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# LETTER FROM THE EDITOR-IN-CHIEF

Since its founding in 1869, Howard University School of Law has been at the forefront of change. The law school has a proud legacy of championing civil rights and social justice issues. The *Howard Law Journal* has a rich history of publishing pieces that embrace the unknown and tackle new legal issues. The articles that are published in Volume 66, Issue 1 invite you to embrace change even if it means dismantling legislation that is deeply rooted in this Nation's history and tradition. We hope that by publishing these pieces, we can do our part in continuing the conversation and moving the needle to a more inclusive society.

This issue begins with "Regulated Immigrants: An Administrative Law Failure." Professor Jill E. Family discusses the Administrative Procedure Act as it relates to immigration law. Professor Family argues that the Administrative Procedure Act has failed to establish a deportation system that aligns with administrative law's core process values. Furthermore, as currently formulated, administrative law lacks the right doctrines to regulate immigrants, and new doctrines are necessary.

Professor David Nows' article "Adding More Sharks to the Shark Tank: Strategies for Allowing More Attorneys to Access Academia in Business Schools," discusses the importance of attorneys becoming faculty within a business school. Most law students that want to become an academic professor choose the route of becoming a law professor to do so. However, in this article, Professor Nows explores how business schools can take advantage of recruiting from a highly qualified pool of J.D. holders and how J.D. holders can find a home as aspiring scholars.

"Maternal mortality is an area where structural discrimination has a historical health care gap based on an individual's gender and race." Third-year doctoral student Nicole A. Strombom introduces her article "Maternal Health: Attacking a Structurally Discriminatory Health Care System Through Advancing the Reproductive Justice Movement" by discussing an important issue that has plagued the United States since the origin of American slavery. In this article, Ms. Strombom argues that changes to Title VI of the Civil Rights Act and the Emergency Medical Treatment and Active Labor Act (EMTALA) could drastically improve health equity and change the structural discrimination maternal morality narrative.

The *Howard Law Journal* is pleased to publish an article by one of our editors. Senior Articles Editor Lauren Reedy's note, "Frisk First, Develop Reasonable Suspicion Later: The Court's Evisceration of the Fourth Amendment and Unwillingness to Exclude Evidence is Contributing to Dysfunctional Policing," discusses the Fourth Amendment's protection

against unreasonable searches and seizures. Ms. Reedy argues that the landmark Supreme Court Case, *Terry v. Ohio*, eroded Fourth Amendment protections and legitimized the practice of stop-and-frisk. In Ms. Reedy's note, she explores the role of the courts in regulating police behaviors and how the Court miscalculated when it decided that reasonable suspicion struck the appropriate balance between the government's interest to frisk and the privacy interest of individuals.

On behalf of the *Howard Law Journal*, we thank you for your support and readership. We hope you find our pieces to be thought-provoking and hope that they encourage you to rally in the fight for change. We proudly present Volume 66, Issue 1 of the *Howard Law Journal*.

Alexandria Mangum
Editor-in-Chief
Volume 66

# Regulated Immigrants: An Administrative Law Failure

Jill E. Family*

Abstract

Congress' grandest reform of administrative law recently celebrated its 75th birthday. The Administrative Procedure Act (APA) is regarded mostly as a success that set the stage for modern federal governance. This article uncovers a major flaw. The APA has failed to establish a deportation system that satisfies administrative law process values.

In retrospect, this failure is not surprising given that Congress never fully integrated immigration law into administrative law. The unique nature of regulating immigrants was not a driving force in the creation of the APA. Instead, the APA was molded by concerns about the New Deal and the increasing power of the federal government over industry. The regulation of human beings by deciding some of life's most basic questions, including whether someone could live with immediate family members, simply was not the focus of reformers. Even once enacted, the APA never had much of a chance to shape deportation adjudication. Shortly after the APA's enactment, Congress exempted deportation adjudication from the APA and created a parallel administrative law universe. This alternative structure has resulted in an adjudication system that is inefficient, unacceptable, and only questionably accurate.

* Professor of Law, Widener University Commonwealth Law School and Faculty Advisor, Law and Government Institute. Thank you to Jack Chin, Peter Margulies, and other participants in a workshop at New York University School of Law, Classical Liberal Institute, for their comments and suggestions. Also, I appreciate the comments and insights I received from Joanna Grisinger, Jennifer Koh, and Chris Walker. Special thanks to Brent Johnson for his excellent library assistance.

Even if the APA applied to deportation proceedings, that would not fix what ails the system. Administrative law, as currently formulated, lacks the right doctrines to regulate the regulation of immigrants. New principles are necessary. To develop these new doctrines, we need to divorce immigration law from the administrative law debates that are charged with arguments about the power of the federal government to regulate the economy. The construction of new principles should be guided by the extreme power imbalance between the government and the regulated parties in immigration law, the effect of the regulation on fundamental issues of human existence, the prominent role of detention in civil immigration adjudication, and the lack of decisional independence for immigration adjudicators.



*"[T]he difficulties you run into when you try to pass a comprehensive bill, which will provide for hearing examiners to pass on complicated rate structures and things of that kind, as opposed to a man who only has to decide a simple little issue as to whether a human being is an alien and whether he entered illegally and should be sent back."*[1]

1. Statement of Major Lemuel B. Schofield, Special Assistant to the Attorney General, in Charge of the Immigration and Naturalization Service (1942).

