in

7. See JONATHAN RAPPING, *GIDEON’S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* (2020).

8. FAIR AND JUST PROSECUTION & BRENNAN CENTER FOR JUSTICE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 14 (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [hereinafter *FJP/Brennan, 21 Principles*].

9. See, e.g., Davis, *supra* note 6, at 823 (stating that prosecutors are the most powerful officials in the criminal justice system and that “their discretionary decisions . . . play a very significant role in creating and maintaining the racial disparities in the criminal justice system.”); ERIK LUNA & MARIANNE WADE, *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 189, 190 (Erik Luna & Marianne L. Wade, eds., 2012) (“statutes threatening harsh deterrent punishments upon conviction . . . became powerful weapons in the hands of prosecutors, who could force defendants to accept plea bargains so as to avoid these harsh sentencing consequences.”); David A. Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 456 (2018) (discussing the relations between prosecutorial discretion and prosecutorial power); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE UNIV. L. REV. 795 (2012) (examining how implicit bias affects the exercise of discretion). For the exercise of prosecutorial discretion in the context of community prosecution, see, e.g., Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285 (2012).

10. For a short overview, see Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 739–741 (2020).

11. Julia Wick, *Newsletter: What Does It Mean to be a Progressive Prosecutor?*, L.A. TIMES (Nov. 12, 2019, 3:30 AM), <https://www.latimes.com/california/story/2019-11-12/progressive-prosecutor-gascon-chesa-boudin>.

criminal justice, and we will discuss this in the article's next section. We also assume that such prosecutors are not a new phenomenon.¹²

Regardless of the adjective, these prosecutors pledge to reform the criminal justice system from within.¹³ They are organizational leaders seeking to change their offices. They embrace a particular vision of criminal justice, one "pledging a more balanced approach to criminal justice — more attentive to racial disparities, the risk of wrongful conviction, the problem of police violence, and the failures and terrible costs of mass incarceration."¹⁴ In practice, this requires changing the very culture of their organizations.¹⁵

This is no simple matter. Organizations are notoriously resistant to change, with path dependence the norm.¹⁶ Change, if it comes, will not be effortless and immediate. One key aspect of the process is changing the people. Not just those in the top organizational positions but all the way down the line, bringing in people who share an elected prosecutor's vision and can help facilitate change at the ground level.¹⁷ This is a key challenge and the one that interests us.

12. Writing 20 years ago Professor Abbe Smith noted the existence of "unorthodox, independent-minded, or 'progressive' prosecutors," and named four. *Good Prosecutor*, *supra* note 4, at 398.

13. See Justin Jouvenal, *From Defendant to Top Prosecutor, this Tattooed Texas DA Represents a New Wave in Criminal Justice Reform*, WASH. POST (Nov. 19, 2018), https://www.washingtonpost.com/local/public-safety/from-defendant-to-top-prosecutor-this-tattooed-texas-da-represents-a-new-wave-in-criminal-justice-reform/2018/11/19/e1dca7cc-d300-11e8-83d6-291fced2ab1_story.html; Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019), [https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor-%20Also; see also FJP/Brennan, 21 Principles, supra note 8. But see Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC \(June 14, 2021\), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/>. Covert is a public defender.](https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor-%20Also; see also FJP/Brennan, 21 Principles, supra note 8. But see Darcy Covert, The False Hope of the Progressive-Prosecutor Movement)

14. David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017).

15. See, e.g., Joyce White Vance, *Want to Reform the Criminal Justice System? Focus on Prosecutors*, TIME (July 7, 2020, 3:55 PM), <https://time.com/5863783/prosecutors-criminal-justice-reform/> (suggesting that structural reforms in D.A.s' Offices should begin with a cultural change among prosecutors); The Crime Rep. Staff, *Why Culture Change for Prosecutors is 'More than Hiring People of Color'*, THE CRIME REP. (Mar. 11, 2021), *Id.* (emphasizing that "while diversity in hiring is part of the solution, it is just one step in a long and challenging process to create a culture of racial equity within prosecutors' offices").

16. See generally Debra Meyerson & Joanne Martin, *Cultural Change: An Integration of Three Different Views*, 24 J. MGMT. STUD. 623 (1987); EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP (2017).

17. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 26–27 (2019).

As Philadelphia District Attorney Larry Krasner eloquently put it, “the coach gets to pick the team.”¹⁸

An important source for meeting that challenge is new law school graduates, and this article looks systematically at those who may want to work as a prosecutor and why. How does that pool of people look? The paper utilizes a unique data source, results from annual Law School Survey of Student Engagement (“LSSSE”) surveys.¹⁹ These surveys provide information on students, and more importantly information *from* them. In other words, the surveys allow students to speak for themselves. We use data from a set of unique questions in the 2010 LSSSE survey that asked students about their motivations for attending law school and choosing law as a profession.²⁰ For more general purposes the paper uses data from the 2007 to 2018 LSSSE survey.²¹ Moving forward, unless otherwise specifically footnoted with a citation, all statistical material used (e.g., numbers, percentages, and statistical relationships) will be from the authors’ original analyses of LSSSE survey data.

18. Quoted in Chris Palmer & Julie Shaw, *New DA Krasner on Ousters: ‘The Coach Gets to Pick the Team’*, PHILA. INQUIRER (Jan. 9, 2018), <https://www.inquirer.com/philly/news/crime/philly-da-larry-krasner-defends-firings-20180109.html>.

19. The Law School Survey of Student Engagement (LSSSE) is administered annually to students in participating schools by the Indiana University Center for Postsecondary Research. See *The LSSSE Survey Tool*, LSSSE, <http://lsse.indiana.edu/about-lsse-surveys/> (last visited Nov. 28, 2021); *Who We Are*, LSSSE, <https://lsse.indiana.edu/who-we-are/> (last visited Nov. 28, 2021). LSSSE has administered its survey from 2004 through 2021. Each survey asks the same questions annually making it ideal for analyzing patterns and changes over time. See BENJAMIN PAGE & ROBERT SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICA’S POLICY PREFERENCES* 39 (1992) (“question wording matters . . . [t]he only safe way to identify opinion change, then, is compare answers to *identical survey questions*.”). LSSSE has provided us with deidentified copies of the raw data files, and our data agreement with LSSSE requires us not to identify schools.

20. According to LSSSE’s director at the time, “each year LSSSE develops experimental questions focused on particular themes or issues . . . administered to students at a subset of participating schools . . . [and one such set for 2010] focuses on the motivation of students both with regard to the decision to enter law school and with regard to working hard once in school.” *2010 Annual Survey Results*, LSSSE 5 (2010), https://lsse.indiana.edu/wp-content/uploads/2016/01/2010_LSSSE_Annual_Survey_Results.pdf. The motivation questions went to students at 22 schools (n=4,626) and are discussed briefly in the report. *Id.* at 10–11.

21. Except for the 2010 motivation data set, the LSSSE data used in this paper are from a large data set the authors created for a more general project looking at law students and public service. That data set covers responses from students at 33 law schools appearing in LSSSE surveys at least three times between 2005 and 2010 and at least six times between 2011 and 2020 (n=129,532 student respondents). Since LSSSE participation by schools varies from year to year (some schools appearing only a few times and others more regularly), the dataset is structured to capture regular LSSSE participants. One caveat on LSSSE data — the very top tier of schools are less prevalent as regular participants, but not certainly absent. Generally speaking, LSSSE states, “[a]mong U.S. law schools, the statistical profiles of LSSSE cohorts tend to closely resemble the overall profile of U.S. law schools.” *The LSSSE Survey Tool*, LSSSE, <https://lsse.indiana.edu/about-lsse-surveys/>.

The remainder of this paper is divided into four substantive sections. First, is a section addressing the broad “why care?” question from our title. As an answer, it provides a basic overview of what some call the “progressive prosecutor” movement, its goals and challenges—especially hiring in the context of changing culture.²² In digging deeper into this answer it looks at the idea of “fit” between potential hires and the goals of organizational change as if we are talking about two sides of an equation. Fit is key to the idea of hiring and change. Especially important for progressive prosecutors is the hiring of new law school graduates who can, over time, be socialized into and sustain the changing culture.

The first section envisions two sides of an equation with the goals of prosecutors on one side and potential hires on the other. The second and third sections of the paper are about the other side of that equation—law students. They are the raw material for change and we need to know about them. More significantly, rather than make assumptions, we need to let them speak for themselves and tell us about their motivations in attending law school and their aspirations in a legal career. These are the matters important for anyone looking to hire with a particular goal in mind.

Together these sections address the other question in our title, “who wants to be a prosecutor?” The second section looks at the importance of motivation and the connections to students’ career aspirations—in particular, working as a prosecutor. It relies on the 2010 LSSSE motivation questions. Those connections reflect a complicated picture as to why people choose law school and a career in law on the one hand, and their real-world career aspirations on the other. Most students have a mixture of motivations for attending law school, and only some motivations are more conducive to criminal law as an area of legal specialization and to the work of a prosecutor. Our particular interest is in those students wanting criminal law as their area of legal specialization and who, in turn, want to work as prosecutors. To provide context and sharpen the discussion we will make comparisons,

22. For the rise and proliferation of progressive prosecutors across the country, see RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 154–60 (2019); EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 147–73 (2019); Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 *FORDHAM L. REV.* 8 (2018); David A. Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 *OHIO ST. J. CRIM. L.* 647 (2017) (examining local district attorney elections and discussing how electoral democracy can serve as a tool for reforming prosecutors’ offices).

where appropriate, to those interested in working as public defenders or in private practice (those eschewing a career in public service).

The third section moves to just those students interested in criminal law as an area of legal specialization. It relies on LSSSE survey data from 2007-2018, but primarily on data from 2013-2018. Again, while our particular interest is in those criminal law students wanting to work as prosecutors, we will make comparisons to those wanting to work as public defenders and those wanting to work in private practice. In doing so, this section also looks at race and gender (especially important given the prosecutor's interest in diversity and an office that reflects the community it serves) along with debt (the concern that debt may drive students away from any kind of public service).²³ In effect, the third section looks at the size and nature of the pool.

The final section explores some practical implications of our findings for reform-minded prosecutors wanting to use hiring as a part of organizational change. It looks at pipelines and issues of diversity in prosecutors' offices. It examines what law schools and prosecutors might be able to do collaboratively, especially regarding experiential learning opportunities and building bridges. It also looks at the possible roles for other bridge-building organizations that connect interested students with prosecutors.

II. WHY CARE? THE REFORM/PROGRESSIVE PROSECUTOR AND CHANGING PROSECUTORIAL CULTURE

A. Context

Unlike United States Attorneys, who are appointed by the President and handle prosecutions in the federal courts, almost all local state-level chief prosecutors are elected.²⁴ As one commentator's historical overview noted, “[t]he United States is the only country in the

23. McGill argues that debt does not have a significant impact on the likelihood that law schools' students would enter the public sector. Given that she relied upon data from the 1990s and early 2000s it's worth looking again at debt. McGill, *supra* note 1, at 685–86 and 692–95. See also *Task Force*, *supra* note 3.

24. Chief prosecutors are elected in all but three states. See George Coppolo, *States that Elected Their Chief Prosecutors*, Connecticut General Assembly Office of Legislative Research, OLR RSCH. REP. (2003), <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm>. State attorneys general, a state's top legal officer, are elected in 43 states; see *Attorney General Office Comparisons: Elected vs. Appointed*, BALLOTPEdia, https://ballotpedia.org/Attorney_General_office_comparison#Duties (last visited Oct. 29, 2021); see also Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 809 (2010) (showing that incumbent prosecutors rarely face challengers and that elections do not provide voters with useful informa-

world where citizens elect prosecutors,”²⁵ the idea being “that popular election would give citizens greater control over government, eliminate patronage appointments, and increase the responsiveness of prosecutors to the communities they served.”²⁶

One key driver behind the development of elected prosecutors was the exercise of prosecutorial discretion and the need “to ensure that prosecutors would remain accountable to the local communities they served.”²⁷ Ruefully, the commentary’s final line notes, “however, supporters of the elected prosecutor neglected to consider the effect elections would have on the administration of criminal justice.”²⁸

More contemporaneously, scholars, commentators, and activists have focused their ire on what they see as one especially pernicious effect — a “tough-on-crime” stance — along with the underlying organizational culture affecting the exercise of prosecutorial discretion and an “assembly-line model” of justice.²⁹ It is a stance that one can trace back well over a generation that aligned with then public perceptions about crime, criminals, and race — perceptions that politicians and would-be officeholders both capitalized on and stoked.³⁰ It is an approach, the critics say, having little or no meaningful place for the rights of the accused. One seamlessly operating within a system, whether by intention or not, whose deleterious practical effects fall disproportionately on the impoverished and people of color.³¹

tion to evaluate the work of their prosecutors). *But see* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537 (2020); Sklansky, *supra* note 22.

25. Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L. J. 1528, 1530–31 (2012).

26. *Id.* at 1531.

27. *Id.* at 1568.

28. *Id.* *See also* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010).

29. Green & Roiphe, *supra* note 10.

By late 2019, a number of elected prosecutors across the United States came to be known as ‘progressive prosecutors.’ These included prosecutors elected in Boston, Brooklyn, Kansas City, Philadelphia, and San Francisco. But not all were from the North or from big cities. So-called progressive prosecutors have been elected in Dallas, Houston, Orlando, San Antonio and localities in Louisiana, Mississippi, and Virginia, among other places. In general, beginning in 2015, their campaigns have been funded by a consortium led by George Soros, as part of a broader criminal justice reform effort.

Id. at 738–39.

30. *See* KATHLYN TAYLOR GAUBATZ, *CRIME AND THE PUBLIC MIND* (1995). One should not assume, of course, that every prosecutor at the time – or later – fit this pattern.

31. *See generally* JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 206 (2017) (arguing that prosecutors have been and remain the cause of mass incarceration); *see also* Steven Weinberg, *Harmful Error: How*

Who Wants to Be a Prosecutor?

More specifically, this displeasure is traced to the 1970s and 1980s, when statutory criminal codes expanded dramatically in the United States because of legislatures' concerns with perceived increases in crime, drugs use, and the social problems accompanying such increases.³² This ongoing expansion provided prosecutors a greater laundry list of possible charges to bring.³³ Legislators took on a greater role in sentencing by introducing a series of mandatory minimum sentences, requiring judges to follow specific, non-discretionary, statutory guidelines.

Enter the reform or progressive prosecutor, someone who successfully runs for a local prosecutor's office on an explicitly reform platform—one in various ways pledging to reform the criminal justice system from within. They embrace a different vision of criminal justice. According to Bruce Green and Rebecca Roiphe, the election of such prosecutors in recent years “marks a significant break from the law-and-order approach to prosecution that dominated for decades.”³⁴

Green and Roiphe provide a nice summary of what the break involves:

[P]rogressive prosecutors advance ideas for reform that take account of the broader socio-economic context in which criminal conduct occurs and cases are prosecuted. They do not simply process cases but seek to change criminal laws, institutions, and procedure. In opposing the status quo and the political establishment responsible for it, today's progressive prosecutors . . . have sought office by

Prosecutors Cause Wrongful Convictions, 7 J. INST. JUST. & INT'L STUD. 28, 29 (2007) (arguing that “prosecutors are the linchpin of the criminal justice system and certainly the linchpin when it comes to wrongful prosecutions and wrongful convictions”); see also TRACI BURCH, *TRADING DEMOCRACY FOR JUSTICE: CRIMINAL CONVICTIONS AND THE DECLINE OF NEIGHBORHOOD POLITICAL PARTICIPATION* (2013).

32. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 33 (2007) (stating that “[i]n the last decades of the twentieth century . . . the war on crime reshaped the American prosecutor into an important model for political authority while also giving real prosecutors enormous jurisdiction over the welfare of communities with little attention to the lack of democratic accountability”).

33. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520–23, 550–52 (2001) (arguing that prosecutors have an interest in broad criminalization because it greases the wheels of plea bargaining and legislators also have an interest in accommodating prosecutors because it ensures the enforcement of criminal law). *But see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (challenging the claims about prosecutorial preeminence and discussing the role of judges, legislators, governors, and police in checking prosecutors' power).

34. Green & Roiphe, *supra* note 10, at 720–21.

appealing directly to the people by promising to protect the poor and to bring the rich and powerful to justice. Consequently, today's progressive prosecutors . . . have faced considerable backlash from the political establishment.³⁵

These prosecutors distinguish themselves by emphasizing such matters as the end of cash bail, declining to pursue certain low-level offenses, more closely scrutinizing the police, reducing racial bias, and addressing mass incarceration.³⁶

Green and Roiphe emphasize the reformers' focus, at least in their campaigns, on leniency and the use of discretion in response to concerns over racial and other disparities.³⁷ In their estimation "a defining feature of contemporary progressive prosecutors' work, and probably the most contentious feature, is the way in which they exercise discretion in investigating, charging, seeking pre-trial detention, plea bargaining, sentencing, and employing alternatives to prosecution and incarceration."³⁸

Reformers also distinguish themselves by emphasizing diversity in hiring.³⁹ Among other things, it means a prosecutor's office that

35. *Id.* at 736. George Gascon, for instance, is facing considerable backlash. See Tim Arango, *Los Angeles Just Elected a Liberal D.A. He's Already Facing a Recall Effort*, N.Y. TIMES (June 19, 2021), <https://www.nytimes.com/2021/06/19/us/george-gascon.html>; *Resisting Reform: How Progressive Prosecutors Navigate Police Union Pushback*, IMPACT JUST. (July 1, 2021), <https://impactjustice.org/resisting-reform-how-progressive-prosecutors-navigate-police-union-pushback/>; Jeremy White, *California Prosecutors Revolt Against Los Angeles DA's Social Justice Changes*, POLITICO (Jan. 25, 2021, 4:30 AM), <https://www.politico.com/news/2021/01/25/george-gascon-california-social-justice-461667>; see also Benjamin Wallace-Wells, *The Trial of Chesa Boudin: Can a Young Progressive Prosecutor Survive a Political Backlash in San Francisco?*, NEW YORKER (July 29, 2021), <https://www.newyorker.com/news/annals-of-inquiry/the-trial-of-chesa-boudin>. Perhaps, only half facetiously, the test of how progressive a prosecutor is the amount of backlash she engenders.

36. Green & Roiphe, *supra* note 10, at 741. For a more detailed and coherent overview of these reform prosecutors and their goals, see *id.* at n.123, directing their readers to *FJP/Brennan, 21 Principles*, *supra* note 8; see also Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

37. "By campaigning on their discretionary charging policies . . . progressive prosecutors seem more directly responsive to popular race-based and class-based sentiment. They discuss their discretionary decision-making on the campaign trail, expressly tying their proposed policies regarding prosecutorial discretion to the social and political concerns of the day." Green & Roiphe, *supra* note 10, at 748.

38. *Id.* at 750–51.

39. See, e.g., Max Marin, *Why Is the Philly DA's Office so White?*, BILLY PENN (Apr. 24, 2019, 8:30 AM), <https://billypenn.com/2019/04/24/why-is-the-philly-das-office-so-white/> (reporting that Krasner's office has implemented a new recruitment program to seek out diverse candidates); see also Adam Geer, *Diversity and Inclusion in Prosecutors' Offices Are Imperative*, PHILA. TRIBUNE (Feb. 21, 2021) https://www.phillytrib.com/commentary/diversity-and-inclusion-in-prosecutors-offices-are-imperative/article_2f244ab1-6ae5-506a-8db5-0d1e86369bb3.html; *About the Office*, SAN FRANCISCO DISTRICT ATTORNEY, <https://www.sfdistrictattorney.org/>

better reflects the community it serves.⁴⁰ Said one California district attorney, “[w]e are a diverse community, we want people to realize our diversity the minute they walk in the doors.”⁴¹ Reflecting the community is important because it helps “to foster an appearance of fairness, cultivate trust within the community, and allow for more effective prosecution.”⁴² The remarks of a deputy district attorney sum up the logic nicely: “we need to be able to respond to the people we are trying to help, the people we are trying to serve and to prosecute, [and] their families. Our jurors need to know we look like them, sound like them, and understand them.”⁴³

B. The Two-Sided Equation: The Link

Why care about law student aspirations in this context? What do those aspirations have to do with progressive or reform prosecutors? What’s the connection? At first glance there may appear to be none at all. Just two disparate matters—the usual job-related angst and dreams of students, on the one hand, and on the other, the goals driving elected state-level prosecutors (and their fervent supporters) that are seeking substantial change in the criminal justice system. In fact, however, there is a critical connection between any kind of reform-oriented success and student interests that align with public service and a social justice sensibility.

Put simply, it’s about people and hiring—hiring in service of organizational change. This is a prerequisite for almost everything else a reform-oriented prosecutor hopes to accomplish.⁴⁴ Organizations do

about-us/join-our-team/ (last visited Oct. 29, 2021) (stating that “diversity promotes a stronger office that pursues and projects fair-mindedness to all those coming in contact with the criminal justice system”).

40. *FJP/Brennan, 21 Principles*, *supra* note 8, at 14–15 (“Hire a diverse staff across all levels . . . teams that include people from a variety of racial, ethnic, and religious backgrounds are more effective and more open to new ideas. Some research shows that increasing the number of minority prosecutors in an office decreases racial sentencing disparities.”); *see also Technical Guide*, PROSECUTORIAL PERFORMANCE INDICATORS (Sept. 2020) <https://ppibuild.wpengine.com/wp-content/uploads/2020/09/PPI-Technical-Guide-Sept-2020.pdf> (“[P]rosecutor’s offices increasingly serve diverse communities. Office leadership and line prosecutors should reflect this diversity in order to better represent local residents and understand their problems, needs, and priorities.”).

41. Katherine J. Bies, Darryl G. Long Jr., Megan S. McKoy, Jimmy S. Threath & Joshua D. Wolf, *Diversity in Prosecutors’ Offices: Views from the Front Line*, STAN. CRIM. JUST. CTR. 28 (2016), <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Diversity-Case-Studies-Final-3.12.16.pdf>.

42. *Id.* at 34.

43. *Id.* at 15.

44. *See, e.g., ELLEN YAROSHEFSKY & BRUCE A. GREEN, LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 267, 285 (Leslie C. Levin & Lynn Mather eds., 2012) (arguing

not change just because the leadership at the very top changes or changes its outlook.⁴⁵ Organizations have their own cultures, meaning the widely shared norms that characterize an organization and act as a social control system shaping members' attitudes, beliefs, and behaviors.⁴⁶ It is the embedded ethos that shapes everyday work, and it does not turn on a dime. In this part of the paper, we'll look at one side of that link, progressive prosecutors and organizational change.

Substantial organizational change (whether we are talking about a prosecutor's office, a public defender's office, a law firm, or some other kind of organization) involves changing the working culture as well as making structural changes or changes in formal policies. Reform-oriented prosecutors seem to recognize this (as do those wanting to change public defenders' offices).⁴⁷ As one such prosecutor succinctly said in a talk with law students, "[c]ulture eats policies for breakfast . . . culture is deep, extensive, and stable If you do not manage culture, it will manage you. And you may not even be aware of the extent to which this is happening."⁴⁸

that offices' hiring policies may affect pretrial disclosure practices because offices can "seek to employ people who will act in accordance with those [offices'] standards" and that hiring can further foster office culture).

45. Studies of organizational culture have suggested that organizational cultures are largely created by organization's leaders. This widespread assumption has been that cultures reflect the values, beliefs, and actions of organization's leaders. See, e.g., EDGAR A. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 2, 317 (1985); James N. Baron & Michael T. Hannan, *Organizational Blueprints for Success in High-Tech Start-Ups: Lessons from the Stanford Project on Emerging Companies*, 44 *CAL. MGMT. REV.* 8 (2002). However, empirical evidence for the influence of organization's management on culture formation and change remains inconclusive. See, e.g., Benjamin Schneider, Mark G. Ehrhart & William H. Macey, *Organizational Climate and Culture*, 64 *ANN. REV. PSYCH.* 361, 372 (2013) (suggesting that empirical studies supporting the role of leaders in organizational culture are difficult to find).

46. According to O'Reilly & Chatman, organizational culture is "a system of shared values defining what is important, and norms, defining appropriate attitudes and behaviors, that guide members' attitudes and behaviors." See Charles A. O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment*, 18 *RSCH. ORGANIZATIONAL BEHAV.* 157, 166 (1996); see also Gideon Kunda, *Engineering Culture: Control and Commitment in A High-Tech Corporation*, 17 *ACAD. MGMT. REV.* 819 (1992); Jennifer A. Chatman & Sandra Eunyong Cha, *Leading by Leveraging Culture*, 45 *CAL. MGMT. REV.* 20 (2003); Jennifer A. Chatman & Charles A. O'Reilly, *Paradigm Lost: Reinvigorating the Study of Organizational Culture*, 36 *RSCH. ORGANIZATIONAL BEHAV.* 199 (2016).

47. Said a district attorney in California, "this movement is something more than winning an election. It demands a fundamental transformation from the grass roots: to change an often sticky and resistant office culture." Stanford Law School Workshop (Oct. 2018) (notes on file with the authors). For a similar take on culture and change, but for public defenders, see Rapping, *supra* note 7, at 76–80 (focusing on recruitment and hiring of the next generation of public defenders as a means of reform).

48. Larry Krasner, Dist. Att'y, Phila. Dist. Att'y Office, Keynote Address at Public Interest Center, Northwestern Pritzker School of Law, From Defense Attorney to Progressive Prosecutor: A Reflection and Vision on The Criminal Justice System (Oct. 15, 2019) (notes on file with the authors); see also Chris Hayes, *Why Is This Happening? How Prosecutors Can Help End*

Another prosecutor tied change directly to hiring. Recognizing the need for and challenge of changing organizational culture, he said: Cultural change is not going to happen overnight. But a key part of the culture change in my office involves the way we hire. The kind of questions we ask when we are hiring are a lot different We used to hire people who wanted to be tough on crime and people who wanted to be the best trial attorneys. We now look for people who want to do justice and understand it's a very different obligation than just going into the courtroom and winning a case.⁴⁹

These remarks, like the ones of the prosecutor quoted above, were made to a law student audience, and we note this because the remarks show the link at the heart of our question in the heading for this section of the paper in a very pragmatic way.

C. The Challenge

The challenge is how to rethink the prosecutor's office—the organization itself and its culture—in ways that can serve reform-oriented goals, or at least in ways that do not thwart such goals. It can be especially daunting for those leading a large organization, like a major urban office, for no other reason than the sheer number of people and subdivisions, some with long histories of their own.⁵⁰ As one prosecutor said, “I manage a big office, with hundreds of prosecutors. Some are junior, some have been there for a decade, some have been there for about 30 years.”⁵¹

Critics with some first-hand knowledge of “tough-on-crime” prosecutor's offices can be quite severe in their assessments. They point to a punitive, carceral mindset and their tough-on-crime, win-at-all-costs office culture, one in which prosecutors' core mentality is to “lock them up” by building cases, pursuing criminals, and seeking harsh punishments.⁵² Perhaps most importantly, it is also a mindset that too

Mass Incarceration, with Larry Krasner: Podcast & Transcript, MSNBC & NBC NEWS THINK (July 10, 2018, 6:06 AM), <https://www.nbcnews.com/think/opinion/how-prosecutors-can-help-end-mass-incarceration-larry-krasner-podcast-ncna890126>.

49. Eric Gonzalez, Dist. Att'y, Brooklyn Dist. Att'y Office, Address at the Stanford Criminal Justice Center and the Center for the Legal Profession, Conversation with Progressive Prosecutors (Oct. 15, 2020) (notes on file with the authors).

50. See also Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012).

51. Kim Foxx, Dist. Att'y, Cook County State Att'y Office, Keynote Address at the Northwestern Pritzker School of Law, The Children and Family Justice Center and American Constitution Society (Sept. 24, 2019) (notes on file with the authors).

52. See, e.g., Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–36 (2004) (suggesting that prosecutors with “the

often overlooks excessive use of force and other misconduct by police officers, tolerates wealth-based pretrial detention, and a blatant exercise of racially discriminatory discretion.⁵³

The challenge can be daunting indeed, given that many reform prosecutors include increasing numbers of women, people of color, public defenders, civil rights attorneys, and candidates with no previous prosecutor experience.⁵⁴ For instance, before being elected as Philadelphia District Attorney, Larry Krasner was a civil rights attorney who represented many activist groups and had sued law enforcement agencies more than 70 times. His opponent, a career prosecutor, received the endorsement of the police union and argued that the city already had a public defender's office and that they didn't "need the district attorney to be a second."⁵⁵

Robust hiring, and occasionally firing, practices are often used by prosecutors in their efforts to change and diversify organizational culture.⁵⁶ They hope for a fit between a new hire and a reformed culture, and new law school graduates (who would be the line prosecutors) are a prime target, especially women and people of color. While attracting the kind of people needed as a part of organizational change is challenging enough, attracting those new lawyers may be even more so given that some of the most severe critics of prosecutors are aca-

highest conviction rates (and, thus reputations as the best performers) stand the greatest chance for advancement internally."); Matt Sledge, *For Insight into DA-Elect Jason Williams, Look to 'Progressive Prosecutors'*, TIMES-PICAYUNE (Dec. 12, 2020, 12:19 PM), https://www.nola.com/news/courts/article_91bd2408-3ca6-11eb-a142-df7dab535c9e.html (reporting on the "win at all costs" office culture in the Orleans Parish D.A.'s Office that tolerated use of both fake subpoenas and material witness warrants).

53. See David E. Patton, *A Defender's Take on Good Prosecutors*, 87 FORDHAM L. REV. ONLINE 20, 23–24 (2018–2019).

54. Elizabeth Weill-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, APPEAL (Nov. 09, 2019), <https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement/>; Maxine Bernstein, *Criminal Defense Lawyer Defeats Beleaguered Veteran Prosecutor for Wasco County District Attorney: Oregon Elections Results*, OREGON LIVE: THE OREGONIAN (May 19, 2020), <https://www.oregonlive.com/pacific-northwest-news/2020/05/criminal-defense-lawyer-defeats-veteran-prosecutor-to-serve-as-wasco-county-district-attorney-oregon-elections.html>; Nadia Hamdan, *A Former Public Defender Hopes to Unseat Top Prosecutor in Travis County District Attorney Race*, KUT RADIO (July 6, 2020, 9:28 PM), <https://www.kut.org/politics/2020-07-06/a-former-public-defender-hopes-to-unseat-top-prosecutor-in-travis-county-district-attorney-race>.

55. Alan Feuer, *He Sued Police 75 Times: Democrats Want Him as Philadelphia's Top Prosecutor*, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/us/philadelphia-krasner-district-attorney-police.html>. In 2021, Krasner won reelection for his second term. See *Philadelphia DA Larry Krasner Wins Second Term*, FOX 29 PHILA. (Nov. 2, 2021), <https://www.fox29.com/news/philadelphia-da-larry-krasner-wins-second-term-ap-reports>.

56. See Green & Roiphe, *supra* note 10, at 727; see *infra* note 130; see also BAZELON, *supra* note 22, at 161.

demics who would discourage women and students of color and students in general from taking such positions—even in the office of a more progressive prosecutor.⁵⁷

Perhaps the most consistently scathing of these academic critics is Professor Abbe Smith of Georgetown University Law Center.⁵⁸ The title of her 2001 article poses a stark question “Can You Be a Good Person and a Good Prosecutor?”⁵⁹ Her purpose was to “examine the morality of prosecution.”⁶⁰ Her answer is a resounding no: “I am saying to those who are committed to social and racial justice: Please don’t join a prosecutor’s office.”⁶¹

Those like Smith with actual experience working in the criminal justice system are important not just because of their normative stance, but because of their experienced-based views on what happens when the best of normative intentions hit the hard, entrenched reality of the everyday world of criminal justice. It is the experienced-based view that gives her assessments strength.

Why? Smith says:

My position is rooted in this time and place. We live in an extraordinarily harsh and punitive time, a time we will look back on in shame. The rate of incarceration in this country, the growing length of prison terms, the conditions of confinement, and the frequency with which we put people to death have created a moral crisis. Although, arguably, all those who work in the criminal justice system have something to do with its perpetuation and legitimacy, *prosecutors are the chief legal enforcers of the current regime* (emphasis added).⁶²

57. This is in addition to a number of other hiring challenges. A study of diversity in California prosecutors’ offices found that “(t)he most frequently identified barrier was the stigma surrounding prosecutors in minority communities, especially among Blacks and Latinos.” Bies et al., *supra* note 41, at 22. The study also noted a “pipeline problem,” that is “the small pool of minority attorneys in California” and the competition for those attorneys. *Id.* at 23.

58. See *Abbe Smith*, GEORGETOWN L., <https://www.law.georgetown.edu/faculty/abbe-smith/> (last visited Dec. 27, 2021).

Abbe Smith is Director of the Criminal Defense and Prisoner Advocacy Clinic, Co-Director of the E. Barrett Prettyman Fellowship Program, and Professor of Law at Georgetown University. She joined the Georgetown faculty in 1996. Prior to Georgetown, Professor Smith was Deputy Director of the Criminal Justice Institute at Harvard Law School, and a Clinical Instructor and Lecturer on Law at Harvard.

Id.

59. *Good Prosecutor*, *supra* note 4. Her article was the focal point of a 2019 symposium. See Bruce Green, *Foreword*, 87 *FORDHAM L. REV. ONLINE* 1 (2018).

60. *Good Prosecutor*, *supra* note 4, at 362–63.

61. *Id.* at 400.

62. *Id.* at 396–97.

Of particular concern for her is the “disproportionate impact on African Americans” and the broader consequences of that impact.⁶³

Though writing in 2001, Smith does acknowledge the idea of “progressive prosecutors,” and she is not sanguine.⁶⁴ They still work within a biased, if not corrupt, system. Even the best cannot escape this reality.⁶⁵ It is the process itself, if not the individual prosecutor’s office, with its emphasis on winning. It mitigates against the more idealistic line prosecutor who hopes to make a difference. “Prosecution is a team effort. Prosecutors have to rely on other prosecutors, police officers, other law enforcement personnel, and a variety of witnesses to do their job.”⁶⁶

Smith has wavered little over time in her assessments. Her normative critique of the criminal justice system with regard to social justice and race is typical of those with a more progressive orientation.⁶⁷ Her views and her 2001 article have been influential enough to have been the focal point of the 2018-2019 symposium in the *Fordham Law Review Online*:

In my view, the decision to become a prosecutor in a time of mass incarceration—a time we will surely look back on in shame—is a moral choice. The disproportionate impact of mass incarceration on black and brown people makes the moral choice inescapable. You can choose to challenge this system either by defending individual clients from its brutality, as defenders do, or through a more broad-based attack. But the very nature of the job prosecutors do — *locking people up* — upholds our shameful system. This hasn’t changed since 2001 (emphasis in original).⁶⁸

The last line in her essay sums up her mostly pessimistic assessment: “I would like to believe that good, well-intentioned people who become prosecutors could bring justice back to the criminal justice system in 2018. But I doubt it.”⁶⁹

Paul Butler, a well-known former federal prosecutor, had hopes of doing something Smith thinks is impossible — making a change

63. *Id.* at 368–72.

64. *Id.* at 398. See also *Born or Made*, *supra* note 4, at 943.

65. *Good Prosecutor*, *supra* note 4, at 399–400.

66. *Id.* at 392; see also Smith’s discussion on how she sees the working culture can negatively shape a line prosecutor, *id.* at 380–84.

67. Green & Roiphe, *supra* note 10.

68. Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 *FORDHAM L. REV. ONLINE* 3, 4 (2018–2019) [hereinafter *Good Person, Bad Prosecutor*]. On the symposium itself, see Green, *supra* note 59.

69. *Good Person, Bad Prosecutor*, *supra* note 68, at 7.

from the inside. As if making Smith's point, in a 2010 book, he reflected on his own experience, saying:

My aspirations of changing the system got shot down because I liked winning too much, and I was good at it. I wanted to be well regarded by my peers, to be successful in my career, and to serve my community. And the way to do that, I learned on the job, was to send as many people to jail as I could. I wasn't so much hood winked as seduced.⁷⁰

He too was pessimistic, finding it "difficult to contain injustice when one participates in it,"⁷¹ and those hoping to do so "have signed up with the wrong team."⁷²

Unlike Smith, Butler talks specifically about organizational culture. It eventually makes individuals see themselves on one side or the other along the prosecutor-defender divide.

The culture of the workplace engenders suspicion against prosecutors with too many progressive values, translating it as too much sympathy toward defendants or too much suspicion of the police. It's not that people think you are a bad person, it's just that they wonder why you became a prosecutor.⁷³

In short, Butler's message in his 2010 book is clear for those concerned about locking people up, prosecution is not the right work for them.⁷⁴

In a sense, Butler is talking about the kind of fit, between the person to be hired and the organization hiring them, we discussed above as a key to the success of reform prosecutors. More recently, in talking about progressive prosecutors like Krasner in Philadelphia, he is (unlike his Georgetown colleague Smith) somewhat less pessimistic. In a 2020 interview, Butler said, "Now . . . we have people like Kim Foxx, people like Chesa Boudin, people like Larry Krasner, who are

70. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 105 (2010).

71. *Id.* at 113.

72. *Id.*

73. *Id.* at 117. See Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors' Morality Tales*, 5 VA. J. CRIM. L. 38 (2017) (discussing prosecutors' professional self-images and narratives regarding their own duties and those of their adversarial counterparts. The study finds that "wearing the white hat," "going over to the dark side," "being a true believer," and "drinking the Kool-Aid" are common descriptive phrases used by state prosecutors).

74. Butler's assessment sounds much like those of a public defender. Jonathon Rapping, a long-time reformer whose sentiments are with public defenders, remarked that prosecutors "must never intentionally engage in conduct that undermines those tenets at the heart of our democracy. Yet culture drives prosecutors across the country to do this. Every day prosecutors help perpetuate a system that over-prosecutes and over-incarcerates. They do so in a way that disproportionately targets the most vulnerable." Rapping, *supra* note 7, at 167.

the man, the woman, and they're using their vast power to try to make a difference. So I'm, I don't know if you could say optimistically skeptical or encouragingly pessimistic. I'm watching real closely. I'm hoping that they are, as leaders, able to transform."⁷⁵

Butler went on to say that organizational change will require changing the people. "So, when a new leader comes in, she must deal with the old guard, and many of those people are not on board You must fire a lot of people, and some prosecutors like Larry Krasner have been able to do that."⁷⁶ This also means hiring the right kind of people, those sharing the reform culture.⁷⁷ "You want people who are enthusiastic about implementing the policy," and Butler thinks they "aren't hard to find. Come to . . . Georgetown law school. I have a number of students who would die to work with Larry Krasner or Kim Foxx or Chesa Boudin."⁷⁸

75. Kay Antholis, *A Conversation with Paul Butler About Progressive Prosecutors*, CRIME STORY PODCAST (Feb. 24, 2020), <https://crimestory.com/2020/02/24/a-conversation-with-paul-butler-about-progressive-prosecutors/>.

76. *Id.* Still, others remain highly skeptical, *see, e.g.*, Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69 (2019) (arguing that hiring "good prosecutors" who care about criminal justice reforms will not help change the office culture because individuals eventually "became increasingly punitive, and no amount of training could counter this trend").

77. However, hiring for fit can have its darker side, with recruiters unconsciously falling prey to a reflect a "similar-to-me" effect rather than being indicative of actual fit within the organization's culture. Recruiters tend to mistake alignment between themselves and the candidate for alignment between the candidate and the organization. *See, e.g.*, LAUREN A. RIVERA, PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS, AT 143–147 (2015); Zack Needles, *Big Law Doesn't Have a Pipeline Problem. It Has an Elitism Problem*, LAW.COM (Feb. 15, 2021, 11:00 PM), <https://www.law.com/2021/02/15/law-com-trendspotter-big-law-doesnt-have-a-pipeline-problem-it-has-an-elitism-problem/> (reporting that the conventional notion of "Big Law material" leads to biased and exclusionary hiring practices); Lauren A. Rivera, *Guess Who Doesn't Fit In at Work*, N.Y. TIMES (May 30, 2015), https://www.nytimes.com/2015/05/31/opinion/sunday/guess-who-doesnt-fit-in-at-work.html?_r=1&mtrref=undefined&gwh=17DE4120763365C6B265FA695DC6621E&gwt=pay&assetType=opinion.

78. Antholis, *supra* note 75. In the past Butler said he would have told these students to be public defenders.

About five years ago, I had students who have the same kinds of concerns that I have asking should they be prosecutors? Because they heard prosecutors have all this power and discretion, and they hoped that maybe by creating change from the inside, they could make more of a difference.

Id.

On the power of prosecutor, *see* David A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480 (2016) (stating that "[t]he starting point for virtually every discussion of prosecutors in the United States is their tremendous clout."). *See* Liz Oyer, *If Biden Wants to Reform Criminal Justice, He Needs Public Defenders on His Team*, WASH. POST (Jan. 15, 2021, 9:00 AM), <https://www.washingtonpost.com/opinions/2021/01/15/if-biden-wants-reform-criminal-justice-he-needs-public-defenders-his-team/> (on the importance of a different mindset).

Who Wants to Be a Prosecutor?

Others emphasize the need for the “good person” prosecutor. Writing in that 2018-2019 *Fordham Law Review Online* symposium, Professor Jessica Roth, herself a former prosecutor, argued that “we need good people [meaning people committed to social justice] to ensure that investigations, pleas, trials, and sentencing are conducted in a manner that respects people’s rights and who consider the broader context of their work.”⁷⁹ Another commentator in the symposium, Professor Rebecca Roiphe, agrees, saying:

it seems to me that this is a unique moment for prosecutors to move their offices incrementally towards reform We need people inside prosecutors’ offices who will engage in this conversation in a meaningful way and help reform their offices to pursue a more just kind of prosecution with a more nuanced understanding of crime, race, poverty, and the criminal justice system.⁸⁰

And a third symposium participant echoes this sentiment, observing:

There are good people currently serving as prosecutors who are implementing a new model of prosecution — one that seeks to reduce the use of incarceration, eliminate racial disparities, and provide second chances. If we ever hope to fix our broken criminal justice system, we must work to replicate that model throughout the country.⁸¹

This, she argues, “will only happen if good people become prosecutors.”⁸²

We do not intend to enter the debate between Smith and those who disagree with her, or to parse out the variations in Butler’s views over time. Those matters involve differing views of the prosecutorial past, the prosecutorial present, and the possibilities of the prosecutorial future; and as a prosecutor we quoted earlier said, “cultural change is not going to happen overnight.”⁸³ We cannot know what might transpire, but we do know that reform prosecutors are trying to change their organizations and using hiring as a key compo-

79. Jessica Roth, *The Necessity of the Good Person Prosecutor*, 87 *FORDHAM L. REV. ONLINE* 30, 30–31 (2018–2019) (suggesting that it is possible for good people to be good prosecutors).

80. Rebecca Roiphe, Revisiting Abbe Smith’s Question, *Can a Good Person Be a Good Prosecutor, in the Age of Krasner and Sessions*, 87 *FORDHAM L. REV. ONLINE* 25, 29 (2018–2019).

81. Davis, *supra* note 22, at 8.

82. *Id.* at 12.

83. Bies, *supra* note 41.

ment. As that prosecutor also said, “a key part of the culture change in my office involves the way we hire.”⁸⁴

The idea of fit — and the chances of success of hiring for change — requires a link between the organization’s purposes and values on the one hand, and the aspirations of potential hires on the other. In too many discussions those potential hires, the students themselves, are largely left out. They are talked about or talked to, but their views, characteristics, and aspirations are neglected. Or worse, just assumed. It makes little practical sense, however, to ignore students or rely on just so assumptions.

III. THE OTHER SIDE OF THE EQUATION: STUDENT MOTIVATION AND ASPIRATION

A. The Importance of Motivation

Given what reform prosecutors hope to achieve and the importance of hiring people attuned to those goals, we need to go beneath just career aspirations and the question of who might want to work as a prosecutor. We need to look to the more basic idea of motivation to get a better purchase on why someone would want to do this kind of legal work (or not). Beyond the specific area of law or kind of practice, what drives student aspirations? What might lie behind not just the choice of a particular legal career, but the choice of a legal career in the first place? Motivation is important for understanding the pool of potential hires, especially if one’s purpose is some kind of fit and hoping to find not just the skills, but the “right” kind of person.⁸⁵

Work in psychology, organizations, and especially public administration suggests that motivations can be important for understanding the outcomes of legal education, especially graduates’ career aspirations.⁸⁶ In other words, aspirations—what students hope to do—be-

84. *Id.*

85. In other words, the idea of fit suggests that if individuals view the mission and values of the prosecutor’s office as congruent with their own motivations, then they are more likely to be attracted to those organizations. See Gregory A. Mann, *A Motive to Serve: Public Service Motivation in Human Resource Management and the Role of PSM in the Nonprofit Sector*, 35 PUBLIC PERSONNEL MGMT. 33 (2006) (demonstrating the importance of incorporating applicant’s motivation as a selection criterion into public service employment). See generally Rivera, *supra* note 77.

86. See Jacquelynne S. Eccles, *Understanding Women’s Educational and Occupational Choices*, 18 PSYCH. WOMEN Q. 585, 591–92 (1994) (showing that “the motivation for students’ occupational choices thus consists of two main aspects: the students’ expectation of success and the value the students attribute to this particular option.”); see also Jacquelynne S. Eccles & Allan Wigfield, *Motivational Beliefs, Values, and Goals*, 53 ANN. REV. PSYCH. 109 (2002).

come intelligible and meaningful to the extent they are connected to the motivations that may drive them.⁸⁷ Relevant for this paper's interests is the literature surrounding "public service motivation" (PSM), largely from public administration.⁸⁸

Within public administration, PSM is important for understanding why people may seek careers in this arena and why they stay or leave.⁸⁹ The most widely accepted definition of PSM dates to 1990 and the work of James Perry and Lois Wise.⁹⁰ They defined public service motivation as "an individual's predisposition to respond to motives grounded primarily or uniquely in public institutions and organizations;"⁹¹ and given Perry and Wise's interests, "public" means governmental.⁹² More specifically, "public service motivation is most commonly associated with particular normative orientations—a desire to serve the public interest, loyalty to duty and to the government as a whole, and social equity."⁹³

The idea of PSM is important for this article's purposes because of the behavioral implications Perry and Wise see. "The level and type of an individual's public service motivation and the motivational composition of a public organization's workforce have been posited to influence individual job choice, job performance, and organizational effectiveness."⁹⁴ In short, it makes a difference who you hire. The

87. See Stephen Daniels & Shih-Chun Chien, *Beyond Enrollment: Why Motivations Matter to the Study of Legal Education and the Legal Profession*, LSSSE GUEST BLOG (Sept. 24, 2020), <https://lssse.indiana.edu/blog/guest-post-beyond-enrollment-why-motivations-matter/>.

88. See Leonard Bright, *Public Service Motivation and Socialization in Graduate Education*, 34 TEACHING PUBLIC ADMIN. 284, 286 (2016) (suggesting that "public service motivation was originally grounded in an intuitive understanding that some individuals were very motivated by opportunities to help their neighbors and contribute to the well-being of society. It was believed that these inclinations attracted individuals toward certain kinds of organizations and occupations.").

89. See Jacqueline Carpenter, Dennis Doverspike & Rosanna F. Migue, *Public Service Motivation as a Predictor of Attraction to the Public Sector*, 80 J. VOCATIONAL BEHAV. 509–23 (2012) (showing that PSM is associated with individuals' perceptions of fit and attraction to public sector organizations); see also Leonard Bright, *Does Public Service Motivation Really Make a Difference on the Job Satisfaction and Turnover Intentions of Public Employees?* 38 AM. REV. PUB. ADMIN. 149 (2008); Philip E. Crewson, *Public-Service Motivation: Building Evidence of Incidence and Effect*, 7 J. PUB. ADMIN. RSCH. & THEORY 499 (1997).

90. James Perry & Lois Wise, *The Motivational Bases of Public Service*, 50 PUB. ADMIN. REV. 367 (1990); Joanna O'Riordan, *Public Service Motivation: State of the Public Services Series*, 12 INST. PUBLIC ADMIN. (June 2013), https://www.ipa.ie/_fileUpload/Documents/PublicServiceMotivation.pdf.

91. Perry & Wise, *supra* note 90, at 368.

92. *Id.* at 367, 372.

93. PSM combines "a variety of rational, norm-based, and affective motives." *Id.* at 369. For a review of various definitions of PSM, see Barry Bozeman & Xuhong Su, *Public Service Motivation Concepts and Theory: A Critique*, 75 PUB. ADMIN. REV. 700, 701–702 (2015).

94. Perry & Wise, *supra* note 90, at 370.

PSM literature suggests that there are people better suited to work in the criminal justice system, as prosecutors or alternatively as public defenders, and others better suited to work in different arenas like business-oriented practices in a private practice setting. The challenge is in finding and attracting people whose motivations are more in the direction of service, and service of a particular kind.⁹⁵

We should expect to find a public service motivation among at least some law students. Law is a profession that is likely to attract people with what might be called a broad public or social interest motivation. The idea, of course, goes to the profession's sense of itself and its place and role in our society. It can be seen in official statements of professional ethics and obligations.⁹⁶ Importantly, the broad idea of public or social interest has a deeper resonance, one beyond professional rules and appropriate professional behavior. As one commentator says, it is "a sense of duty as an officer of the court and responsibility as a part of a system in our society that is engaged in upholding the rule of law."⁹⁷ Francis Zemans and Victor Rosenblum called it a "morality of aspiration" that speaks to upholding "standards above those enforceable through a code, standards that take cognizance of a lawyer's and the legal system's role in achieving justice."⁹⁸

One can, of course, be affected by such a broad idea in deciding on law school and a career in law and not be driven by a more specific motivation to pursue a career within law in the public service arena. This may be a result of the intensity of one's commitment to that idea, which can run from weak to strong. A career interest in public service could reflect a commitment on the strong end of the continuum, while a career interest in private practice (with minimal pro bono-related activity) could reflect commitment on the weak end.

95. See Jennifer A. Chatman, *Matching People and Organizations: Selection and Socialization in Public Accounting Firms*, 36 ADMIN. SCI. Q. 459, 460 (1991) (suggesting that person-organization fit can be established either by attracting and hiring appropriate individuals or by influencing individuals through socialization once they are hired).

96. The Preamble of the American Bar Association's Model Rules of Professional Conduct, for instance, describe lawyers, among other things, "as a public citizen having special responsibility for the quality of justice. *Model Rules, Preamble & Scope, Preamble: A Lawyer's Responsibilities*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/, (last visited Oct. 29, 2021).

97. David Thomson, "Teaching" *Formation of Professional Identity*, 27 REGENT UNIV. L. REV. 303, 315 (2015).

98. FRANCIS ZEMANS & VICTOR ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 170 (1981).

B. What *Do* Students Have to Say About Motivation?

The earliest studies bearing on law student motivation go back to the 1960s and 1970s when the landscape of legal education and the legal profession looked very different than today.⁹⁹ This limits the usefulness of many of their specific findings, but they set the stage for later efforts and their influence is still being felt. Specifically, all legal motivations studies, from a 1961 NORC survey to the 2017 AALS/Gallup surveys,¹⁰⁰ share an interest in a small but varied set of themes surrounding what might drive people to choose law: making money; prestige and professional advancement; serving the public good; the influence of others, especially family; the intellectual side of the profession; independence; and catch-all categories for those with no substantive motivation, like waiting out the poor job prospects in the sluggish economy or the military draft in an earlier time.

Importantly, and consistent with Perry and Wise, all find no unitary factor. Individuals have a mixture of motivations—some more intrinsic, others more extrinsic¹⁰¹—with different degrees of importance or intensity. There are some basic consistencies; money and prestige are always important. Yet, so are motivations that speak to altruistic commitments and the kind of broad public and social inter-

99. See generally Stephen Daniels, *The Perennial (and Stubborn) Challenges of Affordability, Cost, and Access*, in MEERA E. DEO, MINDIE LAZARUS-BLACK & ELIZABETH MERTZ, *POWER, LEGAL EDUCATION, AND LAW SCHOOL CULTURES* (2020), 140–45. Writing in 1965, the author of the introduction to a book reporting on a study of would-be lawyers noted, “the study shows that in its attraction and appeal to young people the law seems to do its fishing in restricted waters stocked largely with the product of professional families, private schools, and the upper social strata.” SEYMOUR WARKOV & JOSEPH ZELAN, *LAWYERS IN THE MAKING*, xviii (1965). The “Introduction” also asked, “Why does a random example of 1,800 law-inclined students include so few Negroes (sic) that they cannot be systematically studied?” *Id.* at xv. To note the gendered composition of the profession at the time, the book’s authors tell the reader, “Since more than 90 percent of all students selecting law are men, women are excluded from consideration throughout the report.” *Id.* at 1. They add, as if for emphasis, that “law is a masculine field.” *Id.* at 8.

100. WARKOV & ZELAN, *supra* note 99; ASSOCIATION OF AMERICAN LAW SCHOOLS/GALLUP, *BEFORE THE JD: UNDERGRADUATE VIEWS ON LAW SCHOOL* (2018) [hereinafter *Before the JD*]; ASSOCIATION OF AMERICAN LAW SCHOOLS/LSAC/GALLUP, *BEYOND THE BACHELOR’S: UNDERGRADUATE PERSPECTIVES ON GRADUATE AND PROFESSIONAL DEGREES* (2018); see also LEONARD BAIRD, *THE GRADUATES: A REPORT ON THE CHARACTERISTICS AND PLANS OF COLLEGE SENIORS* (1973); Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551 (1973); Barry Boyer & Roger Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 243–254 (1974).

101. See Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCH. 54, 55 (2000) (defining intrinsic motivation as “doing something because it is inherently interesting or enjoyable” and extrinsic motivation as “doing something because it leads to a separable outcome.”).

est notions discussed above. The picture is a nuanced one, not just for students in general, but also for individual students.¹⁰²

The extant studies do not, unfortunately, allow us to explore connections among motivations (the nuanced why question) or to explore the connections between motivations and aspirations (the what question, meaning what do I want to do as a lawyer). They weren't designed to do so, but the connections are what's important if we are considering the idea of hiring in the service of organizational change. A unique set of questions in the 2010 LSSSE survey allow us to explore the connections among different motivations, among those motivations and aspirations, and among both and student characteristics.¹⁰³

The 2010 LSSSE survey included a distinctive set of seven motivation questions, posed to a subset of law students in the survey, well within the themes found in the extant literature. The results are not so far in the past that they are irrelevant to understanding more recent findings from annual LSSSE surveys on student aspirations.¹⁰⁴ Importantly for those hoping to hire the right kind of person and not just hiring based on skills alone, the students' responses to the seven questions provide insight into what students value and what might drive them.

The 2010 LSSSE motivation questions asked students (on a 7-point scale running from not at all influential to very influential) how important each of seven motivations was for their decision to go to law school. Given that students may have a mixture of motivations, they were not asked to choose among them. Instead, they were asked to rate each one independently. Table 1 presents the percentage of students indicating that each motivation was "more influential" (choosing 5, 6, or 7), the percentage indicating that each was less influential (choosing 1, 2, or 3) as well the percentage indicating very influ-

102. For instance, a given student may highly rate both contributing to the public good and prestige, while another student may rate one high and the other low. There are studies that take a very different approach to motivation, one that is driven by a "rational actor" conceptualization of motivation. These studies start with a unidimensional rational actor assumption rather than exploring the possibility of a mix of differing motivations. See Ronald Ehrenberg, *An Economic Analysis of the Market for Law Students*, 39 J. LEGAL EDUC. 627 (1989); Ronald Ehrenberg, *American Law Schools in a Time of Transition*, 63 J. LEGAL EDUC. 98 (2013); Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014); Christopher J. Ryan, *Analyzing Law School Choice*, UNIV. ILL. L. REV. 583 (2020).

103. See *supra* note 20.

104. The basic connections between particular motivations and particular aspirations are unlikely to change. What could change is the percentage of students driven by a particular motivation (e.g., the percentage of students motivated by the public good, or prestige, and so on).

Who Wants to Be a Prosecutor?

ential (choosing 7) and the percentage indicating not at all influential (choosing 1).

Table 1.
Law Students: Importance of Each of Seven Motivations
for Choosing Law

	% More Influential	% Less Influential	% Very Influential	% Not at all Influential
Challenging & Rewarding Career (n=4595)	90%	5%	50%	1%
Furthering Academic Development (n=4607)	85%	7%	43%	2%
Financial Security (n=4583)	81%	11%	39%	4%
Prestige in Profession (n=4610)	69%	18%	29%	6%
Contributing to the Public Good (n=4616)	60%	28%	27%	13%
Unsure of Next Steps so Continue in School (n=4611)	34%	54%	13%	31%
Living up to Other's Expectations for Career (n=4604)	27%	62%	10%	37%

The patterns are clear. Most important for students are the intrinsic motivations of a challenging career and academic development along with the extrinsic motivation of financial security (reform prosecutors may take some solace with regard to a challenging career, but perhaps not so with financial security). These three motivations are near constants, and this shouldn't be surprising. The academic background required for any post-graduate or professional training and the challenges and nature of the work will attract some and not attract others.¹⁰⁵ We would be surprised if such intrinsic motivations did not

105. Among other matters, a 2017 survey of undergraduates asked what might prevent them from attending law school. The top five reasons were: high cost/debt (63%), poor work-life balance (51%), too hard would not do well academically (25%), too few jobs paying enough money (17%), and work not creative enough/too confined/too stringent (16%). The sixth reason was lawyers are seen as corrupt/conniving (15%). See Before the JD, *supra* note 100, at 48. On the other side, the top five reasons for choosing law were: pathway for career in politics/government/public service (44%), passionate/high interest in the work (42%), being useful to others/society (35%), advocate for social change (32%), and high-paying jobs (31%). *Id.* at 44. Respondents were not asked to choose among the possibilities, but instead were asked to choose their three top reason reasons for law school or not law school.

play a key role.¹⁰⁶ The same is true for financial security given the investment most students make in pursuit of legal training and the fact that they are choosing a career, a livelihood.

Prestige and the public good are less important in general, but certainly not unimportant. In light of some motivations as near constants, these two motivations help to differentiate things because the two are statistically unrelated.¹⁰⁷ Additionally, the two have quite different statistical relationships with financial security. One, prestige, is positive and the other, public good, is negative.¹⁰⁸ These two motivations give us at least a fuller sense of what students, especially different groups of students, value and how intensely they value it. If one is looking for organizational fit, this differentiation is important.¹⁰⁹

Even though the remaining two motivations seem to lack any meaningful substance in terms of what students might value, they are still important for fit. These two motivations are significantly related, and they too may help to differentiate among students.¹¹⁰ Both have significant but *weak* and *negative* relationships with challenging careers and with public good.¹¹¹ Both have very weak relationships with academic development, but only unsure is significant.¹¹² Each has somewhat stronger, positive relationships with financial security and

106. As we would expect, the two intrinsic motivations are strongly correlated, Spearman's rho = .58, sig. 000. The correlation for each with financial security is more moderate but still significant: for challenging career and financial security, Spearman's rho = .38, sig. 000; for academic development and financial security, Spearman's rho = .30, sig. = .000. Spearman's rho is a commonly used statistic for ranked (ordinal level) data and ranges from -1.0 to 1.0, with -1 reflecting a perfect negative relationship and 1.0 a perfect positive relationship. Moving forward only those statistical relationships that are significant at .05 or better will be used and so no subsequent significance levels will be reported. As we stated in earlier in the text, unless otherwise footnoted with a citation, all statistical analyses reported in the text or in the footnotes are the results of the authors' analyses of LSSSE survey data. See text immediately following note 19.

107. Spearman's rho = 0, and a correlation of 0 means no relationship. Each is significantly related to challenging career (for prestige, Spearman's rho = .44; for public good, Spearman's rho = .21) and academic development (for prestige, Spearman's rho = .37, for public good, Spearman's rho = .28).

108. For prestige and financial security, the relationship is strong, Spearman's rho = .56. For public good, the relationship is more moderate but negative, Spearman's rho = -.18.

109. As reported in published form, data from the AALS/Gallup survey do not allow the analysis of these kinds of connections. See Association of American Law Schools/LSAC/Gallup, *supra* note 100.

110. For unsure and others' expectations, Spearman's rho = .47.

111. For the relationship of each to challenging career, Spearman's rho = -.05. For unsure and public good, Spearman's rho = -.05; and for others' expectations and public good, Spearman's rho = -.07.

112. For unsure and academic development, Spearman's rho = .04. The relationship for others' expectations and academic development is not significant.

with prestige.¹¹³ These two motivations remind us that there are, and have been, some who choose to attend law school for reasons, in whole or part, that may have little to do with the actual practice of law.

Those more driven by these last two motivations may be attractive for and attracted to some legal jobs and not others. The same would be the case for those driven less by these motivations and more by the public good. We would expect to see students who value different things, generally speaking, to have different occupational aspirations.¹¹⁴

Given the concern with diversity, with regard to reform prosecutors and in general, we looked for any differences by gender and by race. The patterns for gender look very similar to those in Table 1.¹¹⁵ There are statistically significant differences between men and women with regard to each of the motivations for all but prestige. Those relationships, however, are weak.¹¹⁶ Despite this, there are some differences in intensity that are worth noting. A larger percentage of women rate public good as more influential (5-7 on the 7-point scale), 66% v. 53% for men; and a larger percentage rate public good as very influential (7 on the 7-point scale), 35% v. 20% for men. Larger percentages of women also rate challenging career and academic development as very influential, 56% v. 45% for challenging career and 49% v. 37% for academic development.¹¹⁷

Differences regarding race are harder to deal with statistically because of the skewed distribution. There is a very high percentage of

113. For unsure and prestige, Spearman's rho = .13; for other's expectations and prestige, Spearman's rho = .26. For unsure and financial security, Spearman's rho = .14; for others' expectations and financial security, Spearman's rho = .18.

114. Bright, *supra* note 89 (showing that mixtures of different motivations attract individuals to particular types of organizations that best match incentive structures to individuals' preferences).

115. The gender breakdown in the 2010 LSSSE motivation data is 50%/50%. American Bar Association figures for the academic year 2009-2010 show a gender breakdown of 53% male, 47% female. See *First Year and Total J.D. Enrollment by Gender: 1947-2010*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/1947_2010_enrollment_by_gender.authcheckdam.pdf (last visited Oct. 29, 2021).

116. The strongest of those weak relationships are public good (Cramer's V = .19), academic development (Cramer's V = .14), and challenging career (Cramer's V = .12). For the others Cramer's V is <.10. Cramer's V is a commonly used statistic for categorical (nominal level) data and ranges from 0 to 1.0, with 1.0 reflecting a perfect relationship. Again, only those relationships significant at .05 or better (using Fisher's Exact for 2x2 tables and chi square for all other tables) will be used.

117. There is little difference between women and men with regard to prestige and financial: prestige rating 7-9, women 70% v. men 69%; financial rating 5-7, 79% v. 82%.

white respondents in the 2010 LSSSE motivation data and much lower percentages for the other groups: White = 74%; African American and AAPI (Asian-American or Pacific Islander), each = 7%; and Hispanic and Other, each = 6%.¹¹⁸ If we look at the data in terms of the percentage of each group, there are some notable differences. White respondents stand out for one motivation in particular — public good. They stand out because only 57% rated it as more influential, while the other groups ranged from 78% for African American to 62% for AAPI. White respondents also had the lowest percentage rating public good as very influential — 25%; in contrast, 44% of African American respondents rated it as very influential. For Hispanic respondents it was 34% and for AAPI respondents it was 28%.¹¹⁹

C. Connections for Students: Motivations to Aspirations

What are the connections between motivation and aspiration? In general, only 12% of the students responding to the 2010 motivation questions indicated criminal law as their desired area of legal specialization.¹²⁰ Just over one-half of these criminal law students indicated wanting to work in the criminal justice system as a prosecutor or as a public defender: 34% prosecutor and 18% public defender.¹²¹ More generally, 75% of the criminal law students wanted to work in some kind of a public service setting and only 20% in private practice.¹²²

118. The respective N's are: White 3,111; African American 309; Hispanic 271; AAPI 282; and Other 259. Figures from the Fall 2010 ABA 509 disclosures for accredited law schools (not including the schools in Puerto Rico) show for those students indicating a race/ethnicity (n=133,288): White, 74%; Non-White, 26% (calculations done by the authors).

119. All rate academic development and challenging career as more influential, 85%-87% for the former and 86%-92% for the latter. For prestige as more influential the range runs from 69% for White and for African American; 71% for Hispanic; to 78% for AAPI. For financial the range is quite narrow, from 78% to 81%. Collapsing into two groups, White and Non-White, shows statistically significant relationships for the two groups and each of the seven motivations, but all are weak. The strongest of them is for public good, Cramer's V = .14.

120. N=529. The LSSSE survey asked students to choose from a list of 26 areas of legal specialization for their preferred area of specialization upon graduation and criminal law was the most popular. They are the most likely source of students wanting to work as prosecutors, or alternatively as public defenders (74% and 69%, respectively). For students in the 2010 motivation data wanting to work as prosecutors, n=244: as public defenders, n=137. For non-criminal law students, only 2% indicated wanting to work as a prosecutor and 1% as a public defender.

121. Another 21% indicated private practice; and 17% indicated some other government agency (federal or state). No other type of work accounted for more than 4% of those interested in criminal law. Some have argued that progressive prosecutors would do well to recruit would-be public defenders, who are likely to bring a different take on the criminal justice system. See Oyer, *supra* note 78.

122. Consistent with Perry and Wise public service includes, in addition to prosecutor and public defender, other public employment work (e.g., work in an agency at any level. Perry & Wise, *supra* note 90.

Who Wants to Be a Prosecutor?

The obvious and important take-away is that most students are not interested in criminal law and even fewer want to work in the criminal justice system. The pool of potential hires for reform prosecutors is small and maybe smaller if we are talking about those who want to work as prosecutors.

As we might expect, those who are interested in criminal law saw the public good as more influential than did their peers interested in some other area of legal specialty (72% more influential v. 59% more influential)¹²³ and the relationship is statistically significant.¹²⁴ Their non-criminal law peers saw financial security as more influential (non-criminal law 81% more influential v. criminal law 73% more influential) and again the relationship is statistically significant.¹²⁵ None of the relationships for the other motivations and these two groups of students (criminal and non-criminal) are statistically significant and the comparable percentages for the two groups are within six percentage points or less for the other motivations.¹²⁶

We can say, then, that those interested in criminal law tend to be driven somewhat more by the public good and somewhat less by financial security than their peers, but otherwise they are not generally that different. Meaning, for instance, that they are not that different regarding furthering their academic development, wanting a challenging career, or prestige. To show a sharper contrast, we can look at students interested in corporate and securities as their area of legal specialty and what may drive them compared to their criminal law peers. They are, in a sense, mirror opposites, with corporate students driven much less by the public good, much more by financial security, and somewhat more by prestige. The two groups of students clearly value different things.

The starkest difference between these two groups of students, criminal law and corporate, is the percentage seeing public good as more influential. Only 39% of those interested in corporate see public good as more influential compared to 72% for those interested in criminal law; and the relationship is statistically significant, and strong,

123. As in Table 1, "more influential" means choosing 5, 6 or 7 on the 7-point scale.

124. Using the full 7-point scale, the relationship, however, is weak, Cramer's $V = .10$, suggesting that students motivated by the public good had an array of more specific aspirations when it comes area of legal specialization.

125. As with public good, using the full 7-point scale the relationship is weak, Cramer's $V = .11$.

126. This is because the relationships do not show much variation between the two groups of students. In other words, those relationships do not help differentiate among students.

when comparing the two groups on public good. As important, more of the corporate group see public good as *less* influential than see it as *more* influential (45% less compared to the 39% more noted above). Only 18% of the criminal law students see public good as less influential.¹²⁷

Financial security looms large for the corporate students with 91% seeing it as more influential compared to 73% for criminal—a significant but moderate relationship.¹²⁸ There is also a significant, but weak, relationship for prestige with 77% of the corporate students see it as more influential compared to 64% for the criminal law students.¹²⁹ None of the relationships for the other motivations are statistically significant and the comparable percentages for the two groups are within six percentage points or less.

Having shown that the criminal law students stand out, the next question goes to the similarities and/or differences between the criminal law students wanting to work as prosecutors and those wanting to work as public defenders. Specifically, do the two groups have a similar profile regarding what is valued? As we would expect, they are functionally the same in seeing academic development and challenging career as more influential.¹³⁰ They do differ somewhat with regard to prestige and financial security. A higher percentage of criminal law/prosecutors see each as more influential (prestige, 64% v. 54% and financial security, 74% v. 66%). They also differ in the intensity of importance (7 on the 7-point scale) for these two motivations, with prosecutors the more intense (prestige, 27% v. 17% and financial security, 34% v. 18%). However, only the difference for financial security is statistically significant and the relationship is still on the weaker side.¹³¹

The more interesting and important difference involves public good. A higher percentage of the criminal law/public defenders see public good as more influential, 87% v. 74%. The relationship is significant, but on the surface not that strong.¹³² What really stands out within the comparison is the intensity, the depth of commitment on the part of the public defender group (seven on the seven-point scale).

127. Using the full 7-point scale (*see* text surrounding Table 1) and chi square, the relationship is moderate relationship with Cramer's V = .36.

128. Cramer's V = .30.

129. Cramer's V = .18.

130. Academic development, both 83-84%; challenging career, both 90-91%.

131. Cramer's V = .02.

132. Cramer's V = .27.

Far more public defenders rated public good at the very top of the scale as very influential, 60% v. 34%. In terms of what they value, their greater commitment to public good is enhanced by their lower (and less intense) concern with prestige and financial security. Perhaps these are the students reform prosecutors should look to, but it may be difficult to overcome an “us v. them” outlook among many wanting to work as public defenders.¹³³

This becomes clearer when we compare that group to those who are interested in criminal law but want to work in private practice, the criminal law non-public service people. The most noticeable difference between the public defender group and the criminal law/private practice group is the one for public good. It is substantially less important for the private practice group—just a bit over one-half (56%) rate it as more influential compared to 87% for the public defender group (for the prosecutor group it is 74%). It is statistically significant and relatively strong.¹³⁴ And the level of intensity is far lower with just 19% of the private practice group rating public good as very influential (seven on the seven-point scale) compared to 60% for the public defender group.

Financial security is also more important for the criminal law/private practice group. Over 80% rated it as more influential (83%) and 45% as very influential. This is much higher than for the public defender group (see above). The relationship is statistically significant, though not as strong as the one for public good.¹³⁵ Financial security is also more important than for the prosecutor group, but the relationship is not statistically significant. The only statistically significant difference for the private practice compared to the prosecutor group is for public good. Again, the private practice group sees it as less important (56% v. 74%).¹³⁶ Perhaps these are the students reform prosecutors might hesitate on.

Finally, only one group sees public good as more influential than the criminal law/public defender group, but not by much. That group

133. A recent law school graduate, interviewed for a separate study by one of the co-authors, Daniels, is working as a public defender. They said they were not “an authority person and didn’t want to work on the prosecution side . . . (instead) it’s the David v. Goliath thing and helping out the underdog.” (interviewed on Mar. 20, 2020). That separate study is still in progress and is one interested in experiential learning in law school. See David Thomson & Stephen Daniels, *Looking Back: A Case Study of Career Interest and Experiential Learning in Law School*, 56 WILLAMETTE L. REV. 283 (2020).

134. Chi square .000, Cramer’s V = .45.

135. Cramer’s V = .04.

136. Cramer’s V = .29.

consists of students wanting to work with a public interest group. Ninety-three percent of these students see public good as more influential, but the relationship by group is not significant.¹³⁷ Their commitment to public good is even more intense than the public defender group, 71% v. 60% rating public good at seven on the seven-point scale. However, and important from the reform prosecutor's perspective, these students are not much of a target of opportunity. Only 3% of the public interest group chose criminal law as their legal practice area.

IV. THE POOL

A. Criminal Law

Contributing to the public good is an important motivation for students interested in criminal law and working in the criminal justice system. It helps to differentiate them from their peers with other values and interests. As we noted above, however, they appear to represent only a small proportion of students, and a small proportion of a shrinking law student body at that. On the other hand, some anecdotal evidence might lead one to think there is substantial pool of interested students, especially at more elite law schools and that it is a lake rather than just a puddle.

Paul Butler suggests that the progressive prosecutors and their goals may attract students interested in criminal justice with a more progressive orientation.¹³⁸ One can find reports of Larry Krasner making recruiting visits to elite law schools and finding large crowds of enthusiastic students.¹³⁹ Maybe the rise, and especially the visibility, of progressive prosecutors is helping to offset or blunt the consequences of declining law school enrollment, at least at certain kinds of schools.¹⁴⁰

137. The only significant difference between the two groups is for financial security, chi square .009, Cramer's V = .20. Just over one-half (51%) of the public interest group sees financial security as more influential compared to two-thirds for the public defender group.

138. Antholis, *supra* note 75.

139. See Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html>; Chris Palmer, *Larry Krasner's First Year as Philly DA: Staff Turnover, Fewer Cases, Plenty of Controversy*, PHILA. INQUIRER (Jan. 6, 2019), <https://www.inquirer.com/news/larry-krasner-philadelphia-district-attorney-staff-reform-cases-first-year-20190106.html>.

140. The LSSSE data do not allow us to probe the possible influence on enrollment and/or motivation of very specific events or movements in the broader environment, such as the rise of Black Lives Matters and what drives it. Still, given the earlier discussion of motivation in this

Who Wants to Be a Prosecutor?

The broader range of LSSSE survey results over time allow us to look for basic changes or trends to explore who wants to work as a prosecutor, as a public defender, or as a lawyer working in private practice (one interested in criminal law). First, however, we need a clear idea of just how much interest there has been and is among law students for these kinds of work. The short answer, as Table 2 below shows, is not much. It displays the percent of all students in the LSSSE surveys over time who chose criminal law as their preferred area of legal specialization.¹⁴¹ While there is a very slight increase in percentage over time, there is an important caveat. The *number* of students in the LSSSE surveys decreased over time, as did law school enrollment generally.¹⁴² In other words, while there may be a bit more interest in criminal law among those in law school, the absolute number is lower.

Table 2.
Criminal Law as Preferred Area of Specialization: Percent
of All Students

	% Criminal
2007–09	9%
2010–12	12%
2013–15	14%
2016–18	14%

article, one should be skeptical of unitary factor explanations, while not dismissing a given factor's possible influence. Again, motivation is nuanced and multifaceted.

141. On the LSSSE data used in this part of the paper, *see* LSSSE *supra* note 19. There is no difference in the percentages comparing public schools to private schools. Table 2 and later tables and figures stop at the 2016-18 time period because LSSSE did not ask a preferred area of legal specialization question in 2019 and 2020. The annual ABA disclosures on employment outcomes do not provide specific data on area of legal specialization; *see* ABA SECTION OF LEGAL EDUCATION, EMPLOYMENT OUTCOMES, <http://www.abarequireddisclosures.org> (last visited Dec. 27, 2021).

142. *See* DANIELS, *supra* note 99, at 140–45. As overall law school enrollment declined after 2010, so did the number of LSSSE respondents in our data. For 2007-09, the first years in Table 2, there is a total of 28,992 respondents in our data set (2,356 criminal); for 2010-12, 29,392 (3,136 criminal); for 2013-15, 25,305 (2,938 criminal); and 2016-18, 18,076 (2,092 criminal).

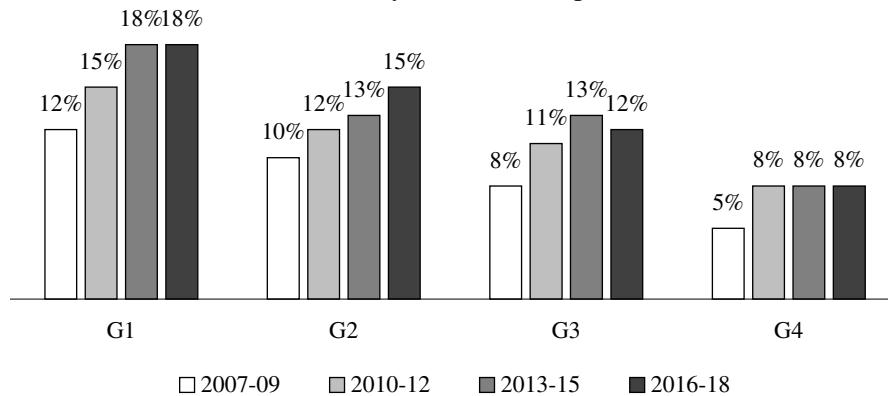
There are, however, some variations among schools when we organize them into four groups based on median LSAT.¹⁴³ Figure 1 shows the percentage of students choosing criminal law by LSAT group over time: G1 LSAT <153, G2 LSAT 153-155, G3 LSAT 156-160, and G4 >160.¹⁴⁴ Generally speaking, we see the percentage of students choosing criminal law decreasing going from the lowest group, G1, to the highest group, G4. For the first two groups, G1 and G2, the percentage increase a bit over time. For G3, the pattern is only slightly different, and for G4 the pattern is slight increase followed by stability at a comparatively lower level.¹⁴⁵ More elite schools, at least in the LSSSE data, do not appear to be a hot bed of interest in criminal law. While there may be more interest in criminal law proportionally over time in less than elite schools, the absolute number again is lower given the decline in the actual numbers.

143. LSAT for each school determined by calculating the overall median LSAT of a school's LSSSE 1L respondents for the years 2005 to 2020, calculations done by authors. Four groups constructed by obtaining from annual ABA 509 disclosures the median 1L LSAT for each accredited law school for 2005 through 2020; next calculating the mean of the median for each school over the years they filed a 509 disclosure between 2005 and 2020, and then calculating quartiles for the entire distribution of those means.

144. Undoubtedly, some readers may want to know more about the schools in Figure 1, even their identities. To protect the identity of schools and respondents, LSSSE provides us with de-identified data. Additionally, our agreement with LSSSE requires us to avoid reporting on the data in any way that might allow for the deductive identification of a school. See LSSSE *supra*, note 19.

145. The relationship between LSAT Group and whether a student choosing criminal law or something else is statistically significant for each of the four time periods, but extremely weak with Cramer's V being <.10 for the first three time periods and .11 for the last period. Though very weak, the pattern is one of increasing LSAT and decreasing interest in criminal law.

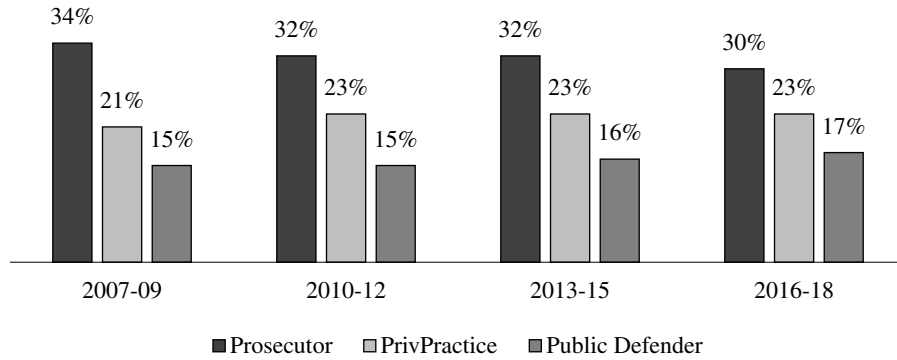
Figure 1
Criminal Law as Preferred Area of Specialization: Percent
of All Students by LSAT Group Over Time



B. Criminal Law and Type of Work

Figure 2 shows the percentage of those students choosing criminal law wanting to work as prosecutors, in private practice, or as public defenders. The patterns are relatively stable, although with a very slight but noticeable decrease in the percent wanting to work as a prosecutor and a very slight but noticeable increase in those wanting to work as a public defender. The largest percentage want to work as prosecutors. Those wanting to work in private practice are the second-largest percentage, with those wanting to work as public defenders being the lowest (which may give those concerned about social justice issues some pause). It is worth noting the difference between prosecutor and public defender, with the prosecutor percentage being twice that for the public defender figure except for the last time period (and that difference not being all that different).

Figure 2
Percentage of Criminal Law Students Choosing Each Working Setting



If we look at the patterns over time by LSAT group as in Figure 1, there are some notable variations comparing groups as Table 3 shows. The percentage of criminal law students wanting to work in private practice gets somewhat lower going from G1 to G4 (reading from left to right in Table 3), with the difference at each point in time between G1 and G4 being the clearest.¹⁴⁶ There is no clear pattern over time for prosecutors over time, nor is there for public defenders. Within groups, G1 and G2 have slightly declining percentages of criminal law students wanting to work as prosecutors (again, one should keep in mind the general decline in law school enrollment).

Table 3.
Percent of Criminal Law Students Preferring Each Work Setting: by LSAT Group Over Time

	G1			G2			G3			G4		
	Pros	PD	Priv	Pros	PD	Priv	Pros	PD	Priv	Pros	PD	Priv
2007-09	30%	14%	26%	41%	13%	18%	32%	18%	19%	32%	18%	17%
2010-12	29%	15%	29%	36%	11%	21%	32%	20%	15%	42%	18%	11%
2013-15	27%	17%	29%	36%	15%	21%	33%	17%	18%	35%	18%	18%
2016-18	26%	15%	31%	32%	15%	19%	30%	22%	18%	35%	21%	16%

146. The relationship between LSAT Group and whether a criminal law student is choosing Private Practice or something else is statistically significant for each of the four time periods (Chi square <.05 for each); but the relationships are extremely weak with Cramer's V being <.10 for all but the second period for which V = .15).

Who Wants to Be a Prosecutor?

In general, although there is some increase over time in the percentage of students interested in criminal law in all but G4 schools, the interest diminishes going from G1 to G4. Most students have not been and are not especially interested in criminal law. Among those who are interested, the largest proportion do want to work as prosecutors and the smallest proportion want to work as public defenders. No LSAT group stands out as one in which working as a prosecutor is especially prominent and the same is true for public defender; and as noted above, G1 and G4 stand out for private practice.

C. Criminal Law, Type of Work, Diversity, and Debt

The final aspect of the pool is diversity, important for whether reform prosecutors can use hiring to diversify their organizations as a part of their goal of change. In general, Table 4 shows little difference between men and women generally regarding the percentage of each choosing criminal law.¹⁴⁷ The one interesting difference is the consistent but slight increase for women from 2007-09 to 2016-18 (from 9% to 15%). While the LSSSE survey data set, as well the law student body overall, became smaller over time, it did become more female.¹⁴⁸ With regard to male students choosing criminal law, this means a smaller percentage of a smaller number choosing criminal law. For females choosing criminal law it means an increasing percentage of a smaller number.¹⁴⁹

147. Overall (ignoring time and LSAT Group), the relationship between gender and choosing criminal law or something else is extremely weak, Cramer's $V = .011$.

148. For the years 2019-20, the gender breakdown in the LSSSE survey data was 55% female and 45% male.

149. In addition, the LSSSE survey data (like the student body overall) became less white over time, from 71% white (not Hispanic) in 2007-09, to 61% in 2016-18. For AAPI students, the percentage of the survey respondents remained stable over time (between 6%-7% for each time period). For African Americans, the percentage also remained relatively stable between, 6% for the first two time periods, 9% in 2013-17, and then dropping again to 7% in 2016-18. Hispanic was the only group to show a consistent, but modest, increase over time, from 7% in 2007-09 to 12% in 2016-18. For the years 2019-20: White (not Hispanic) = 62%; Hispanic = 13%; African American = 7%; AAPI = 5%.

Table 4.
Percent of Each Group Choosing Criminal Law

	Female	Male	White	Black	Hispanic	AAPI
2007-09	9%	10%	10%	9%	11%	6%
2010-12	12%	13%	13%	12%	14%	9%
2013-15	14%	14%	14%	14%	14%	9%
2016-18	15%	12%	13%	17%	16%	8%

In contrast to White and AAPI students, Table 4 shows increases, but only modest ones, for the percentage of Black and Hispanic students choosing criminal law. Still, the percentage of these two sets of students choosing criminal law is not large at the final time period.

Table 4 provides a general context for the more interesting patterns at the intersection of race and gender, particularly for Black females and Hispanic females. For each there is a consistent pattern of increase for 2007-09 to 2016-18 in the percentage choosing criminal law.¹⁵⁰ Hispanic females choosing criminal law increased consistently from 11% to 14% to 15% to 17%. Black females choosing criminal law increased a bit more dramatically from 9% to 11% to 14% to 19%. Again, the caveat that these are increasing percentages of a decreasing number of students for both groups of women.

By focusing on criminal law students in the last two time periods pooled together, 2013-15 and 2016-18, we can go into more detail in looking at that intersection and the percentage of criminal law students choosing to work as prosecutors, public defenders, or in private practice.¹⁵¹ Table 5 presents the patterns for the kinds of work chosen by 2013-18 criminal law students by gender and race. Most noticeable is the difference between the prosecutor and the public defender columns. With the exception of African American males, the percentage wanting to work as a prosecutor is much higher than that for public defender. In fact, a larger percentage of African American males chose private practice than either of the other choices in Table 5.

With the exception of AAPI criminal law students, the percentages of those wanting to work as prosecutor is higher for women than

150. Asian women had the lowest percentage at each point time, going from 6% in 2007-09 to 9% in 2010-12 and staying at 9%. For White women, the percentage started at 10% in 2007-09, went to 15% in 2013-15 and stayed at 15%.

151. Given the declining number of LSSSE survey respondents over time, the small number of respondents in some categories militate against using the 2016-18 period alone.

Who Wants to Be a Prosecutor?

for men, but as Table 4 shows AAPI student were less likely to choose criminal law as an area of practice.¹⁵² For each of the other groups, women are more likely to want to work as a prosecutor than their male counterparts.¹⁵³ The gender differences within groups for those wanting to work as a public defender are more minimal.¹⁵⁴ Generally, female criminal law students are less likely to choose private practice.¹⁵⁵

Table 5
Percent of 2013-2018 Criminal Law Students Choosing
Different Types of Work

	% Choosing Prosecutor	% Choosing Public Defender	% Choosing Private Practice
AAPI Female	33%	19%	15%
African American Female	26%	16%	22%
Hispanic Female	33%	19%	19%
White Female	36%	17%	18%
AAPI Male	35%	19%	25%
African American Male	16%	19%	27%
Hispanic Male	23%	17%	31%
White Male	30%	14%	28%

The LSSSE data do not allow us to probe the possible reasons underlying the patterns just outlined. Although not directly on target a unique set of materials from Texas may at least provide some insight as to why some people of color shy, or run, away from work as a prosecutor. Under the heading Diversity the website of the Texas District & County Attorneys Association (TDCAA) recently published two items providing the views of prosecutors of color (women and men)

152. The gender difference for prosecutor by gender among AAPI students is not statistically significant.

153. The differences are weak: Cramer's V = .11 for African American and Hispanic and .06 for White.

154. The only statistically significant difference is for White criminal law students: Cramer's V = .04.

155. The gender differences for White and for Hispanic criminal law students for private practice are statistically significant but weak (White, Cramer's V = .09; Hispanic, Cramer's V = .10). The others are not statistically significant.

on their jobs and the challenges they face.¹⁵⁶ For instance, an assistant district attorney in Polk County, TX, said:

I have great difficulty with being accused by other members of my community of harming men and women of my race due to the number of minorities incarcerated. It's as if I'm responsible for every African-American person who has been incarcerated. It is assumed that every term of incarceration is unjustified and that I, in my position, am responsible for this injustice to my people. Oftentimes, I have been asked how I sleep at night.¹⁵⁷

She is not alone. An assistant district attorney in Harris County, TX, said:

As a Black woman prosecutor, I have received criticism for joining a flawed, carceral system that seeks to punish more Black and Brown people than anywhere else in the world. It is difficult trying to be an effective advocate for the community and county I serve when the default is a flawed criminal justice system rooted in institutional racism.¹⁵⁸

And still another, an assistant district attorney in Dallas County, TX, said, “We are often seen by other people of color as “sell-outs” or “the man.”¹⁵⁹ While these prosecutors stayed in the job, their remarks give some truth to the David Wilkins speculation from over 20 years ago: “To the extent that these lawyers perceive that the black community disapproves of certain lawyering roles or particular actions, they may be less likely to follow that particular path.”¹⁶⁰

One should not discount the psychological challenges. Adam Geer, from Philadelphia, calls this “our albatross.”¹⁶¹ In his experience,

Being a Black prosecutor can be emotionally and spiritually draining. I experience vicarious trauma in nearly every aspect of the job—whether when reviewing videos of mostly young Black men in

156. See Tiana Jean Sanford, *Courageous Conversations About Race*, TEX. DIST. & CNTY. ATT'Y ASS'N (Sept.–Oct. 2020), <https://www.tdcaa.com/journal/courageous-conversations-about-race/>; Denise Hernandez, *Raising the Voices of Prosecutors of Color (Extended Version)*, TEX. DIST. & CNTY. ATT'Y ASS'N (Sept.–Oct. 2020), <https://www.tdcaa.com/journal/raising-the-voices-of-prosecutors-of-color-extended-version/>.

157. Hernandez, *supra* note 156. Beverly Armstrong, responding to the question, what are the greatest difficulties in being BIPOC (Black, indigenous, and people of color) within the criminal justice system? quoted in Hernandez.

158. *Id.* Kenisha Day, responding to the same question.

159. *Id.* LaQuita Long, responding to the same question. For a non-Texas voice saying the same thing. See Geer, *supra* note 39. Geer works in Philadelphia.

160. David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 MICH. L. REV. 795, 805 (1997).

161. Geer, *supra* note 39.

the last moments of their lives, comforting their grief-stricken mothers, and seeing the defendants (who look like me) shackled and sentenced, at my request, to sometimes decades in prison.¹⁶²

Geer and the Texans are reflecting on their experiences as prosecutors and not talking about students. Strictly speaking they are talking about issues that may affect retention and keeping prosecutors from leaving. Nonetheless, they do tell us about some important obstacles in attracting a diverse pool of people.

The patterns above for private practice raise the issue of debt. Some students may not want to work as a prosecutor or public defender for monetary reasons.¹⁶³ The LSSSE survey data, which include a basic question on debt, allow us to explore this idea at least to a degree.¹⁶⁴ Only 14% of 2013-18 respondents said they expected no debt and 12% of them chose criminal law. Of the 86% with debt, 17% chose criminal law.¹⁶⁵ More generally, the increasing size of the expected debt does not appear to be an obstacle to choosing criminal law for those with debt.¹⁶⁶

Still, debt may or may not be an issue for choosing the type of work, especially considering the Public Service Loan Forgiveness Program.¹⁶⁷ In general for criminal law students, there is no statistically significant relationship between having or not having debt and choosing any one of the types of work in Table 5. The lack of a relationship with private practice would suggest that debt is not a significant obstacle even in a situation in which loan forgiveness would not be available. If we look at the amount of debt and the choice between prosecutor and private practice, there is not a significant relationship; nor is there on for choosing between public defender and private practice.¹⁶⁸

Of course, for particular groups of students the relationship with debt may be different. For female criminal law students, there is no

162. *Id.*

163. See Marilyn Yarbrough, *Minority Students and Debt: Limiting Career Options*, 35 J. LEGAL EDUC. 697 (1989). But see McGill, *supra* note 1.

164. The LSSSE survey asks students how much law school debt they expect to have upon graduation giving the students a range of options, e.g., \$0, \$1-\$20,000, \$20,001-\$40,000, and so on.

165. The difference for having debt/no debt and choosing criminal law or not is statistically significant, Fisher's Exact, .000, but weak, Cramer's V = .05.

166. The relationship between choosing criminal law or not and size of debt is weak, Cramer's V = .04. The median debt for a student choosing criminal law was \$120k to \$140K; for those choosing something else, it was the same.

167. See *Public Service Loan Forgiveness (PSLF)*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service>.

168. Cramer's V for public defender and private practice is a weak at .09.

statistically significant relationship between having or not having debt and choosing any one of the types of work in Table 5. In addition, the relationship between debt or not the choice of prosecutor and private practice is not significant, and neither is the relationship for choosing public defender rather than private practice. The same is true when looking at these choices and the amount of debt. For male criminal law students, there is one significant difference—choosing public defender or not having debt or not, but it is weak. There were no significant relationships for the amount of debt.¹⁶⁹

V. POLICY IMPLICATIONS

Reform or progressive prosecutors know they need to change the culture of their organizations and not just internal policies, protocols, and practices. Hiring is a critical step in reform prosecutors' blueprints for building a new organizational culture, not only the necessary technical skills and competencies for successful job performance as a prosecutor but also a culture component that reflects the organization's values and goals. Indeed, such matching between employees and organizations (or fit) is one of the most salient factors for hiring in professional fields.¹⁷⁰ Hiring new law school graduates is an obvious and crucial part of that effort for reform prosecutors, but they may face very real challenges in trying to recruit the kinds of law school graduates they want.

As discussed above, academe itself may help discourage students from this line of work, especially students of color. Moreover, while there are students motivated by the public good, for most it is to some degree only; and even for those more motivated by the public good not all want to work in the criminal justice area. While students inter-

169. This does not mean that debt is unimportant for retention—for staying on the job. “Retention is equally problematic, as most Black and Brown prosecutors, saddled with crippling student loan debt, often leave the office for more lucrative positions in private practice.” Geer, *supra* note 39.

170. Progressive prosecutors need to reexamine their hiring criteria to ensure that they can properly measure and identify cultural fit during the recruitment process. However, to our knowledge, there is no empirical research that systematically examines the recruitment process in prosecutors' offices and whether existing hiring criteria are sufficient to predict individuals' fit to the office culture. Because recruiters' evaluation of job applicants' cultural fit is often based on limited recruitment materials or interviews, they tend to produce false sense of cultural fit. In fact, it is typical that the recruitment process in prosecutors' offices consists of multiple rounds of interviews that focuses primarily on individuals' trial skills and work ethic, *see, e.g., Memorandum*, GEO. WASH. U.L. CAREER CTR. (July 24, 2017), <https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Prosecution%20Office%20Memo.pdf> (surveying the hiring practices at prosecutors' offices in major U.S. markets).

ested in working as a prosecutor are more likely to be motivated by the public good than their peers generally, those with the most intense interest in the public good and working in criminal justice want to work as public defenders. And again, it cannot be emphasized enough that all our findings are against the background of declining numbers of law students, meaning the challenge for prosecutors is even greater than what the percentages may lead one to think.

Diversity is another major part of prosecutors' efforts to change their organizations but hiring for diversity is an even tougher challenge. The number of those interested is low and progressive prosecutors are not the only ones wanting to hire for diversity.¹⁷¹ Some prosecutors, like Larry Krasner, may have achieved a type of celebrity status that may serve as a powerful recruitment tool to attract diverse candidates. He can visit law schools and personally reach out to candidates, and some will make the decision to become a prosecutor because they are going to work for a celebrity. However, most prosecutors' offices do not have a star or celebrity leader. Those offices will need to make a concerted and deliberate effort to attract diverse candidates in what is a competitive market, one in which prosecutors may start with a handicap because of hostility toward the job. Additionally, the concern about organizational diversity is often intertwined with other competing organizational goals and values.¹⁷²

Despite the increasing interest in diversity, equity, and inclusion in prosecutors' offices,¹⁷³ there is still little systematic and rigorous empirical research on how to effectively accomplish diversity goals. Our findings do help, but only add to that challenge. We found, for instance, that African American students, especially males, are the

171. Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871 (2014); Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483 (2015); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011); see also *Diversity Best Practices Guide*, NAT'L ASS'N L. PLACEMENT (June, 2020), https://www.nalp.org/uploads/2020_DiversityBestPracticesGuide.pdf.

172. See generally Frank Dobbin, Soohan Kim & Alexandra, *You Can't Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 AM. SOC. REV. 386 (2011) (discussing the forces that cause some organizations to embrace diversity programs and suggesting that an organization's culture is a profound predictor for adoption of diversity programs).

173. See, e.g., *FJP/Brennan, 21 Principles*, *supra* note 8, at 14, 29 (suggesting progressive prosecutors "hire a diverse staff across all levels of seniority" by "developing targeted recruitment to diverse groups (like bar association affinity groups); reassessing hiring criteria to address barriers to hiring people of color; and ensuring that underrepresented groups on staff are appropriately supported, considered for promotion, and involved in office hiring decisions").

least interested in working as a prosecutor. Hispanic male students are also less likely to want to work as a prosecutor. Perhaps there is some consolation that debt may not be a general barrier but recruiting for diversity will require special emphasis and creative approaches.

This article's main interest has been the student side of the equation. In the near term, the percentage (and number) of law students interested in criminal law and working in criminal justice will not change much. Progressive prosecutors will need to work with the pool as it is and that can mean not just looking for those who want to be prosecutors. Given the goals in mind, students wanting to be public defenders may be a fruitful source if the "us v. them" mentality can be overcome. As Larry Krasner said to a group of law students, think of it as "a prosecutor with compassion. Or a public defender with power."¹⁷⁴ This, however, may wind up as a "rob Peter to pay Paul" situation for the criminal justice system because both the percentages and numbers are smaller for those wanting work as public defenders.

Unlike Krasner, most prosecutors will not be traveling the country to elite schools trying to interest and recruit new graduates. Most will be working more locally or maybe regionally. They will need to have more than just a good or inspiring message. Reform prosecutors may generate a demand for candidates interested in reimaging and reshaping the role of prosecutors in American society. But they must act strategically to boost the supply of good candidates.

While messaging is important, strategic messaging is a necessity. Although progressive prosecutors often emphasize their offices' mission to engage in criminal justice reform, the attraction for at least some students working in their organizations cannot be taken for granted. Nothing is obvious. Instead, the attraction must be nurtured through messaging and opportunities that demonstrate how working in that prosecutor's office can align with the motivations driving students' interest in law and their career aspirations.

One area of possibility is the law schools. Reform prosecutors need to reach out to law schools to begin building pipelines.¹⁷⁵ This requires a conversation surrounding the nature of change in prosecu-

174. Austen, *supra* note 139.

175. Perhaps there is value to pipelines that go way back. Responding to the question "what inspired you to choose prosecution as a career," Idris Akinpelu (an assistant district attorney in Dallas County, TX) said, "Seeing certain injustices growing up in my low-income neighborhood and influences from high school led me to this career. I was in the Law Magnet at Townview High School, and each magnet school had classes specifically set aside for immersion in our chosen field. In ours, we were able to intern at the Dallas County DA's Office. I worked in the

tors' offices and how law schools can integrate new pedagogy and teaching methods to interest their students in the changing role of American prosecutors. It starts with teaching students the values, concepts, and tools for understanding prosecutorial reforms. Law professors who teach criminal law, criminal procedure, and evidence need to educate their students not only about black letter law and doctrine, but also about issues like mass incarceration, bias in the criminal justice system, and other power dynamics embedded in the current system. Some of course are already doing this, but it is not enough.