## I. Introduction

Administrative law has failed. The principles of federal administrative law have not produced fair adjudication of whether an individual should be removed (deported) from the United States. Congress created the Administrative Procedure Act (APA), its grand design for administrative law, to protect property rights and to put guardrails on economic regulation. The APA does not adequately address the intrinsic nature of immigration regulation, which involves liberty interests. Immigration law is regulation, but it regulates people directly with dramatic effect on basic human rights. In a removal proceeding, an agency adjudicator decides whether the government will use its power to forcibly eject an individual from the United States. Removal inherently involves government detention; an individual's liberty is at stake. Also, immigration administrative proceedings at times determine whether a person will be able to live with immediate family members. This is an entirely different type of regulation than the economic regulation that drove the development of the APA.

The failure of administrative law in immigration law is not surprising given that Congress has never fully integrated immigration law into administrative law. Immigration law was not a driving force in the formation of the APA. And then, when the Supreme Court ruled that the new APA did apply to deportation proceedings, Congress promptly exempted deportation proceedings from the APA. In place of the APA, Congress created independent rules through organic statutes. These rules have resulted in a substandard adjudication system. Even if removal proceedings fell under the umbrella of the APA today, however, the result still would be unsatisfactory. This is because the doctrines and protections of the APA were created with other types of regulation in mind. The APA would not provide enough.

The opening quotation is taken from the congressional testimony of the head of the immigration service in 1941 as Congress considered predecessor bills to the APA. Contrary to the quote, immigration removal adjudication is not "a simple little issue." The quote does accurately reflect, however, that immigration law has always been an awkward fit in administrative law.

The APA established a flexible system of default rules with plentiful opportunities for Congress to establish its own rules for individual agencies or even for when a specific agency engages in a specific administrative law task. Congress' creation of a separate adjudication

scheme for immigration law is not exceptional in the sense that the APA allows for Congress to create a parallel system. This article argues, however, that this feature of the APA—the ability of Congress to make areas of agency adjudication immune from any centralized sub-constitutional guardrails—has failed immigration law. Additionally, even if the provisions of the APA applied to removal adjudication, the APA would not supply adequate protections for immigration law.

The absence of sub-constitutional protections in immigration law is crucial because the Supreme Court has interpreted limitations on constitutional protections for immigrants. Therefore, it is past time to consider new administrative law doctrines for immigration law.

In Part II, this article reveals the minimal role immigration law played in the development of the APA, the fleeting relationship between the APA and immigration law after the APA's enactment, and the current dysfunction of the immigration removal adjudication system. Part III argues that current doctrines of administrative law are inadequate and that new doctrines are necessary.

## II. Is Immigration Law Administrative Law?

Immigration law is administrative law in that immigration law is a type of federal regulation where Congress has delegated power to federal agencies to administer a statute. A deeper dive, however, reveals that Congress has never meaningfully integrated immigration law into administrative law. Through the APA, Congress sought to achieve fairness and uniformity in administrative law by creating a framework to govern the actions of various administrative agencies. But immigration law was not the engine pushing the development of the APA.[2] The APA was not drafted focused on the unique nature of regulating immigrants. Even after enactment, the APA never had much of chance to influence the adjudication of removal cases. Soon after the Supreme Court held in the 1950s that the APA did apply to removal cases, Congress exempted removal cases from the APA. Congress created a parallel universe for removal adjudication. Congress' resulting statutory removal adjudication framework has not produced adjudication that meets the fundamentals of administrative process design.

2. This is ironic given that immigration law provided the United States with one of its first experiences with federal administrative adjudication. Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. CIV. RTS-CIV. LIBERTIES L. REV. 2 (2002).

Removal adjudication is not efficient, adequately accurate, or acceptable.[3] Even if Congress had subjected removal adjudication to the most stringent requirements of the APA, the requirements of formal adjudication, the result would have been disappointing. The APA is simply not a great fit for the regulation of deportation.

## A. Immigration Law and the Development of the APA

### 1. The Goals of the APA

The APA is the central force in administrative law. It represents Congress' most ambitious and grandest reform of administrative law. Senator McCarran, Chair of the Senate Judiciary Committee, described the APA in 1946:

> The Administrative Procedure Act is a strongly marked, long sought, and widely heralded advance in democratic government. It embarks upon a new field of legislation of broad application in the "administrative" area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other. Although it is brief, it is a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men.[4]

The APA sought to provide guardrails for the power of administrative agencies as well as to respect separation of powers principles. To accomplish this, the APA established a flexible framework. It aimed to provide uniformity, but with enough release valves to account for the extreme diversity of administrative agencies and their work.[5]

The fundamental flexible format of the APA allowed Congress to exempt removal cases from the APA and to create a parallel system

3. Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1964) (describing the criteria of administrative process design).

4. Pat McCarran, Foreword, Administrative Procedure Act: Legislative History (1946), available at https://coast.noaa.gov/data/Documents/OceanLawSearch/Senate%20Document%20No.%2079–248.pdf.

5. Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 405 (2008).

that is a failure. Even if the provisions of the APA applied, the results would still be disappointing. This is partly because of the APA's "exceptionalism norm" in agency adjudication.[6] As Emily Bremer has described, the APA provides almost no requirements for agency adjudication unless the APA's formal adjudication proceedings are triggered, and Congress rarely triggers the use of formal adjudication.[7] The design of the APA allows Congress tremendous leeway to avoid the application of sub-constitutional guardrails for immigration law. This design has led to the current dysfunctional removal adjudication system. Application of the APA to removal adjudication also would be disappointing even if Congress triggered formal adjudication procedures because those procedures would not fix the problems with removal adjudication.

That the design of the APA has failed immigration law is not shocking given the small role immigration law played in the development of the APA. Immigration law was not completely ignored, but it was not a major influence in the creation of the APA.[8] The APA's provisions were drafted with an eye on other concerns. The APA grew out of efforts to cabin agency power over the market and to resist the increased power of the executive branch.[9] The APA was the

6. Emily Bremer argues that for informal adjudication, exceptionalism is the norm because the APA rarely requires specific procedures for informal adjudication. Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 Wisc. L. Rev. 1351, 1358 (2019). *See also* Michael Asimow, *Federal Administrative Adjudication Outside the Administrative Procedure Act*, https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20–%20Final.pdf.