A fruitful strategy involves experiential education. Research suggests that many students, including criminal law students, might be more comfortable with a practice-based or practice-lecture hybrid-based learning style. Few prefer a primarily lecture-based style.¹⁷⁶ And students tend to look for experiential opportunities that align with their career interests—clinics, externships, semester in practice, etc.¹⁷⁷ Experiential education helps law students integrate theory and practice. Through these programs, students can build critical lawyering skills, develop relations with mentors, and cultivate career aspirations, especially around public service. Importantly, those opportunities can also aid the goal of diversity by providing appropriate role models, mentors, and support networks.

Clinics may be ideal, but actual prosecution clinics are uncommon. A 2019-2020 survey of law schools by the Center for the Study of Applied Legal Education found that 37 of 185 (20%) of responding schools reported having a criminal prosecution clinic, while 107 (58%) reported having a criminal defense clinic.¹⁷⁸ However, only 17 schools in the survey (9%) had a clinic of any kind (not just a prosecution clinic) that operated off-campus in a host office, suggesting that few

265th Judicial District Court for two years, and my mentor to this day is Judge Keith Dean, who was the presiding judge at the time.” Quoted in Hernandez, *supra* note 156.

176. See Thomson & Daniels, *supra* note 133, at 296–304.

177. *Id.* Experiential opportunities may even help shape career interests. Another of the Texas prosecutors — Chandler Raine, assistant district attorney in Harris County, TX — said, “I knew I wanted to be a prosecutor halfway through my first summer internship at the Harris County District Attorney’s Office That summer internship in 2011 was the first time I realized that the ethical prosecutor fighting to see that justice is done is both the first line of defense for civil liberties—by following the law and never bending the rules—and often the last line of defense for the safety of the community. The two-walk hand in hand only in this profession.” Quoted in Hernandez, *supra* note 156.

178. 2019-2020 SURVEY OF APPLIED LEGAL EDUCATION, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC. 7 (2020), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/5f8e46e59e39d4dc82e70a54_Report%20on%202019-20%20CSALE%20Survey.10.19.20.pdf.

prosecution clinics actually operate in-house in a prosecutor's office.¹⁷⁹

One that does is Ohio State's Moritz College of Law. The clinic students handle misdemeanor cases in Delaware County, Ohio. The clinic includes "two faculty members who team-teach the clinic and hold appointments as special prosecutors, allowing the clinic members full discretion in handling cases."¹⁸⁰ Students interview victims and other witnesses, develop case strategies, negotiate plea bargains with defense attorneys, and conduct hearings, bench trials, and jury trials In the classroom, students learn basic litigation skills and discuss the criminal justice system. They also reflect on their exercises of prosecutorial discretion and their encounters with ethical challenges."¹⁸¹

Another possible model is for law schools to create a "hybrid" prosecution clinic, where faculty assume full or partial responsibility for case supervision in an external placement. Faculty will work closely with prosecutors but not assume full day-to-day responsibility. The structure and arrangement of such clinics may differ based on the relationship between law schools and their partner offices. However, under this model, faculty can play a critical role to prepare students for the highest level of ethical practice by providing students a safety net that permits them to express disagreement with their office supervisors, or to even back out of a case if their supervisors insist on a course of action a student deems unethical.¹⁸²

Law school clinics, of course, are expensive and few schools are likely to want to add more. Externships are another matter. Many, if not most, law schools have an externship program and coordinators. Many may also have some variant of a semester-in-practice program that allows the student to receive an entire semester of credit for their work. These opportunities give students hands-on experience and allow them to see a particular part of the legal process up close. In doing so, these kinds of programs can also provide an opportunity for

179. *Id.* at 29.

180. See *Criminal Prosecution Clinic*, OHIO ST. UNIV. MORITZ COLL. L., <https://moritzlaw.osu.edu/study/clinics/criminal-prosecution-clinic> (last visited Oct. 29, 2021).

181. *Id.*

182. Stacey Caplow, a well-known leader in the field of clinical education in the legal academy, wrote that is crucial to have "faculty involvement as either supervisors or seminar teachers in order to create a safe space for students to critically question their work, their observations of the work of others and the role of prosecutor altogether." Stacey Caplow, *Tacking Too Close to the Wind: The Challenge to Prosecution Clinics to Set Our Students on a Straight Course*, 74 *Miss. L.J.* 919, 952 (2005).

the entity working with the student to expand the pool of candidates. Many prosecutors may already be collaborating with law schools on experiential opportunities. There is perhaps no better way for progressive prosecutors to show what their offices are about and what it means to work there.

In a similar vein are organizations like Fair and Just Prosecution (FJP). FJP works with reform prosecutors across the country. Beyond their involvement in supporting new thinking around policy and practices in prosecutors' offices, FJP has an interesting educational component. One of their programs is the Summer Fellows Program that essentially leverages the power of experiential learning while also acting as a diversity pipeline:

FJP's Summer Fellows Program places rising 2Ls and 3Ls in summer internship positions in the offices of some of the most inspiring elected prosecutors in the country . . . Summer Fellows, who will be part of a diverse cohort of accomplished law students interested in transforming the criminal legal system, will have a unique opportunity to receive hands-on experience working on criminal cases and other assignments typical of internships in prosecutor's offices, while also undertaking a policy reform project on an issue of interest to that office.¹⁸³

The FJP program has worked with over 30 prosecutors' offices and is continually growing.¹⁸⁴ Perhaps most importantly, FJP has also established a cutting-edge District Attorney/Public Defender Summer Split Program. It enables a few select students to split their internship between a prosecutor's office and a public defender's office. This kind of program can help students decide whether to choose a career path in public service, especially addressing the concerns of those individuals who are skeptical about the idea that serving as a prosecutor can contribute to criminal justice reform.

Allowing students to see first-hand the functioning of the criminal justice system from both sides may also reduce the "us versus them" mentality in our adversarial system. More importantly, such a program may provide a valuable platform for aspiring public defenders to get a taste for working as a prosecutor, which further helps progressive prosecutors to expand the pool of candidates.

183. For further details about the FJP/Summer Fellows Program, see *Program Overview*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/summer-fellows-program/> (last visited Dec. 27, 2021).

184. *Id.* One of us, Chien, was an FJP Summer Fellow.

Through clinics, externships, simulations, boot camps, practicums, policy labs, pro bono opportunities, and partnership with bridge organizations, prosecutors' offices and law schools can work together to better leverage existing resources to advise, mentor, and support interested students. In short, if reform prosecutors want to attract and hire those "good candidates" for organizational change, they need to ensure law schools are not an impediment. This means building long-term relationships with individual law schools, rather than merely visiting the campus occasionally to send an inspiring message. It means doing what will allow that message to resonate and become real.

Given the challenges progressive prosecutors face in hiring, prosecutor may need to rethink their recruitment processes. Beyond the hiring phase, they may also need to think about other issues such as continual socialization,¹⁸⁵ retention, and replacement.¹⁸⁶ The earlier remarks of the Texas prosecutors emphasize the challenges of retention. Changing the values defining an organization is a long-term project and finding appropriate hire is only a first step. Keeping those hires, especially with diversity and inclusion in mind, is a whole other challenge and a subject for another article.

VI. CONCLUSION

Reform prosecutors know that meeting their policy goals requires organizational change. This, in turn, involves hiring—especially new law school graduates. It means finding people who will fit into the organization a prosecutor hopes to create. It is a first step of a longer-term process of socializing the new hires into an evolving organization and then retaining them. But that first step is crucial with all else depending on the success of this task.

Using LSSSE survey data on students' motivations and career aspirations, this article shows that the task is daunting given the small pool of people, and especially so in terms of diversity. It argues that

185. See generally Yaroshefsky & Green, *supra* note 44, at 286 (suggesting that informal socialization has a deeper impact on prosecutors' behaviors); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutor' Syndrome*, 56 ARIZ. L. REV. 1065 (2014) (arguing that as prosecutors gain experience, they are better able to adjust their responses to individual cases and to avoid going to trial just to prove their professional worth).

186. For instance, Kim Ogg, a newly elected Harris County, Texas District Attorney in November 2016, started by firing 37 veteran prosecutors. Ogg said that the firings were part of her vision for an organizational change at the office. See Meagan Flynn, *Incoming DA Kim Ogg Prepares to Fire Dozens of Prosecutors*, HOUS. PRESS (Dec. 16, 2016), <https://www.houstonpress.com/news/incoming-da-kim-ogg-prepares-to-fire-dozens-of-prosecutors-9034289>; see also Levine, *supra* note 50.

Who Wants to Be a Prosecutor?

collaborative efforts by schools and prosecutors may prove helpful in expanding the pool, especially collaborations involving experiential opportunities for students including women, students of color, and others.¹⁸⁷

We are aware that there are many issues surrounding the recruitment and hiring processes for prosecutors' offices that are not addressed in this article. This article is our first step in a broader empirical project exploring organizational change and the connections between law students' aspirations and the operation, and possible reform, of the criminal justice system. The students are the raw material. They are the ones who eventually will do a major share of the actual work as prosecutors, public defenders, and activists. Reform prosecutors represent just one key piece.

187. See Hernandez *supra* note 156 (quoting Dallas County Assistant Criminal District Attorney Idris Akinpelu and also quoting Harris County Assistant District Attorney Chandler Raine).

Rebel Cities, Bully States: A New Preemption Doctrine for an Anti-Racist, Pro-Democracy Localism

KATHLEEN MORRIS*

State governments have been draining local government power and preempting local laws with increasing intensity. Researchers have documented this recent phenomenon, which this Article terms “the preemption crisis,” topic by topic. Scholars typically frame the preemption crisis in race-neutral terms and as an attack on local democracy.

This Article exposes the preemption crisis as a frequently racialized attack on democracy as a whole, and proposes a new legal framework to help resolve it. State attacks on cities are often racialized. This is because many state legislatures have been intentionally gerrymandered to shift power away from multiracial urban constituencies in favor of white rural constituencies. And the preemption crisis is an assault not just on local democracy but democracy as a whole, because it grew out of a coordinated effort to drain power from the nation’s collective urban majority. The preemption crisis perfectly illustrates how structural racism, democratic design, and lawmaking are interconnected.

Unfortunately, the current law of preemption is an integral component of the preemption crisis. Preemption law places such a heavy thumb on the scale in favor of state power and against local home rule that it ends up rewarding bully states rather than mandating thought-

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ful negotiation between cities and states. This Article proposes a new preemption doctrine to move constitutional home rule states towards a more anti-racist, pro-democracy localism. It explains the political, demographic, and legal dynamics driving the current preemption crisis; names and catalogues all the governance tools cities use to dissent from state policy preferences; and offers a new doctrinal approach to better resolve state-local disputes in constitutional home rule states.

INTRODUCTION	227
I. THE PREEMPTION CRISIS	232
A. Background: Major Political and Democratic Shifts ..	232
B. Rebel Cities, Bully States, and a Racialized Democratic Crisis	235
C. How Current Preemption Doctrine Backs Bullies ..	238
II. RESETTING PREEMPTION	239
A. Clarifying Key Terms	239
B. The Many Tools of Local Government Action	241
1. Regulatory Acts	242
2. Non-Regulatory Acts: Twelve Tools	243
a. Contracts with Private Entities	243
b. Contracts with Other Public Entities	244
c. Litigation	245
d. Taxing and Spending	246
e. Eminent Domain	247
f. Divestment	247
g. Self-Management	248
h. Passive Non-Compliance	249
i. Domestic Political Organizing	250
j. International Engagement	250
k. Lobbying	251
l. Speech	251
C. Preemption Doctrine's Major Flaws	252
III. A NEW PREEMPTION DOCTRINE	253
A. A Comprehensive Proposal	253
B. How the New Doctrine Improves on the Current Doctrine	255
1. It All-But-Eliminates Nuclear and Punitive Preemption	255

2.	It Structures Legal Analysis for Regular Preemption Around Government Tools Not Topics.....	256
3.	It Uses Balancing Tests Not Bright-Line Rules to Distinguish Permissible from Impermissible Preemption	256
4.	It Is Actively Anti-Racist	258
5.	It Supports Rather than Undermines Democratic Values	258
C.	Applying the New Doctrine—A Few Illustrations .	262
1.	Covid-19 Masking Policy.....	262
2.	Wage & Hour Laws	264
3.	Local NIMBYism	264
	CONCLUSION	265

INTRODUCTION

Conflicts between state and local governments are not new, but they have risen sharply in recent years. The nation is experiencing a frequently racialized and anti-democratic preemption crisis. Political interest groups serving a conservative, anti-regulatory policy agenda have worked for years to gerrymander state legislative districts so that representatives of rural white voters would have more voting power than representatives of multiracial city voters.¹ Having done so, the affected state legislatures are more frequently leveraging preemption doctrine to block and syphon power from city governments.²

In the past, state-local preemption was seen as technical and apolitical, but in recent years it has become a hot topic among scholars and journalists due to changes in how some states are using it.³ At

1. Lydia Bean & Maresa Strano, *Punching Down: How States are Suppressing Local Democracy*, NEW AM. 13, <https://www.newamerica.org/political-reform/reports/punching-down/> (last updated July 11, 2019). Whites make up more than 78% of rural voters as compared to 57% of urban voters. USDA Economic Research Service, *Racial and Ethnic Minorities Made Up About 22 Percent of the Rural Population in 2018, Compared to 43% in Urban Areas*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=99538> (last updated Oct. 13, 2020).

2. Bean & Strano, *supra* note 1. As mentioned in Part III, city governments given too much authority can also be prone to racism and corruption. The preemption proposal in this article would correct for both city and state overreach.

3. This Article joins and adds original dimensions to important recent scholarship and journalism discussing this problem. *See generally* Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) [hereinafter Schragger I] (discussing newly aggressive state preemption of cities); Bean & Strano, *supra* note 1, at 10 (discussing newly aggressive state preemption of cities); *see also* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN.

one time, states employed their preemption powers relatively sparingly, leaving cities and other local governments to regulate and operate as they saw fit.⁴ When state and local laws overlapped, and it was unclear whether the former preempted the latter, the parties or a court would quietly resolve the issue.

The days of sparing preemption are long gone. Today, state-local preemption is not only common, but frequently racialized and politicized. States are more often using preemption to score political points against the urban majority.⁵ Moreover, in addition to regular conflict preemption, states are using more extreme tools scholars have termed “nuclear” and “punitive” preemption to chill and eliminate local laws and policies.⁶ In sum, many states are leveraging preemptive law to allow a majority white minority to overpower a multi-racial majority. The preemption crisis is rightly viewed as one component of the racialized anti-democratic fervor sweeping the Republican party.

L. REV. 1995, 1999–2002 (2018) (surveying the rapidly expanding state-local preemption landscape); Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 957, 964–69 (2019) [hereinafter Davidson I] (surveying the rapidly expanding state-local preemption landscape); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 106 GEO. L.J. 1469, 1469 (2018) [hereinafter Scharff I]; see also Paul A. Diller, *The Political Process of Preemption*, 54 UNIV. RICH. L. REV. 343, 345 (2020) [hereinafter Diller I] (describing and exploring various means of resolving the preemption crisis); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134 (2017) [hereinafter Stahl I] (describing state-local preemption as having reached “nearly epidemic proportions”); Ronald Brownstein, *It’s Not Just Voting and Covid: How Red States Are Overriding Their Blue Cities*, CNN (June 8, 2021), <https://www.cnn.com/2021/06/08/politics/red-states-blue-cities-counties/index.html> (“Republican-controlled states have escalated their offensive against Democratic-controlled cities and counties this year to unprecedented heights, further deepening the trench between red and blue America”); Don Hazen & Steven Rosenfeld, *The Other Right-Wing Tidal Wave Sweeping America: Federal and State Preemption of Local Progressive Laws*, SALON (Feb. 28, 2017), https://www.salon.com/2017/02/28/the-other-right-wing-tidal-wave-sweeping-america-federal-and-state-preemption-of-local-progressive-laws_partner/ (“[disputes surround] every issue you can possibly imagine that anyone would care about that impacts workers, health, safety, or the natural environment.”). Paul Diller set the table for the current discussion in 2007. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1159–75 (2007) [hereinafter Diller II] (previewing the brewing state-local preemption crisis, discussing why courts make good preemption referees, and proposing a “substantial interference” test for local laws).

4. Bean & Strano, *supra* note 1, at 5 (“Until recently, states used their preemptive authority over localities primarily to avoid the type of complicated or harmful regulatory patchworks that can arise in a federal system. That kind of preemption was, and is, a healthy and natural way for states to exercise their considerable power.”); see also *id.* (providing a description and examples of regular, apolitical preemption disputes).

5. See Schragger I, *supra* note 3, at 1166 (describing the preemption crisis as largely an “attack on . . . cities” across the U.S.).

6. See Briffault, *supra* note 3, at 1997 (explaining that nuclear preemption is “blowing up” localities’ abilities to regulate, and punitive preemption is civilly or criminally punishing local government officials for regulating in forbidden areas).

This Article joins the call for the nation's state courts to redraw the balance of power between cities and states.⁷ This Article proposes an entirely novel, detailed and comprehensive doctrine for state-local preemption. It contrasts and furthers existing scholarship by categorizing local action by government tool rather than by topic and proposes a three-part doctrine to address state-local preemption.⁸ This Article explains that cities and other localities act by using two categories of legal authority: regulatory and non-regulatory authority. A city exercises regulatory authority when it orders private persons or entities to do something. It exercises non-regulatory authority when it uses a government tool other than direct regulation to further a policy interest. There are twelve non-regulatory government tools. They are: (1) contracts with private entities; (2) contracts with other public entities; (3) litigation; (4) taxing and spending; (5) eminent domain; (6) divestment; (7) self-management (8) passive non-compliance; (9) domestic political organizing; (10) international engagement; (11) lobbying; and (12) speech.

This Article proposes a novel approach to preemption law, one whose main goals are to lessen structural racism and improve multipart democratic functioning. The new doctrine would create three categories of preemption and apply three different balancing tests. The first very strict test would apply to, and invalidate most, “nuclear” and “punitive” preemption of local acts. The second test would apply to preemption of “non-regulatory” local acts. The third test would apply to preemption of “regulatory” local acts. The proposed preemption analysis would proceed as follows:

STEP ONE (IDENTIFY “NUCLEAR” AND “PUNITIVE” PREEMPTION): Determine whether the challenged state statute constitutes either “nuclear” or “punitive” preemption. If so, it is presumptively invalid. It will only be upheld if it is necessary to achieve an important state objective that cannot be achieved through a non-punitive or more narrowly tailored approach.⁹

7. Paul Diller has explained that courts are institutionally well-positioned to play this role. See Diller II, *supra* note 3, at 1168.

8. This Article's approach to preemption responds to Richard Briffault and Nestor Davidson's proposals. See Briffault, *supra* note 3, at 2018 (suggesting a test that would ban nuclear and punitive tests and apply a balancing test to the remaining conflicts, incorporating both democratic structural and substantive norms); Davidson I, *supra* note 3, at 954 (suggesting a balancing test that incorporates and furthers substantive norms).

9. Briffault would completely ban nuclear and punitive preemption. Briffault, *supra* note 3, at 2018. I am instinctively more comfortable with a strict scrutiny approach that leaves some wiggle room in case there arises the rare appropriate exception.

STEP TWO (DIVIDE REGULATORY FROM NON-REGULATORY EXERCISES OF LOCAL GOVERNMENT POWER): Determine whether the challenged state statute preempts a local act of regulatory or non-regulatory power. This replaces the topic-based approach to sorting state-local preemption disputes with a tools-based approach.¹⁰

STEP THREE: Apply the relevant balancing tests for regulatory and non-regulatory exercises of local power, requiring the state to produce evidence at summary judgment or at trial satisfying each prong of the applicable test.

TEST FOR STATE PREEMPTION OF LOCAL REGULATIONS: A state law will preempt a local regulation if the state government can establish, by a preponderance of the evidence, that: (1) the state law furthers an important policy objective that outweighs the democratic interests in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law.

TEST FOR STATE PREEMPTION OF NON-REGULATORY EXERCISES OF LOCAL POWER: State legislatures are presumed to lack the authority to preempt non-regulatory exercises of local power. A state law will only preempt a non-regulatory act of local power if the state can establish, by clear and convincing evidence, that: (1) the state law furthers an important policy objective that outweighs the democratic interests in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law.¹¹

The new preemption doctrine proposed here would improve upon the current doctrine in five respects. First, it would all-but eliminate the most extreme forms of preemption: nuclear and punitive. Second, it would eliminate the failed approach of using topics as a fulcrum for analysis, substituting a more logical tools-of-government approach. Third, it would employ balancing tests rather than bright line rules, which would permit the fifty states to import policy objec-

10. A tools-oriented approach responds to scholars' contentions that we will never be able to sort the state from the local by topic, because almost every topic is of both state and local concern. See, e.g., Briffault, *supra* note 3, at 2018 (explaining that any preemption doctrine that relies on an ability to rationally divide state from local matters is bound to fail).

11. This new preemption doctrine would need to be rooted in a new general theory of localism and a new approach to constitutional home rule. These tasks are underway but beyond the scope of this article. See Kathleen S. Morris, *Democracy's Double Agents* [hereinafter Morris III] (manuscript on file with author); Kathleen S. Morris, *Home Rule for the Modern Era* [hereinafter Morris IV] (manuscript on file with author).

tives in the course of analysis. Fourth, it softens the current doctrine's structural racism by forcing states and cities to justify their positions in open court. Fifth, support democratic values by taking a thoughtful approach to state-local power-sharing instead of falling back on an anti-democratic might-makes-right approach. Courts would permit preemption whenever states could establish that important bona fide statewide policy considerations outweighed bona fide local considerations.

This Article does not assume, as legal scholars sometimes do, that local governments are intrinsically more likely to be inept, parochial, corrupt, or racist than the state and federal governments, and thus preemption law must somehow account for these peculiarly local weaknesses.¹² In 2017, the late political theorist Benjamin Barber observed that city governments throughout the world have become or are becoming more sophisticated and forward-looking than national governments.¹³ This article assumes that all levels of government are potentially prone to corruption, racism, and other governmental evils, and that the work of preemption doctrine is to force states and cities to debate their conflicts by presenting facts in open court.¹⁴

12. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067 (1980) (noting that city government is often seen as inherently selfish, short-sighted, and parochial); *Id.* (“City discretion of any kind evokes images of corruption, patronage, even foolishness.”); see also Davidson I, *supra* note 3, at 978, 980 (noting concerns about “the dark side of local parochialism,” and “the real, structural, ineluctable problem of parochialism”); Schragger I, *supra* note 3, at 1221 (“Courts . . . are generally wary of broad grants of local power”).

13. In an interview that would be published after his death, Barber observed:

In the 19th and 20th centuries, local meant parochial. Local meant backwards. Local meant reactionary. The fundamental balance between national and local has been inverted. . . . Every progressive policy you can look for?— whether it's the minimum wage, whether it's the defense of rights, whether it's the defense of immigrants?— is now an urban one, a local one. And national government has become reactionary, not universal. It's not just the United States. National governments are increasingly parochial, and cities are increasingly cosmopolitan. It's exactly reversed, which [potentially] gives cities a whole new role.

Benjamin Barber, *quoted in* Richard Florida, *If Cities Ruled the World*, BLOOMBERG (Apr. 26, 2017), <https://www.bloomberg.com/news/articles/2017-04-26/empowering-the-rebel-cities-of-the-trump-era>; see also Fred Hiatt, *Why Aren't These People Running the Country?*, WASH. POST (Mar. 16, 2018), https://www.washingtonpost.com/opinions/why-arent-these-people-running-the-country/2018/03/16/d93523ae-2867-11e8-b79d-f3d931db7f68_story.html (opining that “the non-ideological common sense” ideas America's mayors suggest, to no avail, to Congress and the Trump Administration, and how that dynamic highlights the then-gap between federal ineptitude and local government leadership).

14. The federal and state responses to the Covid-19 pandemic from 2020-2021 illustrated in the starkest possible terms that federal and state governments are also vulnerable to being inept, parochial, and corrupt. Jodi Vittori, *Corruption Vulnerabilities in the U.S. Response to the Coronavirus*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 20, 2020), <https://carnegieendowment.org/2020/03/20/corruption-vulnerabilities-in-u.s.-response-to-coronavirus-pub-81336>.

This Article *does* assume that meaningful judicial oversight is both possible and advisable.¹⁵ Localities can and do seek to increase their power via what have been termed “political safeguards,”¹⁶ but political safeguards have not resolved the preemption crisis.¹⁷ If courts move away from categorizing state and local action by topic and towards categorizing it by tool, and develop balancing tests that are fine-tuned and flexible enough to capture the democratic and substantive values in play for each state, they would be more useful at brokering conflicts between states and constitutional home rule localities.

The current reckoning with racist and anti-democratic forces in American political life presents an opportunity for state courts to reconsider how best to resolve state-local conflict. This Article explains how they can do so, and proceeds in three parts. Part I summarizes the political and demographic changes and conflicts driving the current crisis in preemption, and the courts’ current failed approach to addressing those conflicts. Part II categorizes state-local disputes by government tool as opposed to topic, and explains the problem with current preemption law. Part III proposes a new preemption doctrine to help resolve the current crisis.

I. THE PREEMPTION CRISIS

A. Background: Major Political and Demographic Shifts¹⁸

Between 2010 and 2020, federal level policy making in the U.S. came to a virtual standstill. Congress and the White House stalemated

15. See Diller II, *supra* note 3, at 1159–75 (explaining why courts are suited to this task). Cf. Stahl I, *supra* note 3, at 174–75 (arguing that state-local preemption should be considered a non-justiciable political question).

16. See Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 630 (2001) (introducing the political safeguards of localism).

17. *Id.* at 630 n.16.

18. This section briefly summarizes the political science research, research reports, and news articles addressing demographic and political trends at the local level. The leading legal scholar in this area is Paul Diller. See Paul Diller, *Reorienting Home Rule: Part 1 – The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 290 (2016) [hereinafter Diller III] (describing how federal and state politics systematically disadvantage urban residents); Paul Diller, *Reorienting Home Rule: Part 2 – Remediating the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1048 (2017) [hereinafter Diller IV] (explaining how local lawmaking in urban areas can help to correct the national and state political biases against urban residents). The two leading political scientists in this area are Chris Tausanovitch and Christopher Warshaw. See, e.g., Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 605 (2014) (studying the relationship between local majority policy preferences and the structure of local political institutions).

to the point of calcification, creating a “cycle of despair” for those hoping to make progress through federal legislation.¹⁹ Those hoping for policy changes – right, left and center – increasingly sought leverage at the state and local levels.²⁰

In the meantime, cities grew in population and economic power in an “urban resurgence.”²¹ In a national trend that mirrors an international trend, cities became ever more desirable places to live and work.²² Populations expanded not only in already large cities, but also in small and medium-sized cities, with correspondingly significant political and demographic changes.²³ Populations have grown not only in traditionally progressive cities like Los Angeles, Austin, and Las Vegas, but also in traditionally conservative²⁴ cities like San Diego, Fort Worth, and Yuma.²⁵ As of 2018, America’s urban population was about 57% white and 43% non-white, whereas the rural population

19. Diller III, *supra* note 17, at 288. *See also* Bean & Strano, *supra* note 1, at 14 (“[S]pecial interests, recognizing the extreme difficulty of getting bills through a gridlocked Congress, have shifted their lobbying activities from the nation’s capital to state capitals.”).

20. Progressive and conservative political activists alike have trained their focus downward. *See infra* text accompanying notes 51–56. In a brilliant turn of phrase, Benjamin Sachs wrote in the labor law context that gridlock at the federal level had pushed the “hydraulic demand for collective action” downward. *See* Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. LAW & POL’Y REV. 375, 393 (2007). In recent decades, this characterization can be generalized across almost every imaginable subject matter area in American life. Perhaps the deepest regulatory disagreement between states and cities is how much corporations operating within cities should be subject to regulation. *See* Schragger I, *supra* note 3, at 1228–29 (detailing this particular dynamic).

21. Richard Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. LAW & POL’Y REV. 231, 231 (2013) [hereinafter Schragger II].

22. *See id.* Many companies are responding to these employee preferences by moving their offices from small towns and suburbs to cities. *See* Jonathan O’Connell, *As Companies Relocate to Big Cities, Suburban Towns are Left Scrambling*, WASH. POST (July 16, 2017), https://www.washingtonpost.com/business/economy/as-companies-relocate-to-big-cities-suburban-towns-are-left-scrambling/2017/07/16/81c12cea-618d-11e7-84a1-a26b75ad39fe_story.html.

23. For purposes of this discussion, a “small” metropolitan area is one with a population under 250,000 people; a “medium” metropolitan area is one with a population of between 250,000 and one million people; and a “large” metropolitan area is one with a population of over one million people. *See* Richard Florida, *How America’s Metro Areas Voted*, BLOOMBERG (Nov. 29, 2016), <https://www.bloomberg.com/news/articles/2016-11-29/the-2016-u-s-election-results-by-metro-area> (grouping metropolitan areas using these numbers).

24. For ease of reference, this paper considers a historically “conservative” city to be one in which a majority of voters in the congressional district, including the city or metropolitan area, voted for the Republican Party candidate in the 2016 Presidential election. It considers a historically “liberal” or “progressive” city one in which a majority of voters in the congressional district, including the city or metropolitan area, voted for the Democratic party candidate in the 2016 Presidential election.

25. *See* Davidson I, *supra* note 3, at 963 (“[W]e are in an era of sharply polarized politics, exacerbated by patterns of geographic mobility in which the like-minded are increasingly living together, apart from those with differing political and cultural outlooks.”).

was about 78% white and 22% non-white.²⁶ Hence, under the surface of the typical cable news map of red and blue states,²⁷ most cities and suburbs inside red states are various shades of blue and purple, while most rural spaces inside blue states are various shades of red and pink.²⁸

In theory, a marked growth in urban populations should translate into a corresponding growth in urban political clout at all levels of government. Generally speaking, voting majorities in the largest urban areas tend to prefer more “progressive” policies, while a majority of non-urban voters tend to prefer more “conservative” policies.²⁹ Importantly, progressives envision not merely progressive local policies, but also an affirmative “right to the city,” that is, a collective right to access city resources, shape urban spaces, resist spatial segregation, and obtain “public services that meet basic health, education, and welfare needs.”³⁰

26. USDA Economic Research Service, *Racial and Ethnic Minorities Made Up About 22 Percent of the Rural Population in 2018, Compared to 43% in Urban Areas*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=99538> (last updated Oct. 13, 2020).

27. Federalism scholars tend to write about the federal-state relationship in terms of blue and red states. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1078 (2014):

Democratic and Republican, not state and national, are today’s political identities, but the state and federal governments are sites of partisan affiliation. . . . By instantiating different partisan positions . . . states generate a federalist variant of surrogate representation: individuals across the country may affiliate with states they do not inhabit based on their partisan commitments. . . . [P]orous state borders may enhance states’ ability to challenge the federal government and to serve as sites of political identification.

Id. The same might be said for local governments vis-a-vis both federal and state governments, though as the discussion in this section illustrates, if you’re going to telescope in to view the local, you’re going to need more than two colors.

28. Josh Kron, *Red State, Blue City: How the Urban-Rural Divide Is Splitting America*, ATL. (Nov. 30, 2012), <https://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/>.

29. Conservative economic policies include “minimal redistributive taxation, relatively low levels of economic regulation, and policies that attract and subsidize mobile capital.” Richard Schragger, *City Power: Urban Governance in a Global Age: Introduction - Cities, Capital, and Constitutions*, U. VA. SCH. L. 1, 3 (2016). Progressive economic policies include redistributive taxation, strong economic regulation, and increasing equality of access to public land, public goods, and city services. *Id.* An example of an economically progressive local law is Washington, D.C. City Council’s approval of paid family leave for all city residents. See Peter Jamison, *D.C. Council Votes for Expansive Paid Family and Medical Leave for Private-Sector Workers*, WASH. POST (Dec. 20, 2016), www.washingtonpost.com/local/dc-politics/council-votes-down-radical-restructuring-of-paid-leave/2016/12/20/8a508618-c6cd-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.b18eff44921c.

30. Schragger II, *supra* note 21, at 238. These efforts are the grass roots embodiment of what Heather Gerken has called “a new progressive federalism,” in which national minorities seeking progressive political ends can gain majority status and rule at the local level. See

Due to aggressive gerrymandering, an increase in the number of urban voters has not led to an equivalent increase in urban political influence in state legislatures.³¹ As urban areas grow in population, American state governments have become less and less truly democratic.³² The urban-vs-rural political divide has caused a rise in political and legal tensions between city and state governments.³³

B. Rebel Cities, Bully States, and a Racialized Democratic Crisis

The full picture of local rebellion and state preemption is, of course, more complicated than blue cities and red states.³⁴ Some red cities and counties rebel against blue states.³⁵ Some cities, counties, and states are varying shades of purple,³⁶ and purple states can expect actions from cities and counties to their political right and left. Overbearing state control over local governments and their surrounding communities hurts more than just blue cities.³⁷ And not incidentally, overbearing and racially corrupt local control over topics like land use

Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY (Spring 2012), <http://democracyjournal.org/magazine/24/a-new-progressive-federalism/>.

31. Paul Diller has explained that the urban political disadvantage at the federal and state levels is due to factors that include the existence of intentionally non-representative bodies like the U.S. Senate; winner-take-all district mapping; intentionally partisan gerrymandering; and unintentional gerrymandering. See Diller III, *supra* note 18, at 325–26, 336.

32. Rahsaan Maxwell, *Why Are Urban and Rural Areas so Politically Divided?*, WASH. POST (Mar. 5, 2019), <https://www.washingtonpost.com/politics/2019/03/05/why-are-urban-rural-areas-so-politically-divided/>.

33. Diller III, *supra* note 18, at 292. For example, the Washington Post has written that the State of Arizona is not so much a red or blue “state” as it is four varyingly hued local sub-parts (a deep red part, a deep blue part, a red part with big blue pockets, and an increasingly urban swing part). See David Weigel & Lauren Tierney, *The Four Political States of Arizona*, WASH. POST (Sept. 20, 2020), <https://www.washingtonpost.com/graphics/2020/politics/arizona-political-geography/>.

34. See Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 839 (2020) (explaining that aggressive preemption is harming local democracy in rural America by causing helplessness among constituents). See also Davidson I, *supra* note 3, at 973 (noting that while most state-local conflicts “have played out against the backdrop of the rise of cities that are increasingly progressive, in states with conservative state legislatures or unified conservative control of state political branches. Preemption . . . also occurs in progressive states with relatively conservative local governments.”).

35. See Thomas Fuller, *California’s Far North Deplores ‘Tyranny’ of the Urban Majority*, N.Y. TIMES (July 2, 2017), <https://www.nytimes.com/2017/07/02/us/california-far-north-identity-conservative.html> (noting that the northernmost counties in California make up one fifth of its land mass, and have “a political ethos that bears more resemblance to Texas than to Los Angeles.”)

36. See Richard Parker, *Will Cities Turn Texas Purple?*, N.Y. TIMES (Oct. 5, 2014), <https://www.nytimes.com/2014/10/06/opinion/will-cities-turn-texas-purple.html>. (“Population growth, soaring diversity and dense urbanization are [turning Texas purple], much as they have done in Virginia and North Carolina.”)

37. See Su, *supra* note 34, at 847.

can cause harm to city residents that well-meaning state governments cannot always remedy.³⁸

Yet this article focuses on the battle between “blue” cities and “red” states,³⁹ for two reasons: It is the most high profile, hyper-aggressive locus of preemption, and it is the current area of preemption that is most structurally racist.⁴⁰ Anti-urbanism is a longstanding force in modern state and national politics and frequently a proxy for institutional racism.⁴¹ In recent years, red states like North Carolina, Georgia, and Texas have continued this anti-urban tradition by becoming increasingly aggressive⁴² in preempting city laws and policies that diverge from state policy preferences.⁴³

Cities take action across a wide range of policy issues that include pandemic protocols; race and policing; labor and employment; landlord-tenant law; land use; sugar and tobacco regulation and taxing; oil and gas extraction; firearms; plastic bags; water and air pollution; marijuana policy; immigration; broadband and wireless access; civil

38. See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 *YALE L.J.* 78, 81-83 (2017) (reviewing literature on the economic and social costs of local land use restrictions).

39. See Schragger I, *supra* note 3, at 1166 (discussing blue city rebellion). See also Diller I, *supra* note 3, at 344; Diller III, *supra* note 15 at 288–89.

40. See Schragger I, *supra* note 3, at 1213 (discussing race throughout).

41. See Diller III, *supra* note 18, at 289 (“Big cities as progressive islands in the statewide and national sea is thus a common theme in the local government literature. Inevitably, cities’ views on issues—as translated into policy—collide with the authority of state and federal actors representing a different electorate.”). See also Schragger I, *supra* note 3, at 1163 (“[A]nti-urbanism is a long-standing and enduring feature of American federalism and seeks to understand how a constitutional system overtly dedicated to the principles of devolution can be so hostile to the exercise of municipal power.”).

42. One recent example of aggressive state action is the crusade by Georgia’s governor to block a city law requiring people to wear face coverings in public to prevent the spread of Covid-19. See Nicholas Bogel-Burroughs & Campbell Robertson, *While Virus Surges, Georgia Governor Sues Atlanta Mayor to Block Mask Rules*, *N.Y. TIMES*, <https://www.nytimes.com/2020/07/17/us/brian-kemp-georgia-keisha-lance-bottoms-atlanta.html> (last updated July 21, 2020). A second example is the Governor of Texas’s recent threat to cut property tax revenue to cities that shift public funds from police departments to social services. See Jessica Wolfrom & Mark Berman, *Texas Governor Says Cities That Cut Police Funding Should Not Be Able to Raise Property Taxes*, *WASH. POST* (Aug. 19, 2020), https://www.washingtonpost.com/national/texas-governor-says-cities-that-cut-police-funding-should-not-be-able-to-raise-property-taxes/2020/08/19/d014def4-e264-11ea-b69b-64f7b0477ed4_story.html.

43. See Briffault, *supra* note 3, at 1995 (canvassing a range of state-local conflicts); Scharff I, *supra* note 3, at 1471–72; Schragger I, *supra* note 3, at 1164. Contrary to the belief that municipal governments are non-ideological, the political scientists Chris Tausanovitch and Christopher Warshaw have concluded that the “policies enacted by cities across a range of policy areas correspond with the liberal-conservative positions of their citizens on national policy issues.” Tausanovitch & Warshaw, *supra* note 18, at 605. In other words, if a majority of a city’s electorate is progressive, and elect officials who share those views, then city policies will become more progressive. The same is true if a majority of a city’s electorate is conservative. See *id.*

rights; climate change; and speech.⁴⁴ On economic issues, as compared to states, cities tend to favor more redistributionist policies.⁴⁵ On social issues, cities tend to push harder for equal treatment regardless of race, gender, citizenship status, sexual orientation, gender identity, and other personal characteristics.⁴⁶ On environmental issues, cities are more likely to watchdog business practices that may harm the environment.⁴⁷

In the past, state preemption of local law and policy prerogatives was relatively pedestrian and rare.⁴⁸ But over the past decade, states have preempted cities across a broad sweep of topics including public health, climate change, abortion rights, firearms regulation, education, taxation, and spending.⁴⁹ In some cases, cities are flatly refusing to obey state directives.⁵⁰

In the midst of these state-local conflicts, political activists are battling ferociously to increase both state and local government influence and control.⁵¹ Progressives have intensified voter registration and “get out the vote” drives in communities of color, immigrant, and poor white communities⁵² in historically red states like Georgia⁵³ and

44. See *supra* note 3 and accompanying text (listing articles that unpack these substantive areas of local government activity).

45. See Schragger I, *supra* note 3, at 1194 (describing the preferred policies of progressive versus conservative localities).

46. See, e.g., David A. Graham, *North Carolina Overtakes [Charlotte’s] LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/>.

47. See, e.g., Jim Malewitz, *Paxton Sues Brownsville Over Fee on Plastic Bags*, TEX. TRIB. (Oct. 12, 2016), www.texastribune.org/2016/10/12/paxton-sues-brownsville-over-buck-bag-policy/.

48. Bean & Strano, *supra* note 1, at 9–10 (comparing the “old” versus “new” preemption).

49. See generally Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1541 (2019) [hereinafter Schragger IV] (clarifying that states “are increasingly defunding, defanging, and seeking to delegitimize cities.”); see also Briffault, *supra* note 3, at 1995 (surveying state preemption of local legislation); Davidson I, *supra* note 3, at 957–58; Scharff I, *supra* note 3, at 1471–72; Schragger I, *supra* note 3, at 1164; Stahl I, *supra* note 3, at 133–34; see also Alexander Burns & Mitch Smith, *State G.O.P. Leaders Move Swiftly as Party Bickers in Congress*, N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/us/state-republican-leaders-move-swiftly.html> (summarizing state-local disagreements over a wide range of policy subjects); Elizabeth Daigneau, *Will States Stop Cities From Combating Climate Change?*, GOVERNING (Feb. 16, 2017), <https://www.governing.com/archive/gov-climate-change-states-cities-preemption.html> (discussing state-local battles over climate change).

50. Adriana Gomez Licon & Mike Schneider, *Florida Mayors Defy Ron DeSantis with Mask, Vaccine Mandates*, ASSOCIATED PRESS (July 28, 2021), <https://apnews.com/article/health-miami-coronavirus-pandemic-247f603722fc0f1d38d0bd97a9006c25>.

51. Nestor Davidson has explained that state redistricting after 2010 locked in pre-existing conservative advantages in many state legislatures, while cities grew and became increasingly progressive, which has intensified state-local conflicts. See Davidson I, *supra* note 3, at 963–64.

52. Progressive groups engaged in these efforts include (but are by no means limited to) the California Donor Table (see CAL. DONOR TABLE, californiadorortable.org (last visited Oct. 25,

Texas.⁵⁴ But progressives face an uphill battle against conservative dominance of state governments. Republicans control both chambers of the legislature and the governor's offices in most states⁵⁵ and they are working hard to retain and even increase their dominance in rural strongholds.⁵⁶ This article considers the role and shape of preemption doctrine within this political context.

C. How Current Preemption Doctrine Backs Bullies

During 2021, in the midst of out-of-control Covid-19 Delta Variant explosions in Texas and Florida, the right-wing governors of those states banned local governments from requiring face masks in crowded facilities like concert venues, restaurants, and gyms.⁵⁷ The ban ran against every public health recommendation. People likely

2021)), Orange County Communities Organized for Responsible Development (*see* OCCORD, occord.org (last visited Oct. 25, 2021)), the Center on Policy Initiatives (*see* CTR. ON POL'Y INITIATIVES, cpisandiego.org (last visited Oct. 25, 2021)), the One Arizona Coalition (*see* ONE ARIZ., onearizona.org (last visited Oct. 25, 2021)), and Run For Something (RUN FOR SOMETHING, runforsomething.net (last visited Oct. 25, 2021)). These efforts are growing not only in cities near the U.S. border with Mexico, but in cities with growing international refugee populations, like Lewiston, Maine. *See* Katherine Q. Seelye, *Mayoral Race in Maine Could Help Define City's Future Amid Demographic Shift*, N.Y. TIMES (Dec. 6, 2015), <https://www.nytimes.com/2015/12/07/us/mayoral-race-in-maine-could-help-define-citys-future-amid-demographic-shift.html> (explaining how the steady inflow and political engagement of immigrants from Somalia, Kenya, and the Congo are pushing the second largest city in Maine in a politically progressive direction).

53. *See* Sheryl Gay Stolberg, *In Georgia, Politics Moves Past Just Black and White*, N.Y. TIMES (Sept. 18, 2014), www.nytimes.com/2014/09/19/us/politics/as-georgias-population-changes-its-politics-begin-to-follow.html?_r=0 (describing efforts by a Latino rights advocacy group to register to vote newcomers "from Korea, Vietnam, India, Pakistan and Mexico, all faces of a changing Georgia," and noting that "Latinos in Georgia, as in much of the country, are the fastest growing minority.").

54. *See* Parker, *supra* note 36 ("Many hoping to see Texas go purple point to the growth of its Hispanic community. And that's part of it, but not everything. Population growth, soaring diversity and dense urbanization are also transforming Texas, much as they have done in Virginia and North Carolina.").

55. Joe Walsh, *Republicans Will Enter 2021 with Control over Most States' Governments. Here's Why that Matters for Redistricting*, FORBES (Nov. 6, 2020, 11:57 AM), www.forbes.com/sites/joewalsh/2020/11/06/republicans-will-enter-2021-with-control-over-most-states-governments-heres-why-that-matters-for-redistricting/amp/.

56. *See* Briffault, *supra* note 3, at 2001 (explaining that a conservative law and policy organization known as ALEC actively supports red states by "provid[ing] templates for state preemption laws"); *see also* Alan Greenblatt, *ALEC Goes Local*, GOVERNING (May 21, 2014), governing.com/topics/politics/gov-alec-goes-local.html (describing ALEC's efforts to increase law and policy influence at the local government level). At present, at least some counties in blue states like California seem as likely to remain as deeply "red" as their counterparts in more conservative States like Arizona, Texas, and Oklahoma. *See* Fuller, *supra* note 34 (describing conservative political efforts in the northernmost California counties).

57. Dave Montgomery, *Gov. Greg Abbott Bars Mandates for Vaccinations and Masks in Texas*, N.Y. TIMES, www.nytimes.com/2021/07/31/world/greg-abbott-mask-vaccine-mandate.amp.html (last updated Oct. 12, 2021).

died as a result. Some of Florida’s mayors refused to comply with the ban.⁵⁸ Absurdly, current preemption law backed the governors’ non-sensical directives.

Finally, the current doctrine does not just encourage state bullies. It also permits bullying by local governments. State courts have long permitted cities near-total power over land use. Cities have often used that outsized, unquestioned power to advance the racist and corrupt interests of NIMBYs.⁵⁹ Both outcomes are mandated by current preemption law yet neither reflects rational constitutional power-balancing. State preemption doctrine should help courts thoughtfully resolve policy disagreements between cities and states. A reset is long overdue.

II. RESETTING PREEMPTION

A. Clarifying Key Terms

1. “Regulation,” “Legislation,” “Power,” “Autonomy,” and “Home Rule”

Rethinking preemption must start with clarifying our terms. This is necessary because courts and scholars sometimes use the same term to mean different things, creating analytic confusion. Use of the terms “regulation” and “legislation” are sometimes used interchangeably, as are the terms “autonomy” and “power.”

This Article uses the term “regulation” to mean an ordinance or other legal rule that requires a private person or entity to do or refrain from doing a particular thing. Local government “legislation” is broader than “regulation”; “legislation” means an ordinance or legal rule that applies to public or private persons or entities.⁶⁰ In other words, while “regulations” only bind private actors or entities, “legislation,” as used here, can bind either private or public actors or entities.⁶¹

58. See Gomez Licon & Schneider, *supra* note 50.

59. See Schleicher, *supra* note 38 (reviewing literature on the economic and social costs of local land use restrictions).

60. See Merriam Webster Dictionary, *Legislation*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/legislation> (last visited Oct. 9, 2021).

61. To illustrate: An example of local government “legislation” that is also (more narrowly) a “regulation” is a “minimum wage” ordinance that requires private employers within a local jurisdiction to pay a minimum wage to their employees. An example of “legislation” that is not a “regulation” is “living wage” ordinance that requires city contracts to include a provision in which the private contractor must pay a minimum amount to each employee working under the contract.

This Article uses the term “power” to mean the use of any form of leverage to express or operationalize a policy preference. Enacting and enforcing a regulation is one way for a government to exercise power, but it is not the only way. As the next subpart of this Article unpacks more fully, a locality might exercise power by tucking a policy preference into a contract with a private entity; or leveraging another government’s power via contract; or taxing-and-spending; or taking a contrary position in litigation; or divesting local public funds from public or private enterprises; or engaging in self-management; or refusing to comply or cooperate with state law enforcement; or engaging in domestic or international political organizing; or by lobbying or speaking.⁶²

Moreover, legislatures are of course not the only branches of government that wield power.⁶³ Executive branch officials (like governors, mayors, attorneys general, city and county attorneys, and state and local agency heads) can exercise general powers in the absence of specific legislation. For example, a decision by a city attorney to file a lawsuit against a private or public actor or entity, or to take or decline to take a particular position in the context of litigation, is an exercise of power even though it does not enforce specific legislation.⁶⁴ A state agency’s decision to cut federal funding to a local public entity that it disagrees with is also an exercise of power, although such an act may not require legislation.

This Article uses the term “autonomy” to mean something more than mere “power.” Autonomy means an exercise of government power that a higher-level government cannot legally prevent, block, or overturn via preemptive legislation or in litigation.⁶⁵ An example of autonomy in the context of the federal-state relationship is when a state takes a legal position that is completely protected from the federal government, notwithstanding the Supremacy Clause,⁶⁶ because

62. See sources cited *infra* notes 78, 79, 90, 91, 107, 110, 116, 127, 136.

63. See Municipal Research and Services Center, *Roles and Responsibilities of Local Government Leaders*, MRSC, <https://mrsc.org/Home/Explore-Topics/Governance/Offices-and-Officers/Roles-and-Responsibilities.aspx> (last visited Oct. 9, 2021).

64. See, e.g., Julian Aguilar, *City of El Paso Joins Suit Against Texas Immigration Law*, TEX. TRIB. (June 27, 2017, 4 PM), www.texastribune.org/2017/06/27/el-paso-joins-suit-texas-immigration-law/ (describing Texas cities’ lawsuits filing suit to challenge Texas’ anti-sanctuary city law).

65. See Merriam Webster Dictionary, *Autonomy*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/autonomy> (last visited Oct. 9, 2021).

66. U.S. CONST. art. VI, cl. 2.

the Tenth Amendment⁶⁷ protects the state government from federal interference.⁶⁸

This Article uses the term “home rule” to refer to state constitutional commitments to grant certain local governments authority to regulate without affirmative state authorization, and to allow local constituents a measure of local self-determination, including a meaningful measure of protection from state preemption.⁶⁹

B. The Many Tools of Local Government Action

The next step is to name and categorize the many governance tools cities use to forward their policy preferences. This subpart offers a first-of-its-kind overview of all the tools cities use for this purpose. As we have seen, current preemption doctrine turns entirely on the subject matter at issue in the state-local conflict. Courts typically discuss local government acts topic by topic (like “health care,” “marijuana legalization,” or “immigration”), rather than tool-by-tool (like “regulation,” “public contracting,” or “litigation”).⁷⁰ The final section

67. U.S. CONST. amend. X.

68. See *New York v. United States*, 505 U.S. 144, 176, 183–84, 188 (1992) (agreeing with the State of New York that Congress lacked constitutional authority to enact, and further the Tenth Amendment prohibited application of, so-called “take title” amendments to the Low-Level Radioactive Waste Management Act).

69. See Briffault, *supra* note 3, at 2011–14 (summarizing how courts have applied the home rule principle in the current era of aggressive state preemption).

70. Broadly speaking, legal scholars who write about local government dissent do so from one of three angles. We might call them: (1) the “entity” perspective, which seeks to understand the nature of the states and local governments as entities (see, e.g., Gerald R. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1061 (1980); Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 2 (1990)); (2) the “subject matter” perspective, which focuses on the topic at issue in the dispute (see, e.g., Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 934 (2010) (race discrimination); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013) (firearms); Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L. REV. 939, 940, 942 (2014) (clean air); Pratheepan Gulasekaram, Rick Su & Rose Cuisin Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 842 (2019) (immigration); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008) (immigration); Darien Shanske, *Local Fiscal Autonomy Requires Restraints: The Case for Fiscal Menus*, 25 STAN. L. & POL’Y REV. 9, 10–11 (2014) (finance); Hannah J. Wiseman, *Urban Energy*, 40 FORDHAM URB. L.J. 1793, 1800–01 (2013) (energy)); and (3) the “tools” perspective, which focuses on the applicable mechanism for dissent (see, e.g., Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 63 (2014); Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L. REFORM 581, 586 (2019), and Sarah Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1230–32 (2018) (litigation); Bridget A. Fahey, *Federalism By Contract*, 129 YALE L.J. 2326, 2329, 2330 (2020) (contracts); Roderick Hills, *Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislature’s Control*, 97 MICH. L. REV. 1201, 1202–03 (1999) (local-federal contracts); see generally Kathleen Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L.L. REV. 1, 6, 8 (2012) [hereinafter Morris I]. (litigation); Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the*

will urge the courts to set aside the topic-by-topic approach in favor of a tool-by-tool approach.

This section names, categorizes, and briefly describes each tool. It first divides local government tools into two broad categories: (1) “regulatory acts,” a term used to describe direct regulations of third parties; and (2) “non-regulatory acts,” a term used to describe tools *other than* direct regulations of third parties. It then identifies twelve non-regulatory government acts (or tools). Each of these subtopics is worthy of its own preemption article,⁷¹ and each might give rise to its own peculiarized preemption analysis. This Article simply names and categorizes each regulatory act.

1. Regulatory Acts

This article defines “regulatory acts” as local government regulations that require private persons or entities to do or refrain from doing a particular thing. A classic example of local regulatory dissent is a local minimum wage that is higher than the state government prefers. States wanting to preempt such ordinances must enact statutes stripping away local authority to set a local minimum wage.⁷² Other recent examples of local government dissent via regulation are ordinances regulating the purchase or use of firearms or ammunition,⁷³ purchase or use of marijuana,⁷⁴ zoning and land use,⁷⁵ the use of

Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAS), 50 ARIZ. L. REV. 709, 712 (2008) (amalgamated political engagement); Scharff I, *supra* note 3, at 1516 (litigation)). This sub-section consolidates and supplements this third category of articles.

71. Some of these topics have had their own individual scholarly treatments. See, e.g., *infra*, note 95 (addressing preemption and fiscal authority).

72. In one example, the Missouri and St. Louis clashed on the issue of the appropriate minimum wage for St. Louis, and took their conflict to court. An en banc state Supreme Court sided with the State, “rolling back wage increases that had already begun to change the economic and social landscape of the city.” Davidson I, *supra* note 3, at 957 (footnote omitted).

73. On the subject of firearms, a California bill that would have added a \$25 tax to gun sales, to pay the public costs of gun violence, failed in the state legislature. Bob Egelko, *San Jose Mayor Responds to Gun Violence – Wants to Require Owners to Carry Liability Insurance*, S.F. CHRON. (Aug. 12, 2019, 7:55 PM), www.sfchronicle.com/bayarea/.amp/San-Jose-Mayor-Liccardo-responds-to-gun-violence-14299125.php. Subsequently, the Mayor of San Jose, California, proposed a local ordinance requiring gun owners to carry liability insurance to cover the costs of harm in San Jose caused by gun violence. *Id.*

74. On the subject of marijuana, New Jersey voted to legalize that drug. Omar Farah, *NJ Voted to Legalize Marijuana. What Comes Next?*, DAILY PRINCETONIAN (Nov. 17, 2020, 6:56 PM), <https://www.dailyprincetonian.com/article/2020/11/new-jersey-marijuana-legalization-cannabis-weed-explained-what-comes-next-when-is-weed-legal>. Afterwards, some cities in New Jersey enacted ordinances to outlaw sale or possession of marijuana within their particular borders. See Alan Greenblatt, *Legal in the State or Not, Some Cities Ban Marijuana*, GOVERNING

plastic bags by supermarkets and stores,⁷⁶ and the sale and use of tobacco.⁷⁷ Local regulatory acts are more likely to directly disrupt state policy goals than the non-regulatory acts detailed below, and thus, the new doctrine detailed in Part III applies different preemption tests to these two broad categories.

2. Non-Regulatory Acts: Twelve Tools

This article defines “non-regulatory acts” as local government actions that use a powers *other* than the direct regulation of private persons or entities. The twelve non-regulatory government tools (discussed below) are: (a) contracts with private entities; (b) contracts with other public entities; (c) litigation; (d) taxing and spending; (e) eminent domain; (f) divestment; (g) self-management (h) passive non-compliance; (i) domestic political organizing; (j) international engagement; (k) lobbying; and (l) speech.

a. Contracts with Private Entities

Localities act via contracts with private entities when they tuck policy preferences into local government public-private contracts.⁷⁸ A classic example of local rebellion via private contract was San Francisco’s Equal Benefits Ordinance, which decades before the marriage equality movement, required bidders on San Francisco’s public contracts to offer registered domestic partnered employees (including

(Feb. 20, 2019) <https://www.governing.com/archive/gov-legal-recreational-marijuana-cities-ban-sales.html>.

75. On the subject of land use, which courts typically view as a matter of peculiar local concern, states dealing with affordable housing crises have become more aggressive about preempting local zoning regulations. See John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C.L. REV. 823, 824 (2019) (canvassing the more active role states are taking in zoning, which was historically seen as a quintessential local issue); see also Kenneth A. Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. L. 179, 181–82 (2020) [hereinafter Stahl II]; Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 220–21 (2021).

76. On the subject of environmental law, the states of Arizona, Idaho, and Missouri have preempted all local ordinances that ban businesses from using plastic bags. See Elizabeth Daigneau, *Will States Stop Cities From Combating Climate Change?*, GOVERNING (Dec. 22, 2016) www.governing.com/topics/transportation-infrastructure/gov-climate-change-states-cities-preemption.html.

77. See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U.L. REV. 1219, 1222 (2014) (unpacking local health-related regulations including tobacco use).

78. See David Madland, Karla Walter, Paul Sonn & Tsedeye Gebreselassie, *Contracting that Works*, CTR. FOR AM. PROGRESS ACTION FUND (Mar. 31, 2010, 9:00 AM), <https://www.americanprogressaction.org/issues/economy/reports/2010/03/31/7444/contracting-that-works/>.

same-sex partners) the same workplace benefits as those offered to legally (opposite-sex) married employees.⁷⁹ When the San Francisco Board of Supervisors enacted this ordinance, it flew in the face of California's then-stated policy of only legally recognizing opposite-sex relationships.⁸⁰

More recent examples of acts via local policy making through public-private contract are the living wage ordinances enacted throughout the U.S. Living wage ordinances are not regulations, but rather public contracting provisions. They require an employer awarded a local government contract to pay a minimum wage and particular benefits to employees working under those contracts.⁸¹ When local governments tuck policy preference into bidding requirements for public contracts, rather than regulating directly, they do not conflict with state law unless states ban the particular contract provision at issue.

b. Contracts with Other Public Entities

Local governments can also act by tucking policy preferences contrary to the state's policy preferences into contracts with other public entities.⁸² The examples legal scholars have discussed most are agreements entered into between localities and the federal government. Through such agreements, federal agencies have deputized local officials or granted funds to accomplish particular outcomes that are contrary to state policy preferences.⁸³ For example, cities and counties have entered into agreements with the federal government to help enforce federal immigration laws, sometimes over the objections of their states.⁸⁴

79. SAN FRANCISCO, CAL. ADMIN. CODE §12B.1(b) (1997).

80. Georgetown Law Library, *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GEO. L., <https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201>.

81. See generally Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 N.W.U.L. REV. 1057, 1057 (2007) (surveying living wage ordinances across the U.S. and discussing state preemption of those ordinances).

82. See generally, Fahey, *supra* note 70, at 2331 (examining intergovernmental agreements).

83. In one such case, a federal agency issued the city of Tacoma a federal permit dam for the Cowlitz River over the objection of the Washington state government. See Nestor Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 996–97 (2007) [hereinafter Davidson II] (discussing this case); Hills, *supra* note 70, at 1202 (also discussing the same case). The State sued to stop the project, but the Ninth Circuit upheld the agreement and allowed the project to go forward. *Id.* at 1205–06 n.19 (listing the case rulings).

84. See Tanvi Misra, *The Rapid Rise of the 'Anti-Sanctuary' City*, BLOOMBERG (Sept. 27, 2018, 1:07 PM), <https://www.bloomberg.com/news/articles/2018-09-27/as-anti-sanctuary-cities-spread-so-do-concerns>. See also Rodriguez, *supra* note 70, 591–93 (2008) (discussing federal-

Viewed from the top down, these cases show how the federal government can circumvent state policy preferences (or “dissect[] the state”) by partnering with local governments.⁸⁵ But viewed from the bottom up, they provide examples of localities leveraging federal government power to *evade* the state.⁸⁶ In the current era of aggressive state preemption, one can easily imagine “red” states moving to prevent blue cities from entering into such agreements with a “blue” federal agency.⁸⁷

c. Litigation

Cities and other local governments engage in litigation constantly as plaintiffs, defendants, real parties-in-interest, and amici. Because cities are both policy makers and public corporations, they act in both policy making and commercial capacities,⁸⁸ and they can sue and be sued in both capacities.

In the context of active cases, cities can and do dissent from state policy preferences by making arguments of fact or law that are directly contrary to the state’s arguments.⁸⁹ This can happen in the context of affirmative litigation, defensive litigation, or amicus participation.⁹⁰ A locality might sue its own state (or a state actor) for violating state law.⁹¹ Or it might pursue a lawsuit or claim against a

local immigration enforcement agreements). The flip side of dissent in this area is when localities refuse demands by their own states to enter into contracts with federal immigration enforcement. See Gulasekaram, Su, & Cuisson Villazor, *supra* note 70, at 839–40 (explaining and documenting state statutes seeking to force this issue in Texas, Alabama, Indiana, Iowa, Mississippi, North Carolina, and Tennessee).

85. See Hills, *supra* note 70, at 1201 (coining the phrase “dissecting the state”).

86. As Hills summarized, “[i]n effect, the city – a creature of the state – had invoked federal law to defeat the will of the state government[.]” *Id.* at 1202.

87. Cross-jurisdictional public agreements are commonplace below the federal level. See *Local Government Collaboration: A Matter of Leadership, Process and Trust*, INT’L CITY/COUNTY MGMT. ASS’N (May 2, 2013), <https://icma.org/articles/article/local-government-collaboration-matter-leadership-process-and-trust>.

88. See Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, WHY LOCAL MATTERS: FEDERALISM, LOCALISM, & PUB. INT. ADVOC. (2010) [hereinafter Morris II], at 52–53 (listing one city’s businesses as “a port, an international airport, power and water systems, [] two major hospitals. . . housing and mass transportation [services] . . . several libraries and museums, acres of parks and gardens, and a zoo.”).

89. See Morris I *supra* note 70, 3–4 (generally discussing the positions cities take in litigation and when the law should permit cities to sue their own states).

90. See generally Morris I *supra* note 70, 3–4 n.5. See also Ainsworth Caruso, *supra* note 70, at 62–63; Savit, *supra* note 70, at 583; Swan, *supra* note 70, at 1229–30, 1271 n. 300.

91. See, e.g., Aguilar, *supra* note 64 (describing Texas cities’ lawsuits filing suit to challenge Texas’ anti-sanctuary city law). Legal scholars have debated when and whether localities should be legally permitted to sue their own States for constitutional violations. See David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2232

third party that the state government would prefer it did not pursue.⁹² Or it might defend litigation by taking positions that differ from the state's.⁹³ Or it might dissent as amici by filing an amicus brief taking a different position from its own state government.⁹⁴

d. Taxing and Spending

Localities act via taxing and spending through their chosen local tax policies. They can dissent from state preferences by taxing for greater income redistribution, requiring or rejecting certain local taxes, or challenging tax policies their state governments have embraced.⁹⁵ Perhaps the most high-profile recent example of cities going their own way on taxing and spending is the growing number of cities, including in deep red states, that have voted to provide a universal basic income to all residents.⁹⁶ Other recent examples of local action via taxing and spending include soda taxes,⁹⁷ millionaire taxes,⁹⁸ fire-arm taxes,⁹⁹ and big business employee taxes.¹⁰⁰ Some states have

(2006); Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009); Morris I, *supra* note 70, at 3–4 n.5.

92. See Savit, *supra* note 70, at 583 (canvassing the ways states attempt to block affirmative local government cases with which they disagree).

93. One such example was a 2006 case in which representatives for a group of San Francisco county inmates sued both San Francisco and California seeking the right to vote. See *League of Women Voters of California v. McPherson*, 52 Cal. Rptr. 3d 585, 587 (Cal. Ct. App. 2006). In this case, which the author personally observed as a deputy city attorney for San Francisco, the county (though named as a defendant in the case) filed a brief rejecting the state's legal argument and siding with the petitioners. *Id.*

94. A recent example was a 2018 vote by the County of San Diego Board of Supervisors to file an amicus brief siding with the Trump Administration, against California, on immigration. See Kate Morrissey, *San Diego Becomes the Latest to Fight California Sanctuary State Laws*, SAN DIEGO UNION-TRIBUNE (Apr. 18, 2018, 7:20 AM), www.sandiegouniontribune.com/news/california/la-me-sanctuary-fight-20180418-story.html.

95. See generally Erin Scharff, *Preemption and Fiscal Authority*, 45 FORDHAM URB. L.J. 1270, 1275–76 (2018) [hereinafter Scharff II] (describing how states sometimes preempt and otherwise control the extent to which localities can tax and spend for local purposes).

96. See Rachel Sandler, *Los Angeles, Atlanta Among Cities Joining Coalition to Test Universal Basic Income*, FORBES (June 29, 2020, 1:32 AM), <https://www.forbes.com/sites/rachelsandler/2020/06/29/los-angeles-6-other-cities-join-coalition-to-pilot-universal-basic-income/?sh=7f399b401ae5> (identifying nine cities, including in red states like Mississippi and Louisiana, joining Stockton (CA) Mayor Michael Tubbs in piloting a local universal basic income).

97. See generally David A. Dana & Janice Nadler, *Soda Taxes as a Legal and Social Movement*, 13 N.W.J.L. & SOC. POL'Y 84, 84 (2018) (surveying and discussing city soda taxes).

98. See Andrew Appleby, *Targeted Taxes: Localities Take Aim at Large Employers to Solve Homelessness and Transportation Challenges*, 98 OR. L. REV. 477, 506 (2020) (discussing millionaire taxes).

99. See Dru Stevenson, *The Urgent Need for Legal Scholarship on Firearm Policy*, 67 BUFF. L. REV. 1449, 1506 & nn.140–142 (2019) (discussing local government taxes on firearms and preemption).

100. See Appleby, *supra* note 98, at 480 (discussing per-employee taxes on big businesses to help solve homelessness).

moved aggressively to prevent localities from dissenting via taxation.¹⁰¹

e. Eminent Domain

Local governments act via eminent domain when they “take” private property for public purposes. A state might be indifferent to a city or other local governments use of eminent domain, but it might also be opposed to it. Kenneth Stahl has unpacked the issues in play when states and localities clash over land use.¹⁰² Nestor Davidson and Timothy Mulvaney have discussed state preemption of local acts in the specific context of eminent domain.¹⁰³

f. Divestment

Local governments act via divestment when they withhold local public funds from private or public entities or activities with which they disagree.¹⁰⁴ Probably the most well-known example was the mid-1980’s decisions by various U.S. cities and counties to divest from South Africa to protest Apartheid.¹⁰⁵

More recent examples of local government acting via divestment have involved climate change and the Trump administration-era border wall between the U.S. and Mexico. With regard to climate change, the cities of Seattle, New York City, Washington, D.C., Somerville (MA), Cooperstown (NY), San Francisco, and Oakland (CA) joined cities outside the United States, such as Cape Town, Oslo, Paris, Melbourne and Berlin, to divest city funds from the fossil fuel industry.¹⁰⁶ Regarding the Trump border wall, the cities of New York, Oakland, Berkeley, and San Francisco voted to withhold city funds

101. See Scharff II, *supra* note 95, at 1273 (describing how states sometimes preempt and otherwise control the extent to which localities can tax and spend for local purposes). Roderick Hills has argued, in the context of the federal government partnering with localities in opposition to their states, that courts should treat direct regulations differently from laws authorizing expenditures. See Hills, *supra* note 70, at 1245–46. A major policy concern is that a tax on wealthy people and corporations might drive money out of cities, but the sociologist Cristobal Young has cast doubt on that concern. See CRISTOBAL YOUNG, *THE MYTH OF MILLIONAIRE TAX FLIGHT: HOW PLACE STILL MATTERS FOR THE RICH* (2017).

102. Stahl II, *supra* note 75, at 179.

103. Davidson & Mulvaney, *supra* note 75, at 217, 221–22.

104. See Christine Walsh, *The Constitutionality of State and Local Governments’ Response to Apartheid: Divestment Legislation*, 13 *FORDHAM URB. L.J.* 763, 777 (1985).

105. *Id.* (discussing city and county legislation to divest local public funds from South African corporations).

106. See Sarah Holder, *Why New York City Is Getting Its Money Out of Fossil Fuels*, CITY-LAB, (Jan. 11, 2018, 12:47 PM), <https://www.bloomberg.com/news/articles/2018-01-11/why-new-york-city-is-getting-its-money-out-of-fossil-fuels>.

from companies that participated in designing or building that project.¹⁰⁷

g. Self-Management

Localities act via “self-management” when they make decisions about their own property, public systems, or local elections that defy state policy preferences.¹⁰⁸ As we have seen, local governments serve as both policymakers and public corporations. They engage in self-management in both roles, and their state governments sometimes oppose their management choices.

One recent example of localities dissenting from state policy preferences via self-management is the decision by certain cities and counties in North Carolina to defund the police in response to accusations of institutionalized racism.¹⁰⁹ The state is responding by considering legislation that would reduce funding to any city or county that cut the budgets of police or sheriff’s offices.¹¹⁰ A second example is a locality’s decision to remove confederate monuments from places of honor on their property over the objections of their states.¹¹¹ A third example was the decision by one city to utilize ranked-choice voting in local government elections against the wishes of its own state government.¹¹² A fourth example was a cluster of decisions by localities in New York, Maryland, California, and elsewhere, to allow non-citizens

107. Katy Steinmetz, *Lawmakers Want to Boycott Companies that Help Build Trump’s Border Wall*, TIME (Mar. 23, 2017, 2:23 PM), www.time.com/4710070/border-wall-boycott-san-francisco/.%3famp=true.

108. Joshua Sellers and Erin Scharff have written about this phenomenon, using the term “structural authority.” See Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1361 (2020) (discussing state preemption of “structural authority,” defined as “the autonomy of local governments to design and modify their governments institutions and the terms of local participation.”).

109. Neal Charnoff, *GOP Bill Targets North Carolina Cities That “Defund the Police”*, WFDD POL. & GOV’T (Feb. 16, 2021, 10:54 AM), <https://www.wfdd.org/story/gop-bill-targets-north-carolina-cities-defund-police>.

110. *Id.*

111. See Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 370 (2019) (discussing dispute over monument removal). Removal of monuments could be doubly categorized as “speech,” depending upon the city’s motive for removing them. See *id.* (classifying monument removal as “city speech”).

112. See Sasha D. Urbach, *Reclaiming Electoral Home Rule: Instant-Runoff Voting, New York City’s Primary Elections, and the Constitutionality of Election Law § 6-162*, 46 FORDHAM URB. L.J. 1295, 1300 (2019) (arguing that the state constitution’s home rule provision should prevent New York State from preempting local laws governing elections to local office).

to vote in local elections against the will of their own state governments.¹¹³

h. Passive Non-Compliance

Localities act via what this article terms “passive non-compliance” when they decline or refuse to support or enforce a state law or policy with which they disagree. Examples of passive non-compliance have emerged across a range of topics including coronavirus protocols, immigrant sanctuary, and firearms regulation.

On coronavirus protocols, some mayors have kept indoor mask mandates in place in defiance of state government orders.¹¹⁴ In a reverse example, some state governments have mandated public masks and social distancing but their local police and sheriff departments have declined to enforce the mandates,¹¹⁵ even though non-enforcement of those mandates renders them ineffective.¹¹⁶

On immigration, dissenting “blue” localities have refused to help identify and detain undocumented immigrants where state policy requires detainment.¹¹⁷ In at least one such case, the state government threatened to withhold state funding unless the locality reversed course.¹¹⁸ And in a politically reverse scenario, some “red” localities have refused to comply with state laws providing sanctuary to undocumented immigrants.¹¹⁹ One such locality openly announced it would defy state law by publicizing local custodial releases of undocumented immigrants.¹²⁰

On firearms, state officials have enacted new gun laws in the states of Virginia and Washington, and local officials in each state have announced they would decline to enforce those laws, creating

113. See Rachel M. Cohen, *Letting Noncitizens Vote in the Trump Era*, NATION (Nov. 1, 2018), <https://www.thenation.com/article/archive/noncitizen-voting-trump/> (summarizing recent resurgence of state-local tensions over cities’ plans to allow non-citizens to vote).

114. *Id.*

115. See, e.g., Mary Papenfuss, *Los Angeles Sheriff Refuses to Enforce New Indoor Mask Mandate*, HUFFPOST (July 18, 2021), https://www.huffpost.com/entry/alex-villanueva-mask-mandate-defiance-covid_n_60f38dc9e4b0b2a04a247d70.

116. See Bean & Strano *supra* note 1, at 19–20.

117. See Rod Boshart, *Iowa Bans “Sanctuary Cities” and Threatens to Withhold State Funding*, GOVERNING (Apr. 11, 2018), www.governing.com/archive/tns-iowa-sanctuary-city-ban.html.

118. *Id.*

119. See Roxana Kopetman, *Orange County Steps Up Resistance to California Sanctuary Law*, GOVERNING (Mar. 27, 2018), www.governing.com/archive/tns-orange-county-sheriff-california-sanctuary.html.

120. *Id.*

what they term sanctuary jurisdictions for gun owners.¹²¹ At least one state attorney general has threatened to hold local governments liable for refusing to enforce state gun laws.¹²²

i. Domestic Political Organizing

Local public entities and officials act via “domestic political organizing” when they join organizations that “aggregate political capital” to further policy goals that are contrary to their own states’ policy preferences.¹²³ Organizations of local governments and actors, which Judith Resnik and her co-authors have termed “TOGAS,”¹²⁴ typically organize themselves around the level of government (city, county, etc.), or the category of public official (mayor, city council, etc.), rather than by subject matter.¹²⁵ The first TOGA—the National Conference of Commissioners on Uniform State Laws—was founded in 1892.¹²⁶ Other, more high profile TOGAS include the U.S. Conference of Mayors and the National League of Cities.¹²⁷

j. International Engagement

A local government acts via international engagement when it reaches outside of U.S. borders to collaborate and advance preferred policies.¹²⁸ TOGAS organize and engage not only in the domestic sphere, but also internationally.¹²⁹ International issues in which TOGAS have involved themselves include the Kyoto Protocol on climate

121. See Gregory S. Schneider, In Virginia, and Elsewhere, Gun Supporters Prepare to Defy New Laws, WASH. POST (Nov. 23, 2019), www.washingtonpost.com/local/virginia-politics/in-virginia-and-elsewhere-gun-supporters-prepare-to-defy-new-laws/2019/11/23/4a95fcc2-0c86-11ea-bd9d-c628fd48b3a0_story.html (“In the past two weeks, county governments from the central Piedmont to the Appalachian Southwest . . . have approved resolutions to defy Richmond to come take their guns.”); see also Jason Wilson, *Washington State: At Least 20 County Sheriffs Refuse to Enforce New Gun Laws*, GUARDIAN (Feb. 22, 2019), www.theguardian.com/us-news/2019/feb/22/washington-state-county-sheriffs-refuse-to-enforce-gun-laws (“At least 20 county sheriffs in Washington state – more than half of the state’s total – are now publicly refusing to police new gun laws. Several county governments have also passed local resolutions officially opposing enforcement of the laws.”).

122. See David Gutman, *Sheriffs Who Don’t Enforce Washington’s New Gun Law Could Be Liable, AG Bob Ferguson Says*, SEATTLE TIMES (Feb. 12, 2019), www.seattletimes.com/seattle-news/politics/sheriffs-who-dont-enforce-washingtons-new-gun-law-could-be-liable-ag-bob-ferguson-says/.

123. See Resnik, Civin & Frueh, *supra* note 70, at 726–29 (describing how localities amalgamate political leverage).

124. See *id.* at 711 (coining the term).

125. *Id.* at 731.

126. *Id.*

127. *Id.*

128. *Id.* at 719.

129. *Id.* at 739.

change¹³⁰ and the Convention on the Elimination of All Forms of Discrimination Against Women.¹³¹

k. Lobbying

A local government official acts via lobbying when he or she engages in lawful activities to influence the actions, policies, or decisions of state or federal government officials.¹³² One usually associates lobbying with private entities (like corporations or labor unions), but local public entities also exert power via direct lobbying.¹³³ Some localities even hire private lobbyists at taxpayer expense to engage the state and federal law and policy processes.¹³⁴

l. Speech

A local government official acts via speech when he or she takes a public position or disseminates information. As Yishai Blank has detailed, cities engage in speech all the time,¹³⁵ and some states have moved aggressively to muzzle them.¹³⁶ States also move to quash speech by counties and other local public entities.¹³⁷ The most eye-popping recent attack on local government speech, though it was not an attack on the constitutional home rule entities this article addresses, is the effort by conservative Republicans to ban the teaching of critical race theory, an academic discipline that examines the structural role of race and racism in shaping the nation's legal and social systems.¹³⁸

130. *Id.* at 718.

131. *Id.* at 722.

132. Daniel Rodriguez has written about how local governments participate as lobbyists in state legislative and political processes. See Rodriguez, *supra* note 15, at 627–28 (“Local governments have unstable legal protections from state control, but they make up for some of that by deploying political power in the state lawmaking process . . . [L]ocal governments act as interest groups as well as official authorities and representatives of citizens at the local level.”).

133. *Id.* at 643.

134. See *id.*

135. See Blank, *supra* note 111, at 367 (summarizing various examples of cities' speech).

136. See *id.* at 368–69 (noting that states “have begun to employ silencing measures to prohibit a variety of expressive activities by cities,” and arguing that city speech should enjoy First Amendment protection).

137. See *id.* at 369.

138. See Arellis R. Hernandez & Griff Witte, *Texas Bill to Ban Teaching of Critical Race Theory Puts Teachers on Front Lines of Culture War Over How History is Taught*, WASH. POST (June 2, 2021), www.washingtonpost.com/national/texas-critical-race-theory-bill-teachers/2021/06/02/4a72afda-bee9-11eb-9bae-5a86187646fe_story.html%3foutputType=amp. School districts are not directly relevant to this article, which addresses home rule localities, but state legislatures are also hotly contesting their power.

Local governments have recently dissented via speech on issues including coronavirus mask mandates; coronavirus data related to students returning to schools; and immigration policy. On coronavirus mask mandates, the Governor of Georgia disagreed with the Mayor of Atlanta on whether to require masks in that city.¹³⁹ The Governor sued the Mayor seeking, among other remedies, an injunction “to restrain [the Mayor] from issuing press releases, or making statements to the press, that she has the authority to impose more or less restrictive measures” than the State.¹⁴⁰ The Atlanta mayor pushed back hard against the Governor’s attempts to muzzle her.¹⁴¹

On immigration, the State of Iowa enacted a law banning its local governments from becoming “sanctuaries” for undocumented immigrants, threatening to impose financial sanctions on those that did not comply.¹⁴² Notably, in a direct move against speech, the bill additionally specifically prohibited local government officials from making statements to discourage other local government officials from enforcing federal immigration laws.¹⁴³

C. Preemption Doctrine’s Major Flaws

No doubt state and local disagreements will continue to be intensely politicized in a way that undermines democratic and anti-racist values. Current preemption doctrine cannot meet this political moment because it is both technically and substantively flawed.

Preemption doctrine is technically flawed because it attempts to meaningfully sort cases according to whether the topic at issue is of statewide or local concern. The state-versus-local-concern sorting method is hopeless doctrinally because almost every imaginable topic is of concern to both cities and states. The courts end up categorizing almost everything as a matter of both statewide and local concern and then allowing states to preempt all but the most local of local laws.¹⁴⁴

139. See Mary Papenfuss, *Atlanta Mayor Slams Governor for Trying to Gag Her on Face Mask Mandate*, HUFFPOST (July 21, 2020) (quoting the complaint), www.huffpost.com/entry/keisha-lance-bottoms-brian-kemp-face-masks-atlanta-gag-order_n_5f1504dbc5b6d14c33691730.

140. Keisha Bottoms (keishabottoms), INSTAGRAM, https://www.instagram.com/keishabottoms/?utm_source=IG_embed&ig_rid=417fe8cd-d35e-4aae-b8a0-880d2ae15f76 (last visited October 19, 2021).

141. See Papenfuss, *supra* note 139.

142. See Boshart, *supra* note 117.

143. See *id.*

144. A similar problem bedeviled dormant commerce clause analysis until the courts discarded the topic-based approach. See *infra* text accompanying notes 164–67.

Preemption doctrine is substantively flawed because it fails to incorporate the actual values at stake when we divide power in a democracy. Most state constitutions have “home rule” provisions that explicitly contemplate a significant degree of local government power and autonomy.¹⁴⁵ But one would never know that from the current preemption doctrine.¹⁴⁶ As Richard Briffault explains:

[T]he empowered local self-government that is at the core of home rule necessarily places limits on state preemption. Laws that punish local officials or governments for exercising their home rule powers or that broadly sweep away local lawmaking over vast areas of local concern are fundamentally inconsistent with the idea of home rule. So too, state measures that displace local policies without replacing them with state ones or that unduly constrain local powers beyond what is needed to achieve state goals are in deep tension with the value of local autonomy enshrined in most state constitutions and many state laws. Such an approach would take seriously the mix of values, practices, and laws that make local self-government a cornerstone of our political system while respecting the state’s overarching authority to preempt when it sets statewide policy or addresses the costs localities impose on nonlocal residents or on the state as a whole.¹⁴⁷

The preemption crisis is not going anywhere until state courts reshape preemption doctrine. States can be expected to continue bullying cities, and cities that disagree with state policy preferences can be expected to continue pushing back.¹⁴⁸ This will raise a series of elemental questions. What preemption analysis should be applied to each act of dissent? How can courts consider both good democracy and good government when evaluating a preemption dispute? The final section proposes a comprehensive new preemption doctrine that endeavors to address these difficult questions.

III. A NEW PREEMPTION DOCTRINE

A. A Comprehensive Proposal

Important recent scholarship has collectively explained that a new state-local preemption doctrine should follow four foundational

145. Briffault, *supra* note 3, at 2017.

146. *Id.* at 2018.

147. *Id.*

148. As Ben Sachs has explained in the labor law context, just like water, political flow that is frustrated in one direction seeks out another. *See* Sachs, *supra* note 20, at 376–77 (describing the “hydraulic demand for collective action”).

rules. It should: (1) apply balancing tests not bright line rules¹⁴⁹; (2) consider the nature of the state law that seeks to have preemptive effect (considering whether the state law is an act of nuclear, punitive, or regular preemption¹⁵⁰); (3) support democratic values (appropriately respect the division of power contemplated by the state constitution¹⁵¹); and (4) further, rather than undermine, substantive state constitutional and statutory norms.¹⁵² To this I would add fifth and sixth foundational rules: (5) A new preemption doctrine should apply different balancing tests to regulatory versus non-regulatory local government acts; and (6) in creating these balancing tests, the courts should prioritize “good constitutional democracy” over preferred policy preferences.

I propose a state-local preemption doctrine for constitutional home rule localities that has three steps, and three balancing tests:

STEP ONE (WEED OUT “NUCLEAR” AND “PUNITIVE” PREEMPTION): Determine whether the challenged state statute constitutes either “nuclear” or “punitive” preemption. If so, it is presumptively invalid. It will only be upheld if it is necessary to achieve an important state objective that cannot be achieved through a non-punitive or more narrowly tailored approach.¹⁵³

STEP TWO (DIVIDE REGULATORY FROM NON-REGULATORY EXERCISES OF LOCAL GOVERNMENT POWER): Determine whether the challenged state statute preempts a local act of regulatory or non-regulatory power. This would replace the current topic-based approach to sorting state-local preemption disputes with a tools-based approach.¹⁵⁴

STEP THREE: Apply the relevant balancing tests for regulatory and non-regulatory exercises of local power, requiring the state to produce evidence at summary judgment or at trial satisfying each prong of the applicable test.

149. Jesse Merriam, *Preemption as a Consistency Doctrine*, 25 WM. & MARY BILL RTS. J. 981, 2017 (2017).

150. See Briffault, *supra* note 3, at 1997 (dividing nuclear and punitive from regular preemption).

151. See *id.* at 2018.

152. See Davidson I, *supra* note 3, at 962 (arguing preemption should further normative values).

153. See Briffault, *supra* note 3, at 2008 (arguing to entirely ban nuclear and punitive preemption). This strict scrutiny approach to nuclear and punitive preemption would leave some room for the rare occasion when these types of preemption may be justified.

154. Responds to scholars’ contentions that we will never be able to sort the state from the local by topic, because every topic affects both. See, e.g., Briffault, *supra* note 3, at 2018 (attempting to divide state from local matters is bound to fail).

TEST FOR STATE PREEMPTION OF LOCAL REGULATIONS: A state law will preempt a local regulation if the state government can establish, by a preponderance of the evidence, that: (1) the state law furthers an important policy objective that outweighs the interest in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law.

TEST FOR STATE PREEMPTION OF NON-REGULATORY EXERCISES OF LOCAL POWER: State legislatures are presumed to lack the authority to preempt non-regulatory exercises of local power. A state law will only preempt a non-regulatory act of local power if the state can establish, by clear and convincing evidence, that: (1) the state law furthers an important policy objective that outweighs the interest in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law.

This three-step doctrine would allow courts to insert the particular values of their own state constitutions and statutes, balancing the need for statewide uniformity against the powerful interest in local self-government. Because of the difference in the strength of the presumptions, the test for preempting regulatory exercises of local power would be considerably easier for a state to meet than the test for preempting non-regulatory exercises of local power, which would be considerably easier to meet than the test for nuclear or punitive preemption.

B. How the New Doctrine Improves on the Current Doctrine

1. It All-But-Eliminates Nuclear and Punitive Preemption

In most cases, states will be attempting ordinary subject matter preemption. But in recent years, states have been engaging in two different forms of more aggressive preemption, which scholars have termed “nuclear” and “punitive” preemption.¹⁵⁵ Recall that punitive preemption punishes local public officials with harsh penalties when they diverge from state policy preferences.¹⁵⁶ Nuclear preemption “blow[s] up the ability of local governments to regulate without affirmative state authorization.”¹⁵⁷ Nuclear preemption blocks lawmaking and punitive preemption chills lawmaking.¹⁵⁸

155. *Id.* at 1997.

156. *Id.*

157. *Id.*

158. Scharff I, *supra* note 3, at 1469 (explaining that punitive preemption, which she terms “hyper-preemption,” chills the lawmaking process).

Presented with regular preemption, courts can employ the careful balancing tests spelled out in subpart three, above. But in cases of nuclear or punitive preemption, the courts should either categorically invalidate the state statute or treat it as highly suspect and apply strict scrutiny. Under a strict scrutiny test, the court would presume the state law is motivated by might-makes-right politics rather than a bona fide policy dispute and strike down the statute unless the state can show it is necessary to serve an important state interest that cannot be addressed through more narrowly tailored state legislation.

2. It Structures Legal Analysis for Regular Preemption Around Government Tools Not Topics

The current preemption structures its analysis around subject matter.¹⁵⁹ But subject matter does not work as a fulcrum because almost no public policy issues are purely state or purely local.¹⁶⁰ This approach did not work for the federal dormant commerce clause and it will not work here.¹⁶¹

This Article's proposal for a new preemption doctrine improves upon the current preemption by structuring analysis around tools for local action and state preemption, not around topics (or subject matter). It distinguishes regulatory from non-regulatory dissent on the ground that, logically speaking, local regulations are more likely to disrupt statewide uniformity than local non-regulatory acts. The balancing tests recognize this reality by creating a stricter test to a state's attempt to preempt localities' non-regulatory acts than to their regulatory acts.

3. It Uses Balancing Tests Not Bright-Line Rules to Distinguish Permissible from Impermissible Preemption

From the courts' perspective, preemption doctrine needs to divide power between localities and their states—that is its procedural purpose. But it also has at least two substantive purposes: (1) to balance power between states and localities in a way that reflects pre-existing structural law and supports democratic norms; and (2) where possible, to help governments achieve the best outcomes. Current preemption doctrine does neither of these things, in part because it

159. Diller I, *supra* note 3, at 344.

160. *Id.*; Stahl I, *supra* note 3, at 171.

161. *See infra* text accompanying notes 164–67.

uses bright line rules that hope to distinguish matters of local concern from matters of statewide concern.¹⁶² This kind of bright line test is too blunt an instrument to address the complicated matter of determining where state power should end and local autonomy begin.

We might look for insight to the U.S. Supreme Court's struggle to develop a workable dormant commerce clause doctrine. The principle behind the dormant commerce clause is that, although states have plenary power to regulate for health, safety, and welfare, they should not regulate in a way that disrupts or places an "undue burden" on interstate commerce.¹⁶³ This principle is inferred from a grant to Congress, under Article I, § 8 of the U.S. Constitution, to regulate commerce among the states.¹⁶⁴ The Supreme Court struggled for decades to develop a workable test for when courts should strike down a state law as too disruptive to the federal interests in interstate commerce. Among other approaches the Court tried for decades to apply a bright line test that classified topics of regulation as either "national" or "local."¹⁶⁵ But ultimately the bright line approach failed because the Court found it was a fool's errand to try to distinguish topics as primarily "national" or "local" since most topics are of simultaneously national, state, and local government concern.¹⁶⁶ The Court turned instead to a balancing test approach that survives to this day.¹⁶⁷

The state courts should do likewise to address disagreements between states and home rule cities in a manner that respects democratic structures. The doctrine this article proposes would allow courts to distinguish between the preemptive state laws that are truly necessary to ensure uniformity around important state values, and avoid harmful and avoidable impacts of patchwork regulation, and those that are not. No matter the subject matter, a difference in opinion between state and local governments, without more, should never suffice to justify state preemption of local law. The state should have to show

162. Stahl I, *supra* note 3, at 144–45.

163. *See generally*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 444 (6th ed. 2019).

164. U.S. CONST. art. I, § 8, cl. 3.

165. *Cooley v. Board of Wardens*, 53 U.S. 299, 316–17 (1851).

166. *Id.* at 320.

167. The dormant commerce clause's balancing test has its critics. Justice Scalia was particularly hostile to the balancing test, writing that trying to weigh the relevant interests of the federal and state governments was nonsensical, "like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). In a parallel analysis, discussing state-local preemption, Ken Stahl has written that the question of where state power ends and local power begins is a political question, not one for judicial resolution. *See* Stahl I, *supra* note 3, at 174–75.

that preemption is justified relative to the state policy interest at issue. Such a balancing test would emphasize the structural constitutional values of power sharing and maximizing channels for local self-governance/determination,¹⁶⁸ and the substantive values reflected in the particular state's constitution and statutes.¹⁶⁹ The test proposed here is designed to be mechanical yet flexible and evidence based. In states that have constitutional or statutory home rule provisions, it would place a thumb on the scale in favor of local self-determination rather than state control.¹⁷⁰ But state governments could overcome that presumption by making an adequate evidentiary showing.

4. It Is Actively Anti-Racist

As explained in Part I, in the current political context the preemption crisis contributes to structural racism.¹⁷¹ When state legislatures are gerrymandered to advantage rural white constituents over multi-racial urban constituents, hyper-aggressive preemption by states is objectively racialized. Similarly, when local governments are made all-powerful in one area, such as zoning, it results in localized racism. In other words, a topic-based, might-makes-right preemption doctrine supports structural racism wherever it occurs. Contrarily, requiring state and local governments to make their respective cases in open court, and requiring courts to apply carefully drawn balancing tests, is an approach that is more likely to root out racism.

5. It Supports Rather than Undermines Democratic Values

The doctrine proposed is also pro-democracy. Determining how state and cities should share power does not present a new question

168. See Schragger I, *supra* note 3; Briffault, *supra* note 3.

169. See Davidson I, *supra* note 3.

170. As Richard Briffault has explained, the states of California and Ohio have tried to achieve this result by using a "narrow tailoring" test (in the case of California), and by only permitted preemption when the state law is deemed "general" (in the case of Ohio). See Briffault, *supra* note 3, at 2013–15. These tests move in the right direction because they achieve many of the goals this Article champions. But they are too blunt as doctrinal instruments to fully address the complexities, the breadth and nuance of how local governments rebel and states try to preempt them.

171. See Bean & Strano, *supra* note 1 at 6 ("The National League of Cities reports a surge in preemption conflicts that have pitted [predominantly white] rural- and suburban-dominated state legislatures against cities with large populations of low wage earners and ethnic minorities.") (citation and internal quotation marks omitted). See also *id.* at 12 (a "coalition of socially conservative and economically libertarian special interests, consultants, and politicians" masterminded the attack on cities to serve "an anti-regulatory and culturally white, Christian, and conservative policy agenda.") (citation omitted).

for the courts. The federal and state constitutions have designed the U.S. government, each state government, and many local governments to share and balance power. One of the most basic ideas behind sharing power vertically (as opposed to horizontally) – that is, behind distributing power vertically among the federal, state, and local governments – is that, as a nation, and as states, sometimes we can be “many,” but other times we must be “one.”¹⁷²

Preemption is one of the many legal doctrines that police this basic idea of “sometimes many, sometimes one.” At times, local policies can diverge from state policies without disrupting important state interests, and in those times the state can be many. But other times, to function well as a state, local policies and state policies cannot diverge: The state must be one. The key is to maximize self-determination, facilitate decisional dissent, and discourage might-makes-right thinking.¹⁷³

The policy considerations typically discussed in the context of dividing state from local government power include desires to: (1) encourage a close citizen-government connection;¹⁷⁴ (2) encourage innovation in government;¹⁷⁵ (3) maximize positive policy outcomes;¹⁷⁶ (4) maximize judicial efficiency;¹⁷⁷ (5) minimize negative externalities;¹⁷⁸ (6) encourage deliberative democracy;¹⁷⁹ and (7) maximize channels for decisional dissent.¹⁸⁰

172. This principle is reflected in multiple federal and state constitutional provisions, including Article I section 8’s limits on Congressional power, the Supremacy Clause, the Tenth Amendment, the Dormant Commerce Clause, and home rule provisions.

173. See Briffault, *supra* note 3, at 2018 (discussing the constitutional values behind local self-determination).

174. See Davidson I, *supra* note 3, at 15 (discussing the value of local self-empowerment); Briffault, *supra* note 3, at 2018–19 (discussing the value of citizen involvement); see also Briffault, *supra* note 3, at 2018 (value of government responsiveness to citizens).

175. See Davidson I, *id.* at 15 (noting the value of local experimentation and innovation); Briffault, *id.* at 2018 (same).

176. Nestor Davidson refers to this goal as maximizing the general welfare of the State. See *id.* at 5.

177. See Hills, *supra* note 70, at 1241–42 (1999) (noting the need to avoid unnecessary fragmentation).

178. See Briffault, *supra* note 3, at 2021 (discussing the importance of avoiding spillover); Hills, *supra* note 70, at 1272 (same).

179. Allowing for reasonable disagreements (David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 381 (2001)); allowing the courts to mediate tensions and facilitate disagreements between political factions (Stahl I, *supra* note 3, at 164; Barron, *supra* note 4, at 377); allowing courts to provide a check against tyranny by ensuring the diffusion of power (Barron, *supra* note 4, at 377).

180. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 (2005) (arguing that permitting local government “decisional dissent” from state majority views is good for democracy overall).

It seems to this author that the most powerful values behind the courts' current approach to preemption are the fourth and fifth above, namely, maximizing government efficiency and minimizing negative externalities. After all, to take a state-centered topic-based approach to state-local disputes is to value mostly centralized, efficient decision making. These same values are consistent with the deeply flawed yet dominant theory that local governments are best understood as "powerless subdivisions" of state governments.¹⁸¹ Even in states that have constitutionalized or otherwise codified "home rule,"¹⁸² the "powerless subdivisions" theory drives preemption. Current preemption doctrine divides matters of statewide versus purely local concern then narrows the latter to nearly nothing.¹⁸³

Courts should not treat uniformity and efficiency as the highest order goals of a functioning deliberative democracy. As Cass Sunstein explains, by design deliberative democracy "responds to political disagreements not simply by majority rule but also by attempting to create institutions that will insure reflection and reason-giving. . . . One of the points of constitutional arrangements is to protect the processes of reason-giving, ensuring something like a 'republic of reasons.'"¹⁸⁴

181. See DAVID J. BARRON & GERALD FRUG, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 2 (2008).; see also Barron, *supra* note 91, at 2232; *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted [sic] to them."). The powerless subdivisions theory announced in *Hunter v. Pittsburgh* has spread like wildfire through federal and state cases involving disputes between local and state governments. See Morris I, *supra* note 70, at 4 n.7 (detailing the spread of the powerless subdivisions theory throughout federal Supreme Court case law). Courts sometimes depart sub silentio from the rule of local powerlessness by applying a "shadow doctrine" that treats localities as independent of their states. See Richard C. Schragger, *Reclaiming the Canvassing Board*, *Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 395–96, 407–09 (2002) ("Schragger IV") (explaining that under the shadow doctrine, localities are not powerless state subdivisions but autonomous actors with broad authority to set policy); see also Morris I, *supra* note 70, at 5 (citing specific cases in which the U.S. Supreme Court applied the shadow doctrine). In other words, while courts sometimes depart from the dominant rule because it suits the particular case, the powerless subdivisions theory remains dominant in state and local government law.

182. The original purposes of the home rule movement were twofold (and somewhat in tension), namely, to simultaneously expand and boundary local government power. See Barron, *id.* at 2285 (noting home rule's goal of overturning Dillon's rule of utter local powerlessness); *id.* at 2294–95 (noting the home rule movement's simultaneous contrary goal of trying to cabin local power by limiting the scope of local charters). The home rule movement began in 1875, when the state of Missouri added a home rule provision to its constitution. Barron, *supra* note 11, at 2289–90 (detailing the history of the home rule movement). Most other states eventually followed Missouri's lead. *Id.* at 2290.

183. Topics of local control tend to address intensely parochial matters like local elections and the day-to-day operations of local government. See Briffault, *supra* note 3, at 2011–12. They "provide little protection for local power to regulate private behavior." *Id.*

184. *Id.*

The American “republic of reasons” is designed in a way that deliberately, structurally incorporates decisional dissent, including at the local level.¹⁸⁵ The courts can maximize the value of this feature by creating pliant legal channels for local dissent.¹⁸⁶ Like federalism, localism can help “mediate tensions between competing groups within the framework of the nation-state.”¹⁸⁷ To the degree localism theory and doctrines suppress rather than facilitate dissent, they risk fracturing rather than facilitating a healthy democracy. And of course if the democracy itself fractures, ordinary policy considerations will become largely moot.