7. *Id.*

8. The lack of focus on immigration does not mean that all were pleased with the function of the immigration agencies in the lead up to the APA. Walter Gellhorn described that before the APA was enacted, there were efforts to reform immigration administrative procedure. He said: "The Immigration and Naturalization Service was an absolute procedural cesspool. Maybe it still is, but it was even worse in those days. Louis Jaffe and Henry Hart were retained by the Department of Labor (I think probably at the behest of Frances Perkins) to make a study of the procedures and see if something couldn't be improved." American Bar Association, *Present at the Creation: Regulatory Reform Before 1946, 38* Admin. L. Rev. 511, 517 (1986). The referenced Department of Labor report was published in 1940, culminating an almost two–year study. The report references "sadistic hearings" and describes how under the current system, "correct and even–handed application of the law is not possible." The Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service 50 (1940), https://play.google.com/books/reader?id=7bulmwEhhLwC&pg=GBS.PP4&hl=EN. The study's proposed reforms are specific to immigration administration and focus on needed reforms within executive branch administration of immigration law. *Id*. at 125.

9. Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 Geo. Mason L. Rev. 573, 575–94; Jacob M. Lashly, *Administrative Law and the Bar*, 25 Va. L. Rev. 641, 645–54 (1938–1939); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 Va. L. Rev. 219, 230–31 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1560

product of a years-long effort to rein in the growing power of New Deal-era administrative agencies.[10] It was a reaction to the New Deal's regulation of property rights.

The fight that resulted in the APA has been described as a "pitched political battle for the life of the New Deal."[11] The APA itself represented a "cease-fire."[12] Upset by the New Deal's shift of power to the government to regulate business, advocates pushed for procedural protections.[13] Some advocates saw procedure as a way to control policies that they otherwise could not control.[14] The New Deal was meant to be an engine for social change, and some sought to stop it by gumming up the works of certain administrative agencies.[15] Those who sought to lessen agency power invoked a fear of Marxism as a reason to cabin agency power.[16]

Kenneth Culp Davis described the accomplishments of the APA as "much more political than legal."[17] He explained: "The warfare preceding the Act was intense; the animosity on both sides was very considerable; and the APA was adopted by a unanimous vote of both Houses of Congress. The political warfare then ended."[18] Joanna Grisinger has argued that the APA gave "the appearance of administrative fairness" by implementing "systemic reform" that assuaged public concerns and gave "some semblance of order."[19] According to Grisinger, however, the APA did not drastically change administrative

(1995–1996). Other motivating forces included a fear that agencies would end patronage politics and a lawyers' fear that the move from court adjudication to agency adjudication would threaten the interests of lawyers. Daniel R. Ernst, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 78, 107, 125–26 (Oxford Univ. Press 2014).

10. Gellhorn, *supra* note 9, at 219; Shepherd, *supra* note 9, at 1560.

11. Shepherd, *supra* note 9, at 1560.

12. *Id.*

13. *Id.* at 1570. The American Bar Association established a Special Committee on Administrative Law in May 1933 that focused on procedures to control President Roosevelt's New Deal programs. *Id.* at 1570–71; *See also* Grisinger, *supra* note 6, at 384–85.

14. Shepherd, *supra* note 9, at 1568; Ernst, *supra* note 9, at 132.

15. Gellhorn, *supra* note 9, at 222; Shepherd, *supra* note 9, at 1601, 1626–27; *Present at the Creation*, *supra* note 8, at 516; Grisinger, *supra* note 5, at 380. Reform efforts often exempted certain agencies and seemed aimed at specific New Deal agencies. Shepherd, *supra* note 9, at 1601, 1618–19.

16. American Bar Association, Report of the Special Committee on Administrative Law 63 Annu. Rep. ABA 331, 340 (1938). *See also* Shepherd, *supra* note 9, at 1601; Ernst, *supra* note 9, at 127.

17. *Present at the Creation, supra* note 8, at 518. *See also* Grisinger, *supra* note 5, at 381 (arguing that the APA "did not transform the administrative state" but rather sought to apply best practices across the administrative state).

18. *Id.* (arguing that the APA "use[d] procedure to change the terms of the debate about the administrative process").

19. Grisinger, *supra* note 5, at 381–82.

law. Rather, it encouraged the adoption of already existing best practices but left plenty of flexibility for agencies.[20]

In the creation of the APA, Congress allowed the possibility that immigration law would be exempt from its reform.[21] This is because Congress designed the APA to give itself wide flexibility to exempt agencies or certain agency actions from the APA. When the Supreme Court held in the 1950s that the APA did govern removal cases, Congress promptly adopted legislation that explicitly carved removal cases out of the APA. That left removal adjudication under the auspices of the Immigration and Nationality Act. The failures of that framework are discussed in Part II(C). This section describes the minor role that immigration played in the development of the APA.

2. The Legislative History of the APA: Immigration Law Edition

The APA was enacted in 1946, but that enactment followed legislative efforts that began in the late 1920s and early 1930s.[22] In response to continuing unsuccessful legislative calls for administrative procedure reform, in 1939 President Roosevelt tasked the attorney general to study administrative procedures and practices across agencies and to recommend reforms.[23] While that review was underway, the Walter-Logan bill passed Congress, but President Roosevelt vetoed it in 1940. The Walter-Logan bill contained administrative procedure reform based on recommendations developed within the American Bar Association throughout the 1930s.[24] The Walter-Logan bill would have "judicialized administrative law by forcing all agency decision-making into a trial type hearing."[25] The supporters of the Walter-Logan bill believed that by mandating this type of procedure, government power could be corralled.[26]

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20. *Id.; See also* Ernst, *supra* note 9, at 145 (discussing that the APA adopted best practices then in existence).