The current preemption doctrine all but eliminates bona fide state-local deliberation and permits state governments to categorically prohibit local decisional dissent. The powerless subdivisions account respects two values: efficiency and power. If the political safeguards of localism were sufficient to facilitate local government dissent; or if state governments seemed inclined to exercise restraint; a theory that values efficiency and power might work.¹⁸⁸ But disturbing power plays by state and local governments illustrate that courts should develop a more thoughtful, adaptable, pro-democracy, anti-racist preemption doctrine to resolve state-local disputes.¹⁸⁹

185. See Gerken, *supra* note 154.

186. Legal scholars sometimes use the terms “localism” and “federalism” in overlapping ways. See Barron, *supra* note 179, at 381 (explaining the “natural points of connection between these two bodies of law”). This Article uses the term “localism” to mean the law and theory of the legal and political relationships between state and local governments, which is rooted in state constitutions and state statutes. See *id.* (“the law of localism [] defines the relations between states and their local governments.”); see also Rodriguez, *supra* note 16, at 627 (“Localism, in this sense, is the intrastate analogue of federalism in American constitutional law It can refer to the dynamics of state and local relations in the political, as well as the legal, sense.”) (italics in original). The term “local government law” is narrower than “localism”; it refers to “the portion of state law that is specifically designed to define the powers of [localities].” BARRON & FRUG, *supra* note 81, at 3. This Article uses the term “federalism” to mean the law and theory of the legal and political relationship between federal and sub-federal governments (state or local), which is rooted in the federal constitution and federal statutes. See Barron, *supra* note 4, at 381 (“the law of federalism [] defines the relations of the federal government vis-a-vis state and local governments”). Localities also rebel against federal policies (see CityLab Staff, *The Year in City Resistance*, BLOOMBERG NEWS (Dec. 29, 2017), <https://www.bloomberg.com/news/articles/2017-12-29/the-year-in-city-resistance>), but the topic of federal-local disagreements is beyond the scope of this Article. Localities also sometimes battle against each other (see Alice Speri, *A Progressive Prosecutor Faces Off with Portland’s Aggressive Police*, PORTSIDE (Sept. 23, 2020), <https://www.portside.org/2020-09-23/progressive-prosecutor-faces-portlands-aggressive-police>), but that topic is likewise beyond the scope of this Article.

187. Stahl I, *supra* note 3, at 164.

188. See Rodriguez, *supra* note 16 (discussing the political safeguards of localism).

189. See, e.g., Alan Greenblatt, *States Pre-empt Cities Almost to the Point of Irrelevance*, GOVERNING (Feb. 8, 2021), <https://www.governing.com/now/States-Preempt-Cities-Almost-to-the-Point-of-Irrelevance.html> (discussing legislative proposals in Arizona, Indiana, Florida,

This returns us to Part I of this Article. As Paul Diller has shown, although a supermajority of American voters live in urban space, political gerrymandering has concentrated rural power in the federal and state governments. And as Ken Stahl has argued: “The territorial division of partisan allegiances that once proved so perilous for our democracy is happening again today, though the sectional conflict is now between urban and rural areas within states, rather than between northern and southern states.”¹⁹⁰

Unfortunately, in this highly politically charged environment, state governments too often leverage the awesome powers they have to “systematically discriminate against” urban voters¹⁹¹ rather than engaging in deliberative democracy. And the powerless subdivisions theory makes the problem worse by allowing states “to dilute the influence of political minorities through gerrymandering, and to quash local autonomy by preempting local legislation despite the supposed protections of home rule.”¹⁹²

A theory of localism that supports deliberative democracy and decisional dissent would support legal doctrines that facilitate deliberation and rational, peaceable tradeoffs in state-local power. Admittedly, such a theory would be less efficient and predictably than the current might-makes-right approach. But building a degree of inefficiency and uncertainty into state-local legal disputes may encourage localities to negotiate before they rebel; and encourage states to negotiate before they attack.

C. Applying the New Doctrine: A Few Illustrations

1. Covid-19 Masking Policy

During the Covid-19 pandemic, federal, state, and local government agencies have openly disagreed over public indoor masking policies. Some state governments mandate public masks but their local

Iowa, Tennessee, and Louisiana that would largely shutter local policy making in areas like policing and public health).

190. Stahl I, *supra* note 3, at 148–49. Ken Stahl has written that the question of state versus local power is political not legal, so the best way forward is to fix gerrymandering. Stahl’s position presents an interesting contrast with Richard Schragger’s work. Schragger is specifically disturbed by the states’ hostility to urbanism and dedicated to protecting the structural devolution of power, with suggests he would not be satisfied with an approach that seeks merely to make the state legislature more democratic but continue allowing states to control cities. Schragger I, *supra* note 3, at 1165.

191. Paul Diller has argued that the courts are institutionally well-positioned to referee state-local disputes. See Diller I, *supra* note 3, at 345.

192. Stahl I, *supra* note 3, at 135.

police and sheriff departments refuse to enforce the mandates,¹⁹³ even though non-enforcement of those mandates renders them ineffective.¹⁹⁴ Some localities enact laws requiring public masks but their own state governments disagree with and threaten to punish, sue, or preempt local mask mandates.¹⁹⁵

If a state enacted a law that forbade localities from taking any action related to masks (nuclear preemption), or threatened local officials with civil or criminal liability for taking such action (punitive preemption), the court would apply strict scrutiny. It would only be upheld if it is necessary to achieve an important state objective that cannot be achieved through a non-punitive or more narrowly tailored approach.

If a state required masks statewide in all businesses open to the public, the court would apply the test for regulatory dissent. A state law would preempt the local regulation if the state government could establish, by a preponderance of the evidence, that: (1) the state law furthers an important policy objective that outweighs the democratic interests in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law.

If a state required masks in local public spaces, or banned local governments from purchasing masks, or encouraging mask wearing, the court would apply the test for non-regulatory dissent (in this case, preempting dissent via contract and speech). It would only be upheld if the state can establish, by clear and convincing evidence, that (1) the

193. See Hannah Fry, *Sonoma County Retreated on Reopening. Now the Sheriff Will Stop Enforcing Coronavirus Orders*, L.A. TIMES (May 29, 2020), https://www.google.com/amp/s/www.latimes.com/california/story/2020-05-29/sonoma-county-sheriff-says-he-wont-enforce-county-health-order%3f_amp=true; see also Zoe Nemerever, *Why ‘Constitutionalist’ Sheriffs Won’t Enforce Coronavirus Restrictions*, WASH. POST (Apr. 23, 2020), <https://www.washingtonpost.com/politics/2020/04/23/why-constitutionalist-sheriffs-wont-enforce-coronavirus-restrictions/>; Lauren Theisen, *Ohio Sheriff Won’t Enforce Governor’s Coronavirus Face Mask Order*, N.Y. DAILY NEWS (July 9, 2020), <https://www.nydailynews.com/coronavirus/ny-ohio-republican-sheiff-wont-enforce-coronavirus-face-mask-orders-20200709-rahfunoplnff3owpnzwl2fxzca-story.html>.

194. See Francis Suarez & Vin Gupta, *Mask Mandates Won’t Work — Unless They Are Enforced*, WASH. POST (July 27, 2020), https://www.washingtonpost.com/opinions/mask-mandates-wont-work--unless-they-are-enforced/.2020/07/27/5d26badc-d041-11ea-9038af089b63ac21_story.html%3foutputType=amp.

195. See Nicholas Bogel-Burroughs & Campbell Robertson, *While Virus Surges, Georgia Governor Sues Atlanta Mayor to Block Mask Rules*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/brian-kemp-georgia-keisha-lance-bottoms-atlanta.html>; see also Nati Harnik/Associated Press, *Nebraska Governor Says He’ll Withhold Federal Money from Counties that Require Masks*, L.A. TIMES (June 18, 2020), <https://latimes.com/world-nation/story/2020-06-18/nebraska-governor-mask-requirement-will-cost-counties-money>.

state law furthers an important policy objective that outweighs the democratic interests in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law.

2. Wage and Hour Laws

Cities frequently have policy interests in city-based employers paying more than the state or federal minimum wage to their employees.¹⁹⁶ If a state enacted a law that forbade localities from taking any action related to wages (nuclear preemption), or threatened local officials with civil or criminal liability for taking such action (punitive preemption), the court would apply strict scrutiny. It would only be upheld if it is necessary to achieve an important state objective that cannot be achieved through a non-punitive or more narrowly tailored approach.

If a state attempted to preempt a mandatory minimum wage ordinance that applied directly to private employers, the court would apply the test for regulatory dissent. A state law would preempt the local regulation if the state government could establish, by a preponderance of the evidence, that: (1) the state law furthers an important policy objective that outweighs the democratic interests in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law.

If a state attempted to preempt a living wage ordinance (which mandates city contractors to pay a minimum amount under city contracts), the court would apply the test for non-regulatory dissent (in this case, preempting dissent via contract). It would only be upheld if the state can establish, by clear and convincing evidence, that (1) the state law furthers an important policy objective that outweighs the democratic interests in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law.

3. Local NIMBYism

States are not the only governments prone to abusing power. Cities have also abused their near-total power over land use under the

196. See Dilini Lankachandra, *Enacting Local Workplace Regulations in an Era of Preemption*, 122 W. VA. L. REV. 941 (2020) (discussing this issue area).

current preemption doctrine.¹⁹⁷ Applying the new approach to preemption in this proposal, the law would treat land use ordinances as regulatory acts subject to the second-highest level of scrutiny. The state government could preempt a local land use regulation if it could establish, by a preponderance of the evidence, that: (1) the state law furthers an important policy objective that outweighs the democratic interests in local self-government; and (2) the local law disrupts that objective or achieving that objective requires statewide uniformity of law. This would give states the ability to go into court and, assuming adequate factual support, argue successfully against the harms of NIMBYism.

CONCLUSION

This Article's proposal for a new preemption doctrine admittedly faces two major hurdles. The first hurdle is theoretical, and the second is constitutional. First, any approach to preemption that shifts power from state to local governments necessarily cuts against the dominant "powerless subdivisions" theory of local government law. Second, any such approach is likewise arguably inconsistent with the current, weak conception of constitutional home rule. Yet these objections should not encourage courts and scholars to stick with the current anti-democratic, structurally racist approach to preemption. Instead, these objections should encourage courts and scholars to develop approaches to localism theory and home rule that are fully consistent with an anti-racist, pro-democracy preemption doctrine.¹⁹⁸

197. See Schleicher, *supra* note 38 (reviewing literature on the economic and social costs of local land use restrictions).

198. The author has works in progress that rethink localism's powerless subdivisions theory and home rule. See Morris III, Morris IV, *supra* note 11.

NOTE

Killer Cops, Killer Laws: Fourth Amendment Jurisprudence and Separate, but Equal Policing

KUFERE LAING*

ABSTRACT

Police officer killings follow a tired refrain: A White officer kills an unarmed Black person and faces no criminal punishment. Rinse and Repeat. But what is to blame? Bad laws? Perhaps. Bad prosecutors? Maybe. How about both? True enough, but still incomplete. The answer lies in America's founding and constitutional design. When States codified the Supreme Court's holding in *Tennessee v. Garner*, not only did they provide officers with an affirmative defense for otherwise homicidal acts, they strengthened one of America's original sins: white supremacy.

Since its founding, America has maintained a white-supremacist racial hierarchy. What is more, state legislatures and the Supreme Court, in tandem, have created a legal framework that permits state-sanctioned violence against Black communities. Police, of course, are the most violent actors and patrol Black communities so that they are effectively police-states.

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Legal checks against police violence, therefore, require a fundamental restructuring of American law and society. Quite simply, power must be reallocated from police and to the people. To that end, I suggest two reforms that will begin a path towards reconstruction. The first reform requires a fundamental reworking of our constitutional and legal framework that has yet to fully repudiate the errors of *Dred Scott v. Sandford* and *Plessy v. Ferguson*. The second reform provides citizen review boards with independent prosecutors to bring charges against police that abuse citizens. By convicting police officers, the current power dynamic that denies Black people full citizenship rights will be upended.

INTRODUCTION	269
I. REASONABLE POLICE KILLINGS: FROM GARNER TO ROSFELD	273
A. <i>Tennessee v. Garner</i> : Reasonable Police Killings	273
B. <i>Garner</i> , Pennsylvania law, and Due Process	275
C. Rosfeld's trial	282
1. Jury Properly Apply the Law?	283
2. To What Extent Did Race Support Rosfeld's Acquittal?	284
II. THE POLICE STATE VS. DEMOCRACY	286
A. Historical Origins	287
B. Constitutionalizing the Police State: <i>Scott v.</i> <i>Sandford</i>	291
C. The Reconstruction Amendments: Citizenship vs. Personhood	294
D. From Terry to Wardlow: Separate, but Equal Policing	300
III. ABOLITION CONSTITUTIONALISM	305
A. The Constitutional Fix	305
B. Improving State Laws	308
1. Eliminating the Garner Defense	308
2. Citizen Review Boards and Independent Prosecutors	310
IV. CONCLUSION: RECONSTRUCTION III	317

INTRODUCTION

In January 2018, the University of Pittsburgh determined that Michael Rosfeld was unfit to be a police officer and fired him.¹ Six months later, he was sworn in as an East Pittsburgh police officer.² Ninety minutes after his ceremonial re-introduction to the police force, he shot and killed Antwon Rose II, an unarmed, seventeen-year-old Black male.³ After days of city-wide protests,⁴ Allegheny County District Attorney Steven Zappala, finally charged Rosfeld with criminal homicide.⁵

The facts leading up to Rosfeld shooting Rose were obtained from a witness video.⁶ Rosfeld pulled over a Chevrolet Cruze, in which Rose and another teenager were passengers.⁷ He then approached the car with his weapon drawn and ordered the driver and

1. Tom Davidson, *Former Cop Michael Rosfeld Sues University of Pittsburgh Over 2018 firing*, TRIBLIVE (Jan. 16, 2020, 5:03 PM), <https://triblive.com/local/pittsburgh-allegheny/former-cop-michael-rosfeld-sues-university-of-pittsburgh-over-2018-firing/>.

2. Chris Irvine, *Cop Who Fatally Shot Unarmed 17-Year-Old Boy Was Sworn in Just 90 Minutes Before, Police Sources Say*, FOX NEWS, <https://www.foxnews.com/us/cop-who-fatally-shot-unarmed-17-year-old-boy-was-sworn-in-just-90-minutes-before-police-sources-say> (last updated June 22, 2018).

3. *Id.*

4. Amy Held, *'Why Are They Shooting?' E. Pittsburgh Enraged Over Police Killing of Black Teen*, NPR (June 21, 2018, 12:57 PM), <https://www.npr.org/2018/06/21/622174783/why-are-they-shooting-anger-grows-in-pittsburgh-over-police-killing-of-black-tee>; Clark Mindock, *Antwon Rose: Second Day of Protests After Unarmed Black Teenager Shot by Officer Who Joined the Force Hours Earlier*, INDEP. (June 21, 2018, 9:37 PM), <https://www.independent.co.uk/news/world/americas/antwon-rose-pittsburgh-shooting-protests-killed-police-unarmed-a-8410861.html>; Samuel Davidson, *Hundreds Rally in Pittsburgh to Demand Justice for Unarmed Teen Killed by Police*, WORLD SOCIALIST WEB SITE (June 22, 2018), <https://www.wsws.org/en/articles/2018/06/22/rose-j22.html>; Theresa Clift, Jamie Martines & Mike Divittorio, *Protests Disrupt Pittsburgh, Homestead; 4 Arrested*, TRIBLIVE (June 22, 2018, 8:39 AM), <https://archive.triblive.com/local/protests-disrupt-pittsburgh-homestead-4-arrested/>; *Car Drives Through Crowd Outside PNC Park Protesting Over the Killing of Antwon Rose by East Pittsburgh Police Officer*, CBS PITTSBURGH (June 22, 2018, 11:55 PM), <https://pittsburgh.cbslocal.com/2018/06/22/protest-downtown-pittsburgh-antwon-rose-killing-by-east-pittsburgh-officer-michael-rosfeld/>; Andrew Goldstein, *Protesters March in South Side Over Shooting Death of Antwon Rose II*, POST-GAZETTE, <https://www.post-gazette.com/local/city/2018/06/23/antwon-rose-shooting-death-pittsburgh-protest-police-violence-south-side-east-carson-street-leon-ford/stories/201806230108> (last updated June 24, 2018, 1:13 AM).

5. Elliott C. McLaughlin, *East Pittsburgh Officer Charged with Criminal Homicide in Antwon Rose Shooting*, CNN, <https://www.cnn.com/2018/06/27/us/michael-rosfeld-charged-criminal-homicide-antwon-rose-east-pittsburgh/index.html> (last updated June 27, 2018, 3:44 PM).

6. Joshua Barajas, *What We Know About the Police Shooting Death of Antwon Rose Jr.*, PBS NEWSHOUR, <https://www.pbs.org/newshour/nation/what-we-know-about-the-police-shooting-death-of-antwon-rose-jr> (last updated June 25, 2018, 12:04 PM).

7. Matthew Haag, *Officer Who Shot Antwon Rose Is Charged with Criminal Homicide*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/antwon-rose-shooting-michael-rosfeld.html>.

passengers out of the vehicle.⁸ The driver complied, but Rose and another passenger fled.⁹ Rosfeld did not chase either passenger: instead, he aimed his gun at Rose and shot three times.¹⁰ Each bullet struck Rose: once in his back, once in his elbow, and once in his face.¹¹ Hours later, Rose was pronounced dead at a local hospital and the Allegheny County Medical Examiner's Office ruled his death a homicide.¹²

In Pennsylvania, criminal homicide is classified as murder, voluntary manslaughter, or involuntary manslaughter.¹³ Meaning, the government's burden was to prove Rosfeld "intentionally, knowingly, recklessly, or negligently" caused the death of Antwon Rose.¹⁴ The facts were certainly on the government's side: (1) a video showed Rose was unarmed and ran *from* Officer Rosfeld;¹⁵ (2) the woman shooting the video asked: "Why were they shooting at them?"; and (3) Rosfeld appeared "frantic."¹⁶ Further, Rosfeld initially admitted to detectives that "he did not see a gun" when Rose fled¹⁷ and conceded: "I don't know why I shot him."¹⁸ Yet, Rosfeld—like countless other White officers who kill Black people¹⁹—was acquitted.²⁰

8. *Trial Begins for Former East Pittsburgh Officer Charged with Fatally Shooting Antwon Rose*, WTAE, <https://www.wtae.com/article/trial-michael-rosfeld-former-east-pittsburgh-officer-charged-with-fatally-shooting-antwon-rose/26861934> (last updated Mar. 20, 2019, 7:23 AM).

9. *Id.*

10. *Id.*

11. Adeel Hassan, *Antwon Rose Shooting: White Police Officer Acquitted in Death of Black Teenager*, N.Y. TIMES (March 22, 2019), <https://www.nytimes.com/2019/03/22/us/antwon-rose-shooting.html>.

12. Joshua Barajas, *supra* note 6.

13. 18 PA. STAT. AND CONS. STAT. ANN § 2501 (West 2021).

14. *Id.*

15. Kenneth Moton, M.L. Nestel, Matthew Claiborne & Sabina Ghebremedhin, *Witness Who Recorded Teenager Shot by East Pittsburgh Sop: 'All They Did Was Run.'* ABC NEWS (June 23, 2018, 9:01 PM), <https://abcnews.go.com/US/witness-recorded-teenager-shot-pittsburgh-cop-run/story?id=56111765>.

16. *Id.*

17. McLaughlin, *supra* note 5.

18. Ramesh Santanam, *'I Don't Know Why I Shot Him': Witness Says Ex-Officer Panicked After Shooting Pa. Teen Antwon Rose*, NBC10 PHILA., <https://www.nbcphiladelphia.com/news/local/antwon-rose-michael-rosfeld-police-shooting-trial-video/109360/> (last updated March 20, 2019, 8:21 PM).

19. Janell Ross, *Police Officers Convicted for Fatal Shootings Are the Exception, Not the Rule*, NBC NEWS, <https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741> (last updated Mar. 14, 2019, 7:56 AM); *see also* Associated Press, *Police Officers Not Charged for Killing Breonna Taylor*, POLITICO, <https://www.politico.com/news/2020/09/23/grand-jury-indicts-police-officer-breonna-taylor-death-420606> (last updated Sept. 23, 2020, 5:44 PM); John Eligon, *No Charges for Ferguson Officer Who Killed Michael Brown, New Prosecutor Says*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/michael-brown-darren-wilson-ferguson.html>; Deb Erdley, *Tragic Deaths of Jonny Gammage and Antwon Rose Twice put Pittsburgh in the Spotlight*, TRIB-

Rosfeld's acquittal was based on his defense that Pennsylvania law justifies police officers to use deadly force to complete a "felony arrest."²¹ The statute, however, is not the brainchild of the Pennsylvania legislature. Rather, it is largely modeled after the Supreme Court's *Tennessee v. Garner* holding.²² There, the Court held that the Fourth Amendment forbids an officer from using deadly force to complete an arrest *unless* the suspect is "dangerous."²³

But there is a key distinction between *Garner*'s holding and its applicability as an affirmative defense to homicide. *Garner* provided a Fourth Amendment baseline that there are some circumstances where uses of deadly force are constitutionally unreasonable.²⁴ Meaning, it provides a narrow framework for determining what uses of deadly force are unreasonable under the Fourth Amendment and give rise to *civil* liability in a Section 1983 suit.²⁵ *Garner* does not provide a standard for exonerating an officer charged with *criminal* homicide, and for good reason. Promulgating criminal law statutes, unlike interpreting the Fourth Amendment, is a provincial duty of state legislatures, not the Supreme Court.²⁶ Quite simply, state legislatures have the authority and the duty to determine what objectively reasonable acts are criminal.

LIVE (Mar. 17, 2019, 1:00AM), <https://triblive.com/local/regional/tragic-deaths-of-jonny-gam-gam-and-antwon-rose-twice-put-pittsburgh-in-the-spotlight/>; Associated Press, *Police Officer Will Not Be Charged in Shooting of Korryn Gaines*, GUARDIAN (Sept. 22, 2016, 4:35 PM), <https://www.theguardian.com/us-news/2016/sep/22/korryn-gaines-fatal-police-shooting-baltimore-no-charges>; Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rose-police-shooting-cleveland.html>.

20. Paula Reed Ward & Shelly Bradbury, *Former Officer Michael Rosfeld Found Not Guilty in Death of Antwon Rose*, POST-GAZETTE, <https://www.post-gazette.com/news/crime-courts/2019/03/22/michael-rosfeld-trial-verdict-antwon-rose-police-shooting-east-pittsburgh/stories/201903210103> (last updated Mar. 22, 2019, 10:39 PM).

21. Cynthia Fernandez, *Police Reforms in Pa. Languished After Antwon Rose's Killing. Will Now Be Any Different?*, SPOTLIGHT PA (June 3, 2020), <https://www.spotlightpa.org/news/2020/06/police-protest-pennsylvania-antwon-rose-use-of-force/>.

22. Compare 18 PA. STAT. AND CONS. STAT. ANN. § 508 (West 2021) with *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

23. *Garner*, 471 U.S. at 1.

24. *Id.*

25. *Id.*

26. Compare U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") with KIMBERLY SIMMONS, *Extent and origin of power of state over criminal matters*, in CARMODY-WAIT 2d § 172:2 (2021) ("The state legislature has wide power to prescribe the nature and definition of crimes, and the procedure to be followed in prosecution and punishment of defendants.")

Yet, by codifying *Garner* as a justification for homicide, Pennsylvania—and its sister jurisdictions—betrayed the fundamental principles of criminal law. Generally, a self-defense statute has three rules: (1) it limits the use of force in response to an imminent threat of violence, (2) it requires the defendant to prove that the imminent threat was objectively *and* subjectively present, and (3) it only exonerates a defendant who used deadly force after first attempting to retreat or de-escalate.²⁷ The *Garner* defense, therefore, does not require *any* of the elements of a traditional self-defense statute.²⁸ Rather, it simply permits the officer to kill in cases where a felonious suspect flees arrest.

But the *Garner* defense's biggest issue is its most invidious: it perpetuates systemic racism that denies Black humanity. Historically, America's criminal justice system has systematically targeted and oppressed Black people.²⁹ Indeed, officers are both more likely to kill Black people,³⁰ and more likely to prejudge them as criminal.³¹ As a consequence, the likelihood of a *Garner* defense operating to exonerate an officer that extrajudicially executes a Black person becomes the *rule*, not the *exception*. Thus, a clear message is sent: Black Lives Do Not Matter.

This Note, in three parts, argues that the current legal framework governing police violence is unworkable and largely functions to reinforce white-supremacy. In Part I, I examine Michael Rosfeld's acquittal and the constitutional decisions that justified his killing of an unarmed, Black teenager. In Part II, I explain that the Fourth Amendment jurisprudence that justified Michael Rosfeld's killing largely mirrors the rationale of two of the Supreme Court's most infamous decisions: *Dred Scott v. Sandford* and *Plessy v. Ferguson*. Thus, in Part III, I argue that the Fourth Amendment case law that extends *Dred Scott* and *Plessy*'s legacy must be overturned, and the powers of citizen-review boards must expand to include independent prosecu-

27. See MODEL PENAL CODE § 3.04 (AM. L. INST. 2019).

28. 18 PA. STAT. AND CONS. STAT. ANN. § 508 (West 2021).

29. See generally Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, in POLICING THE BLACK MAN 3 (First Vintage Books ed. 2018); Jin Hee Lee & Sherrilyn A. Ifill, *Do Black Lives Matter to the Courts?*, in POLICING THE BLACK MAN 255, 274–82 (First Vintage Books ed. 2018).

30. Ryan Gabrielson, Eric Sagara & Ryann Grochowski Jones, *Deadly Force*, in *Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <https://www.propublica.org/article/deadly-force-in-black-and-white>.

31. Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 37 U. HAW. L. REV. 339, 361 (2015).

tors that bring charges for police misconduct. In conclusion, I argue that America is approaching a third Reconstruction, and this time, the failure to fully recognize the sanctity of Black humanity may spell the end of our democracy.

I. REASONABLE POLICE KILLINGS: FROM GARNER TO ROSFELD

To begin, it is necessary to examine the doctrinal roots of Michael Rosfeld's acquittal: *Tennessee v. Garner*. When decided, it established that the Fourth Amendment's prohibition against unreasonable seizures applies to police use of force.³² But, it has since expanded into a problematic defense that improperly exonerates killer officers like Michael Rosfeld. Making matters worse, in *Graham v. Connor*, the Supreme Court again provided improper constitutional protections for killer officers. In tandem, both *Garner* and *Graham*, reflect a larger issue of constitutional law: The Supreme Court has routinely interpreted the Constitution to legalize violent attacks on Black lifer.

A. *Tennessee v. Garner*: Reasonable Police Killings

There are tragic parallels between Michael Rosfeld's killing of Antwon Rose II and Elton Hymon's killing of Edward Garner. Both officers shot and killed a teenager, rather than complete an arrest.³³ Both teenagers were Black, unarmed, and fleeing a dangerous officer; likely out of fear.³⁴ Tennessee's law, like Pennsylvania's, permitted an officer to use deadly force in these circumstances.³⁵ Ultimately, neither officer was convicted of homicide despite killing an unarmed, nonthreatening child. Ironically, the stories of Rose and Garner unite due to a key factual difference: the constitutionality of the law that justified Hymon's killing was challenged to the Supreme Court.

In fact, after a grand jury decided against indicting Hymon,³⁶ the only legal remedy available to the Garner estate was through a civil lawsuit. And because the Sixth Circuit granted Hymon qualified im-

32. *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985).

33. Janell Ross, *How Police Justify Shootings: The 1974 Killing of an Unarmed Teen Set a Standard*, NBC NEWS (Jan. 23, 2020, 4:30 AM), <https://www.nbcnews.com/news/nbcblk/officer-killed-unarmed-teen-1974-it-changed-how-police-justify-n1120611>.

34. *Id.*

35. *Garner*, 471 U.S. at 4.

36. *Id.* at 5.

munity,³⁷ the Garner estate would only obtain legal relief if it proved that the Tennessee statute that justified Hymon's killing was unconstitutional. Hence, the focus of *Tennessee v. Garner* was Tennessee law, not Hymon's actions. Tennessee, therefore, could have prevented the lawsuit all together by settling the case and changing its law.

Instead, Tennessee defended its statute—that justified an officer killing an unarmed fifteen-year-old—on extreme grounds. At the time, Tennessee law permitted an officer to use deadly force “if, after notice of the intention to arrest the defendant, he either flee or forcibly arrest.”³⁸ In response to the Garner estate's Fourth Amendment challenge, Tennessee urged the Court to read the statute “in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon.”³⁹ In essence, Tennessee argued that the “government's interest” in preventing a person *suspected* of a felony from escaping was greater than the suspect's “interest” in living.⁴⁰ Thus, it was reasonable for an officer to kill a felonious suspect that posed no immediate threat.⁴¹

The Court's response to Tennessee's argument is ambiguous.⁴² Broadly, it rejected the absurd argument that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances,” was constitutionally reasonable.⁴³ Narrowly, the Court held that the Fourth Amendment forbids the use of deadly force where the “suspect poses no immediate threat to the officer and no threat to others.”⁴⁴ But at the same time, the Court explained that there were some circumstances that permit police to reasonably kill in the absence of an immediate threat. “[I]f . . . there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm,” the Court explained, “deadly force may be used if necessary to prevent escape.”⁴⁵ In those circumstances, the permission to kill is rooted in suspicion of a past act, not a presently verifiable threat.

37. Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 114 (2015).

38. *Id.* (quoting TENN. CODE ANN. § 40-7-108 (1982)).

39. *Id.* at 109.

40. *Garner*, 471 U.S. at 9.

41. *Id.*

42. Flanders & Welling, *supra* note 37, at 117.

43. *Garner*, 471 U.S. at 11.

44. *Id.*

45. *Id.*

Dangerousness, therefore, is the key inquiry. In affirming the Sixth Circuit, the Court reasoned that the statute’s constitutional flaw is that it did not require Hyman to provide an “articulable basis to think Garner was armed.”⁴⁶ “The fact that Garner was a suspected burglar could not,” the Court explained, “without regard to the other circumstances, *automatically* justify the use of deadly force.”⁴⁷ Thus, *Garner* suggests that dangerousness may be determined by the immediacy of the threat, or by examining the totality of the circumstances, including the suspected crime.

States that codified *Garner* have the freedom to determine what “dangerous suspects” may be legally killed, so long as, the officer can justify her suspicion. Pennsylvania’s interpretation—officers can kill fleeing suspects where there is probable cause to believe the person has committed a violent crime—is especially problematic and seemingly contravenes fundamental constitutional protections. Can a suspect effectively waive their right to an indictment *and* trial by simply fleeing arrest? Does our Constitution permit an officer to impose the death penalty with only unverified probable cause and not a conviction? Michael Rosfeld’s acquittal suggests that the answer is yes.

B. *Garner*, Pennsylvania law, and Due Process

Pennsylvania is one of those twenty-three states that codified *Garner*’s holding.⁴⁸ Under Pennsylvania law, an officer may use deadly force if she

believes both that: (i) such force is necessary to prevent the arrest being defeated by resistance or escape; and (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, *or* otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.⁴⁹

Thus, Pennsylvania justifies officer killings where “it is necessary to prevent escape” and the officer believes that the person that has fled: (1) committed or attempted a forcible felony, (2) possesses a deadly weapon, or (3) poses an immediate threat to human life or will inflict serious bodily injury.⁵⁰

46. *Id.* at 21.

47. *Id.* (emphasis added).

48. Flanders & Welling, *supra* note 37, at 119–20.

49. 18 PA. STAT. AND CONS. STAT. ANN. § 508(a)(1)(ii) (West 2021) (emphasis added).

50. *Id.*

Garner only permits the third justification—where the officer uses deadly force in the face of an immediate threat. But where the officer merely suspects the person to be arrested committed a “forcible felony,” the suspect “poses no immediate threat to the officer and no threat to others.”⁵¹ Therefore, “the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”⁵² The same is true where a nonthreatening suspect flees while possessing a deadly weapon.⁵³ Pennsylvania’s statute, however, justifies officer killings in both scenarios.

Two Pennsylvania district attorney offices—Allegheny County and Philadelphia—agree that the text of Pennsylvania’s law contravenes *Garner*.⁵⁴ In separate cases, both argue that the statute should only exonerate an officer that kills if the jury determines that the officer suspected the “person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon,” and “indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.”⁵⁵

The statute on its face—the Philadelphia District Attorney’s Office (PDAO) argued in a brief before the Pennsylvania Supreme Court—contravenes *Garner* for two reasons. First, the “forcible felony” justification is too broad because forcible felonies are undefined under Pennsylvania law.⁵⁶ But even if the court narrows forcible felonies only to crimes involving force, the PDAO submits that the forcible felony justification remains unconstitutional because it permits an officer to kill a person suspected of burglary—the very crime at issue in *Garner*.⁵⁷

Second, PDAO takes issue with the “deadly weapon” justification.⁵⁸ Because Pennsylvania defines some “common items,” e.g., broom handles, mace, and mouse poison, as deadly weapons, if a suspect runs away from an officer while holding a broom handle or mouse poison, then the Pennsylvania statute permits the officer to

51. *Garner*, 471 U.S. at 11.

52. *Id.*

53. *Id.* at 2.

54. See Brief Related to Justification Instruction, Commonwealth of Pa. v. Rosfeld, (No. CF-2019-858), [hereinafter *Rosfeld* Brief] (unreported and unpublished); Brief for the Commonwealth as Appellant, Commonwealth of Pa. v. Pownall, No. 17 EAP 2021 (Pa. Commw. Ct. petition for cert. filed Oct. 2, 2020) [hereinafter *Pownall* Brief] (unreported and unpublished).

55. *Rosfeld* Brief, *supra* note 54, at 7.

56. *Pownall* Brief, *supra* note 54, at 4.

57. *Id.*

58. *Id.* at 30–31.

kill.⁵⁹ *Garner*, of course, holds that such a killing is unconstitutional. Still, *Garner* seemingly permits the officer to kill the fleeing suspect that has—say, a broom handle—if the suspect threatens the officer with the broom handle.⁶⁰

The Allegheny County District Attorney’s office advanced similar arguments in its brief related to the *Garner* justification jury instruction in Michael Rosfeld’s trial. It highlighted that under Pennsylvania law it is legal for the “police to shoot someone with a legal license to carry a firearm who is running away from a disorderly conduct arrest or an arrest for a retail theft.”⁶¹ *Garner*, the Allegheny County office contended, forbids deadly force in those circumstances.⁶²

Together, both offices believe that the statute only applies where the person to be arrested flees *and* threatens the officer. Whether the person possesses a deadly weapon or is suspected of a forcible felony is immaterial. This argument is certainly supported by *Garner*’s holding, but not by its hypothetical. To review, *Garner* reasons that “if . . . there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape.”⁶³ Applying this hypothetical to the broom handle fact-pattern, if an officer has probable cause to believe that a person has violently beat another with a broom handle, and the person flees when the officer attempts to make an arrest, the use of deadly force is “reasonable.”

But that still seems wrong. *Garner* acknowledges that deadly force “frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.”⁶⁴ An officer, therefore, cannot legally justify killing a person suspected of an assault with a broom handle simply because the bullet will catch the fleeing suspect faster than the sprinting officer. Right?

Indeed, what *Garner* identifies as the “interest of the individual, and of society, in judicial determination of guilt and punishment,” is also enshrined in our Constitution. To be more precise, Justice White, *Garner*’s author, should have stated that each time an officer uses

59. *Id.* at 30.

60. *See Garner*, 471 U.S. at 11.

61. *Rosfeld* Brief, *supra* note 54, at 10.

62. *Garner*, 471 U.S. at 10–11.

63. *Id.* at 11.

64. *Id.* at 9.

deadly force the suspect's Sixth Amendment right to trial *and* Fourteenth Amendment right to Due Process is jeopardized. As the opinion submits, "The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice system in motion. If successful, it guarantees that that mechanism will not be set in motion."⁶⁵ A statute, like Pennsylvania's, that permits officers to kill people fleeing with a broom handle, so long as the officer "reasonably suspects" that the person violently used it is the "self-defeating way of apprehending a suspect," that *Garner* and Due Process rebuke. Surely, States should not have the ability to apply capital punishment based on suspicion of a previously violent act, with no trial to determine guilt.

But this argument runs into a formidable hurdle: Supreme Court precedent. In *Graham v. Connor*,⁶⁶ the Court clarified *Garner*'s "dangerousness" ambiguity regarding police uses of force. The facts that give rise to this case include two all-too-familiar parties: an overzealous, violent police officer; and an unarmed, innocent Black male.

The encounter begins when Dethrone Graham, a diabetic Black male, entered a convenience store to purchase orange juice to offset hypoglycemia.⁶⁷ After noticing a long line in the store, Graham quickly left to go to a friend's home instead.⁶⁸ Graham's quick entry into and exit from the store aroused the suspicion of M.S. Connor, the police officer, who stopped Graham and a friend, William Berry, after following their car.⁶⁹ Upon stopping the car, Connor ignored Berry's warning that Graham was suffering a "sugar reaction." Instead, he forced the two to wait as he called for backup and investigated "what, if anything, had happened at the store."⁷⁰ As Connor sat in his patrol car, Graham got out of his car, and ran around it twice before passing out on the curb.⁷¹

When the officers arrived, they disregarded Graham's health, ignored Berry's pleas to get him sugar, and rolled Graham over on his back to cuff him.⁷² One officer proclaimed, "Ain't nothing wrong

65. *Id.* at 10.

66. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

67. *Id.* at 388.

68. *Id.* at 388–89.

69. *Id.* at 389.

70. *Id.*

71. *Id.*

72. *Id.*

with the motherfu**** but drunk. Lock the son of a b*tch up.”⁷³ After Graham regained his consciousness, officers shoved him against the hood of the patrol car, ignored his instruction to check his wallet for a diabetic decal, and refused to provide him with orange juice that a friend brought to the scene.⁷⁴ In the end, the officers concussed Graham, broke his foot, and injured his shoulder before ultimately finding out that “Graham had done nothing wrong.”⁷⁵

Thankfully, Graham survived the encounter and sued the officers who attacked him. His Section 1983 claim alleged that the officers’ actions were a deprivation of liberty without due process of law in violation of the Fourteenth Amendment.⁷⁶ Although these officers did not use excessive force, their use of excessive force seemingly “frustrate[d] the interest of the individual, and of society, in judicial determination of guilt and punishment.”⁷⁷ And, at the time, many circuit courts agreed that an officer’s use of deadly force may violate the Fourteenth Amendment.⁷⁸ Yet, despite wide-spread agreement amongst the circuits, and its own dicta in *Garner*, the Court rejected Graham’s Fourteenth Amendment claim.⁷⁹ Instead, it held that “all claims that law enforcement officers have used excessive force—deadly or not” must adhere to the Fourth Amendment’s reasonableness standard.⁸⁰

The Court further reasoned that reasonableness must be determined “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁸¹ “The calculus of reasonableness,” Chief Justice Rehnquist’s opinion held, “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁸² Fair enough. But the Chief continued, “the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer’s evil intentions

73. *Id.*

74. *Id.* at 390.

75. *Id.* at 389–90.

76. *Id.* at 390.

77. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

78. *Graham*, 490 U.S. at 390.

79. *Id.* at 395.

80. *Id.*

81. *Id.* at 396.

82. *Id.* at 396–97.

will not make a Fourth Amendment violation out of an objectively reasonable use of force.”⁸³ Reasonableness was, therefore, a fact-specific inquiry that required courts to weigh, “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting or attempting to evade arrest by flight.”⁸⁴

Graham therefore answers *Garner*’s ambiguity by giving full deference to officers. Dangerousness is, in effect, whatever the officer says it is. If the officer finds an immediate threat, but a relatively minor crime, and a “reasonable officer” agrees—then the use of force is constitutional. If the officer does not find an immediate threat, but determines the suspect committed a severe crime and is attempting to evade arrest by flight, and a “reasonable officer” agrees—then that use of force is also constitutional. To the Chief Justice, and five others (excluding justices Blackmun, Brennan, and Marshall whose alternate views are outlined in a separate concurrence), the Fourth Amendment’s explicit text and its deference to officers provided the correct approach to evaluating intrusive government conduct, not the “more generalized notion of ‘substantive due process.’”⁸⁵

Graham is troubling for many reasons, some of which are outlined in Justice Blackmun’s concurrence. Justice Blackmun begins by critiquing the majority’s disregard of two bedrock principles: judicial restraint and adherence to precedent. “I see no reason,” he explains, “for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard.”⁸⁶

“I also see no basis,” he continues, “for the Court’s suggestion that our decision in *Tennessee v. Garner* implicitly held so. Nowhere in *Garner* is a substantive due process standard for evaluating the use of force in a particular case discussed; there is no suggestion that such a standard was offered as an alternative and rejected.”⁸⁷ His concurrence concludes with a prediction that has since been disproven, “I expect that the use of force that is not demonstrably unreasonable

83. *Id.* at 397.

84. *Id.* at 395.

85. *Id.*

86. *Id.* at 399–400 (Blackmun, J., concurring).

87. *Id.* at 400.

under the Fourth Amendment only rarely will raise substantive due process concerns.”⁸⁸

Somewhat ironically, that prediction was unsound at the time it was made. In fact, the most prominent case *Graham* overturns is *Johnson v. Glick*: a Second Circuit decision authored by acclaimed conservative jurist, Judge Friendly, about sixteen years prior.⁸⁹ The *Glick* court, in fact, “assume[d] that brutal police conduct violates a right guaranteed by the due process clause of the Fourteenth Amendment.”⁹⁰ Rather than provide full deference to the “reasonable officer,” Judge Friendly provided a comprehensive test that evaluated the officer’s use of force *and* the individual’s liberty interests. At the outset he concedes that, “Not every push or shove, even if it may seem unnecessary in the peace of a judge’s chambers, violates a [person’s] constitutional rights.”⁹¹ “Determining whether the constitutional line has been crossed,” therefore, requires a court to analyze the “need for the application of force.”⁹²

Johnson’s factor-test also greatly differ from *Graham*’s. To start, there is no mention of the “reasonable officer” or a disavowal of “20/20 hindsight.” Rather, *Johnson* requires a weighing of the officer’s professed need against “the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”⁹³ Deadly force applied to a fleeing, unarmed, and non-dangerous teen—it seems—would result in a violation of due process. Thus, *Johnson*’s inquiry, “did the officer *need* to kill,” provides greater protection to civilians than *Graham*’s fundamental question, “would a reasonable office *have* killed?” It is quite easy to apply both tests to the same facts and come to opposite conclusions: “no, the officer did not need to kill,” but “yes, the officer’s decision to kill was reasonable.”

The different analytical frames are exacerbated because *Graham* forbids any investigation of possible racial bias where police kill.⁹⁴ As

88. *Id.*

89. *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

90. *Id.* at 1031.

91. *Id.* at 1033. Ironically, this reasoning is quoted verbatim in Chief Justice Rehnquist’s majority opinion in *Graham*. *Graham*, 490 U.S. at 396.

92. *Johnson*, 481 F.2d at 1033.

93. *Id.*

94. See Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1218–23 (2017).

the Chief Justice explained, under the Fourth Amendment, there is no inquiry into the officer's "underlying intent or motivation."⁹⁵ Or, more crudely, "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force."⁹⁶ Indeed, under this standard, it may be evil for a police officer to racially profile and call an innocent Black person a "son of a b*tch," but it may also be reasonable (read: constitutional) to break their foot because they did not comply with the officer's instructions as they were suffering from a hypoglycemia attack. That is, of course, if it turns out a "reasonable officer" would have also broken the victim's foot.

Together, *Garner* and *Graham* create a legal standard that grants officers broad deference. When a suspect flees, they effectively have a choice: kill or arrest. If they decide to pursue an arrest without deadly force—as officers did when arresting Dylann Roof—they may.⁹⁷ But they are also free to kill, like Michael Rosfeld and Elton Hymon. This framework, which leaves the officers with unfettered deference, proved to be insurmountable in Michael Rosfeld's trial.

C. Rosfeld's trial

Rosfeld's defense relied on Pennsylvania's constitutionally suspect legal standard. Rosfeld argued that he killed Antwon Rose in defense of himself and the community, which was legal because he suspected that Rose committed a forcible felony and he fled.⁹⁸ Inherent in this defense is a showing that Rosfeld reasonably believed that Rose committed a forcible felony. Rosfeld's innocence, thus, necessitated a showing of Antwon's guilt. The practical result is chilling: Rosfeld's defense inherently placed a deceased child on trial.

In turn, the State, which brought charges against Rosfeld, was required to prove that Rosfeld could not have reasonably suspected Rose of a felony. Therefore, the trial was about Rosfeld's decision to arrest. And if a jury found he reasonably decided to arrest, the legal standard required that they also decide he reasonably decided to kill.

95. *Graham*, 490 U.S. at 397.

96. *Id.* at 397.

97. Andrew Dunn, Mark Washburn & Michael Gordon, *Shelby Police Chief Describes Arrest of Charleston Shooting Suspect*, CHARLOTTE OBSERVER (June 24, 2015, 6:26 AM). Roof was arrested after evading police for sixteen hours.

98. *See Jury Foreman Opens Up About How Verdict Reached in Michael Rosfeld Trial*, WPXI (Mar. 25, 2019, 6:01 PM), <https://www.wpxi.com/news/officer-trial/jury-foreman-opens-up-about-how-verdict-reached-in-michael-rosfeld-trial/933904801/>.

Or that the moment Rose fled, he was eligible to be capitally punished.

The awkward posture of the prosecution having to exonerate a victim, while proving the guilt of a police officer proved to be too much. Rosfeld was acquitted.⁹⁹ But the acquittal resulted in protests: the people did not believe that justice was served.¹⁰⁰ The *Garner* statute certainly induces unjust results, was that the case here? That determination requires an analysis of the jury's application of the law to the facts.

1. Jury Properly Apply the Law?

Let's return to the facts: On June 19, 2018 at 8:40 PM, Michael Rosfeld stopped the gold Chevy Cruze carrying Antwon Rose and two others.¹⁰¹ Because the gold Chevy Cruze matched the description of a car that was involved in a nearby shooting that took place thirteen minutes earlier and had gunshot damage to the back window, this was not a routine traffic stop.¹⁰² Objectively, Rosfeld had reasonable suspicion to suspect the car was involved in the earlier shooting. The jury agreed.¹⁰³

Under Pennsylvania law, Rosfeld's reasonable suspicion of a violent felony automatically triggered the *Garner* defense when Rose fled. That is because (1) the officer suspected that Rose and the other passengers committed a forcible felony;¹⁰⁴ (2) he attempted to arrest based on this suspicion; and (3) Rose fled. As the foreman explained, "Once you were in a felony stop, they knew the cop knew. Michael knew that these kids been shooting at someone, so what goes through your mind as an officer."¹⁰⁵ The foreman's quote suggests that the

99. *Id.*

100. PublicSource staff, *Hundreds Gather in Protest Over the Verdict in the Shooting Death of Antwon Rose II*, PUBLICSOURCE (Mar. 23, 2019), <https://www.publicsource.org/photos-hundreds-gather-in-protest-over-the-verdict-in-the-shooting-death-of-antwon-rose-ii/>.

101. Julian Routh, *A Moment-by-Moment Recounting of the Shooting of Antwon Rose and the Charging of Michael Rosfeld.*, POST-GAZETTE, <https://newsinteractive.post-gazette.com/nine-months-before-trial-recounting-the-shooting-of-antwon-rose-and-charging-of-michael-rosfeld/> (last visited Oct. 8, 2021).

102. Shelly Bradbury, Paula Reed Ward & Adam Smeltz, *Police Shooting of Unarmed Youth in East Pittsburgh Sparks Outrage*, POST-GAZETTE (June 20, 2018, 6:26 PM), <https://www.post-gazette.com/news/crime-courts/2018/06/20/Police-shooting-unarmed-boy-Antwon-Rose-East-Pittsburgh-sparks-outrage-woodland-hills/stories/201806200202>.

103. WPXI, *supra* note 98.

104. *Id.*

105. *Id.*

jury not only concluded that Rosfeld's stop was reasonable, but that Rose fled because he was guilty.

And that's the problem: the foreman justified Rosfeld's decision to shoot largely because he had sufficient cause to detain. There was no independent inquiry of whether the knowledge that justified the stop was sufficient to support shooting three times. The foreman justified Rosfeld's acquittal because Rose and the other passenger, "knew the cop knew." That justification, of course, is wholly unsupported. Rosfeld did not know—in fact, he could not have known. And immediately after killing Rose, he did not even know why he shot at him. Recall that Rosfeld stated, "I don't know why I shot him." Rosfeld's extrajudicial killing based on speculative guilt contravenes the purpose of ensuring a suspect is tried: to determine whether the State can prove what the officer suspected.

Had the law asked the jury to focus on Rosfeld's, not Rose's actions, the result is likely much different. Analyzing the facts this perspective: Rosfeld pulls over a car suspecting that it was previously involved in a shooting.¹⁰⁶ He approaches the vehicle with his gun drawn.¹⁰⁷ He orders the passengers out of the car.¹⁰⁸ One passenger, a teen, is visibly unarmed and runs away.¹⁰⁹ He shoots at the teen: not once, not twice, but three times.¹¹⁰ Each shot connects: to the back, to the elbow, to the face.¹¹¹ Were each (or any) of these shots reasonable? In the end, by shooting at—and killing—Antwon Rose, who did the officer protect?

2. What Extent Did Race Support Rosfeld's Acquittal?

Prior to Rosfeld's trial, it was clear that race mattered. Before District Attorney Zappala filed charges, protests began featuring chants of "Black Lives Matter" and "No Justice, No Peace."¹¹² The chants, while particularized to the need to bring charges against Rosfeld, invoke the larger issue: police are not held accountable when

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Matt Stevens, Melissa Gomez & Christina Caron, *Police Killing of Antwon Rose, 17, in East Pittsburgh Prompts Protests*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/antwon-rose-police-killing-protests.html>.

they kill Black people.¹¹³ Indeed, protesters doubted that Zappala would even prosecute a cop that killed a Black boy.¹¹⁴

Race was just as important in the jury selection process. As a preliminary matter, the jury was not selected from Allegheny County because the judge felt that the combination of protests and media coverage could deny Rosfeld a fair trial.¹¹⁵ And at voir dire, the State won a *Batson* challenge after the defense attempted to strike a Black woman because, as it argued, “the pressure on her would be tremendous,” from her “inner city” community.¹¹⁶ Ultimately, three of the twelve jurors were Black.¹¹⁷

At trial, the White officer, the Black victim, and the standard of the *Garner* defense inherently had racial implications. In fact, the Rosfeld-Rose interaction itself involved race. Surely, a Black teen that is approached by a White officer with a gun drawn has reason to fear for his life.¹¹⁸ That, of course, makes Rose’s decision to run reasonable. The law, however, requires that jurors determine whether Rosfeld’s perception of Rose as a violent felon was reasonable. Though there were three Black jurors, the trope of the young-Black-male criminal is well-established.¹¹⁹ This deeply-rooted stereotype presents young Black males as “super-predators,” that are prone to violence.¹²⁰ It also persists implicitly—it is, indeed, the status quo.¹²¹

113. See Aaron Morrison, *Decades Later, Sharpton Still Insists: No Justice, No Peace*, AP NEWS (Aug. 26, 2020), <https://apnews.com/article/race-and-ethnicity-racial-injustice-aead32dbf8e001d4f52452796404162>.

114. Avery Keatley & Megan Harris, *Ten Tumultuous Days: The Death of Antwon Rose and Arrest of Michael Rosfeld*, WESA (June 29, 2018, 11:37 AM), <https://www.wesa.fm/show/the-confluence/2018-06-29/ten-tumultuous-days-the-death-of-antwon-rose-and-arrest-of-michael-rosfeld>.

115. Associated Press, *Jury to Be from Outside of Allegheny County in East Pittsburgh Officer’s Trial*, WESA (Jan. 14, 2019, 1:27 PM), <https://www.wesa.fm/identity-justice/2019-01-14/jury-to-be-from-outside-of-allegheeny-county-in-east-pittsburgh-officers-trial>.

116. Paula Reed Ward, *The Michael Rosfeld Trial: Nine Jurors Chosen, Including Three African Americans*, POST-GAZETTE (last updated Mar. 12, 2019, 6:27 PM), <https://www.post-gazette.com/news/crime-courts/2019/03/12/michael-rosfeld-antwon-rose-police-killing-east-pittsburgh-jury-selection-dauphin-county/stories/201903120081>. Ironically, despite the pretty-obvious dog-whistle racism in the justification to strike, Rosfeld’s counsel responded to the *Batson* challenge by asserting he was not racist. Counsel’s individual views of race, however, are largely immaterial to the substance of a *Batson* challenge.

117. Christine Vendel, *Jury Selection Complete: Dauphin County Residents Chosen for Cop’s Homicide Trial*, PENN LIVE, <https://www.pennlive.com/news/2019/03/jury-selection-complete-dauphin-county-residents-chosen-for-cops-homicide-trial.html> (last updated Mar. 13, 2019, 11:02 AM).

118. See Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1553 (2018).

119. TOMMY J. CURRY, *THE MAN-NOT: RACE, CLASS, GENRE, AND THE DILEMMAS OF BLACK MANHOOD* 112 (TEMP. UNIV. PRESS 2017).

120. *Id.* at 113–14.

Convicting Rosfeld, therefore, required the prosecutors to disabuse jurors of the bias that Rose, as a Black male, was a criminal. Then, it had to overcome *facts* that justified Rosfeld's car-stop as reasonable.

Therein lies the most invidious issue of Rosfeld's acquittal and *Garner* itself. At bottom, in acquitting Rosfeld, the jury had to accept an unjustifiable legal proposition: it is reasonable for an officer to kill a Black child that flees because the officer suspects he is a violent felon. If due process means anything, it means that a person should not be punished (especially by death) without a determination of guilt. And the *Garner* Court recognized that: "The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment."¹²²

Yet, to say that Michael Rosfeld frustrated Antwon Rose's interest in a judicial determination of guilt and punishment is an understatement. When Michael Rosfeld shot Rose, he imposed a death sentence. His acquittal is proof that the Pennsylvania legal system determined that Rosfeld's application of the death penalty was permissible by its laws. That is not a mere frustration of life: it is an endorsement of an extrajudicial execution.

At the demonstrations protesting the Rosfeld verdict, protestors chanted: "Three shots in the back, how you justify that?"¹²³ The chant made clear that *Garner*'s legal justification did not square with a fundamental societal value: officers are not justified in their execution of Black lives. Protecting Black lives from police, therefore, requires abolishing *Garner* defenses. But that is no easy fix. *Garner*, of course, was not decided in a vacuum. Unfortunately, *Garner* and *Graham* are a manifestation of a fundamental flaw in our Constitution: it has yet to fully recognize that Black people are human beings.

II. THE POLICE STATE VS. DEMOCRACY

The Constitution's recognition of citizenship rights—rather than human rights—has largely functioned to legitimize violent attacks against Black people. Creating legal remedies for victims of police-

121. Ariela Rutbeck-Goldman & L. Song Richardson, *Race and Objective Reasonableness in Use of Force Cases: An Introduction to Some Relevant Social Science*, 8 ALA. C.R. & C.L. L. REV. 145, 149–50 (2017).

122. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

123. Caitlin McCabe, *'Three Shots to the Back, How Do You Justify That?': Philadelphia Protesters Show Solidarity in Justice for Antwon Rose*, PHILA. INQUIRER (Mar. 23, 2019), <https://www.inquirer.com/news/antwon-rose-philadelphia-rally-pittsburgh-police-shooting-20190324.html>.

killings, therefore, requires a reallocation of power that expands America's body politic to fully include Black people. The combination of reallocating power and expanding America's body politic displaces the current standard where Black people are second-class citizens with no remedies when police kill.

A. Historical Origins

America's foundation, economically and sociologically, is framed by its reliance on chattel slavery. Beginning with the Revolutionary War, the capital that funded the American empire was produced by African labor. And of chattel slavery's many evils, its most invidious is that it only recognized Black people as capital, not human beings. This reduction of Black people from person to chattel-capital required legalized violence.

The Framers attempted to legally justify chattel slavery's violence by denying Black humanity in America's document: the Constitution. Of the Constitution's fifty-five male drafters, most—George Washington, Thomas Jefferson, and James Madison, to name a few—were proud enslavers.¹²⁴ Madison, for example, bragged that he “could make \$257 on every Negro in a year, and spend only \$12 or \$13 on his keep.”¹²⁵ Unsurprisingly, in Federalist Paper 54, Madison rejects Black people as human.¹²⁶ In his view, under the Constitution, Black people are “mixed character of persons and of property.”¹²⁷ “This is *in fact their true character*,” he submits.¹²⁸

Of course, logic could not support such mental gymnastics. Violence did. “The system of slavery,” W.E.B. Du Bois explains, “demanded a special police force and such a police force was made possible and unusually effective by the presence of the poor [W]hites.”¹²⁹ The special police force, Du Bois asserts, “explains the difference between the slave revolts in the West Indies, and the lack of effective revolt in the Southern United States.”¹³⁰ Though working the police force provided economically poor Whites slight for financial

124. See, e.g., HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 33 (HARPER PERENNIAL MODERN CLASSICS 2009) (1980); see also JERRY FRESIA, TOWARD AN AMERICAN REVOLUTION: EXPOSING THE CONSTITUTION & OTHER ILLUSIONS 13–22 (1988).

125. Zinn, *supra* note 124.

126. THE FEDERALIST NO. 54 (James Madison).

127. *Id.*

128. *Id.*

129. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 12 (FREE PRESS 1998) (1935).

130. *Id.*

benefits, it also “fed his vanity because it associated him with the masters.”¹³¹ In short, the police force created a social hierarchy that functioned to “keep Negroes in slavery and to kill the [B]lack rebel.”¹³²

Indeed, the “great and primary” issues that troubled the Framers revolved around maintaining the relationship of “slaves to democracy.”¹³³ As Rawlins Lowndes, one of South Carolina’s first governors explained, “without Negroes, this state would degenerate into one of the most contemptible in the union.”¹³⁴ To Lowndes, Black people—not South Carolina’s fertile soil or vast geography—was their “wealth,” and “only natural resource.”¹³⁵ Black revolts, therefore, posed the greatest “threat” to this “democracy” that was ultimately built off Black subjugation.¹³⁶ The South, which at that time was America’s economic fulcrum, knew the threat of Black revolt best.

Take the Stono Rebellion in colonial South Carolina as an example. It began with twenty enslaved men who were forced to build roads storming a weapons store, seizing firearms, and building a small force of ninety others seeking to escape to Spanish Florida, where at that time, freedom was guaranteed.¹³⁷ Or consider Prosser’s Rebellion in 1800. That plan—hatched in Virginia after the colonists overthrew the “tyrannical” British and partly inspired by the Haitian revolution—sought to take advantage of dissension amongst America’s ruling class.¹³⁸ Gabriel Prosser, the revolt’s namesake, was literate and aware of the “toxic fissures between the Republicans and Federalists.”¹³⁹ Hoping to strike quick, Gabriel and company attempted to takeover Virginia’s capital city, Richmond, and kidnap then-Governor and future-President James Monroe.¹⁴⁰ Next, they would seize the guns from the state armory, grab the money in the treasury, and win the battle for freedom.¹⁴¹

But both the Stono and Prosser’s Rebellions fell short for one reason: armed militia that functioned as a police force shut the rebel-

131. *Id.*

132. *Id.*

133. *Id.* at 13.

134. CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 25 (2021).

135. *Id.*

136. *Id.* at 11.

137. *Id.* at 15–16.

138. *Id.* at 55–56.

139. *Id.* at 56.

140. *Id.*

141. *Id.*

lions down. Those militia, of course, are enshrined in the Constitution's Second Amendment.¹⁴² Though the rights to bear arms and to a well-regulated militia were not included in two-thirds of state constitutions, it is included in America's founding document.¹⁴³ Its inclusion is largely due to the work of Patrick Henry—who once proclaimed “Give me liberty or give me death”¹⁴⁴—because of his fear that without a constitutional right to a well-regulated militia, a Northern dominated Congress would refuse to defend the South from slave revolts.¹⁴⁵ Henry also feared that a Northern Congress could effectively end slavery by requiring that Black men fight in the army.¹⁴⁶ To some Southerners, a Union with unenslaved Black people may not be “worth fighting for at all.”¹⁴⁷ The Constitution providing a right to a well-regulated militia to the *States*, was therefore, a “bribe, paid again with Black bodies.”¹⁴⁸ An assurance to the South that the federal government would protect their most valued asset—Black people—with state-sponsored violence.

The militia clause effectively turns the Bill of Rights on its head because it speaks to the protection of the states—not the individual. Review the Second Amendment's text, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹⁴⁹ During the antebellum period, the Second Amendment “ensured that the federal government's constitutional role would not interfere in the states' ability to use those forces when necessary.”¹⁵⁰ To that end, Southern states passed laws that ensured they would police enslaved communities. The militia “regularly searched the homes of the enslaved for weapons,” and in Georgia had a “standing warrant to search any Black's house, enslaved *or* free, for offensive weapons and ammunition.”¹⁵¹

That law, of course, patently contravened the Fourth Amendment's prohibition on warrantless searches—unless Black people had no Fourth Amendment protections. And if Black people had no

142. U.S. CONST. amend. II.

143. ANDERSON, *supra* note 134, at 32.

144. *Patrick Henry – Give Me Liberty or Give Me Death*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/patrick.asp.

145. ANDERSON, *supra* note 134, at 30.

146. *Id.*

147. *Id.* at 21.

148. *Id.* at 32.

149. U.S. CONST. amend. II.

150. ANDERSON, *supra* note 134, at 37.

151. *Id.* at 34–35.

Fourth Amendment protections, then what constitutional protections did they have? In sum, if the states had a constitutional right to a well-regulated militia, and could deploy the militia without restraint, is this not a police state?

Georgia's law was not an outlier, rather, it was consistent with the Constitution's design and federal law. Consider Article IV, Section II of the Constitution: "No Person held to Service or Labour in one State, under the Laws thereof,"¹⁵² the third clause begins, "shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."¹⁵³ If Pennsylvania, for example, knows that an enslaved person has escaped from Maryland, under this Section, Pennsylvania *shall* return the enslaved person to the Maryland enslaver. The escaped person is not entitled protection under Pennsylvania law. In the abstract, the Constitution required that the States surveille Black people to ensure they were not harboring "fugitives." The practical effect, of course, is that an unrecognizable Black person is inherently suspicious.

Though Article IV provided a mandate, it was not self-enforcing: a State could refuse to provide resources or instruct its police to search for escaped enslaved people. That "shortcoming" explains the Fugitive Slave Act of 1850. "This was a law with teeth and venom. Northern states could no longer abstain or refuse to help slave hunters capture those who escaped human bondage."¹⁵⁴ Indeed, under this law, United States marshals—not solely State officials—had the authority to re-capture Black people that refused to be enslaved.¹⁵⁵ What is more, Black people that were captured "had no rights whatsoever to proclaim their freedom. Only the slave catchers and slave owners had any standing in court."¹⁵⁶

Prohibiting Black people from legally challenging their captivity demonstrates the alliance between the police-state and the court system. And perhaps, no case better demonstrates this alliance than *Scott v. Sandford*.¹⁵⁷ Despite all its infamy, *Scott* raised many difficult legal issues: federal-court jurisdiction, state citizenship versus federal

152. U.S. CONST. art. IV, § 2.

153. *Id.*

154. ANDERSON, *supra* note 134, at 73.

155. *Id.* at 74.

156. *Id.* at 73.

157. *Scott v. Sandford*, 60 U.S. 393 (1857).

citizenship, and even, substantive due process. But these complex issues are undergirded by fundamental questions that the Framers dodged: Does the Constitution recognize Black people as . . . well, people? If not, do Black people have any legal protections, or are they truly of a “mixed character” and subjects in a lawless police state?

B. Constitutionalizing the Police State: *Scott v. Sanford*

Scott arises from a violent act.¹⁵⁸ After the Scotts sued for their freedom in Missouri state court, Sanford—despite prevailing—whipped each member of the family (mother, father, and two daughters) for being “worthless and insolent.”¹⁵⁹ But it is doubtful that this attack had its desired effect. The Scotts sued for their freedom again: this time in federal court and alleging assault.¹⁶⁰

There were two issues antecedent to the Court’s ability to address the Scotts’ assault claims. The first was procedural: as Chief Justice Taney phrased it,

Can a Negro, whose ancestors were imported into this country, and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.¹⁶¹

The second was substantive: Did the passage of the Missouri Compromise effectively “free” the Scotts when the family was in Missouri?¹⁶² And if not, was Dred Scott no longer enslaved because his previous enslaver held him captive in Illinois prior to selling him to Sanford?¹⁶³

Chief Justice Taney’s majority opinion could not have been clearer: Black people cannot access the federal courts, and therefore, have no constitutional rights. Black people, he contended, were “beings of an inferior order, and altogether unfit to associate with the

158. *Id.* at 397.

159. Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHIKENT L. REV. 49, 52 (2007).

160. Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 6 (1996).

161. *Scott*, 60 U.S. at 403.

162. *Id.* at 431.

163. *Id.* at 431–32.

[W]hite race, either in social or political relations.”¹⁶⁴ They “had no rights which the [W]hite man was bound to respect; and . . . might justly and lawfully be reduced to slavery for his benefit.”¹⁶⁵ Black people, Taney continued, “are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides and secures to citizens of the United States.”¹⁶⁶ The Scotts, therefore, could not bring their claims in federal court—there was no jurisdiction.

But the opinion went a step further. At the time of the Constitution’s ratification, it was “fixed and universal in the civilized portion of the [W]hite race” that Black people were “treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it,” the Court reasoned.¹⁶⁷ The Constitution made no distinction between “the right of property of the master in slave” and any other form of property ownership. Black people, therefore, were not, as Madison suggested, of mixed character: They were property. Thus, under the Fifth Amendment, Congress could not pass a law that deprived enslavers of the *right to possess* Black people “without due process of law.”¹⁶⁸ Therefore, the Constitution did not, as the Scott family argued, grant Congress the authority to outlaw enslavement. It did quite the opposite. The Constitution *guaranteed* enslavers the right to enslave—free of any federal government interference.

The Court’s language and reasoning is, at a minimum, perverse. But it is consistent with the Framers’ beliefs. James Madison certainly would have agreed, as would many of the States upon joining the Union. States’ laws and constitutions also refused to provide any protections for Black people.¹⁶⁹ The Court reasoned, “[i]t [was] not the province of the court to decide upon the justice or injustice, the policy or impolicy” of the words “people of the United States.”¹⁷⁰ Rather, “[t]he decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution.”¹⁷¹ Taney, writing for the Court, explained that its’ duty was

164. *Id.* at 407–08.

165. *Id.*

166. *Id.* at 404.

167. *Id.* at 407.

168. *Id.* at 450.

169. *Id.* 413–17.

170. *Id.* at 405.

171. *Id.*

solely to “interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.”¹⁷²

Scott’s rationale provided a troubling view on the Constitution’s recognition of Black humanity. It was one thing to hold that the Scotts remained enslaved. It was another to hold that Black people, under no circumstances, had constitutional rights—more specifically, “no rights which the [W]hite man was bound to respect.” In effect, Black people did not have the “self-evident,” “unalienable” rights that derive from the “Creator,”¹⁷³ only White people did. Rather, the government—the “[W]hite man’s government”—endowed Black people with rights, not God.¹⁷⁴

On the other hand, *Scott* submits that the Constitution recognizes a divine character in White men. This divine nature is so powerful, that in fact, it permits White men to define the rights of Black people. Black people were not fully human because White men said so.¹⁷⁵ Likewise, Black people had no rights until White men said so. In sum, White men, not the Constitution’s text, were America’s legal authority.

History suggest that *Scott* is as much fighting words as it is legal doctrine. Under no circumstances would Black people accept its premise or its holding. Though “[s]lavery altered the conditions of their being, it could not negate their being.”¹⁷⁶ *Scott* was, to Frederick Douglass, a “devilish decision.”¹⁷⁷ “Judge Taney can do many things, but he cannot perform impossibilities,” he remarked.¹⁷⁸ Black humanity could not simply be reduced to an instrument of capital.¹⁷⁹ Such a relationship, as Frederick Douglass predicted, was bound to fail. Thus, *Scott* contributed to an inevitable confrontation that only a war could fix: what to do with a constitution that reduced people to capital and, by consequence, upheld a police state that stood in democracy’s way?

172. *Id.*

173. *Id.* at 410.

174. *Id.* at 405.

175. See also *The Civil Rights Cases*, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting).

176. CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 125 (1983).

177. Finkelman, *supra* note 160, at 40.

178. *Id.*

179. ROBINSON, *supra* note 176, at 122.

C. The Reconstruction Amendments: Citizenship vs. Personhood

If America were to evolve from a police state into a democracy, its Constitution, at least, needed to repudiate *Scott*. But that was no easy task; recognizing Black people as citizens required a moral and political reckoning. Inherent in recognizing Black people as citizens required the moral acknowledgment that Black people were human.¹⁸⁰ But, as Du Bois asks, was acknowledging that Black people are human and transforming the country from a police state into democracy “good policy?”¹⁸¹

The outcome of the Constitution’s moral and political reckoning is present in the passage and interpretation of the Reconstruction Amendments. Slavery, by virtue of the Union’s victory in the Civil War, would no longer endure. The ratification of the Thirteenth Amendment abolished chattel slavery and granted Congress enforcement power with appropriate legislation.¹⁸² And it was with great enthusiasm that Congressional Republicans, like Charles Sumner and Thaddeus Stevens, planned to use Section II to enfranchise formerly enslaved Black people.¹⁸³ But this enthusiasm was quickly diminished as multiple Confederate states ratified the Amendment with the Alabama provision, which provided:

This amendment to the Constitution of the United States is adopted by the Legislature of Alabama with the understanding that it does not confer upon Congress the power to legislate upon the *political status* of freedmen in the State.¹⁸⁴

In other words, the States ratified the Thirteenth Amendment and conceded that chattel enslavement was no more. The Thirteenth Amendment did not, however, grant Congress authority to determine *what* Black people were—if not slaves. Said differently, the Thirteenth Amendment did not confer Black people citizenship, let alone recognize their humanity.

The State’s attempt to limit its reach aside, the Thirteenth Amendment had an independent flaw: The Punishment Clause.¹⁸⁵ In

180. DU BOIS, *supra* note 129, at 257. “Could a government, by united and determined effort, raise the Negroes to full American citizenship? Of course it could, if they were men; but were they men? Even if they were men, was it good policy thus to raise a great new working, voting class?”

181. *Id.*

182. *Id.* at 207–09.

183. *Id.* at 208.

184. *Id.* (emphasis added).

185. U.S. CONST. amend. XIII.

fact, it perfectly captured the citizenship versus humanity dichotomy. In full, the Amendment provides that, “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”¹⁸⁶ Sandwiched between the “gift” is the curse. Undoubtedly, the Punishment Clause was deliberately added to permit the re-enslavement of Black people through criminalization.¹⁸⁷ And States, through the passage of the Black Codes, took full advantage.¹⁸⁸ In short, the Thirteenth Amendment tempered yet did not repudiate *Scott*.

But, the Fourteenth Amendment did. Its first section grants Black people citizenship; forbids States from abridging the “privileges or immunities” of citizenship; requires States to grant people due process before deprivations of life, liberty, and property; and mandates that States provide equal protection of the law to all people within its jurisdiction.¹⁸⁹ The fifth, and final section, carries the ultimate weapon: congressional enforcement power.¹⁹⁰ Thus, it comes as no surprise that this Amendment has served as the primary vehicle to enhancing American democracy and limiting attempts to discriminate based on race, gender, and sexual orientation.¹⁹¹

Still, to some Republicans, the Fifteenth Amendment was the key to accessing democracy. Like its sister amendments, it grants Congress enforcement power.¹⁹² It is also simple and to the point, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁹³ To Sumner, “The ballot is a *schoolmaster* It teaches manhood. Give him the ballot, and

186. *Id.* (emphasis added).

187. Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 66–67 (2019).

188. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* 28 (2010).

189. U.S. CONST. amend. XIV, § 1.

190. U.S. CONST. amend. XIV, § 5.

191. *See generally*, *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Plyler v. Doe*, 457 U.S. 202 (1982); *United States v. Virginia*, 518 U.S. 515 (1996); *Roe v. Wade*, 410 U.S. 113 (1973); *Batson v. Kentucky*, 476 U.S. 79 (1986); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

192. U.S. CONST. amend. XV, § 2.

193. *Id.*

he will be educated into the principles of the government.”¹⁹⁴ Such an education was required to “redress the balance of our political system and assure the safety of patriot citizens.”¹⁹⁵

Together, the Reconstruction Amendments largely repudiate *Scott* and provide an avenue for Black people to use the law in self-defense. Sure, the Second Amendment continued to grant States a militia, but Black people also had rights. After all, they were now citizens. Right?

Not exactly. The Supreme Court, once again, interpreted the Constitution to reinstate the police state and limit democracy.¹⁹⁶ Although the language of the Reconstruction-era opinions interpreting the reconstructed Constitution did not have the same vitriol of *Scott v. Sandford*, the rationale that Black people were “altogether unfit to associate with the [W]hite race, in social or political relations” remained.¹⁹⁷ Indeed, the courts would continue to legalize white-supremacist violence, uphold the police state, and betray democracy by denying Black people legal protections.

Consider Mississippi, a state that in 1873, was predominately Black with Black men holding the positions of Lieutenant Governor, Secretary of State, Superintendent of Education, and Speaker of the House.¹⁹⁸ But Mississippi’s former Confederates knew they could use violence to retain their political and social power.¹⁹⁹ Two years later, during the 1875 elections, White terrorist violence erupted throughout the state.²⁰⁰ In fact, a mob attacked Charles Caldwell, a Black state legislator, at a public debate during his re-election campaign.²⁰¹ Initially, the Governor mobilized and armed a state militia largely composed of Black Mississippians in response to the uprising.²⁰² But the militia was demobilized after the guerillas won a case before the Mississippi Supreme Court preventing the allocation of resources to state-supported militias.²⁰³ Within weeks the Black militias

194. DU BOIS, *supra* note 129, at 189.

195. *Id.*

196. See Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 66–67 (2019).

197. *Scott v. Sandford*, 60 U.S. 393, 407 (1857).

198. AKINYELE UMOJA, *WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT* 13 (2013).

199. *Id.* at 14.

200. *Id.*

201. *Id.*

202. *Id.* at 15.

203. *Id.* at 16.

were disarmed, and Caldwell was assassinated.²⁰⁴ Violence, of course, complimented poll taxes and literacy tests that “legally” disenfranchised Black voters.²⁰⁵

How about that? The Mississippi Supreme Court effectively restricted its state’s Second Amendment right of a well-regulated militia for its protection to ensure that terrorists could attack Black citizens and prevent them from accessing democracy. But it is unlikely the Supreme Court would have come to a different conclusion. As Derrick Bell notes, the Supreme Court, in a series of cases: *United States v. Reese*, *United States v. Harris*, *United States v. Cruikshank*, and *Screws v. United States* created a “major obstacle” to curtailing white-supremacist violence and the police state.²⁰⁶

In response to criticism “because of the continued denial of rights to Negroes, sometimes accompanied by violent assaults,” in 1866 and again in 1870, Congress, pursuant to its Fourteenth Amendment enforcement powers, passed the Enforcement Act.²⁰⁷ In essence, it permitted the federal government to prosecute “any person who, ‘under the color of law’ deprive[d]” a person of a constitutionally protected right “by reason of his color or race.”²⁰⁸ What’s more, the law provided stiff penalties, including the potential for life imprisonment.²⁰⁹ But in *Reese*, *Harris*, *Cruikshank*, and *Screws*, the Supreme Court effectively gutted these statutes through its interpretation of the “color of law.”²¹⁰ In creating the state-action doctrine, those courts held that the federal government could only prosecute under the Enforcement Act where it could prove that the wrongdoer acted illegally as a “state actor.”²¹¹ Put simply, these statutes did not apply to private citizens, like the Mississippi mob that attacked Mr. Caldwell; rather they only covered state employees—like police officers—who kill while working.

204. *Id.*

205. Javonte Anderson, *Challenges to Black Voting Rights Hark Back to Jim Crow Era*, USA TODAY, <https://www.usatoday.com/story/news/2021/03/05/black-voting-rights-reconstruction-jim-crow/6919352002/> (last updated Mar. 5, 2021, 8:37 PM).

206. DERRICK BELL RACE, RACISM, AND AMERICAN LAW 232 (Vicki Been et al. eds., 6th ed. 2008).

207. *Id.* at 231.

208. *Id.*

209. *Id.*

210. *Id.* at 232.

211. *Id.*

The overall impact of the state-action doctrine was two-fold.²¹² On the one hand, it provided White people with legal immunity to use violence to subjugate Black people. On the other, it left Black people vulnerable to both private and state violence as the courts limited the reach of the Enforcement Act and local prosecutors were uninterested in protecting Black lives. In sum, the courts and the police-state remained united, just as they were during the *Scott* era.

Thus, it seems that the Supreme Court provided an answer to Du Bois' question: No, it was not "good policy" to include Black people in the body politic. Instead of abolishing the police state, the courts reformed it. In *Plessy v. Ferguson*, for example, the Court affirmed the "separate, but equal" doctrine because the Fourteenth Amendment granted citizenship but was incapable of eradicating "social prejudices."²¹³ Thus, legislation that reflected those social prejudices was not unconstitutional because the law was "powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences."²¹⁴ "If one race be inferior to the other socially," the Court reasoned, "the constitution of the United States cannot put them upon the same plane."²¹⁵ In other words, though the Fourteenth Amendment no longer permitted denying Black people citizenship, to the Court, *Scott's* finding that Black people were less human remained true.

In what can only be described as gaslighting, *Plessy* asserted that any belief that segregation placed a "badge of inferiority" on Black people was because "the colored race chooses to put that construction upon it."²¹⁶ White people, the Court reasoned, would not conclude that segregation could "relegate the [W]hite race to an inferior position."²¹⁷ In the end, the Court concluded that attempting to use the law to eliminate racism would "only result in accentuating the difficulties of the present situation."²¹⁸ In short, the law was only recognizing a societal truth: Black people and White people were different. Whatever conclusions were drawn from that recognition were on the individuals. It was not an arbitrary exercise of power for a State to determine Black and White people should not commingle.

212. *Id.*

213. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

214. *Id.*

215. *Id.* at 552.

216. *Id.* at 551.

217. *Id.*

218. *Id.*

This conclusion was both ahistorical and legally unsound. Indeed, Justice Harlan's dissent predicts that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."²¹⁹ Though the Reconstruction Amendments were ratified to repudiate *Scott*, Justice Harlan explains that *Plessy* will both "stimulate aggressions" against Black people and abridge the Fourteenth Amendment's promise of citizenship.²²⁰ Separate but equal was not a neutral legal principle; rather, it "arouse[d] hate," "create[d] and perpetuate[d] . . . distrust," and inherently assumed Black inferiority.²²¹ "The arbitrary separation of citizens, on the basis of race, while they are on a public highway," Justice Harlan continues, "is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds."²²²

In a decision that adopts much of *Scott's* reasoning, *Plessy* sparked many troubling questions. Was the American legal system capable of recognizing Black people as human? What if, in fact, it was *bad policy* to integrate Black people into the body politic? What were the shortcomings of "granting" Black people citizenship, but the inability to recognize Black humanity? It appeared that *Scott's* rationale—God provides White men with rights, who, in turn, determine what rights Black people are worthy of—remained deeply entrenched in the Constitution.

An opportunity for redemption came almost sixty years later in *Brown v. Board of Education*.²²³ For the first time, the Court denounced *Scott's* legal framework. Though *Brown's* holding is narrow, "in the field of public education the doctrine of 'separate but equal' has no place,"²²⁴ it radically changed the legal framework that "governed race and race relations in America for more than three hundred fifty years."²²⁵ Indeed, *Brown's* reasoning that race-based segregation when sanctioned by law harmed Black children in a way that was po-

219. *Id.* at 559 (Harlan, J., dissenting).

220. *Id.* at 560.

221. *Id.*

222. *Id.* at 562.

223. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

224. *Id.* at 495.

225. Michael Combs & Gwendolyn Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal, and Political Perspective*, 47 *How. L.J.* 627, 631 (2004).

tentially irreparable to “our democratic society” justified overturning *Plessy*.²²⁶

Simply put, the *law*, as Black people knew all along, was a tortfeasor.²²⁷ While the Constitution could not put Black people and White people on the same plane, after *Brown*, it no longer legitimized indiscreet articulations of Black inferiority. *Brown* seemingly welcomed Black people into America’s body politic: Democracy at last.

Or so it seemed. Derrick Bell advances a different interpretation. To Bell, the Court’s about-face was motivated by White self-interest, not upholding democratic principles, or affirming Black humanity.²²⁸ *Brown*, Bell contends, was central to America’s international reputation to communist countries during the cold war, “offered much-needed reassurance to American [B]lacks” that the country would live up to its World War II reputation, and finally, was necessary to transition the Southern economy.²²⁹ So perhaps, *Brown* was not an about-face after all. The Court’s holding in *Brown II*, that desegregation should occur with “all deliberate speed”²³⁰ and the Court’s continued narrowing of constitutionally permissible remedies for past discrimination support Bell’s thesis.²³¹ As does the Court’s Fourth Amendment jurisprudence.

D. From Terry to Wardlow: Separate, but Equal Policing

Since *Terry v. Ohio*,²³² Fourth Amendment jurisprudence effectively ensures Black people are not treated equally under the law, and by extension, denied full citizenship. The Fourth Amendment jurisprudence that governs police uses-of-force, therefore, remains in the *Scott-Plessy* framework: the law, along with individual police officers, acts as tortfeasors.

Terry, like most modern police encounters, begins on a street corner. After watching two men circle the block, and at times engage with a third person, Cleveland Police Detective Martin McFadden had

226. *Brown*, 347 U.S. at 493.

227. See Combs & Combs, *supra* note 225, at 646–47.

228. BELL, *supra* note 206, at 105–06.

229. *Id.*

230. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

231. See generally *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Parents Involved in Comm. Schs. v. Seattle*, 551 U.S. 701 (2007).

232. *Terry v. Ohio*, 392 U.S. 1 (1968).

seen enough: he believed that the men were planning a robbery.²³³ Acting on this hunch, the officer approached the group of men, and after a quick inquiry, grabbed one of the men, Terry—the petitioner to the Supreme Court—and immediately patted him down.²³⁴ Upon feeling a pistol Terry’s coat pocket, McFadden ordered the men into the store, removed a .38-caliber revolver from Terry’s jacket, and repeated the process with the other two men, Chilton and Katz.²³⁵ Ultimately, McFadden found guns on both Terry and Chilton, and both were charged with carrying concealed weapons.²³⁶

The men fought the charges on constitutional grounds. McFadden, the men argued, had no probable cause to arrest the men before patting them down; therefore, the “stop” and “frisk” that uncovered the weapon violated the Fourth Amendment.²³⁷ The illegally obtained evidence, the two maintained, must be suppressed under the exclusionary rule.²³⁸ After losing the suppression motion at trial, and ultimately being convicted, Terry and Chilton appealed to the Supreme Court.²³⁹ The question presented was straightforward: When, if ever, is it reasonable under the Fourth Amendment for a police officer to violate a person’s right to bodily security based on suspicion of criminal activity?²⁴⁰

Like *Scott* and *Plessy*, the central issue undergirding the legal question was race. As the Court explained, “We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity.” Indeed, permitting police to stop and frisk based on absent probable cause to arrest may “exacerbate police-community tensions in the crowded centers of our Nation’s cities”²⁴¹ where Black people “frequently complain[ed]” about “wholesale harassment by certain elements of the police community.”²⁴² That harassment, the opinion explains, is “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by

233. *Id.* at 5.

234. *Id.* at 7.

235. *Id.*

236. *Id.*

237. *Id.* at 25.

238. *Id.* at 17.

239. *Id.* at 8.

240. *Id.* at 9.

241. *Id.* at 12.

242. *Id.* at 14.

humiliating anyone who attempts to undermine police control of the streets.”²⁴³

At the same time, the Court weighed the counterargument that a “flexible” constitutional standard is needed to protect police that are often in “often dangerous situations on city streets.”²⁴⁴ From this perspective, a stop-and-frisk is simply a “minor inconvenience and petty indignity” that is necessary to ensure the officer’s safety.²⁴⁵ The Court, therefore, must reject traditional Fourth Amendment jurisprudence and provide a new standard granting police more authority.²⁴⁶

To be fair, the Court weighed these interests cautiously. In fact, it noted that its “limitations . . . in controlling the myriad daily situations in which policemen and citizens confront each other on the street.”²⁴⁷ The Court also reasoned that its decision would not simply impact police (mis)conduct, but also the admissibility of evidence recovered from stops-and-frisks.²⁴⁸ In other words, the Court was aware that ruling against the police would likely result in fewer Black people being convicted of crimes. After all, how could Terry and Chilton’s armed-possession charge withstand if the evidence of the gun was suppressed?

But in its consideration of the exclusionary rule, *Terry* makes a *Plessy*-esque concession. Excluding evidence obtained from the “wholesale harassment, of which minority groups, particularly Negroes, frequently complain,” the Court reasons, “will not be stopped by the exclusion of any evidence from any criminal trial.”²⁴⁹ Therefore, it was imprudent to provide a rule that may circumvent race-based police harassment done largely to maintain a powerful image because it may “exact a high toll in human injury and frustration of efforts to prevent crime.”²⁵⁰ Likewise, in *Plessy*, the Court reasoned that race discrimination was not arbitrary when done to maintain “peace and good order.”²⁵¹ In other words, *Terry* largely ignores *Brown*’s principle that the law can be a tortfeasor that contributes to

243. *Id.* at 15.

244. *Id.* at 10.

245. *Id.*

246. *Id.* at 11.

247. *Id.* at 12.

248. *Id.*

249. *Id.* at 14–15.

250. *Id.* at 15.

251. *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

race-based harms. Instead, it relies on *Plessy*'s reasoning that race-based legal subjugation was necessary to keep the peace.

Though *Terry* is not as vulgar as *Scott* or *Plessy*,²⁵² the opinion is just as harmful. For the first time in the Court's history, it held that police may search and seize absent probable cause to arrest.²⁵³ And it did so with the knowledge that the searches and seizures were likely to predominately occur in Black neighborhoods where police misconduct abounds. Under *Terry*, it was reasonable to permit police officers to patrol Black and White communities differently . . . unequally.

With this permission, just as Justice Douglas' dissent warned, *Terry* was "a long step down the totalitarian path."²⁵⁴ In bowing to the "hydraulic pressures . . . to water down constitutional guarantees and give police the upper hand," *Terry* initiated a "new regime."²⁵⁵ In *Whren*, for example, the Court unanimously held that race-based police stops are reasonable, so long as the officer can provide reasonable suspicion of a criminal act.²⁵⁶ Four years later in *Wardlow*, the Court went a step further, holding that flight in a "high crime area" is a relevant factor in determining reasonable suspicion.²⁵⁷ Though people have "a right to ignore police and go about their business," *Wardlow* contended that "flight by its very nature is not going about one's business; in fact, it is just the opposite."²⁵⁸ To Chief Justice Rehnquist, and the four justices who joined his majority opinion, "Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning."²⁵⁹

When scrutinized, Chief Justice Rehnquist's reasoning falls apart. To begin, a person is not a fugitive unless they have escaped captivity.²⁶⁰ So, how are police ever confronted with the flight of fugitives if they have no grounds to stop them other than "flight?" This is only true if the police's mere presence in a "high crime area" places every

252. *Terry*, 392 U.S. at 24. ("It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.")

253. *Id.* at 24.

254. *Id.* at 38 (Douglas, J., dissenting).

255. *Id.* at 39.

256. *Whren v. United States*, 517 U.S. 806, 813 (1996).

257. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

258. *Id.*

259. *Id.*

260. *See Fugitive*, OXFORD DICTIONARY OF ENGLISH (2020).

person in their vicinity into captivity. That cannot be what the Chief Justice means—right? Or, how can it be that people have a right “to go” about their business, but “going” is flight, which is “the opposite of going about one’s business”? This is only true if the Chief Justice means to say that in “high crime areas” the police have a right to inspect everyone’s business. Is it the geography that makes an area “high crime” or the people occupying it? Because it must be the people, how does the Chief’s rule comply with the Fourth Amendment’s general bar against searches and seizures absent *individualized* suspicion.²⁶¹

Ah, but of course, fleeing a “high crime area,” rather than remaining in it, provides an officer with the necessary individualized suspicion. In effect, once the police enter the “high crime area,” all people must remain in place to avoid being deemed suspicious. Not quite property of the police, but certainly not free: The person is upon attempting to escape the police’s gaze becomes a fugitive subject to capture.

For a moment, let’s consider *Wardlow* with *Garner*, *Graham*, and *Whren*. If the Constitution permits officers to racially profile first, then find suspicion of a crime second; consider flight in “high crime” communities as suspicious; and ultimately requires that all police killings are evaluated from the perspective of a “reasonable” officer with no evaluation of evil intent—under what circumstances does the Constitution forbid officers from killing Black people? How troubling is it that in 2000, over a century after *Scott*, Chief Justice Rehnquist compared flight from police oversight to fugitivity? It appears that *Scott* and *Plessy*’s denial of Black humanity has found a new home. At “best,” the Fourth Amendment reduces Black people to second class citizens. At worst, it denies Black humanity all together.

Fortunately, members of the federal judiciary have taken note. In *Kisela v. Hughes*, for example, Justice Sotomayor’s dissent concludes that Fourth Amendment jurisprudence “tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”²⁶² Likewise, her *Utah v. Strieff* dissent explains that police “treat[] members of our communi-

261. See *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (The Fourth Amendment “generally bars [government] officials from undertaking a search or seizure absent individualized suspicion.”).

262. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (Sotomayor, J., dissenting).

ties as second-class citizens.”²⁶³ Consider Chief Judge Gregory of the Fourth Circuit, in a unanimous opinion, he concluded that there has been a “systematic erosion of Fourth Amendment protections for a certain demographic.”²⁶⁴ Most forcefully, Judge Floyd, also of the Fourth Circuit, provided this insight:

Although we recognize that our police officers are often asked to make split-second decisions, WE EXPECT THEM TO DO SO WITH RESPECT FOR THE DIGNITY AND WORTH OF BLACK LIVES. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. THIS HAS TO STOP.²⁶⁵

III. ABOLITION CONSTITUTIONALISM

Recognizing and protecting Black lives requires constitutional and legislative fixes. Undoubtedly, Fourth Amendment jurisprudence must evolve and just as the Court overturned *Scott* and *Plessy*, it must overturn *Terry* and its progeny. Still, policing is largely a local issue. Therefore, state legislature must pass laws creating citizen review boards that review complaints of police misconduct. These review boards must include independent prosecutors that have the authority to bring charges with the board’s recommendation. This reform will drastically change the power dynamic in Black communities as they are most impacted by police violence. By rearranging the power dynamic, Black people will finally have the protection to truly enter America’s body politic. Now is the time to determine that recognizing Black humanity and democracy is good policy.

A. The Constitutional Fix

In a 2021 concurrence, Second Circuit Judge Lohier argued that *Whren*, and the Fourth Amendment doctrine that permits racial profiling, “cannot be the correct constitutional outcome in a multiracial democracy.”²⁶⁶ He’s correct, but *Whren* is merely an extension of *Terry*. Thus, if *Whren* is incorrect in a multiracial democracy, so is *Terry*. Just as the Court re-evaluated its equal protection jurisprudence and determined that *Plessy*’s “separate, but equal” doctrine caused an irreparable harm, it must re-evaluate *Terry* and its progeny.

263. *Utah v. Strieff*, 136 S. Ct. 2056, 2069 (Sotomayor, J., dissenting).

264. *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013).

265. *Est. of Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020) (emphasis added).

266. *United States v. Weaver*, 9 F.4th 129, 159 (2nd Cir. 2021).

The bottom line is that *Terry* acknowledges that it is a radical departure from traditional Fourth Amendment jurisprudence.²⁶⁷ In fact, *Terry* makes this concession with reference to Caleb Foote's article, "The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?"²⁶⁸ There, Foote argues against the proposed Uniform Arrest Act, a law that would permit officers to "stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going."²⁶⁹ Or quite simply, a law that *Terry's* holding constitutionalizes.

Foote's argument is not only that the Uniform Arrest Act is unconstitutional, but that it contravenes democracy.²⁷⁰ "In a democracy police effectiveness is measured even more by what the police do *not* do than by their positive accomplishments," Foote explained.²⁷¹ Providing ample statistical evidence from Baltimore, Massachusetts, New Hampshire, and Chicago, Foote demonstrated that *Terry* stops would do more harm than good—police were incapable of predicting who was breaking the law.²⁷² "An officer's impressions of a suspect's explanation of his 'identity and reason for being where he is,'" Foote argued, "are wholly subjective and seem to suggest almost unlimited discretion in the police."²⁷³ Granting police this discretion was "reminiscent of the elements of common law vagrancy, an outmoded relic of feudal class distinctions which has been grossly abused by the police in dealing with socially and economically disadvantaged elements of our society."²⁷⁴

Replacing *Terry*, therefore, is simple: Return to the Fourth Amendment's text. Searching and seizing people absent probable cause is unreasonable. There is no caveat for "reasonable suspicion." Under the traditional rule, the initial seizure that becomes a police shooting will no longer have constitutional support. In *Graham*, for example, the initial encounter only became violent because the officer stopped Mr. Graham because he had a "reasonable suspicion" that he

267. *Terry v. Ohio*, 392 U.S. 1, 11 (1968).

268. *Id.*

269. Caleb Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L. & CRIMINOLOGY 402, 402 (1960–1961).

270. *Id.* at 405.

271. *Id.*

272. *Id.* at 406.

273. *Id.* at 407.

274. *Id.*

stole from the corner store.²⁷⁵ Requiring police to establish probable cause prior to initially seizing a person should reduce police killings.

Overturing *Terry*, however, is not enough. We must also replace *Garner*'s "balancing" framework that weighs an individual's right to life "against the importance of the governmental interests alleged" to justify the shooting.²⁷⁶ Instead, officers may only use deadly force to defend human life against an imminent threat of death or serious injury.²⁷⁷ Under no circumstances is it reasonable for the government to kill with no imminent threat to life—flight alone can never justify taking a human life.

In determining whether there is an immediate threat, courts should no longer view the facts from the "reasonable officer" without any consideration of 20/20 hindsight, *Graham*'s standard is in error. This rule too, should return to the traditional Fourth Amendment "prudence and caution" standard articulated in *Carroll v. United States*. Rather than evaluate facts and circumstances from the reasonable officer, *Carroll* held that a seizure is only justified "if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed."²⁷⁸ That same rule should apply when evaluating an officer's decision that an immediate threat necessitated the use of deadly force.

Last, considerations of race are essential in applying the "prudence and cautious" standard. In rejecting *Graham*'s rationale that a use of deadly force may be evil, it is also necessary to repudiate *Whren*'s reasoning that racist, "subjective intentions play no role in ordinary . . . Fourth Amendment analysis."²⁷⁹ Prudence and racism are irreconcilable. After officers kill, courts must be permitted to consider evidence that contends the officer's decision was racially motivated. And if the court finds that race was a "motivating factor" in the officer's decision, the officer was not prudent and cautious—the use of deadly force was unreasonable.

But simply correcting the constitutional standard is incomplete. Technically State laws, not the Constitution, exonerate officers that kill. Reforming state law, therefore, is just as important to ending sep-

275. *Graham v. Connor*, 490 U.S. 386, 399 (1989).

276. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

277. Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, 7 KAN. J. L. & PUB. POL'Y 100, 113–14 (1997).

278. *Carroll v. United States*, 267 U.S. 132, 161 (1925).

279. *Whren v. United States*, 517 U.S. 806, 813 (1996).

arate, but equal police doctrine as correcting Fourth Amendment jurisprudence.

B. Improving State Laws

Ensuring that state laws protect Black life from police violence requires a two-tiered approach. The first tier is the most basic: Eliminate the *Garner* defense. As Michael Rosfeld's trial demonstrates, the *Garner* defense places the victim on trial with the officer. States should not have codified a poorly reasoned Fourth Amendment opinion. The second tier, however, requires systemic change. Laws are only effective when enforced. Therefore, states must provide citizen-review boards that investigate police misconduct with independent prosecutors to bring charges where necessary.

1. Eliminating the Garner defense

In codifying *Garner*, twenty-four states justified the unjustifiable: police may justify a homicidal act based on their mere suspicion.²⁸⁰ As the Rosfeld acquittal demonstrates, this rule permits an officer to kill even where there is no present danger. Consider this example: A ninety-year-old man is suspected of a robbery committed seventy years ago. An officer sees this man sitting on a stoop, with a cane, in front of his home. She approaches preparing to arrest, but the old man raises with his cane and begins to walk away. The officer, not in the mood for a chase, shoots and kills. In twenty-four states, the *Garner* felony arrest standard supports the officer's acquittal.²⁸¹

There are two easily identifiable reforms that should replace the felony arrest framework. First, states should follow California's lead and incorporate an imminence standard into their statute. It provides that:

A threat of death or serious bodily injury is imminent when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one

280. SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 61 (2020).

281. *See id.*

that, from appearances, must be instantly confronted and addressed.²⁸²

The strength of California’s definition is that it requires the officer’s judgment to be addressed. Under this standard, it is hard to imagine that killing a fleeing teenager is justifiable. Still, this standard has a significant drawback: it permits an evaluation from the perspective a “reasonable officer.”

To be sure, legal standards of care based upon a specialized, public service job are common.²⁸³ But these standards grant great deference to the professionals.²⁸⁴ Given the amount of police killings and a culture of protecting killer cops at the expense of public safety,²⁸⁵ the “reasonable officer” could very-well be homicidal. Thus, determining whether violence is imminent from the “reasonable” officer’s perspective may be problematic and the evaluation should be from a “prudent and cautious” person.