21. The design of the APA allows for other areas of administrative law to be exempt from the APA as well. This feature is not directed solely at immigration law. This article examines how this feature has manifested in immigration law. For additional discussion on why immigration law is exceptional in administrative law, see Jill E. Family, *Immigration Law Exceptionalism and the Administrative Procedure Act*, PUBLIC AFFAIRS QUARTERLY (forthcoming 2023).

22. Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 397 (2021); Gellhorn, *supra* note 9, at 219–24; Shepherd, *supra* note 9, at 1566. For an excellent resource on the development of the APA, *see* the Bremer–Kovacs collection on HeinOnline.

23. Shepherd, *supra* note 9, at 1594; Grisinger, *supra* note 5 at 379.

24. Gellhorn, *supra* note 9, at 224; Shepherd, *supra* note 9, at 1598.

25. *Present at the Creation*, *supra* note 8, at 512, 518.

26. The bill's procedural limits on agencies, however, would not have applied to every agency. The bill exempted certain agencies. The exempted agencies were pre–New Deal agen-

After President Roosevelt vetoed the Walter-Logan bill, the Department of Justice completed its study. The study resulted in 27 monographs that presented the results of examining 27 different federal administrative agencies.[27] The monographs studied existing administrative practice at these agencies.[28] The Department of Justice committee presented a majority and minority recommendation for legislative action based on their study.[29] The recommendations differed on how much restraint to impose on the operations of federal agencies.[30] No legislation passed in the period immediately following the committee's report and recommendations due to the onset of World War II.[31]

The committee selected the agencies it studied because it believed those agencies "directly affect[ed] persons outside the Government" and "[gave] rise to the greatest amount of litigation and discussion regarding administrative law."[32] The Department of Justice's examination did not include immigration administration. It did, however, study the US Tariff Commission. It studied the importation of goods through the customs laws, but not the migration of people.[33] Immigration law was left out and was not the focus of discussion in administrative law circles at the time.[34]

Immigration law was not completely ignored in the pre-APA efforts, however. In 1941, Congress heard the testimony of Major Lemuel Schofield, who was then the Special Assistant to the Attorney General in charge of the Immigration and Naturalization Service (INS).[35] While his testimony did not concern the APA (because it did

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cies that held better reputations among conservatives. Shepherd, *supra* note 9, at 1617–18. *See also* Grisinger, *supra* note 5, at 385–86.

27. Shepherd, *supra* note 9, at 1632.

28. *Id*.

29. *Id*. at 1632–33.

30. *Id*.

31. *Id*. at 1641.

32. Attorney General's Committee on Administrative Procedure 254 (U.S. Dept. of Just., App. A, 1985).

33. *Id*. at 27. There was a separate study of immigration procedures in 1940. *See infra* note 8.

34. Joanna L. Grisinger, THE UNWIELDY AMERICAN STATE 83 (Cambridge Univ. Press 2012) (explaining that "many thought of immigration as a separate part of the administrative process," that the Department of Justice committee "had not inquired in the operations of the INS," and that "most administrative law scholars devoted their attention to the economic regulatory commissions").

35. Statement of Maj. Lemuel B. Schofield, Special Assistant to the Attorney General, in Charge of the Immigration and Naturalization Service, 556. At the time of Schofield's testimony, a Board of Special Inquiry existed at each port of entry to make admission decisions. There were 226 ports of entry. A noncitizen could appeal a negative determination to the Board

not exist yet), he did comment on the themes of uniformity, centralization, and fairness, which became the themes of the APA.[36] In reacting to congressional efforts to standardize administrative governance, Schofield was concerned about: (1) leaving the INS with enough flexibility to maneuver during the "present emergency," i.e., World War II;[37] (2) a fear that centralized administrative law principles would hinder INS' efforts to fight communism;[38] and (3) a concern that new requirements on administrative procedure would be detrimental to his agency's efficiency.[39]

In moving toward standardization, Schofield was concerned that Congress would "paralyze" the work of the INS.[40] He did not want Congress to eliminate the decentralization that he saw as necessary to administer immigration law. He testified against any form of centralization that would prevent officers in the field from moving quickly.[41] He was especially concerned about proposed access to records provisions that would, in his view, allow for immigrants and their allies to "ransack the [INS]'s files" and would tie up offices with efforts to stymie investigations.[42] He explained that the INS "deals with delicate and vital matters . . . especially in times like these."[43] Schofield preferred the status quo, where noncitizens had no rights to see what the INS held in its files.[44]

Schofield's testimony was influenced by the INS' contemporaneous attempt to deport Harry Bridges. Harry Bridges was a labor leader who led a strike in 1934 that shut down ports on the west coast

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of Immigration Appeals in Washington, DC. *Id*. at 557. Deportation charges were adjudicated by an inspector acting as a "trial examiner" with an administrative appeal to the Board of Immigration Appeals. *Id*.

36. Major Schofield's testimony focused on how congressional efforts would affect his agency's ability to maintain its adjudicatory functions. There is relatively little discussion of rulemaking or judicial review. He did testify against a requirement of a public hearing before INS could issue a regulation, however. *Id*. at 570. Also, there was some discussion about the scope of review under habeas jurisdiction (the only type of judicial review that existed at the time). *Id*. at 568. As far as benefits adjudication, Major Schofield testified that immigration benefits adjudication necessarily needed to be less formal than removal adjudication. He was concerned that Congress would demand more formal proceedings for immigration benefits determinations. If Congress required that, he said that the INS "might as well close up shop." *Id*. at 565.