Second, States must require officers to de-escalate an encounter before they are able to use deadly force. Under this standard, instances of “officer-created jeopardy”—where the officer creates an unjustifiable risk that should have been avoided—will not be justified if the arrestee flees.²⁸⁶ A de-escalation standard also lessens the power imbalance between the officer and arrestee. Because de-escalation strategies recognize the autonomy of the arrestee, it requires the officer to respect the arrestee’s personal space and talk to them as an equal.²⁸⁷ Specifically, a de-escalation framework requires the officer to: (1) listen to the arrestee and permit venting; (2) explain what the officer is doing and what the arrestee can do; (3) take an equitable action that is “fair and free of bias”; and (4) act with dignity and leave the arrestee with their dignity.²⁸⁸ In essence, requiring de-escalation lessens the likelihood of an officer needlessly approaching an arrestee with a gun drawn, while requiring the officer to take affirmative steps to ensure deadly force is not used.

282. *Id.* at 84.

283. See DAN B. DOBBS, PAUL T. HAYDEN, ELLEN M. BUBLICK, *TORTS AND COMPENSATION* 417 (2017) (explaining the standard of care for medical practitioners in tort claims).

284. *Id.* at 421.

285. Philip Hayden, *Why an Ex-FBI Agent Decided to Break Through the Blue Wall of Silence*, USA TODAY, <https://www.usatoday.com/story/opinion/policing/2019/01/31/blue-wall-of-silence-policing-the-usa-cops-community/2604929002/> (last updated Jan. 31, 2019, 8:26 PM).

286. *STOUGHTON ET AL.*, *supra* note 280, at 156.

287. See *Id.* at 179.

288. *Id.* at 180.

Together, these reforms eliminate inequitable officer justifications for homicide while lessening the likelihood that an officer kills. But of course, the statute will only combat police killings if it is enforced. Effective enforcement requires strengthening citizen-review boards by adding independent prosecutors.

2. Citizen Review Boards and Independent Prosecutors

Though once considered a radical reform, currently, many cities have citizen-review boards that monitor police misconduct.²⁸⁹ While the power of a citizen-review board depends on the jurisdiction, at bottom, they function to provide a democratic-controlled independent review of police violence and a department's internal proceedings.²⁹⁰ Despite great potential to serve as a check on police violence, most are ineffective because "police departments refuse to cooperate with the boards," reject the results of their investigations, and citizens are unaware of the boards' purpose or mission.²⁹¹ In short, citizen-review boards are ineffective because they lack enforcement power.

Likewise, most elected prosecutors fail to effectively curb police misconduct. This is largely because of the conflict of interest between prosecutors and police departments. Simply put, a prosecutor's success is largely contingent upon police officer cooperation.²⁹² Prosecutors rely on police to investigate crimes, gather evidence, arrest, and serve as witnesses.²⁹³ In fact, in most trials securing a conviction requires convincing the jury to believe the officer's testimony.²⁹⁴ Prosecutors largely rely on police to successfully do their jobs and often become friendly with police due to the proximity of their work.²⁹⁵

The prosecutor-police relationship also presents a political conflict. That is because elected district attorneys usually receive significant campaign funds from police unions.²⁹⁶ This arrangement

289. Justina R. Cintrón Perino, *Developments in Citizen Oversight of Law Enforcement*, 36 URB. LAW. 387, 387 (2004).

290. Note, Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 538–39 (2017).

291. *Id.*

292. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1465 (2016).

293. *Id.* at 1465–66.

294. *Id.* at 1469.

295. *Id.* at 1470.

296. Eric Westervelt, *Prosecutors Call to End Conflict of Interest Between Police Unions and Attorneys*, NPR (June 22, 2020, 4:04 PM), <https://www.npr.org/2020/06/22/881826930/prosecutors-call-to-end-conflict-of-interest-between-police-unions-and-attorneys>; see also Miriam Aroni Krinsky & Buta Biberaj, *Want Prosecutorial Reform? Start with Curtailing the Influence of Police*

incentivizes elected prosecutor to limit their office's investigations and prosecutions of police misconduct. Police unions also use their access to the media to influence the policies and cases prosecutors try.²⁹⁷ Elected prosecutors, therefore, recognize that any investigation or prosecution of an officer will meet an aggressive response from the police union that may cost them their job.²⁹⁸

Thus, simply choosing to prosecute a killer officer upends the usual prosecutor-police relationship. When an officer is on trial, no longer are the two groups allies. The officer-defendant is now an adversary to the prosecutor, formerly their friend. Likewise, the prosecutor, who usually convinces the jury that the officer is a respected and honorable authority figure, now does the opposite. The prosecutor must prove the officer is a killer. An abuser. A person that presents a threat to public safety. Someone who belongs in jail.

But these problems are minimized where there is an independent prosecutor. In Minnesota, for example, Governor Tim Waltz appointed Keith Ellison, the State's Attorney General, to prosecute Derek Chauvin, the officer who killed George Floyd.²⁹⁹ This decision came in response to Minnesota state representatives asking the Governor to transfer the case because their "constituents, especially constituents of color, have lost faith in the ability of Hennepin County Attorney Mike Freeman to fairly and impartially investigate and prosecute" the police.³⁰⁰ Ultimately, Ellison's team of outside attorneys—some of whom had no current ties to any prosecutor office—successfully convicted Chauvin.³⁰¹ While the prosecutors certainly benefited

Unions., THE APPEAL (Aug. 24, 2020), <https://theappeal.org/want-prosecutorial-reform-start-with-curtailing-the-influence-of-police-unions/>.

297. Marco della Cava, *New, More Progressive Prosecutors Are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/> (last updated Feb. 10, 2020, 11:50 AM).

298. Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J. L. & POL'Y 137, 151 (2015).

299. Sarah Al-Arshani, *Minnesota Attorney General Keith Ellison Will Lead Prosecution of the Cop Charged with George Floyd's Murder*, INSIDER (May 31, 2020, 11:18 PM), <https://www.insider.com/minnesota-ag-keith-ellison-to-lead-derek-chauvin-prosecution-2020-5>.

300. *Id.*

301. *See, e.g.*, Jim Salter, *Explainer: Legion of Chauvin Prosecutors, Each with Own Role*, ASSOCIATED PRESS (Apr. 4, 2021), <https://apnews.com/article/derek-chauvin-trial-steve-schleicher-e1a14774fe5d88666232187c1413d5b8>; Marie Fazio, *Who Are the Key Players in the Derek Chauvin Trial?*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/key-figures-derek-chauvin-trial.html>; Erik Ortiz, *Prosecutors in Chauvin Trial Had a Winning Strategy. Here's What They Did Right.*, NBC NEWS (Apr. 20, 2021, 8:25 PM), <https://www.nbcnews.com/news/us-news/prosecutors-chauvin-trial-had-winning-strategy-here-s-what>

from officers testifying against Chauvin, from the beginning it was clear that the prosecution was shielded from any conflict with the local police department.³⁰²

Still, ceding all prosecutorial power to the State government carries an inherent danger. Consider Jackson, Mississippi. Its mayor, Chokwe Antar Lumumba, was elected after running on a platform to make Jackson the world's most radical city.³⁰³ In fact, Mayor Lumumba's political philosophy is largely modeled after the Republic of New Afrika's³⁰⁴ plan for Black self-determination and independence.³⁰⁵ Likewise, Jody Owens, the District Attorney and former civil rights attorney that has extensive experience suing prisons, was elected after running on a de-carceral platform.³⁰⁶ But on the other hand, Tate Reeves, the Governor, is a strong supporter of the Confederacy.³⁰⁷ And Lynn Fitch, the Attorney General, faced criticism from Black protesters after dropping manslaughter charges against a White officer who killed a Black male.³⁰⁸ It is safe to say, Jackson's predominantly Black populace³⁰⁹ would prefer Mr. Owens's office (with support from the mayor) retain the power to prosecute a killer officer, rather than have the Governor appoint Ms. Fitch to do so.

they-n1264698; Jordan Lebeau, *The Derek Chauvin Trial Laid Out the Playbook for Prosecuting Killer Police*, QUARTZ (Apr. 25, 2021), <https://qz.com/2001174/the-derek-chauvin-trial-gave-a-playbook-for-prosecuting-police/>.

302. Mark Berman, *As Derek Chauvin's Former Bosses Line Up to Condemn Him, 'Policing in America Is on Trial.'* WASH. POST (Apr. 11, 2021, 4:00 PM), <https://www.washingtonpost.com/nation/2021/04/11/derek-chauvin-trial-thin-blue-line/>.

303. D.D. Guttenplan, *Is This the Most Radical Mayor in America?*, THE NATION (Nov. 17, 2017), <https://www.thenation.com/article/archive/is-this-the-most-radical-mayor-in-america/>.

304. The Republic of New Afrika (RNA) embodies the spirit of the maroon communities. As such, the RNA organizes for the creation of an independent government in the Black belt, the "historical homeland" of African Americans. See EDWARD ONACI FREE THE LAND: THE REPUBLIC OF NEW AFRIKA AND THE PURSUIT OF A BLACK NATION-STATE, 25–26 (2020).

305. Guttenplan, *supra* note 303; see also Katie Gilbert, *The Socialist Experiment: A New-Society Vision in Jackson, Mississippi*, in JACKSON RISING: THE STRUGGLE FOR ECONOMIC DEMOCRACY AND BLACK SELF-DETERMINATION IN JACKSON MISSISSIPPI 270–72 (Kali Akuno and Ajamu Nangwaya ed. 2017).

306. Aliyah Veal & Donna Ladd, *Reformer Jody Owens Wins Hinds DA's Seat, Other Races Head to Runoff*, JACKSON FREE PRESS (Aug. 7, 2019, 12:47 PM), <https://www.jacksonfreepress.com/news/2019/aug/07/reformer-jody-owens-wins-hinds-das-seat-other-race/>.

307. Donna Ladd, *SCV: Gov. Tate Reeves Proclaimed 'Confederate Heritage Month' on April 3*, JACKSON FREE PRESS (Apr. 5, 2020, 3:53 PM), <https://www.jacksonfreepress.com/news/2020/apr/05/scv-gov-tate-reeves-proclaimed-confederate-heritag/>.

308. Alex Rozier, *'No Free Kill': Protesters Confront AG Lynn Fitch After She Drops Charge of White Officer Who Killed Black Man in 2015*, MISS. TODAY (June 5, 2020), <https://mississippitoday.org/2020/06/05/no-free-kill-protesters-confront-ag-lynn-fitch-after-she-drops-charge-of-white-officer-who-killed-black-man-in-2015/>.

309. *QuickFacts Jackson City, Mississippi*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/jacksoncitymississippi/BZA115219>.

By endowing citizen-review boards with independent prosecutors, two issues are corrected. First, citizen-review boards now have prosecutorial power. Second, prosecutors now answer directly to citizens and the prosecutor-police conflict of interest is eliminated. And, as Justice Scalia explains in his *Morrison v. Olson* dissent, prosecutors wield unique power in the American criminal justice system. There, largely relying on a speech by former prosecutor Justice Jackson, he neatly distills the prosecutor's job as follows: "What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is most flagrant, the public harm the greatest, and the proof the most certain."³¹⁰

In isolation, that excerpt paints an objective picture of "justice," we know not to be true: Flagrancy, harm, and proof are subjective. But that is the point. "If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted."³¹¹ Without interruption, Justice Scalia continues to cite Justice Jackson's speech, "It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies."³¹² Then, the justices bring it home, "It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group."³¹³

While justices Scalia and Jackson provide a warning that prosecutors may abuse their power, that issue is not present when prosecutors are the tool of a citizen-review board designed to check police abuses of power. These independent prosecutors do not have the ability to hunt defendants. Rather, the citizen review board provides the prosecutor with a wrongdoing. A person that has abused their power and must be brought to heel. Ultimately, the independent prosecutor that only brings charges against police assists in restructuring the white-

310. *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting).

311. *Id.*

312. *Id.*

313. *Id.*

supremacist political hierarchy that police are critical to maintaining.³¹⁴

By destabilizing the police's role in maintaining white-supremacy, America moves closer to eliminating the second-class citizenship that Justice Sotomayor, and Judges Gregory, Floyd, and Lohier identify as unsustainable. Take Larry Krasner, Philadelphia's District Attorney, as an example. In 2017, Krasner ran on a platform, that has since become a trend: "the progressive prosecutor."³¹⁵ Prior to running for public office, Krasner was a well-known civil rights attorney whose practice consisted of suing the police and representing people accused of assaulting the police.³¹⁶ Because of his background, neither his co-workers, nor the police union, took his candidacy seriously.³¹⁷ But his platform: eliminating cash bail, addressing police misconduct, and ending mass incarceration, found grassroots and high-profile support and culminated with a convincing victory capturing seventy-five percent of the electorate.³¹⁸

True to his platform, Krasner has aggressively challenged the police and their union. In his first term, his office released a list of police officers that his office would not call as witnesses due to allegations of misconduct.³¹⁹ Now, his office, has charged a Philadelphia police officer for murder, something that had not occurred in twenty years.³²⁰ It is also challenging the *Garner* statute's jury instructions at the Pennsylvania Supreme Court to increase the likelihood of the conviction.³²¹ And, in May 2021, Krasner was popularly reelected despite the police

314. See, e.g., Roberts, *supra* note 196, at 22–29; Nick J. Sciallo, *The Ghosts of White Supremacy: Trayvon Martin, Michael Brown, and the Spectors of Black Criminality*, 117 W. VA. L. REV. 1397, 1399 (2015).

315. Joshua Vaughn, *The Successes and Shortcomings of Larry Krasner's Trailblazing First Term*, THE APPEAL (Mar. 22, 2021), <https://theappeal.org/the-successes-and-shortcomings-of-larry-krasners-trailblazing-first-term/>.

316. Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration>.

317. *Id.*

318. *Id.*

319. Julie Shaw & Chris Palmer, *Here Are the 29 Philly Cops on the DA's 'Do Not Call' List*, PHILA. INQUIRER (Mar. 6, 2018), <https://www.inquirer.com/philly/news/crime/29-philly-officers-do-not-call-list-krasner-20180306.html>.

320. Kiley Kosciński, *Pennsylvania's Supreme Court to Hear Arguments About the State's Police Use of Force Statute*, WESA (April 26, 2021, 4:02 PM), <https://www.wesa.fm/courts-justice/2021-04-26/pennsylvanias-supreme-court-to-hear-arguments-about-the-states-police-use-of-force-statute>.

321. *Id.*

union's support of his opponent,³²² a public disassociation with Pennsylvania District Attorneys Association, and a political attack from the U.S. Attorney for the Eastern District of Pennsylvania.³²³ In effect, Krasner has gone after the police, and Philadelphia voters have supported him.

Admittedly, Krasner is not without progressive critics. Though Krasner promised to end cash bail, he instituted a policy that requests judges either release people without cash bail or hold people pretrial for certain violent crimes with a \$999,999 bail.³²⁴ This policy, Krasner argued, would ultimately keep fewer people in jail and mirrored a successful policy in Washington, D.C.³²⁵ But in practice, magistrate judges have largely ignored Krasner's requests and, in some cases, his office has continued to seek high bail even where the person is charged with a non-violent crime.³²⁶ To some, Krasner is proof that the "progressive prosecutor" is a myth and an irreconcilable contradiction.³²⁷ Prosecutors, the argument goes, cannot fix a system that fundamentally functions to dehumanize Black people.³²⁸ Instead, the progressive prosecutor may do more harm than good because they legitimize an otherwise illegitimate system.³²⁹

Reformists beware and listen to Audre Lorde, this group argues, "[T]he master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."³³⁰ Jailing killer officers is merely a temporary fix that in the aggregate perpetuates the punishment and prison industrial complex that disproportionately subjugates Black people.³³¹ Indeed, prosecuting police does not end

322. Akela Lacy & Alice Sperti, *Philadelphia District Attorney Larry Krasner Trounces Police-Backed Primary Challenger*, THE INTERCEPT (May 18, 2021, 11:56 PM), <https://theintercept.com/2021/05/18/larry-krasner-carlos-vega-philadelphia/>.

323. Bobby Allyn, *U.S. Attorney Slams Philadelphia DA Over 'Culture of Disrespect for Law Enforcement'*, NPR (Aug. 17, 2019, 4:26 PM), <https://www.npr.org/2019/08/17/752051788/u-s-attorney-slams-philadelphia-da-over-culture-of-disrespect-for-law-enforcemen>.

324. Vaughn, *supra* note 315.

325. *Id.*

326. *Id.*

327. See Contributors, *There's No Such Thing as a "Progressive Prosecutor" in a System Designed to Criminalize Blackness*, BLACK YOUTH PROJECT (July 10, 2019), <http://blackyouthproject.com/theres-no-such-thing-as-a-progressive-prosecutor-in-a-system-designed-to-criminalize-blackness/>.

328. *Id.*

329. *Id.*

330. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER 113 (2007).

331. See Elisabeth Epps, *Amber Guyger Should Not Go to Prison*, THE APPEAL (Oct. 7, 2019), <https://theappeal.org/amber-guyger-botham-jean/>.

the invidious cycle of state violence, but further “entrenches us in the oppressive American criminal legal system.”³³² To these prison abolitionists, subjecting killer officers to an unjust criminal justice system permits individual officers to take the blame for the system’s failures.³³³ Because individual arrests leaves the entire system intact, “collective strategies,” including uprisings, demands that removing the officers from positions of power, defunding the police, and healing and repair for the harmed are more likely to lead to justice.³³⁴ What’s more, the aforementioned approaches will not lead to the disappointment of failed prosecutions because the system cannot hold itself accountable.³³⁵ True justice cannot be achieved through reforms until the entire system of police and prisons is abolished.³³⁶

To some extent, the abolitionist argument is correct. Undoubtedly, America’s system of punishment—the police and prisons—must be abolished. Indictments, Mariame Kaba, a leading prison abolitionist explains, “won’t and can’t end oppressive policing, which is rooted in anti-Blackness, social control, and containment.”³³⁷ History is also instructive, winning elections is not a systematic fix. True change requires a change in values.

But electing prosecutors is different, as Justices Scalia and Jackson instruct, because of their power to enforce the law. Prosecutors wield far too much power to fit Lorde’s description of a tool. Prosecutors, as Justice Scalia described, are the wolf. They are hunters. And they attack based upon the electorate’s will. The prosecutor alone can shift the equilibrium of power. Indeed, a prosecutor can be a direct confrontation to the “utterly corrupt, racist system of policing . . . [that] will never change itself.”³³⁸

332. *Id.*

333. *The Problems with Using the Criminal Legal System to Fight the Criminal Legal System*, TEX. J. C.L. & C.R. (Oct. 3, 2019), <http://sites.utexas.edu/tjclcr/2019/10/03/amber-guyger-botham-jean-police-prison-abolition/>.

334. Mariame Kaba & Andrea J. Ritchie, *We Want More Justice for Breonna Taylor than the System that Killed Her Can Deliver*, ESSENCE, <https://www.essence.com/feature/breonna-taylor-justice-abolition/> (last updated Dec. 6, 2020).

335. *Id.*

336. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>.

337. Mariame Kaba, *Whether Darren Wilson Is Indicted or Not, the Entire System Is Guilty*, IN THESE TIMES (Nov. 17, 2014), <https://inthesetimes.com/article/darren-wilson-indicted-guilty>.

338. Aislinn Pulley & Frank Chapman, *The Abolitionist Case for Prosecuting Killer Cop Jason Van Dyke*, IN THESE TIMES (Sept. 28, 2018), <https://inthesetimes.com/article/laquan-mcdonald-jason-van-dyke-chicago-police-shooting-abolition>.

Thus, the combination of citizen-review boards with independent prosecutors fits within the abolition constitutionalism framework. As Dorothy Roberts, a leading abolition constitutionalist, articulates, non-reformist reforms “shrink rather than strengthen ‘the state’s capacity for violence.’”³³⁹ Imprisoning killer officers does just that.

IV. CONCLUSION: RECONSTRUCTION III

Ultimately, the fight for Black life and abolition of police violence boils down to one thing: power. It is the battle for power that undergirds police protests, legislation that aims to act as non-reformist reforms, and the longstanding movements for black self-determination.³⁴⁰ History demonstrates that Black people have refused to accept America’s attempts to reduce Black life. Indeed, Black people, in asserting their humanity, have twice forced massive restructuring of America’s political structure. First, during the Civil War and Reconstruction. And second, during the Civil Rights-Black Power era.³⁴¹ It appears, we are either approaching, or amid, a Third Reconstruction.³⁴²

This Reconstruction is largely a power struggle centered on the police and the punishment industry.³⁴³ In fact, following Michael Rosfeld’s acquittal, Antwon Rose’s peers became leaders of the movement. One marcher summed up the injustice without citing a single case or Amendment; they stated, “Somebody who a lot of us knew close, mostly Woodland Hills students, was shot and he did not have the right to a fair trial. He did not get his day in court, and it’s time for those students to speak up and use their voice.”³⁴⁴ Likewise, another young person stated, “If this happened to a [W]hite person, you know, it would take different actions, but because this happened to a [B]lack man and a [W]hite officer, it can just fly by, and it can’t. This is

339. Roberts, *supra* note 196, at 114.

340. See Max Rameau, *Community Control over Police: A Proposition*, PAN-AFRICAN CMTY.ACTION, <https://pacapower.org/index.php?page=Community-control-over-police-2>.

341. See Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 77, 127 (2020).

342. *Id.*

343. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 811 (2021).

344. *Pittsburgh Public School Students Protest Rosfeld Not Guilty Verdict*, CBS PITTSBURGH (Mar. 25, 2019, 6:30 PM), <https://pittsburgh.cbslocal.com/2019/03/25/pittsburgh-public-schools-michael-rosfeld-verdict-walkout-protest/>.

a human being.”³⁴⁵ There is no question that the young people will not settle for another incomplete reconstruction.

The determination of the youth presents America’s latest dilemma. It is clear, Black people remain steadfast that their lives matter. But it is just as clear that white-supremacy continues to maintain an unworkable racial hierarchy. So, we are left with this question: how many Reconstructions can America endure?³⁴⁶ Is this the last chance to save, what may be, a fatally flawed nation-state? To repeat the youth protestor, the *Garner* defense exonerating an officer cannot just “fly by.” Antwon Rose, and other Black victims of police violence, “are human beings.” That is an undeniable truth that the Constitution must, but has yet to, fully recognize.

345. *Id.*

346. See GIL SCOTT-HERON, COMMENT #1 (WHO WILL SURVIVE IN AMERICA) (1970), <https://genius.com/Gil-scott-heron-comment-1-annotated>.

NOTE

None but Ourselves Can Free Our Minds: Analyzing Barriers to the Institutionalization and Ownership of African Traditional Medical Knowledge and Proposing a Pan-African Approach to Nagoya Protocol Compliance

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ABSTRACT

Colonialism gravely impacted the role of African traditional knowledge systems in Modern Africa—especially traditional healing. While traditional healing typically plays a secondary role to biomedicine in African public health facilities and pharmaceutical research efforts, traditional healing is utilized by around 80% of the population throughout Africa. Moreover, pharmaceutical companies based in the Global North continue bioprospecting remedies from traditional healing as well as African flora and fauna at large. Stigmas created by colonial tactics continue to impair the integration of African traditional healing in modern African public health efforts; these tactics include the implementation of biomedical institutions, Witch Ordinances, and unequal access to storefronts for African traditional healers. In attempts to improve African economies, greater integration of traditional medical knowledge into African public health research and development is necessary. Still, the legacy of Western policy – colonial law and global trade law like the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement – continues to impair the capabilities of African governments to embrace indigenous healing. With the adoption of the Nagoya Protocol by the African Union and the naming of a Center of Excellence for Traditional Medicine by the African Network for Drug and Diagnostic Innovation, the African Union must balance its desire to develop systems that promote benefit sharing with the need to increase research and development of Africa’s medicinal plants and traditional healing. This note examines the model of the United States Patent Office’s system of collecting and enforcing patents to suggest that the African Union develop an arm focused on documenting traditional healing practices and using this documentation to advocate for indigenous communities when patents are developed under the TRIPS Agreement using these communities’ traditional knowledge.

I. INTRODUCTION	321
II. AFRICAN TRADITIONAL KNOWLEDGE AND THE NAGOYA PROTOCOL	325
A. Background on African Traditional Healing	326
B. Biopiracy and Background on the Nagoya Protocol	328

III. AFRICAN TRADITIONAL HEALING'S STIGMATIZATION UNDER COLONIAL REGIME	331
IV. POST-COLONIAL BARRIERS TO ENTRY FOR TRADITIONAL HEALING IN INTELLECTUAL PROPERTY	335
A. Background on the TRIPS Agreement and Its Provisions	336
B. The TRIPS Agreement and the Rights Related to African Indigenous Knowledge	338
i. The Case of Rosy Periwinkle	341
ii. The Case of the Hoodia	341
iii. The Case of Endod Berry	342
iv. Other Potential Cases of Biopiracy in Africa ...	343
V. BENEFIT SHARING AND CHALLENGES WITH BENEFIT SHARING RELATED TO INDIGENOUS PLANTS AND HEALING REMEDIES.....	344
VI. THE AFRICAN NETWORK FOR DIAGNOSTIC AND DRUG INNOVATION (ANDI)	347
VII. CREATING A PAN-AFRICAN LEGAL FRAMEWORK TO PROMOTE BENEFIT SHARING.....	350
VIII. CONCLUSION.....	352

I. INTRODUCTION

With the continued globalization of agreements involving benefit sharing and traditional medicine research, there is a need to create a system designed to promote equitable benefit sharing. In 2010, traditional healing gained notability with the introduction of the Nagoya Protocol, an international framework for implementing fair and equitable sharing of benefits arising from the utilization of genetic resources – including traditional knowledge.¹ The World Health Organization (“WHO”) also developed the African Network for Drugs and Diagnostics Innovation (“ANDI”) to promote health inno-

1. *History, CONVENTION ON BIOLOGICAL DIVERSITY*, <https://www.cbd.int/abs/background> (last visited Sept. 25, 2020); Roger Chennells, *Traditional Knowledge and Benefit Sharing After the Nagoya Protocol: Three Cases from South Africa*, 9/2 *LAW, ENV'T & DEV. J.* 163, 166 (2013).

vation throughout Africa.² ANDI named a center of excellence in traditional medicine research, the Institute of Medical Research and Medicinal Plants Studies (“IMPM”) in Cameroon, West Africa.³ As African nations seek to safeguard their indigenous traditional healing practices, there is a need for a legal framework to prevent the use of traditional knowledge without conferring the benefits of recognition, compensation or protection to indigenous and rural communities.

Colonialism and the institution of biomedicine impaired the value given to African traditional healing in Modern African public health systems and amongst African public health and medical leaders.⁴ Although traditional medicine is not heavily regulated, it remains actively used by around 80% of the population throughout Africa.⁵ Moreover, pharmaceutical companies based in the Global North continue bioprospecting remedies from traditional healing, as well as African flora and fauna at large.⁶ Colonial tactics, such as implementation of biomedical institutions, Witch Ordinances, and unequal access to storefronts for African traditional healers, fostered the marginalization of traditional healing in modern African public health efforts.⁷ Utilizing Christianity and Western education, traditional healing was relegated by colonists as an archaic practice associated with evil and witchcraft.⁸ These tools were used to downgrade tradi-

2. *About ANDI CoE for Malaria Diagnosis*, ANDI CTR. OF EXCELLENCE FOR MALARIA DIAGNOSIS, <https://andimalariacentre.org/about-andi-coe-for-malaria-diagnosis/> (last visited Mar. 23, 2009).

The ANDI Centre of Excellence for Malaria diagnosis is a research platform in the College of Medicine, University of Lagos, Idi-Araba, Lagos, that was conceptualized to provide leadership in malaria research using the power of diagnostics that could be deployed in research, diseases surveillance, case management, drugs, vaccine and diagnostic trials in the area of malaria. ANDI as an acronym is African Network for drugs and Diagnostic Initiative – a directorate arm of the World Health Organization (WHO).

3. *Id.*; see also WORLD HEALTH ORGANIZATION & SPECIAL PROGRAMME FOR RESEARCH AND TRAINING IN TROPICAL DISEASES, STRATEGIC AND BUSINESS PLAN FOR THE AFRICAN NETWORK FOR DRUGS AND DIAGNOSTICS INNOVATION (ANDI), (Jan. 2009) https://www.who.int/tdr/publications/documents/sbp_andi.pdf?ua=1.

4. Ali Arazeem Abduhalli, *Trends and Challenges of Traditional Medicine*, 8 AFR. J. TRADITIONAL, COMPLEMENTARY & ALT. MED. 115, 116 (2011).

5. *Id.*; Oyinlola Oyebode, Ngianga-Bakwin Kandala, Peter J. Chilton & Richard J. Lilford, *Use of Traditional Medicine in Middle-Income Countries: a WHO-SAGE Study*, 31 HEALTH POL’Y & PLAN. 984, 985 (2016).

6. See Antony Barnett, *The New Piracy: How West ‘Steals’ Africa’s Plants*, GUARDIAN (Aug. 27, 2006), <https://www.theguardian.com/science/2006/aug/27/plants.theobserversuknewspages>.

7. See Abduhalli, *supra* note 4; see also Karen Flint, *Indian–African Encounters: Polyculturalism and African Therapeutics in Natal, South Africa, 1886–1950s*, 32 J. S. AFR. STUD. 367, 379 (2006).

8. See Abduhalli, *supra* note 4; see also Fidelis Nkomazana & Senzokuhle Doreen Setume, *Missionary Colonial Mentality and the Expansion of Christianity in Bechuanaland Protectorate*,

tional healing and gravely impacted the place of traditional healing in a post-Colonial state, where African countries declared political independence from the Western world. However, African countries remain handicapped to the West's pharmaceuticals and biomedical knowledge in their public health institutions.⁹

In an attempt to achieve true independence and an autonomous health system, African nations must not only integrate traditional medical knowledge into African pharmaceutical and research development, but also develop a legal framework that promotes benefit sharing with the communities from which this knowledge comes. The African Network for Drugs and Diagnostic Innovation created a Pan-African approach to funding, expanded drug-related research and development, and named a center specifically focused on traditional medicine.¹⁰ However, there is a need for the African Union to go a step further to ensure that there is a sharing of the benefits of the research with indigenous groups and traditional healers whose knowledge and caretaking of plants makes these pharmaceutical innovations and bioprospecting possible.

Ideological and social barriers created by Western policy, such as colonial law, global trade law, and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement" or "TRIPS") continue to impair the capabilities of African governments to preserve indigenous healing and adequately share benefits with traditional healers and indigenous groups.¹¹ With the adoption of the Nagoya Protocol by the African Union, there is a need for those governments to establish a legal framework or body where traditional healers and indigenous groups can contest their rights to benefits from patents and profits.¹² Considering the model of the United States Pat-

1800 to 1900, 29 J. STUDY RELIGION 29, 37–40 (2016); see also Kwasi Konadu, *Medicine and Anthropology in Twentieth Century Africa: Akan Medicine and Encounters with (Medical) Anthropology*, 10 AFR. STUD. Q. 45, 51 (2008).

9. See Konadu, *supra* note 8 at 57–59.

10. WORLD HEALTH ORGANIZATION, *supra* note 3; 32 *New African Centres of Excellence Named*, WORLD HEALTH ORGANIZATION (Oct. 31, 2011) [hereinafter *New African Centers*], <https://www.who.int/tdr/news/2011/african-centres-excellence/en/> ("The ANDI centres of excellence are spread across the five sub-regions of Africa and are conducting research and development, and innovation activities on drugs, diagnostics, vaccines, medical devices and traditional medicines" . . . naming the "Institute of Medical Research and Medicinal Plants Studies" as "ANDI Centre of Excellence in Traditional Medicine Research.").

11. *New African Centers*, *supra* note 10; *Report of the IBC on Traditional Medicine Systems and Their Ethical Implications*, UNESCO INT'L BIOETHICS COMM., at 14 (2013), https://unesdoc.unesco.org/ark:/48223/pf0000217457_eng.

12. AFRICAN UNION STRATEGIC GUIDELINES FOR THE COORDINATED IMPLEMENTATION OF THE NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITA-

ent and Trademark Office (“USPTO”), this note proposes the creation of a Pan- African legal framework, whereby the African Union can document and advocate for the rights of indigenous people and thus, benefit in the pharmaceutical innovations that involve Africa’s medicinal plants. As Africa’s medicinal plants begin to play a larger role in health research, this system would serve as a medium to promote traditional healing as a tool for pharmaceutical innovation, publicize and provide benefits for the role that traditional knowledge plays in the pharmaceutical industry and institute the Nagoya Protocol’s guidelines on fair and equitable benefit sharing.

Furthermore, this note will not only discuss the stigmatization of traditional medicine throughout Africa and the social and legal barriers to ownership of this intellectual property under the current global patent regime; it will also utilize the USPTO as a model for the creation of a branch of the African Union that aims to document these traditional practices and create a foundation for later claims to benefits for the communities that utilize these practices. This effort will allow African countries to safeguard the intellectual wealth of their traditional healing practices, while also creating a medium through which African countries can achieve independence from their former colonizers’ pharmaceutical offerings.

Part II will provide a background on the Nagoya Protocol and African traditional healing – exploring the efficacy of traditional healing and its uses before colonialism. Through contextualizing the role of traditional healing throughout history, this note will establish the legitimacy of African traditional healing and highlight the inextricable role that traditional healing plays in the development of modern medical offerings—namely Western biomedicine. Part III will explore its stigmatization during the colonial regime, highlighting the various legal and ideological tools used to relegate it as secondary to biomedicine in African public health systems. In doing so, the article will contextualize the place of traditional healing in today’s medical offerings by showing how it was demoted from its traditional role in African societies.

Part IV will highlight how colonialism and global trade/patent law create barriers to entry for traditional healing, examining the access of the West to African traditional medical knowledge and remedies, as

BLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION, ACCESS BENEFIT SHARING INITIATIVE (2015), http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Pulications/African_Union_Guidelines/AU_Strategic_Guidelines_On_ABS_-_20150215.pdf.

well as the 20-year monopoly that the TRIPS Agreement offers pharmaceutical patent holders. Consequently, this note suggests that the development of global trade law in an era where Western countries have a dominant voice in the negotiation of such law and are dominant players in global trade offerings, resulted in the development of global trade law that is inherently biased towards biomedicine. This biased global trade law neglects to confer benefits to indigenous groups when biomedical innovations result from the knowledge of these groups. Part V will discuss how the development of ANDI expands global stakeholders' involvement in Africa's medicinal plant research. Through analyzing some of the current challenges to traditional healing in Africa, this note will make a case for why a Pan-African legal framework for documenting traditional practices can ensure more equitable benefit sharing, identification of groups with whom benefits should be shared and a greater foundation to base claims for benefit sharing.

Part VI proposes an intra-African agreement for benefit sharing, which equitably confers benefits to traditional healers and indigenous groups for pharmaceutical innovations resultant from their traditional knowledge. This agreement would involve a system whereby African nations can document uses of medicinal plants by indigenous groups and utilize these documented uses to advocate for benefit sharing for these groups when the TRIPS Agreement grants pharmaceutical patents, which arise from research which identifies the biomedical properties that explain the efficacy of prior indigenous uses. This note uses the USPTO's role in documenting and enforcing proposed inventions as a model for this intra-African system designed to set the foundation for claiming benefits for indigenous groups as African medicinal plants play a larger role in global pharmaceutical innovation.

II. AFRICAN TRADITIONAL KNOWLEDGE AND THE NAGOYA PROTOCOL

The World Health Organization defines traditional healing as “the sum total of the knowledge, skill, and practices based on the theories, beliefs, and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical

and mental illness.”¹³ In developing countries, between 60% and 90% of populations rely on traditional healing for health care provision.¹⁴ Reasons for these percentages include its lower cost compared to other biomedical services, accessibility to rural populations who may not have biomedical institutions, and the desire to utilize it because their cultural beliefs.¹⁵ Traditional medicine often entails a wider arrangement of therapies, including medications, manual treatments, and psychological or spiritual treatments.¹⁶ The vast array of offerings in traditional medicine are indicative of the commonly-held belief that “medicine [is] often inseparable from spirituality and connection with the divine, the universe or higher powers.”¹⁷ In rural and low-income communities, traditional healers and spiritual counselors are often the first point of contact for the ill.¹⁸ Ultimately, traditional healing remains ingrained in the “health-seeking behaviors, culture and collective psychology” of the communities in which it is widely practiced – especially developing nations where it often serves as one of the only means of healthcare provision for rural and low-income populations.¹⁹

A. Background on African Traditional Healing

For centuries before colonialism, African ethnic groups practiced unique forms of traditional healing, which utilized spiritualism and Africa’s diverse flora and fauna to provide holistic services.²⁰ Through centuries of navigating disease on the African continent, ethnic groups developed large bodies of knowledge on herbal remedies.²¹ Because African traditional healing is an oral tradition and non-Africans typically record the traditions via anthropological accounts, early

13. *Traditional, Complementary and Integrative Medicine*, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/traditional-complementary-and-integrative-medicine#tab=tab_1 (last visited Oct. 29, 2020).

14. UNESCO INT’L BIOETHICS COMM., *supra* note 11, at 3.

15. *Id.* at 9–10.

16. *Id.* at 4.

17. Clay Jones, *Honoring Traditional Healing Practices in Global Health*, DUKE GLOB. HEALTH INST. (Nov. 30, 2016), <https://globalhealth.duke.edu/news/honoring-traditional-healing-practices-global-health>.

18. *Id.*

19. *Id.*; Oyebode et al., *supra* note 5, at 985.

20. Maboe Mokgobi, *Understanding Traditional African Healing*, 20 AFR. J. PHYSICAL EDUC. RECREATION & DANCE 24, 28 (2014); see Adam Ashforth, *Muthi, Medicine and Witchcraft: Regulating ‘African Science’ in Post Apartheid South Africa?*, 31 SOC. DYNAMICS: A J. AFR. STUD. 211, 212–216 (2005).

21. See M. Fawzi Mahomoodally, *Traditional Medicines in Africa: An Appraisal of Ten Potent African Medicinal Plants*, 2013 EVIDENCE-BASED COMPLEMENTARY & ALT. MED., at 2–9 (2013), <https://www.hindawi.com/journals/ecam/2013/617459/>.

None but Ourselves Can Free Our Minds

accounts of traditional healing are often associated with witchcraft and superstition.²² However, traditional healing has proven effective in curing diseases in Africa, even in cases where European medical knowledge could not find remedies.²³ Variolation, the pre-cursor for vaccination, was even brought to the United States by a Ghanaian slave who taught it to his master.²⁴

Not only did traditional African healing have efficacy in improving conditions of the ill and produce notable contributions to modern medical practices, it was also highly intertwined with African spirituality. Some practices involved in traditional African healing included: counseling individuals around their spiritual life, erecting shrines, and conducting tributes to ancestors that incorporated dancing and musical performances.²⁵ The connection between healing and spirituality is rooted in a common understanding amongst many African ethnic groups that issues in the spiritual world, including the displeasure of spirits and ancestors with actions taken in the physical world, impact the health of individuals.²⁶

Traditional healing is typically passed down as an oral tradition.²⁷ Healers typically undergo apprenticeships with experienced healers to inherit the wealth of knowledge encompassed in the practice and then serve as guardians of this traditional knowledge; these apprenticeships can span months or years and requires the apprentice to live with the healer who is training him or her.²⁸ As traditional healing is typically passed down orally, early European accounts of African traditional

22. Donna Maier, *Nineteenth-Century Asante Medical Practices*, 21 *COMP. STUD. SOC'Y & HIST.* 63 (1979).

23. *See Id.* at 63–64, 66 (1979); *see also* WILLEM BOSMAN, *NEW AND ACCURATE DESCRIPTION OF THE COAST OF GUINEA*, 221, 224 (1705).

24. Maier, *supra* note 22, at 70.

25. *See* Neil Kodesh, *History from the Healer's Shrine: Genre, Historical Imagination, and Early Ganda History*, 49 *COMP. STUD. SOC'Y & HIST.* 527, 538–40 (2007) (discussing the role of shrines, drumming, dancing, spiritual tribute like sacrifices and spiritual counseling in the Ganda Kingdom of East Africa).

26. Phillip Kubukeli, *Traditional Healing Practices Using Medicinal Herbs*, 354 *LANCET* 24 (1999). *See* Kola Abimbola, *Medicine and Culture: Transcultural Needs in Modern Western Societies*, 13 *AMA MED. & LEGAL J.* 112, 114–17 (2007).

27. *See generally* Valentine U. Iheanacho, *The significance of African oral tradition in the making of African Christianity*, 77 *HTS THEOLOGICAL STUD.* (2021) <https://hts.org.za/index.php/hts/article/view/6819/19979> (stating that “African oral tradition is visible primarily through . . . traditional medicines”); KAREN FLINT, *HEALING TRADITIONS: AFRICAN MEDICINE, CULTURAL EXCHANGE, AND COMPETITION IN SOUTH AFRICA, 1820-1948*, at 163 (2008) (categorizing Zulu traditional knowledge on healing as an oral tradition in differentiating between Indian and Zulu traditional healing).

28. Mokgobi, *supra* note 20.

healing have played a large role in modern understandings of the practice.²⁹

Ultimately, anthropology and other accounts of traditional healing presented knowledge on traditional healing, and African people, largely in a way that perpetuated the narrative of Africans and their medical knowledge as “primitive and inferior.”³⁰ In doing so, those accounts justified a need for Africans to be educated and acculturated with the ways of knowing in the specific colonizing nation, whether it be England, France, the Netherlands or other European countries.³¹ Such an inequitable representation of traditional healing is further exacerbated representations of the “black body” or “African body” as diseased.³² Simultaneously, the narrative of Africans and African knowledge as inferior promoted the reappropriation of African traditional medical knowledge by non-Africans.³³ Consequently, this reappropriated African traditional medical knowledge allows non-Africans to commercially capitalize on this knowledge, without any accountability to the Africans from whom the knowledge originated.³⁴

B. Biopiracy and Background on the Nagoya Protocol

Since the 1970s, the WHO and the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) have been interested in integrating traditional healing to strengthen global health.³⁵ In a 2019 report, the WHO found that 80% of countries in the WHO’s Africa and Southeast Asia region had some national or state-level laws and regulations for traditional and complementary medicine.³⁶ With continued globalization and the influence of emerging global intellectual property and trade law, traditional healing has been assim-

29. See Flint, *supra* note 26, at 32–36.

30. *Id.* at 22.

31. Carolyn Sargent & Stéphanie Larchanché, *Disease, Risk, and Contagion: French Colonial and Postcolonial Constructions of “African” Bodies*, 11 J. BIOETHICAL INQUIRY 455, 459 (2014).

32. *Id.* at 455.

33. See generally, Kubukeli *supra* note 26.

34. Abduhalli, *supra* note 4, at 117.

35. Tim K. Mackey & Bryan A. Liang, *Integrating Biodiversity Management and Indigenous Biopiracy Protection to Promote Environmental Justice and Global Health*, 102 AM. J. PUB. HEALTH 1091, 1092 (2012).

36. WHO GLOBAL REPORT ON TRADITIONAL AND COMPLIMENTARY MEDICINE 2019, WORLD HEALTH ORGANIZATION (2019), <https://www.who.int/traditional-complementary-integrative-medicine/WhoGlobalReportOnTraditionalAndComplementaryMedicine2019.pdf>.

lated into biomedicine through tactics that involve the bioprospecting of plants and traditional healing remedies.³⁷

Bioprospecting is the process by which biological resources undergo scientific testing to identify their chemical and biomedical value for treating ailments.³⁸ Bioprospecting can be of excellent value for indigenous communities because it adds economic value to their resources.³⁹ However, bioprospecting can have negative impacts when it results in biopiracy, wherein entities gain exclusive use of biological resources without conferring benefits to those from whom the knowledge or biological resources originates.⁴⁰

The term “biopiracy” was first coined by Pat Mooney, the president of the Rural Advancement Foundation International (“RAFI,” now the ETC Group), and refers specifically to “the use of intellectual property systems to legitimize the exclusive ownership and control of biological resources and knowledge, without recognition, compensation or protection for contributions from indigenous and rural communities.”⁴¹ Traditional medicine may be especially susceptible to biopiracy, given that the traditions are orally passed down.⁴² This oral nature of the tradition often leads to a lack of documentation of the ownership of that knowledge.⁴³

The Nagoya Protocol is a legal framework for governments developed by the Convention on Biological Diversity, an international agreement adopted in 1992 with signatures from 168 nations.⁴⁴ The goal of the Nagoya Protocol is to provide greater protection, legal backing and transparency to genetic resources in order to promote more equitable benefit-sharing for indigenous groups and developing

37. Mackey & Liang, *supra* note 31.

38. Joseph Millum, *How Should the Benefits of Bioprospecting be Shared?*, 40 HASTINGS CTR. REP. 24, 24–25 (2016).

39. Mackey & Liang, *supra* note 31.

40. *Id.* at 1091.

41. Gian Carlo Delgado, *Biopiracy and Intellectual Property as the Basis for Biotechnological Development: The Case of Mexico*, 16 INT’L J. POL., CULTURE & SOC’Y 297, 299 (2002).

42. Jay Erstling, *Using Patents to Protect Traditional Knowledge*, 15 TEX. WESLEYAN L. REV. 295, 296 (2009).

43. *Id.*; *see generally*, Delgado, *supra* note 41, at 299.

44. *About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/abs/about/> (last visited Sept. 25, 2020); *see also* *Convention on Biological Diversity*, CROPLIFE.ORG, <https://croplife.org/plant-biotechnology/convention-on-biological-diversity/> (last visited Sept. 25, 2020); *see generally* *Text of the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY [hereinafter *Text of Nagoya Protocol*], <https://www.cbd.int/abs/text/> (last visited Sept. 25, 2020); Mackey & Liang, *supra* note 33, at 1093.

countries.⁴⁵ The term ‘genetic resources’ refers to “any material of plant, animal, microbial or other origin containing functional units of heredity.”⁴⁶ The Nagoya Protocol sets out core obligations related to accessing these genetic resources,⁴⁷ benefit-sharing from those resources,⁴⁸ compliance with domestic and regulatory legislation,⁴⁹ and contractual terms related to benefit sharing.⁵⁰ In many ways, the Nagoya Protocol serves as a guideline to help countries develop a regulatory infrastructure to preserve genetic resources and encourage benefit sharing.⁵¹

At the twenty-fifth Ordinary Session of the Assembly of the African Union, the member-states of the African Union adopted the African Union Strategic Guidelines for the Coordinated Implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.⁵² This guideline was an effort on the part of the African Union to promote the adoption of the Nagoya Protocol by its member states;⁵³ set guidelines for benefit sharing amongst indigenous communities;⁵⁴ and garner financial and technical support internally from its member states, adjoining bodies, and external partners.⁵⁵ The Nagoya Protocol also focuses on encouraging member states to implement regulations aimed at preserving traditional knowledge related to genetic resources through ensuring that those utilizing such knowledge have prior informed consent or approval and involvement.⁵⁶ Thus far, forty-one countries in Africa have ratified the Nagoya Protocol.⁵⁷

45. CONVENTION ON BIOLOGICAL DIVERSITY, *supra* note 44; *see generally* Text of Nagoya Protocol, *supra* note 44.

46. *Genetic Resource*, INFORMEA, <https://www.informea.org/en/terms/genetic-resource> (last visited Sept. 25, 2020).

47. The Convention on Biological Diversity, The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, art. 6, U.N. K3488 .A48 2011, [hereinafter *The Nagoya Protocol*]; *see generally* Text of Nagoya Protocol, *supra* note 44.

48. *Id.* at art. 5.

49. *Id.* at art. 6.

50. *Id.* at art. 12 (3)(c).

51. *Id.* at art. 1.

52. ACCESS BENEFIT SHARING INITIATIVE, *supra* note 12, at 1.

53. *Id.*

54. *Id.* at 9

55. *Id.* at 5.

56. ACCESS BENEFIT SHARING INITIATIVE, *supra* note 12, at art. 16.

57. *Parties to the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/abs/nagoya-protocol/signatories/> (last visited Sept. 25, 2020).

These countries include Ghana, South-Africa, Cameroon, Rwanda and the Democratic Republic of the Congo.⁵⁸

The adoption of the Nagoya Protocol by the African Union is a big step towards better recognizing the contributions of African traditional healers and indigenous groups to pharmaceutical innovation. However, colonialism gravely relegated traditional medical practices out of public institutions.⁵⁹ This relegation not only left Africa to recognize only recently the worth of its indigenous groups' traditional medical knowledge but also created inherent ideological barriers which stigmatize traditional healing in modern Africa even in lieu of its recent recognition as a valuable tool of pharmaceutical innovation.⁶⁰

III. AFRICAN TRADITIONAL HEALING'S STIGMATIZATION UNDER COLONIAL REGIME

Colonization had a deleterious impact on the place of the African Indigenous Knowledge System ("AISK"), which is the collective way in which different African ethnic groups have come to understand themselves in relation to their surroundings and how they organize this knowledge to enhance their lives.⁶¹ Utilizing religion and instituting Western systems of learning, European colonizers strove to undermine AISK to further the colonial agenda.⁶² One of the most prominent European colonizers, King Leopold the II, even said:

Evangelize the niggers so that they stay forever in submission to the white colonialists, so they never revolt against the restraints they are undergoing. Recite every day – 'Happy are those who are weeping because the kingdom of God is for them.' Convert always the blacks by using the whip. . . Teach the niggers to forget their heroes and to adore only ours.⁶³

To best understand the role colonization played in undermining AISK, it is important to examine it alongside the concept of epistemic

58. *Id.*

59. Abdullahi, *supra* note 4, at 115.

60. *Id.* at 116.