37. *Id*. at 558.

38. *Id*. at 561–64 (discussing the Bridges case).

39. *Id*. at 558.

40. *Id*.

41. *Id*. at 558, 575, 578, 580.

42. *Id*. at 559–61.

43. *Id*. at 561.

44. *Id*.

of the United States.[45] The INS sought to deport Bridges because it believed he was a communist.[46] During his deportation proceedings, Bridges demanded to see the evidence against him.[47]

Schofield was concerned that any administrative law reform would require the INS to show someone like Bridges the evidence that it held against him.[48] That scenario would be "ruinous to any successful enforcement of the deportation statutes."[49] The agency, he explained, needed to keep confidential information about its network of informers.[50] Schofield said that Bridge's request for information about the witnesses against him "was made ostensibly to enable the alien to investigate in advance the witnesses who were to be called against him, to check on their statements in an effort to bolster their contention that the evidence was in large respect untrustworthy and manufactured."[51] But, Schofield said, "we are positively convinced that the real purpose was for the alien to conduct false alibis, false testimony, and endeavor falsely and corruptly to meet the evidence that was fairly presented against him."[52]

These assumptions of bad faith on Bridges' part and the insinuation of the categorical bad faith of all immigrants are extremely problematic. They are problematic because they assert that individuals subject to the civil immigration government power should not have the right to confront the evidence against them. They are also problematic because Schofield's testimony is one of immigration law's major contributions to the development of the APA. If immigration law was only considered on these terms, then Congress only considered immigration law through a very skewed viewpoint.

In his testimony, Schofield did recognize the need to at least maintain the appearance of fairness. He said that immigration adjudication needed to be fair to maintain "confidence in the processes of this democratic government."[53] He elaborated that the job of the immigration agency was to "demonstrat[e] in our daily activities to the

45. Alison Peck, The Accidental History of the US Immigration Courts 61 (1st ed. 2021).
46. *Id*. at 62.
47. Schofield, *supra* note 36, at 561.
48. *Id*. at 561–64.
49. *Id*. at 562.
50. *Id*. at 563.
51. *Id*. at 562.
52. *Id*.
53. *Id*. at 558.

aliens that this is a democratic country."[54] The objective of this demonstration was to gain the "loyalty" of immigrants by showing "a regard for the fundamental rights and duties of fair play."[55] As far as concrete action, however, he testified in favor of allowing lawyers and non-lawyers to represent immigrants in deportation proceedings,[56] and not much else. He classified the existing limited procedures available in exclusion and deportation cases as "formal."[57]

Immigration law presented challenges to standardization from the time of the seeds of the APA. During the same 1941 hearing, others questioned whether the restrictions on administrative agencies being considered should apply in immigration law.[58] The challenges presented by Schofield and others in 1941 were mainly driven by a fear that standardization would thwart the INS' security and anti-communist functions. Schofield's testimony illuminates a long-standing problem in incorporating immigration law into the administrative law project. While the APA was motivated by efforts to temper the government's power to regulate business, Schofield prompted Congress to think about how regulatory concepts such as increased participation and increased access to information would manifest in immigration law. His prompts were very one-sided and promoted ignoring fundamental tenets of fairness.

Congress eventually enacted administrative law reform through the APA in 1946.[59] The resulting bill attempted to address the major questions surrounding reform: (1) How much restraint on agencies is appropriate; (2) Should agency power be centralized; and (3) How much uniformity is desirable? For example, notice and comment rulemaking arrived as a compromise between those who wanted full hearings for every rulemaking and those who did not.[60] Much of the APA was ambiguous due to an inability to reach consensus on every

54. *Id*.
55. *Id*.
56. *Id*. at 558–59.
57. *Id*. at 577.
58. *See, e.g*., Hearing on S. 674 Part III, Testimony of Carl McFarland at 1349 (citing Schofield's objection to reform applying to the INS as "well–taken"), Joint Statement of the Minority of the Attorney General's Committee on Administrative Procedure at 1390 (agreeing with Schofield's testimony), Statement of Acting Attorney General Frances Biddle at 1458 (noting the need for decentralization in immigration adjudication), 1475–76 (objecting to inclusion of INS in access to records provisions), 1478 (dismissing the need for a formal hearing to adjudicate immigration benefits).
59. *See* Shepherd, *supra* note 9, at 1641–49; 1658–59 (discussing why reform finally succeeded in 1946).
60. *Id.* at 1650–51.

issue,[61] and the fight over its interpretation began almost immediately.[62] The APA was an acceptable compromise; neither side was thrilled.[63] Federal agency power remained strong, but some restrictions were implemented.

Some had argued in the pre-APA period that administrative law reform should include more independent agency adjudication or stronger judicial review. There were several introduced bills from 1929 until 1938 that advanced the idea of a US Court of Administrative Justice.[64] The American Bar Association argued for independent judicial tribunals, or, in the alternative, that agency action should be completely reviewable by courts.[65] The Walter-Logan bill attempted to codify these proposals, and President Roosevelt vetoed it because of them.[66] The push for more independent agency adjudication was tied to efforts to dismantle the New Deal and to lawyers who wanted to thwart the growth of agency adjudication out of fear that it would eliminate the role of lawyers.[67] The APA rejected these proposals.

The APA allows adjudication to take place within an agency, and the APA requires a formal adjudicatory hearing only if Congress, via another statute, mandates one.[68] If Congress triggers formal adjudication under the APA, the APA contains detailed procedures for it.[69] If Congress does not activate formal adjudication, agencies retain the flexibility to establish their own informal procedures. The APA contains only limited requirements for informal adjudication,[70] including the right to be represented by counsel (at private expense), the right

61. *Id*. at 1665.

62. *Id*. at 1662–66.

63. *Id*. at 1674.

64. *Id*. at 1566; S. 1835, 73d Congress (1933) (The Logan Bill); S. 3676, 75th Congress, 3d Sess., § 1 (1938).

65. American Bar Association, Report of the Special Committee on Administrative Law 63 ANN. REP. A.B.A 331, 342–46, 361 (1938); Gellhorn, *supra* note 9, at 219.

66. The White House, Office of the President, Veto Message on Bill Providing for Expeditious Settlement of Disputes with United States (1940) (President Franklin Delano Roosevelt writing to veto the Walter–Logan bill) ("[t]he bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation").

67. American Bar Association, *supra* note 8, at 524 (statement of Kenneth Culp Davis)("The ABA of the period 1933 to 1941 was, in my view, (and this is an opinion) a pernicious organization; it was extremely harmful."); Grisinger, *supra* note 5, at 386–87.

68. Dominion Energy v. Johnson, 443 F.3d 12, 14–15 (1st Cir. 2006); s*ee also* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 238 (1973) (discussing triggering language in the context of rulemaking).

69. 5 U.S.C. §§ 554–56.

70. WILLIAM F. FUNK, ET AL, ADMINISTRATIVE PROCEDURE AND PRACTICE at 197 (Revised 6th ed. 2019).

to the conclusion of the adjudication within a reasonable time, and the right to prompt notice of a decision with a brief explanation of reasons.[71]

The APA rejected a judicial model for agency adjudication. The APA does not require a neutral arbitrator in the same sense as a court proceeding. The APA does not "significantly increase the 'judicialization' of the administrative process."[72] This is true in informal adjudication, where there are no requirements. It is also true in formal adjudication, where the APA allows an agency adjudicator to work for the agency pursuing enforcement.[73]

The legislative history of the APA reveals that immigration was an awkward fit from the very beginning. Immigration was not the type of regulation that motivated advocates to push for uniformity in administrative procedures or to temper the power of agencies. The APA was designed to check agency power against control over the market. Immigration law, however, is a scenario where control over the market is generally embraced; it is perhaps embraced strongest by those who challenge the legitimacy of administrative law in other contexts.[74] Immigration law also differs in that it regulates people. It addresses some of life's most basic questions, including whether someone will be able to live with immediate family members, including children. Immigration law goes beyond economic interests and property rights, and it raises issues of human rights, including race.[75]

The move away from judicializing administrative adjudication would prove disastrous for immigration adjudication. If the APA applied to removal cases, courts would look for triggering statutory language to activate its most formal hearing procedures.[76] Even if Congress provided that language for immigration law, as Part III de-

71. 5 U.S.C. § 555. Other provisions applicable to informal adjudication include the right to use agency subpoena power, the right of interested persons to appear if orderly public business permits, and the right to obtain copies of documents submitted to the agency. *Id.*

72. Grisinger, *supra* note 5, at 408.

73. Under the APA's formal adjudication rules, separation of functions within the agency is required (i.e., the same agency employee cannot investigate and adjudicate). 5 U.S.C. § 554(d). Also, Administrative Law Judges, with their accompanying civil service protections, preside over formal adjudication. Id. at § 7521. Formal adjudication, however, does not demand Article III–like adjudication. Administrative Law Judges work for the enforcement agency. *Id*. at § 3105.

74. Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 111–12 (2018).

75. Chin, *supra* note 2, at 4, 62 (discussing the role of racism in the foundation of immigration adjudication); s*ee also* Kevin R. Johnson, *The Intersection of Race and Class in US Immigration Law and Enforcement*, 72 LAW AND CONTEMP. PROBLEMS 1, 17–18 (2010).

76. Dominion Energy v. Johnson, 443 F.3d 12, 14–15 (1st Cir. 2006).

scribes, the APA's formal hearing procedures would not be enough for immigration law. The absence of informal adjudication procedures in the APA means that even if the APA's informal procedures applied, the APA would not provide the procedural demands that immigration law needs. In creating a procedural system outside of the APA, Congress has departed downward and has not supplied the subconstitutional protections that immigration law requires.

At the time of the APA's creation, agency adjudicators "were believed by many critics to be potentially lawless figures who abused their decision-making powers to help their agencies deprive regulated parties of their property rights."[77] The APA has done little to dispel similar concerns in immigration law—except in immigration law, the concern is not about property rights, but rather human rights.

## B. Removal Cases and the Implementation of the APA

Soon after the enactment of the APA, the Department of Justice published an influential manual to guide its implementation. Immigration law is only briefly mentioned in the manual.[78] The immigration agency itself separately considered the fundamental question whether the APA applied to deportation and exclusion cases and determined it did not.[79]

The Supreme Court, however, held in 1950 that deportation hearings were subject to the procedures of the APA in *Wong Yang Sung v. McGrath*.[80] Agency adjudication was bifurcated into two types of removal proceedings then: deportation (expulsion) or exclusion.[81] The Immigration Act of 1917 was the then-governing immigration statute and judicial review of deportation decisions occurred through habeas

77. Joanna L. Grisinger, *The Hearing Examiners and the Administrative Procedure Act*, 1937–1960, 34 J. Nat'l Ass'n Admin. L. Judiciary 1, 2 (2014).

78. Attorney General's Manual on the Administrative Procedure Act at 97 (1947) (mentioning that habeas corpus review will still be used in immigration law).