61. Njoki Nathani Wane, *African Indigenous Knowledge: Claiming, Writing, Storing, and Sharing the Discourse*, 40 J. THOUGHT 27, 30–33 (2005).

62. Hassan O. Kaya & Yonah N. Seleti, *African Indigenous Knowledge Systems and Relevance of Higher Education in South Africa*, 12 INT'L EDUC. J.: COMPAR. PERSP. 30, 36 (2013); Francis Adyanga Akena, *Critical Analysis of the Production of Western Knowledge and Its Implications for Indigenous Knowledge and Decolonization*, 42 J. BLACK STUD. 599, 607–08 (2012).

63. GREGORY GORDON, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION 3 (2017).

injustice. Epistemic injustice is a term coined by philosopher Miranda Fricker.⁶⁴ Episteme is the Greek word for knowledge.⁶⁵ It was used by philosopher Michael Foucault to describe the pre-existing knowledge upon which a discourse is developed—a way of knowing.⁶⁶ Epistemic injustice concerns the harm done to someone in their capacity as a knower.⁶⁷ Fricker denotes two kinds of epistemic injustice: testimonial and hermeneutic injustice.⁶⁸ Testimonial injustice involves the use of prejudice to undermine the value of what a speaker has to say.⁶⁹ Hermeneutic injustice involves structural marginalization of a group's knowledge from the collective, and a normative body of knowledge impairs a group's ability to make sense of their knowledge.⁷⁰ In understanding the impact of colonization on the AISK, it is vital to understand hermeneutic injustice. One area of AISK gravely impacted by colonialism was traditional healing.⁷¹

Early colonial writing indicates the efficacy of traditional healing remedies, and early colonial doctors learned from traditional healers to better understand diseases in the context of the African continent.⁷² While early colonists saw the value of traditional healing, colonialism ultimately stigmatized traditional healing as witchcraft because of its connection to African spirituality.⁷³ Simultaneously, colonialism promoted biomedicine as the framework for African public health institutions.⁷⁴ Such a framework created a medical pluralism throughout Africa. Medical pluralism is “the employment of more than one medical system or the use of both conventional medicine and [complementary and alternative medicine] for health and illness.”⁷⁵ In other words, Africans use multiple systems of heal-

64. Morten Fibieger Byskov, *What Makes Epistemic Injustice an “Injustice,”* 52 J. SOC. PHIL. 117–18 (2020).

65. MARIE KLAGES, KEY TERMS IN LITERARY THEORY, at 26–27 (2012).

66. KLAGES, *supra*, note 60, at 27.

67. Byskov, *supra* note 59, at 114.

68. *Id.* at 115.

69. *Id.*

70. *Id.*

71. Abduhalli, *supra* note 4, at 117–18.

72. See Maier, *supra* note 22, at 63–64, 66 (1979).

73. Abduhalli, *supra* note 4, at 117–18.

74. Abduhalli, *supra* note 4, at 116–17.

75. Mosa Moshabela, Dominic Bukenya, Gabriel Darong, Joyce Wamoyi, Estelle McLean, Morten Skovdal, William Ddaaki, Kenneth Ondeng'e, Oliver Bonnington, Janet Seeley, Victoria Hosegood & Alison Wringe, *Traditional Healers, Faith Healers and Medical Practitioners: The Contribution of Medical Pluralism to Bottlenecks Along the Cascade of Care for HIV/AIDS in Eastern and Southern Africa*, 93 SEXUALLY TRANSMITTED INFECTIONS 1 (2017).

ing to alleviate ailments.⁷⁶ Africa's pluralistic health offerings include traditional healing, Western medicine, and faith-based healing.⁷⁷

In further discussion of the stigma around traditional healing, it is important to discuss the impacts of religion and Western education. The evangelization of Africans relegated traditional healing as secondary to biomedicine. By converting Africans to Christianity, missionaries also promoted their cultural practices among Africans.⁷⁸ Understanding the role that healers played in encouraging the practice of African spirituality, missionaries challenged the role of healers by providing alternative healthcare options; additionally, they would encourage leaders to limit the traditional healers' practice.⁷⁹ Missionaries also utilized intimidation to convert Africans; although, some converted on their own.⁸⁰ Some colonized African states had policies that forced Africans to adopt Christian names in attempts to access primary education.⁸¹

Colonists utilized education as a tool to undermine traditional healing.⁸² Colonists would use public education by missionaries to discourage traditional practices—even those that positively impacted health, like birth spacing practices in the Congo.⁸³ Also, colonist set up health training institutions that created an African workforce that ultimately promoted Western medicine amongst the indigenous population. The African workforce was only equipped with enough education to serve as assistants to European health practitioners.⁸⁴ Some governments would also amalgamate the traditional healing workforce by providing Western medical training to traditional healers—namely, traditional birth attendants.⁸⁵

76. Moshabela et al., *supra* note 54, at 1; Chun-Chuan Shih, Yi-Chang Su, Chien-Chang Liao & Jaung-Geng Lin, *Patterns of Medical Pluralism Among Adults: Results from the 2001 National Health Interview Survey in Taiwan*, 10 BMC HEALTH SERV. RES. 191, 191–92 (2010).

77. Moshabela et al., *supra* note 54, at 1; *see generally* WILLIAM OLSEN & CAROLYN SARGENT, *AFRICAN MEDICINE PLURALISM* (2017).

78. Flint, *supra* note 26, at 101.

79. Flint, *supra* note 26, at 102.

80. Mokgobi, *supra* note 20, at 26.

81. *Id.*

82. Nancy Rose Hunt, 'Le Bebe en Brousse': *European Women, African Birth Spacing and Colonial Intervention in Breast Feeding in the Belgian Congo*, 21 INT'L J. AFR. HIST. STUD. 401, 426 (1988).

83. *Id.*

84. Danwood M. Chirwa, *Access to Medicines and Health Care in SubSaharan Africa: A Historical Perspective*, 31 MD J. INT'L L. 21, 28 (2017).

85. *See* STACEY A. LANGWICK, *BODIES, POLITICS, AND AFRICAN HEALING: THE MATTER OF MALADIES IN TANZANIA* 121–48 (2011).

Colonists also used policy and policing as a tool to limit the practice of traditional healers. Some governments barred traditional healing by instituting witchcraft bans.⁸⁶ In South Africa, governments created licensing programs to regulate who was allowed to engage in traditional healing, only licensing those they felt posed the least risk to colonial goals.⁸⁷ The government also barred the use of urban storefronts to sell traditional herbal remedies, known as *muthi*.⁸⁸ Karen Flint describes the unequal access to urban storefronts for Africans under the Apartheid government, where Africans and Indians were not allowed to buy property:

Indian *muthi* shop owners, however, had a distinct commercial advantage over their African counterparts. Although the white government restricted African and Indian purchase of property, Indians could generally obtain shops closer to the city or town centre and, more importantly, near major transport hubs. Under apartheid, the Group Areas Act (1950), designated Indian areas adjacent to railway stations in both downtown Durban and Pietermaritzburg. Apartheid administrators forced African merchants out of the cities and into African townships, where they serviced a local rather than a metropolitan clientele. The restrictions placed on hawkers and African merchants successfully minimised competition for Indian *muthi* shops. By the mid-1980s, Indian *muthi* shops had prospered to such an extent that the Sunday Tribune reported some 100 such outlets in Durban's Grey Street area.⁸⁹

Through impairing African's ability to access land and practice spirituality, colonist legally and ideologically undermined the efficacy, ethics and core tenets of African traditional healing; these tenets include spiritualism, community and holistic healing.⁹⁰ Consequently, colonizers fostered long-lasting social, economic and political barriers to instituting traditional healing. The effort to institute traditional healing throughout Africa rests on rebuilding the reputation of traditional healing as more than just a tool of low-income, rural communities. Traditional healing must be rebranded as a viable source of medical knowledge—not only for Africa, but for the world. Greater utilization of traditional healing in national and regional efforts to advance medical research and development throughout Africa would

86. Abduhalli, *supra* note 4, at 116–17.

87. Flint, *supra* note 26, at 107–08.

88. Flint, *supra* note 26, at 153.

89. Flint, *supra* note 7, at 379.

90. *Id.* at 381.

provide African countries with the opportunity to establish a larger impact on the broader medical discourse.

The relegation of traditional healing in colonial Africa alongside the simultaneous institution of biomedicine promoted biomedicine throughout Africa and ultimately, the world. With biomedicine as the revered way-of-knowing to resolve health related issues, global systems were built with only the biomedical episteme of healing in mind.⁹¹ In many ways, the colonial stigmatization of traditional healing cast traditional healers as unworthy of being a part of the development of public systems related to health and, consequently, led to various post-colonial barriers to the institution of traditional healing, especially in the realm of intellectual property.

IV. POST-COLONIAL BARRIERS TO ENTRY FOR TRADITIONAL HEALING IN INTELLECTUAL PROPERTY

The introduction of Western ideology in Africa resulted in the disenfranchisement of traditional healing. This disenfranchisement slowed down the development of traditional healing and created a stigma that impairs the consideration given to traditional medicine in post-colonial efforts to improve African health systems and research.⁹² Specifically, this stigma impairs the ability of traditional and biomedical health practitioners to work together because of the distrust resultant from the difference in understandings of efficacy inherent within the practices, respectively.⁹³ In biomedicine, things must be biologically, chemically and medically proven versus traditional healing where efficacy is based on holistic efforts involving spirituality, trial and error-based herbalism and so on.⁹⁴ The lack of development of traditional healing during the colonial period is especially daunting for preserving traditional medical knowledge in the current era where global law promotes a framework for ownership of medical knowledge that was developed by “developed nations” and typically favors

91. See Olajuide Oloyede, *Epistemological Issues in the Making of an African medicine Sutherlandia (Lessertia Frutescens)*, 14 *AFRICAN SOCIOLOGICAL REV.* 74, 78, 84 (2010) (stating that biomedicine is charged within the discourse around the hegemony of the Western world and highlighting that even in attempts to generate true knowledge about traditional healing is undermined by the need to legitimize this knowledge through a vocabulary rooted in biomedicine).

92. Abduhalli *supra* note 4, at 116–17.

93. *Id.*

94. *Id.*

those countries and their transnational corporations.⁹⁵ In understanding barriers to traditional healing, it is important to understand intellectual property as well as global trade law—like the TRIPS Agreement, the dominance of Western countries in the enforcement of the TRIPS Agreement and its impacts on the preservation of traditional knowledge.

A. Background on the TRIPS Agreement and Its Provisions

According to the WTO, intellectual property rights are the rights given to individuals for their creations.⁹⁶ Patents are the category of intellectual property that governs pharmaceuticals.⁹⁷ Pharmaceuticals that fit the criteria of global novelty, non-obviousness, and industrial or commercial application are considered patentable.⁹⁸ While countries typically have their own patent regimes specific to individuals looking to patent their drugs locally, globalization set the foundation for the regulation of patenting as a facet of the WTO's agenda.⁹⁹ Resultantly, the TRIPS Agreement was developed at the Uruguay Round of the 'General Agreement on Tariffs and Trade' in 1994 to set out standards for the protection and enforcement of intellectual property rights among member states of the agreement.¹⁰⁰

Drugs patented under the TRIPS Agreement gain exclusive rights to market that drug for a given time, usually twenty-years.¹⁰¹ Such a monopoly can impair access to drugs among developing countries because it prevents such countries from seeking cheaper alternatives.¹⁰² Consequently, the TRIPS Agreement adopted certain

95. Graham Dutfield, *TRIPS and Its Impact on Developing Countries*, SCIDEV.NET, (Jan. 10, 2001) <https://www.scidev.net/global/policy-brief/trips-and-its-impact-on-developing-countries.html>.

96. WHAT ARE INTELLECTUAL PROPERTY RIGHTS?, WTO, https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm (last visited Sept. 25, 2020).

97. Chandra Nath Saha & Sanjib Bhattacharya, *Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry*, 2 J. ADVANCED PHARM. TECH. & RSCH. 88, 89 (2011).

98. *Id.*

99. *Id.*

100. OVERVIEW: THE TRIPS AGREEMENT, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Sept. 25, 2020); see generally, Greg Martin, Corinna Sorenson & Thomas Faunce, *Balancing Intellectual Monopoly Privileges and the Need for Essential Medicines*, 3 GLOBALIZATION & HEALTH (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1904211/>.

101. Martin et al., *supra* note 100.

102. *Id.*

options to aid in accessibility, including parallel importing and compulsory licensing and promotion of generic drugs.¹⁰³

Compulsory licensing occurs when countries authorize local manufacturers to produce a generic version of a patented drug while offering lower compensation to the patent holder.¹⁰⁴ This licensing can pose a challenge for many developing countries that lack such manufacturing capacity.¹⁰⁵ There are many barriers to African nations utilizing compulsory licensing given that Africa imports 80% of its pharmaceuticals, and many African countries have: (1) small fragmented markets; (2) weak regulatory frameworks; (3) companies with little financial capacity; (4) inadequate human resource capacity in the pharmaceutical sector; and (5) little educational incentive to encourage more citizens to enter into the pharmaceutical workforce.¹⁰⁶

Parallel importing is the process by which countries can access on-patent drugs from low-priced manufacturers without the patent holder's permission.¹⁰⁷ While parallel importing is an alternative to expensive drug prices, it can negatively impact international relations, especially when there is a power differential between the country seeking to gain parallel importation and the patent holder.¹⁰⁸ An example of this is South Africa's attempt to utilize parallel importation to access cheaper antiretrovirals.¹⁰⁹ In 1997, the South African government passed legislation to permit parallel imports, which was allowable under the TRIPS Agreement and would allow the country to access cheaper antiretrovirals for its growing HIV-positive population.¹¹⁰ As a result, US government-backed pharmaceutical companies sued South Africa.¹¹¹ Ultimately, the US went on to add South Africa to the US trade watch list due to its decision to prioritize the accessibility of drugs.¹¹²

103. *Id.*

104. *Id.*

105. *Id.*

106. Janet Byaruhanga, *How African Can Manufacture to Meet its Own Pharmaceutical Needs*, UNITED NATIONS (Sept. 4, 2020), <https://www.un.org/africarenewal/magazine/september-2020/how-africa-can-manufacture-meet-its-own-pharmaceutical-needs>.

107. Rajat Acharya & Maria D.C. Garcia-Alonso, *Parallel Imports, Drug Innovation and International Patent Protection: A Policy Game*, 21 J. INT'L TRADE & ECON. DEV. 865, 866 (2012).

108. *U.S. to South Africa: Just Say No*, WIRED (Apr. 25, 2000), <https://www.wired.com/2000/04/u-s-to-south-africa-just-say-no/>.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

African countries face economic, political, and structural barriers to accessing pharmaceuticals and such barriers inhibit the growth of Africa's pharmaceutical sector. African countries continue to import drugs that further supports the dominance of the Western pharmaceutical companies in the global pharmaceutical industry, or better yet, empire. The African pharmaceutical industry's inability to play a larger role in the provision of necessary pharmaceuticals for the continent's disease climate inadvertently serves to perpetuate the dominance of biomedicine further. This dominance of Western pharmaceutical companies in Africa's pharmaceutical market is especially harmful to the growth of a thriving African pharmaceutical industry. This harm is buttressed by the notion that the same pharmaceutical companies who dominate African markets do not benefit share with African stakeholders when they use these stakeholders' genetic resources and knowledge to produce the very drugs they sell and profit from. Furthermore, the inability of global trade law to provide adequate avenues for developing nations to access affordable drugs necessitates the expansion of local pharmaceutical research, development, and distribution on the continent that utilizes traditional knowledge as a tool to achieve this expansion. The economic, political, and structural barriers to African stakeholder's benefiting from their knowledge will be further elaborated on throughout the remainder of the note through practical examples.

B. The TRIPS Agreement and the Rights Related to African Indigenous Knowledge

Global IP law should more consciously focus on safeguarding indigenous knowledge and natural resources of the developing world, especially through the use of benefit sharing. Colonialism halted the development of the Global South, particularly in Africa.¹¹³ It accomplished this through disempowering the episteme/knowledge systems of many of those colonized Southern nations, preventing their accumulation of wealth and access to resources, and forcing those nations to comply with global standards founded in a Eurocentric episteme.¹¹⁴ Colonialism deeply ingrained Eurocentric ideals in Af-

113. Shiraz Dossa, *Slicing Up 'Development': Colonialism, Political Theory, Ethics*, 28 *THIRD WORLD Q.* 887, 888 (2007).

114. Petro du Preez, Labby Ramrathran & Lesley le Grange, *On the Hegemony of International Knowledge in Tier 1 High-Impact Literature: A Meta-Study of Citations in Indilinga*, 73 *J. EDUC.* 4, 6-7 (2018); Brian-Vincent Ijejiaku, *International Law Is Western Made Global Law:*

rica and its local and national workforce through years of social, political, and economic imperialism by its numerous European colonizers.

In that same vein, colonialism gravely impaired the establishment of an African workforce vested in safeguarding Africa's traditional knowledge, and flora and fauna. Savo Helata uses his literature review to describe how the implanting of Eurocentric ideals handicapped African education and, resultantly, the African workforce to Western ways of knowing:

Jansen (1998:109) writes that the failure to increase the number of [B]lack academics and decolonise the curriculum have "left unchallenged the Achilles heel of [previously] white institutions: the kind of knowledge (and therefore authority) which is passed on to African students as unquestionable truth and inscrutable value." The curriculum continues to 'reinforce the prejudice' that there is not much we can learn from Africa, developing countries and the "third world" and that "universal" knowledge rests in the Western world. When Africa appears in the curriculum, it is not more than a 'version of Bantu education. . . students are being taught a curriculum which presumes that Africa begins at the Limpopo, and that this Africa has no intelligentsia worth reading.' Accordingly, most South African academics who teach about Africa rely primarily on Western interpretations of the continent. Knowledge about Africa produced by African academics is largely ignored.¹¹⁵

This far-reaching impact of colonialism is further contextualized by the impact of slavery, colonial policies, and now, a culture of globalization that favors workers trained in developing countries. This context elucidates: (1) the displacement of skilled healers and leaders during slavery; (2) the great esteem placed on biomedical professionals by indigenous people and local educational and medical institutions; (3) lagged access to higher educational opportunities and management job opportunities amongst the indigenous population; and (4) the association of educational institutions in developed na-

The Perception of Third World Category, 6 AFR. J. LEGAL STUD. 337, 340 (2013); Hippolyte Fofack, *Overcoming the Colonial Development Model of Resources Extraction for Sustainable African Development*, BROOKINGS (Jan. 13, 2019), <https://www.brookings.edu/blog/africa-in-focus/2019/01/31/overcoming-the-colonial-development-model-of-resource-extraction-for-sustainable-development-in-africa/>.

115. Savo Heleta, *Decolonisation of Higher Education: Dismantling Epistemic Violence and Eurocentrism in South Africa*, 2016 TRANSFORMATION HIGHER EDUC. 4; see also Heleta *supra* note 115, footnote 7.

At universities in the colonies, 'native' history was devalued while the history of the colonial power was promoted and celebrated. The negative effects of this would remain for many decades after independence.

tions with a reputation of producing intelligent and skillful leaders in public health who end up inadvertently instituting their Western knowledge as the framework for African governmental response to public health concerns.¹¹⁶ In many ways, African countries are left handicapped to the Eurocentric episteme and, consequently, the developing world. Africans are forced to contend their ways of knowing under global regimes which favor Eurocentricity.

While a twenty-year monopoly under the TRIPS Agreement serves the purpose of patent law that is to incentivize innovation, it does not effectively balance this with the public interest in protecting and reaping benefits from African nations' knowledge and natural resources — especially the public interest of indigenous groups and developing nations.¹¹⁷ A twenty-year monopoly on a pharmaceutical may appear fair in the context of capitalism and an ideal world where benefits are conferred to those from that the knowledge stems. However, it is not fair when one considers the lasting legacy of colonialism, which halted the development of indigenous healing as a public institution and provided developed nations with access to plants and indigenous knowledge from developing nations.¹¹⁸

Numerous plants indigenous to Africa were the center of controversy in highly publicized global intellectual property disputes involving biopiracy and large pharmaceutical companies. These plants include periwinkle, which is indigenous to Madagascar but used by ethnic groups in Jamaica to treat diabetes;¹¹⁹ the hoodia, which the Sans in South Africa use to suppress thirst and hunger;¹²⁰ and the endod berry from Ethiopia used for laundry soap and shampoo.¹²¹

116. See Babacar M'Baye, *The Economic, Political, and Social Impact of the Atlantic Slave Trade on Africa*, 11 EUR. LEGACY 607, 611–12 (2006) (noting that the African brain drain begins during the Trans-Atlantic Slave Trade when “skilled Africans of all ages” are exported to the West); see also Adetoyeje Oyeyemi, *Skill, Professionalism, Self-Esteem and Immigration: The Case of Nigerian Physical Therapists*, 3 IRINKERINDO 1 (2004); see also Chirwa *supra* note 79 at 28–29.

117. Zia Qureshi, *Intellectual Property, Not Intellectual Monopoly*, BROOKINGS (July 11, 2018), <https://www.brookings.edu/opinions/intellectual-property-not-intellectual-monopoly/>.

118. John L. Trotti, *Compensation Versus Colonization: A Common Heritage Approach to the Use of Indigenous Medicine in Developing Western Pharmaceuticals*, 56 FOOD & DRUG L.J. 367 (2001).

119. Chidi Oguamanam, *Drawn Out Battle Over Genetic Resources Dampens Africa's Hopes*, CONVERSATION (Apr. 25, 2016), <https://theconversation.com/drawn-out-battle-over-genetic-resources-dampens-africas-hopes-57289>; Chris Kilham, *Rosy Periwinkle: A Life Saving Plant*, FOX NEWS (July 31, 2013), <https://www.foxnews.com/health/rosy-periwinkle-a-life-saving-plant>.

120. Oguamanam, *supra* note 119; Matthew McGarry, *Desert Diet Inspired by Africa*, ABC NEWS (Jan. 7, 2006, 11:50 AM), <https://abcnews.go.com/WNT/story?id=129526&page=1>.

121. Oguamanam, *supra* note 119; James O. Odek, *Bio-Piracy: Creating Proprietary Rights in Plant Genetic Resources*, 2 J. INTELL. PROP. L. 141, 146 (1994).

i. The Case of Rosy Periwinkle

Rosy Periwinkle (*Catharanthus roseus*) is a perennial plant indigenous to Madagascar.¹²² It was widely spread throughout the world after French explorers of Madagascar took it to Europe in the 18th century — giving the developed world access to the plant.¹²³ Gordon Svoboda, a medical researcher for Eli Lilly, extracted its curative alkaloids — vincristine and vinblastine — for use in cancer, Hodgkinson’s disease, and other diseases.¹²⁴ In the case of Eli Lilly’s cancer patent, a Jamaican group, whose use of periwinkle in a tea to treat diabetes sparked bioprospecting of the plant, could not challenge Eli Lilly’s patent because they did not have a claim to the extracted molecule nor the new use.¹²⁵ Moreover, Eli Lilly sourced periwinkle from plantations in southern Madagascar without paying any royalties to the country from its acquiring of the plant.¹²⁶ This same drug made around 400 million dollars before its patent expiry.¹²⁷

ii. The Case of the Hoodia

The hoodia is a leafless succulent from the Kalahari Desert in South Africa.¹²⁸ It is abundant in Africa’s southern region and used by members of the San ethnic group to depress hunger and thirst while hunting.¹²⁹ The San’s use of hoodia sparked a further investigation into the hoodia’s biochemical properties by the Council of Scientific and Industrial Research (“CSIR”).¹³⁰ Using state resources, the CSIR identified and isolated the active ingredient, P57, which fostered appetite suppression.¹³¹ P57 works by mimicking the effects that glu-

122. Raymond Cooper & Jeffery Deakin, *Africa’s Gift to the World*, ROYAL SOC’Y CHEMISTRY (Dec. 20, 2015), <https://edu.rsc.org/feature/africas-gift-to-the-world/2000064.article>.

123. *Rosy Periwinkle*, SMITHSONIAN EDUC., <http://www.smithsonianeducation.org/migrations/zoofood/rosper.html> (last visited Oct. 10, 2021).

124. Joseph Mercola, *Why so Many Cancer Drugs Are Made from Periwinkle*, ORGANIC CONSUMER’S ASS’N (Dec. 31, 2018), <https://www.organicconsumers.org/news/why-so-many-cancer-drugs-are-made-periwinkle>; BENJAMIN D. NEIMARK, BIOPROSPECTING AND BIOPIRACY IN THE INTERNATIONAL ENCYCLOPEDIA OF GEOGRAPHY: PEOPLE, THE EARTH, ENVIRONMENT, AND TECHNOLOGY 4 (2016).

125. Kilham, *supra* note 119.

126. NEIMARK *supra* note 124.

127. *Id.*

128. Lere Amusan, *Politics of Biopiracy: An Adventure into Hoodia/ Xhoba Patenting in Southern Africa*, 14 AFR. J. TRADITIONAL COMPLEMENTARY & ALT. MED. 103 (2017).

129. *Id.*

130. *Id.*

131. Pusch Commey, *The New Scramble for Africa: Biopiracy: Africa is Losing Billions of Dollars Through the Filching of the Continent’s Biodiversity by Powerful Western Companies and Individuals. Here, We Unearth How the Stealing from Africa of Centuries Old Indigenous Knowl-*

cose has on nerve cells in the brain such that it causes the body to believe it is full.¹³²

After discovering P57, CSIR subsequently negotiated with a United Kingdom-based company, Phytopharm, which quickly sought a patent and licensed the patent to a U.S. pharmaceutical company, Pfizer.¹³³ While Phytopharm was aware of the San's prior use, they proceeded with the patent process as CSIR informed them that the San ethnic group was extinct.¹³⁴ CSIR assumed they were extinct on the basis that there were only a few hundred Sans "bushmen" left in South Africa itself, living in isolated areas, and who were very hard to contact.¹³⁵ In 1999, the Sans people challenged the patent taken out by CSIR, Phytopharm, and Pfizer.¹³⁶ Their attorney, Roger Chennels, negotiated royalties from Pfizer after a prolonged battle.¹³⁷ The agreement entailed the San people helping to cultivate the hoodia and Pfizer providing millions of dollars annually, including jobs and scholarships, to the community of around 100,000 San people spread out over the Kalahari desert.¹³⁸

iii. The Case of Endod Berry

The endod berry is a perennial plant that has been cultivated for centuries in Ethiopia and is also called "soapberry."¹³⁹ Throughout Ethiopia, it is used as a shampoo and laundry detergent.¹⁴⁰ It is also used in the treatment of schistosomiasis.¹⁴¹ After scientists found a correlation between where endod berries were used to wash clothes and a lack of aquatic sales, research began to understand the berries' property better.¹⁴² The University of Toledo subsequently patented

edge of Local Resources (Plants, Herbs, Seeds, Livestock Germ, Etc), Is Increasingly Becoming the New Scramble for Africa, NEW AFR. (Dec. 2003), <https://www.questia.com/magazine/1G1-111800832/the-new-scramble-for-africa-biopiracy-africa-is>.

132. McGarry, *supra* note 120.

133. Commey, *supra* note 125; Antony Barnett, *In Africa the Hoodia Cactus Keeps Men Alive. Now Its Secret Is 'Stolen' to Make Us Thin*, GUARDIAN (June 17, 2001, 06:41 EDT), <https://www.theguardian.com/world/2001/jun/17/internationaleducationnews.businessofresearch>.

134. Commey, *supra* note 125.

135. Barnett, *supra* note 127.

136. McGarry, *supra* note 120.

137. *Id.*

138. *Id.*

139. Odek, *supra* note 121.

140. *Id.*

141. Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT'L L. 919, 923 (1996).

142. *Id.*

an endod-berry-derivative.¹⁴³ The derivative stops zebra mussel invasion in the Great Lakes, which typically inhibited water supply and threatened marine life.¹⁴⁴ Ethiopia and the ethnic groups which maintained the plant received no profit from the newly patented drug.¹⁴⁵

iv. Other Potential Cases of Biopiracy in Africa

A report by the Edmond Institute, in collaboration with the African Centre for Biosafety, highlighted other potential cases of biopiracy.¹⁴⁶ Amongst thirty-six examples of medicine and other products made from natural resources of Africa, many of the cases involved research and biotechnology companies that used African traditional knowledge without prior consent from or benefit sharing with the indigenous knowledge holders.¹⁴⁷ Bayer patented a microbe from Lake Ruiru in Kenya in the US, Europe, and Australia.¹⁴⁸ A Libyan medicinal plant called *Artemesia Judaica* was patented in the US as a diabetes treatment by Phytopharm.¹⁴⁹ Glaxo-SmithKline patented a streptomyces strain isolated from a termite hill in the Gambia for anti-fungal and immunosuppressant.¹⁵⁰ Merck patented a fungus found in the dung of giraffes from Namibia in the US.¹⁵¹

Sutherland Maciver patented proteins produced by an amoeba from Mauritius in the US.¹⁵² Option Biotech patented the seeds of a Congolese plant called *Aframomum stipulatum* for use in an anti-impotency drug called “Bioviagra.”¹⁵³ An Ethiopian medicinal plant called *milletia ferruginea* was patented in the US by a Tennessee researcher who claimed its use for breast cancer, leukemia, melanoma, myeloma, viral infection, diabetes, Parkinson’s disease, tuberculosis, and fungal infections.¹⁵⁴ Iboga, a plant from Central and West Africa, was patented in the US for drug addictions.¹⁵⁵ A component of Cen-

143. *Id.*

144. *Id.*

145. *Id.*

146. Paul Kuruk, *Regulating Access to Traditional Knowledge and Genetic Resources: The Disclosure Requirement as a Strategy to Combat Biopiracy*, 17 *SAN DIEGO INT’L L.J.* 1, 11 (2015).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Kuruk, *supra* note 146, at 11–12.

155. *Id.* at 12.

tral and West Africa's Kombo butter was patented in the US to lower cholesterol and fight cancer.¹⁵⁶

Western pharmaceutical research efforts utilize African traditional knowledge and flora and fauna as tools for medical innovation. As seen in the named instances of biopiracy involving African flora and fauna, the global patent regimes allow Western pharmaceutical companies to use African genetic resources without benefit sharing because of these companies' abundant resources for bioprospecting and drug development and the global patent regime's favoring of speedy documentation of innovation, biomedically-proven uses, and knowledge ownership.

V. BENEFIT SHARING AND CHALLENGES WITH BENEFIT SHARING RELATED TO INDIGENOUS PLANTS AND HEALING REMEDIES

Benefit sharing is "the action of giving a portion of advantages/profits derived from the use of genetic resources or traditional knowledge to resource providers."¹⁵⁷ The Organization of African Unity specifically defines benefit sharing as "the sharing of whatever accrues from the use of biological resources, community knowledge, technologies, innovations or practices."¹⁵⁸ Abena Osseo-Asare contextualizes the emergence and conception of benefit sharing:

By the end of the twentieth century, a major intervention in bioprospecting was the creation of benefit-sharing contracts and agreements. This approach sought to balance the efforts of researchers and companies to profit from their innovations, while allowing nations and communities to limit access to valuable natural resources and extend profits to affected groups. Benefit sharing assumed a class of individuals to whom compensation might be afforded, ideally descendants of a first-people group in a threatened ecosystem. The term gained currency in a number of arenas where stakeholders sought compensation, including law, medicine, mining, forestry, and agriculture. . . [B]enefit sharing emerged as a catalyst for community solidarity.¹⁵⁹

156. *Id.*

157. Doris Schroeder, *Benefit Sharing: It's Time for a Definition*, 33 J. MED. ETHICS 205 (2007).

158. *Id.* at 206.

159. Memory Elvin-Lewis, *Evolving Concepts Related to Achieving Benefit Sharing for Custodians of Traditional Knowledge*, 4 AFR. J. TRADITIONAL, COMPLEMENTARY & ALT. MED. 443, 445 (2007); *see also* ABENA DOVE OSSEO-ASARE, BITTER ROOTS: THE SEARCH FOR HEALING PLANTS IN AFRICA (2014) at 20–21.

Given that benefit sharing necessitates a claim to ownership by a single entity, there are several challenges implicated in benefit sharing for patents involving indigenous plants and healing remedies.

Firstly, Western countries have access to plants from the developing world due to transfers of such plants to mother nations during colonialism.¹⁶⁰ Since the discovery of the “New World” by Columbus, Europeans sporadically transferred plants from newly explored areas, including Africa, to the Old World.¹⁶¹ This collection led to the establishment of botanical gardens in Europe, which housed collections of plants.¹⁶² These plants included a majority of plants, which are from tropical or subtropical climates.¹⁶³ Such plants would spread from the colonies where they were indigenous to either the mother country or other colonies where the plant could thrive.¹⁶⁴ This kind of transfer, as mentioned in regard to periwinkle, complicates the claims on the plant by groups and/or individuals from the countries to which the plants are native. This is because claims for benefit sharing weaken when the plant is accessible outside of its nation or region of origin.¹⁶⁵ The reality that such access gives people other than the aforementioned group opportunities to invest in experimentation and discover useful biomedical properties and use empirical data of its efficacy in the treatment of a particular ailment to claim unique uses of the contested plant.¹⁶⁶ This very concept of use directly relates to one of the broader philosophical theories underlying property law—John Locke’s theory of property, where utilization of land and resources fosters a claim to such property.¹⁶⁷ Locke describes his theory:

160. IKECHI MGBEOJI, *GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE* 97 (2006).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. OSSEO-ASARE, *supra* note 159 at 69.

Many people—healers, scientists, elderly women, corporations, and communities—help shape products of medical science, complicating claims to priority in science and traditional medicine, because some of these groups of individuals historically did not document their research on healing plants with written records, credit for innovation had typically gone to those who could claim to be inventors of chemical extraction using complex, expensive equipment.

Id.; see Elvin-Lewis *supra* note 159; see also OSSEO-ASARE, *supra* note 159, at 14 (noting that “plants, people and information have moved for a long time, complicating claims to the first rights to knowledge of healing plants”).

166. *Id.*

167. *Property and Ownership*, STAN. ENCYCLOPEDIA OF PHIL., (Sept. 6, 2004), <https://plato.stanford.edu/entries/property/>.

Though the earth. . . be common to all men, yet every man has a property in his own person. Nobody has any right to but himself. The labor of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men.¹⁶⁸

Similarly, the global patent regime perpetuates a structural challenge to safeguarding indigenous knowledge and resources. This regime values the labor and resources expended to document and scientifically prove a product's use for a particular purpose over safeguarding traditional knowledge or ensuring benefit sharing when such products impact the economic and natural resources of the developing world or indigenous communities.

Secondly, there is a major challenge related to benefit sharing with communities, given that knowledge may be widely spread amongst ethnic groups of a given region.¹⁶⁹ It becomes complex to determine whom to confer benefit sharing when it is unclear which single entity — group, country or so on — has the right to such knowledge.¹⁷⁰ This issue with benefit sharing is compounded by the transfer of knowledge amongst ethnic groups through migratory patterns that created derivative ethnic groups spread throughout the African continent.¹⁷¹ Even when such a singular ethnic group is

168. STANFORD ENCYCLOPEDIA OF PHIL., *supra* note 156.

169. Rachel Wynburg, *Justice Is Still Not Being Done in the Exploitation of Indigenous Products*, CONVERSATION (April 5, 2016 9:48 EDT), <https://theconversation.com/justice-is-still-not-being-done-in-the-exploitation-of-indigenous-products-57080>.

170. *Id.*

171. Elvin-Lewis, *supra* note 159.

This information may be associated with a community, clan, and tribe through a sense of custodianship, guardianship or cultural responsibility and its exclusivity is often circumscribed to either a particular indigenous or nonindigenous local group or groups. However, if cultural groups and floras regionally overlap, some information may be widely dispersed (or widely held) within this broader context but otherwise not necessarily well known elsewhere. As such, it may be considered the collective knowledge (CK) of groups from one or more nations. However, one cannot presume that all uses have arisen from the original inhabitants of a particular region. Contact with other peoples and their plants can also impact on how certain pharmacopeias evolve. Therefore, the uniqueness of TK or CK associated with medicinal plants can only be defined within the parameters of people, places, nations, and floras. It is important to appreciate that what is considered as traditional knowledge is an ever-evolving process. Access to other information, introduction of plants not indigenous to a region, natural inventiveness, as well as changing disease patterns, can all impose modifications on use and preference.

Id.

identifiable, there are also challenges in who receives the benefits—whether the benefit is accorded only to a leader or whether individuals who qualify for a given benefit are genuine group members.¹⁷²

Thirdly, there is a challenge when working with traditional healers to bioprospect their remedies to benefit share. This challenge finds its roots in how colonialism ostracized traditional healers and how an awareness of such ostracism caused traditional healers to distrust the government, research institutions, biomedical professionals, and Western pharmaceutical companies.¹⁷³ There is an emergent culture wherein individuals whom these healers give access to healing practices and related knowledge under the guise of partnership and, sometimes, anthropology, have stolen the healer's knowledge.

These issues are challenging to the goals of developing a booming African-made pharmaceutical industry that not only uses traditional knowledge but equitably shares benefits with the communities from which the knowledge originates. However, the challenging nature of the goal has not deterred the WHO. The WHO established scientific institutions like the African Network for Diagnostic and Drug Innovation's Center of Excellence in Traditional Medicine Research to further the bioprospecting of traditional medical remedies and medicinal plants. Despite the presence of these institutions, there is a need to go beyond researching biomedical properties of traditional medicine and create a legal framework that not only acknowledges traditional uses of remedies and herbal plants but also creates opportunities for traditional healers and indigenous groups to claim rights to benefits from pharmaceutical innovations that use their knowledge.

VI. THE AFRICAN NETWORK FOR DIAGNOSTIC AND DRUG INNOVATION (ANDI)

With Africa accounting for only 15% of the world's population but 25% of the world's disease burden, global stakeholders created an initiative to expand Africa's research and development efforts—the

172. *Id.*

173. See OSSEO-ASARE, *supra* note 159, at 25–26 (noting that oral interviews with traditional healers throughout South Africa, Ghana and Madagascar often involved a narrative that researchers stole knowledge from traditional healers without conferring benefits); see Sarah Wild, *Bringing Traditional Healing Under the Microscope in South Africa*, UNDark (Dec. 30, 2020) (featuring a statement on distrust towards scientists: “There is a lot of mistrust of scientists, the belief that scientists steal the information and then make a lot of money,” said Vinesh Maharaj, a plant chemist at the University of Pretoria who was at the CSIR when it brokered the *H. gordonii* benefit-sharing agreement.”).

African Network for Diagnostic and Drug Innovation.¹⁷⁴ The need for such an effort was further buttressed by statistics showing that: (1) 10% or less of African research and development funding was locally-funded; (2) only 40% of health research related to 17 African diseases had an African lead author although 90% of the research included African researchers; and (3) only 13% of African health research involved intra-African research collaboration.¹⁷⁵ ANDI arose after a 2008 meeting in Abuja, Nigeria, where African political and scientific stakeholders built the momentum for a task force of African governments and research institutions focused on promoting and sustaining African-led health product research and development with the purpose of controlling and treating Africa's disease climate.¹⁷⁶ The ultimate goal of ANDI is to discover, develop and deliver affordable new health tools, such as drugs, vaccines and diagnostics—including those based on traditional medicine.¹⁷⁷ ANDI'S strategic and business plan was presented at a second meeting of the ANDI task force in early May 2009 in Tunis, Tunisia. ANDI was officially presented and launched at the 2nd ANDI stakeholders meeting in October 2009 in Cape Town, South Africa.¹⁷⁸

Now, ANDI is an “arm” of the WHO designed to stimulate drug and diagnostics research.¹⁷⁹ The ANDI agreement involves global stakeholders working to increase health-related research and development on the continent.¹⁸⁰ These stakeholders include the Special Program for Research and Training in Tropical Diseases (“TDR”), WHO Regional Office for Africa (“AFRO”), WHO Regional Office for the Eastern Mediterranean (“EMRO”), the African Development Bank, the European Union, and several national African institutions.¹⁸¹

174. WORLD HEALTH ORGANIZATION & SPECIAL PROGRAMME FOR RESEARCH AND TRAINING IN TROPICAL DISEASES, *supra* note 3.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. THE ANDI CENTRE OF EXCELLENCE FOR MALARIA DIAGNOSIS, *supra* note 3; see WORLD HEALTH ORGANIZATION & SPECIAL PROGRAMME FOR RESEARCH AND TRAINING IN TROPICAL DISEASES, *supra* note 3.

180. WORLD HEALTH ORGANIZATION & SPECIAL PROGRAMME FOR RESEARCH AND TRAINING IN TROPICAL DISEASES, *supra* note 3.

181. *Id.*; see generally THE SPECIAL PROGRAMME FOR RESEARCH AND TRAINING IN TROPICAL DISEASES, WORLD HEALTH ORGANIZATION, <https://www.who.int/tdr/about/en/> (last visited Mar. 23, 2021); *World Health Organization Regional Office for Africa*, WORLD HEALTH ORGANIZATION, <https://www.afro.who.int/> (last visited April 16, 2021); *World Health Organization Regional Office for the Eastern Mediterranean*, WORLD HEALTH ORGANIZATION, <http://www.emro.who.int/index.html> (last visited April 16, 2021).

None but Ourselves Can Free Our Minds

ANDI's Secretariat is based in Africa with decentralized hubs distributed in Africa's regions.¹⁸² ANDI has a central office that coordinates ANDI activities, manages network data infrastructure, and houses ANDI's core teams focused on advocacy, intellectual property and technology transfer, and research and development management.¹⁸³ Furthermore, ANDI includes an African Innovation Fund ("AIF"), which collects, manages and accounts for ANDI finances – the funds used towards operations and network projects.¹⁸⁴ ANDI's hubs and central office are hosted by African institutions selected through a transparent process that examines key criteria for their creation.¹⁸⁵ The hubs are named "centers of research excellence."¹⁸⁶ In 2011, ANDI named 32 institutions as centers of excellence.¹⁸⁷ These institutions were spread out across Africa's five subregions and are designed to implement ANDI projects.¹⁸⁸ There are now 38 centers of excellence with specialized focuses –including a center dedicated to traditional medicine research.¹⁸⁹

The Institute of Medical Research and Medicinal Plants Studies ("IMPM") was named the ANDI Centre of Excellence in Traditional Medicine Research. IMPM is a Cameroonian research institute created by Cameroonian decree, No. 74/888 of October 31, 1974 and reorganized by decree No. 2019/686 of December 26, 2019, to serve as a public scientific and technical establishment supervised by the Cameroonian Ministry of Scientific Research and Finance.¹⁹⁰ IMPM promotes and carries out research on traditional healing remedies under

182. WORLD HEALTH ORGANIZATION & SPECIAL PROGRAMME FOR RESEARCH AND TRAINING IN TROPICAL DISEASES, *supra* note 3.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *DST/CSIR's Nanomedicine Research Programme Awarded Status as ANDI Centre of Excellence in Health Innovation*, CSIR (Dec. 7, 2011) <https://www.csir.co.za/dstcsirs-nanomedicine-research-programme-awarded-status-andi-centre-excellence-health-innovation>; *New African Centers*, *supra* note 10.

188. *New African Centers*, *supra* note 10.

189. Solomon Nwaka, Alexander Ochem, Dominique Besson, Bernadette Ramirez, Foluke Fakorede, Sanaa Botros, Uford Inyang, Charles Mgone, Ivan Aday-Mensah, Victor Konde, Barthelemy Nyasse, Blessed Okole, Anastasia Guantai, Glaudina Loots, Peter Atadja, Peter Ndumbe, Issa Sanou, Ole Olesen, Robert Ridley & Tshinko Ilunga, *Analysis of Pan-African Centres of Excellence in Health Innovation Highlights Opportunities and Challenges for Local Innovation and Financing in the Continent*, 12 *BMC INT'L HEALTH & HUM. RTS.* 11, 11 (2012).

190. *Institut de Recherches Medicales et D'Etudes des Plantes Medicinales (IMPM)*, DEVEX, <https://www.devex.com/organizations/institut-de-recherches-medicales-et-d-etudes-des-plantes-medicinales-impm-153460> (last visited Apr. 16, 2021).

the supervision of the WHO.¹⁹¹ Its research covers the bioprospecting of medicinal plants to develop essential medicines and improved traditional medicines.¹⁹² IMPM works in partnership with local and global stakeholders to promote medicinal plant research.¹⁹³

As initiatives like ANDI continue to engage with global stakeholders to develop pharmaceutical innovations using Africa's medicinal plants, African nations must ensure that benefit sharing is equitable. With the Nagoya Protocol's adoption, there is momentum for legal frameworks to be established for this purpose. This note proposes an intra-African legal framework to document indigenous uses of medicinal plants and advocate for these indigenous groups to benefit from patents issued under the TRIPS Agreement when such patents arise from prior knowledge of indigenous uses.

VII. CREATING A PAN-AFRICAN LEGAL FRAMEWORK TO PROMOTE BENEFIT SHARING

This note proposes a legal framework for promoting benefit sharing. This legal framework entails an agreement that creates an arm of the African Union designed to document indigenous uses of African medicinal plants and use this documentation as a tool in advocating for benefits from patents issued under the TRIPS Agreement. As previously discussed, a significant challenge to advocating for benefit sharing is the lack of documentation of traditional medical practices, which is inherent in its oral transmission. This legal framework utilizes an understanding of this challenge to create a system aimed at preserving traditional medicine and claiming rights for the holders of this medical knowledge. Modeling the USPTO's roles in documenting inventions and enforcing people's rights with claimed inventions, this proposal develops an intra-African agreement that strengthens claims for benefit sharing amongst African indigenous groups.

The USPTO is an agency of the US Department of Commerce designed to grant patent protection for inventions and register trademarks.¹⁹⁴ It aids inventors by allowing them to apply for legal rights in an invention whereby the invention "cannot be commercially made, used, distributed, imported, or sold by others without the patent

191. *Id.*

192. *Id.*

193. *Id.*

194. *General Information Concerning Patents*, USPTO (Oct. 2015), <https://www.uspto.gov/patents/basics/general-information-patents>.

owner's consent."¹⁹⁵ Inventors formally document their inventions through the patent application process; the application includes specifications, descriptions, and claimed uses of the invention.¹⁹⁶ Issued patents are stored in the USPTO's database, where potential inventors can conduct a search to determine whether their patent is novel, unique, and unlike previously issued patents.¹⁹⁷ Through doing so, inventors have a platform to advocate for their rights in an invention and challenge the granting of patents and the commercialization of products that are sufficiently similar to their invention. A similar system dedicated to documenting and advocating for medicinal plants' indigenous uses could foster a long-term structure for benefit sharing.

The proposed agreement would request signatures from members of the African Union as a show of their commitment to create an arm of the African Union focused on benefit sharing. The arm has two main tasks: documenting indigenous uses and advocating on behalf of indigenous groups when patents are issued to inventors who utilize indigenous knowledge to identify plants of interest for bioprospecting. Similar to the USPTO system, the proposed agreement would collect and review applications from individuals or groups with proven citizenship in an African Union member state. These applications will be broadly accepted to create a database of uses and avoid marginalizing ethnic groups with fewer resources to develop their applications.

The agreement would also require each nation to assist in documenting these uses by connecting with representatives from ethnic groups across each country to encourage them to submit applications. This can be accomplished by opting for each country to have their own representative conduct this task or request a liaison from the African Union. Through doing so, this agreement strives to meet indigenous groups where they are and increase transparency around why these practices are being documented and how this documentation can be subsequently used.

Lastly, the agreement would create a team of intellectual property specialists dedicated to advocating on behalf of African indigenous groups as patents — and twenty-year monopolies — are issued

195. *Frequently Asked Questions: Patents*, WIPO, https://www.wipo.int/patents/en/faq_patents.html#:~:text=A%20patent%20is%20an%20exclusive%20right%20granted%20for%20an%20invention.&text=the%20patent%20owner%20may%20give,new%20owner%20of%20the%20patent (last visited April 16, 2021).

196. USPTO, *supra* note 194.

197. WIPO, *supra* note 195.

under the TRIPS Agreement. This advocacy would be prompted if a patent's inventor uses indigenous knowledge as a tool to identify medicinal plants or homeopathic remedies for bioprospecting. The ability to identify when indigenous knowledge is being used such that benefit sharing is prompted would be a question for the WTO in its trade disputes. Indigenous groups would apply to the African Union for assistance in benefit sharing claims based on their priorly approved, documented indigenous use. Through doing so, the African Union will make advocacy against biopiracy more accessible for African indigenous people by creating an intra-African system that supports their claims for benefits in a particular pharmaceutical through using this approved documentation.

VIII. CONCLUSION

As the African Union adopts the Nagoya Protocol and engages with global stakeholders through ANDI to stimulate increased research and development for pharmaceuticals, there is a need to create systems that preserve traditional knowledge and create a foundation for claiming benefits in patented inventions that utilize Africa's genetic resources. Similar to the USPTO's functions of documenting usage and providing legal grounds for inventors to claim rights to their inventions, the African Union needs to develop an arm which allows indigenous groups to document their traditional healing practices and subsequently, use this documentation to advocate for benefits in patented inventions utilizing Africa's genetic resources for similar uses. Through doing so, the African Union can create greater momentum to advocate for benefit sharing in the global trade regime, preserve the traditional knowledge of its diverse ethnic groups and stimulate economic growth through monetary benefits accrued from the use of genetic resources.