79. Ugo Carusi, *The Federal Administrative Procedure Act and the Immigration and Naturalization Service*, Federal Administrative Procedure Act and the Administrative Agencies at 291, 297 (1947) (noting in 1947, the INS expressed its opinion that entry and deportation proceedings were not subject to the new APA).

80. Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950).

81. Aleinikoff, et. al., Immigration and Citizenship at 895; Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 Interp. Releases 453, 455–56 (1988). At the time, the agency adjudication of exclusion cases followed different procedures than the adjudication of deportation cases. For exclusion cases, immigrant inspectors referred applicants for admission to a Board of Special Inquiry assigned to the port of entry. These three member boards further examined the applicant for entry. There was an agency appeal available to the INS Central Office, and then to the Board of Immigration Appeals. *Id*.

corpus proceedings.[82] The agency deportation proceedings in *Wong Yang Sung* resulted in a deportation order.[83] The deportation order was challenged because the proceedings were not conducted under the APA's formal adjudication procedures.[84] The government argued that the APA did not apply to deportation adjudication.[85]

In *Wong Yang Sung*, the Supreme Court explained that concern about the combination of functions within agencies—the idea that one person would investigate, prosecute, and adjudicate—was a major concern addressed through the APA's formal adjudication provisions.[86] At the time, the immigration agencies employed inspectors who investigated and adjudicated deportation cases. The same inspector would not investigate and decide in the same case, but the position required investigation and adjudication. Inspector X would adjudicate cases investigated by Inspector Y and Inspector Y would adjudicate the cases investigated by Inspector X.[87] Also, an inspecting officer, when acting as an adjudicator, usually presented the case for removal and adjudicated it.[88] The Supreme Court held that this adjudication framework violated the APA. The Court explained:

> [T]hat the safeguards [the APA] did set up were intended to ameliorate the evils from the commingling of functions as exemplified here is beyond doubt. And this commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceedings, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved, and who often do not even understand the tongue in which they are accused.[89]

The Court held that Congress did not exempt immigration adjudication from the formal adjudication requirements of the APA. It also held that allowing the position of immigration inspector to investigate and adjudicate violated those requirements, even if one inspector did not investigate and adjudicate the same case.[90]

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82. *Id.* at 453–54.

83. Wong Yang Sung, 339 U.S. at 35. At the time, there was an agency appeal procedure available. The decision of the inspector could be appealed to the INS Central Office and to the Board of Immigration Appeals. Rawitz, *supra* note 81, at 455.

84. Wong Yang Sung, 339 U.S. at 35.

85. *Id.* at 36.

86. *Id.* at 38, 41–45.

87. *Id.* at 45–46.

88. Rawitz, *supra* note 81, at 454–55.

89. Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950).

90. *Id.* at 53. The Court concluded that the APA's formal adjudication provisions governed deportation hearings because deportation hearings were "required by statute" under the APA

Six months after the Supreme Court's decision, Congress passed legislation exempting deportation and exclusion cases from the APA through an appropriations bill.[91] The Immigration and Naturalization Service requested from Congress almost $4 million for 1951 (approximately $45 million in today's dollars) to comply with the Supreme Court's opinion in *Wong Yang Sung*.[92] Instead of appropriating the funds, Congress exempted deportation and exclusion cases from the APA.

In 1952, Congress passed a new comprehensive immigration law, the Immigration and Nationality Act (INA). The Supreme Court held that Congress did intend to continue to exempt agency deportation procedures from the APA through the INA. The Court also concluded, however, that Congress did not exempt agency deportation adjudication from the APA's judicial review provisions. Thus, the procedures used to decide whether to deport did not need to comply with the APA, but the APA's court review procedures did govern.

In *Marcello v. Bonds*, the Court held that Congress did effectively displace the APA with respect to agency deportation procedures through the INA.[93] Marcello argued that a deportation proceeding that was overseen by a "special inquiry officer" who was supervised by those engaged in investigation and prosecution violated the APA.[94] The Court held that Congress, through the INA, expressly set up a parallel system for deportation hearings and that Congress meant for the system to be exempted from the APA.[95] Congress' 1952 immigration adjudication system did not require a separation of prosecutorial and adjudicatory functions within the agency (as the APA's formal adjudication rules would have required, as discussed in *Wong Yang*

even though deportation hearings were not, in fact, required by statute but rather were required by the Court's interpretation of the Constitution. *Id.* at 51–52.

91. Supplemental Appropriation Act of 1951, Pub. L. 64 Stat. 1044, 1048 (1951); Rawitz, *supra* note 81, at 456.

92. Supplemental Appropriations for 1951 at 751–52. The agency estimated that future costs could rise to $25–30 million per year. Id. at 753. The Association of Immigration and Nationality Lawyers and the American Bar Association objected to the exemption. Id. at 754–55. The American Bar Association labelled the agency's estimates a "gross exaggeration." Revision of Immigration, Naturalization and Nationality Laws, joint hearings before the subcommittees of the Committees on the Judiciary, Congress of the United States, Eighty–second Congress, first session, on S. 716, H.R. 2379 and H.R. 2816, bills to revise the laws relating to immigration, naturalization and Nationality at 526–27, 534–35 (Mar. 6-9, 12-16, 20-21 and Apr. 9, 1951).

93. *See* Marcello v. Bonds, 349 U.S. 302, 314 (1955).

94. *Id.* at 305.

95. *See id.* at 308–310.

*Sung*).[96] Additionally, the Court held that because the Constitution did not require separation of functions in immigration law, the congressional desire for no separation of functions would stand.[97]

The parallel system of removal adjudication procedures used today has evolved from the system at issue in *Marcello v. Bonds*. The separation of functions sought in the case was partially achieved when the Executive Office for Immigration Review (EOIR) was created within the Department of Justice by regulation in 1983.[98] Under that framework, investigators and adjudicators worked in different components of the same agency. In 2003, Congress altered this structure to provide further separation of functions by leaving immigration removal adjudicators (immigration judges) within the Department of Justice but moving the agency employees who seek removal to the new Department of Homeland Security (DHS).[99]

As Part II(C) reveals, however, immigration removal under the INA is highly problematic, even if it has adopted some of what the APA would require if it is applied. For example, while functions have been separated, the immigration adjudicators still answer to the attorney general, the nation's chief law enforcement officer.[100] Also, Congress has allowed immigration judges to remain mere employees of the Department of Justice.[101] Immigration judges are not Administrative Law Judges (ALJs) and they do not benefit from the civil service protections afforded to ALJs.[102] Congress has not given immigration judges special protection against political influence in either their selection for the position or in their removal.[103] Additionally, the growth of diversions from the immigration court system means that most removal adjudication takes place solely within DHS.[104] Therefore, the effect of the separation of functions is blunted.

While the Supreme Court held that Congress did express a clear intent to exempt agency deportation procedures from the APA, in

96. *See id.* at 305.
97. *See id.* at 311.
98. 8 C.F.R. § 1003.0; Rawitz, *supra* note 81, at 459.
99. T. ALEINIKOFF, ET. AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 898 (9th ed. 2021).
100. 8 U.S.C. § 1101(b)(4).
101. *See id.*
102. Jill E. Family, *Immigration Adjudication Bankruptcy*, 21 UNIV. OF PA. J. CON. LAW 1025, 1029 (2019).
103. There is a regulatory command that immigration judges should use their independent judgment in adjudicating cases. 8 C.F.R. § 1003.10(b).
104. *See Family, supra* note 102, at 1038.

*Shaughnessy v. Pedreiro*, the Court held that Congress did not expressly exempt immigration deportation hearings from the judicial review provisions of the APA.[105] Given the APA's goal of increasing judicial review, the Court held that Congress would need to use explicit language to preempt the APA's judicial review scheme and to demand some other system.[106]

In 1961, Congress enacted legislation that provided the clearer statement the Court sought in *Shaughnessy v. Pedreiro*. Congress expressed its clear intent to move judicial review of deportation and exclusion proceedings out from under the APA and into a scheme supplied by the organic statute. The 1961 statute was intended to pull back on the possibilities for review opened by the Supreme Court's recognition of judicial review under the APA.[107]

For example, the 1961 statute eliminated the role of the federal district courts in reviewing deportation orders.[108] Congress directed all those seeking judicial review of a deportation order to file a petition for review directly with a US Court of Appeals.[109] Also, the 1961 legislation added a six-month time limit on when judicial review could be sought and a requirement to exhaust administrative remedies.[110]

Congress next enacted major restrictions on judicial review in 1996.[111] In 1996, Congress applied the 1961 framework for review of

105. Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955). In the 1952 Act, Congress stated that agency deportation orders are "final." The Court held that the "final" language was ambiguous. The Court said that it would be "more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word "final" in the 1952 Immigration Act as referring to finality in administrative procedure, rather than as cutting off the right of judicial review in whole or in part." *Id.* at 51. The Court reached the same conclusion as to exclusion hearings in 1956. *See* Brownell v. Tom We Shung, 352 U.S. 180, 185–86 (1956).

106. *See* Shaughnessy, 349 U.S. at 51.

107. T. Aleinikoff, et. al., Immigration and Citizenship: Process and Policy 1029 (8th ed. 2016).

108. *Id.* Habeas corpus review remained available for exclusion orders.

109. Immigration and Nationality Act, Pub. L. No. 87–30, § 5(a), 75 Stat. 650 (1961).

110. *Id.*; H.R. Rep. No. 1086, 87th Cong., 1st Sess., 22–23 (1961). ("The purpose of section 5 is to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States, by adding a new section 106 to the Immigration and Nationality Act.").

111. In 1988, Congress shortened the time limit for filing a petition for review from six months to sixty days for those whose removal orders were based on an aggravated felony conviction. Anti–Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7347(b)(1), 102 Stat. 4472 (1988). This time limit was shortened to 30 days in 1990. Immigration Act of 1990, Pub. L. No. 101–649, § 502(a), 104 Stat. 5048 (1990). There were other restrictions aimed at individuals with aggravated felony convictions enacted before 1996, but 1996 marked the next major restructuring of immigration judicial review. *See, e.g.,* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, title XIII, §130004(b), 108 Stat. 2023 (1994).

deportation orders to exclusion orders as well.[112] Additionally, Congress narrowed the ability of the courts of appeals to review both deportation and exclusion decisions. Congress enacted restrictions that affect the timing and form of challenges,[113] as well as restrictions on review based on the substance of the case.[114] The substantive restrictions include provisions that eliminate review over categories of executive discretionary decisions and that limit review for those whose removal orders are based on the commission of a variety of criminal acts.[115]

The post APA litigation of the 1950s and 1960s, and the congressional reaction to it, established that both agency adjudication of removal and judicial review of removal agency adjudication would be governed by an organic statute, the INA, and not the APA. Congress short-circuited this aspect of immigration law—removal—from the reforms of the APA.[116] That removal adjudication would have fared better under the APA is not this article's argument. In fact, even if the APA applied, its provisions would not be enough. More important is that Congress created its most ambitious administrative law reform ever, the APA, with the chance for it to quarantine immigration law from reform. Congress did just that, and the system it implemented in its place is a failure.

### C. Removal Cases under the Immigration and Nationality Act

Immigration removal adjudication has not fared well under the INA. The APA expressly allows for Congress to exempt regulatory areas from the APA's uniform procedures.[117] Immigration law's exceptions from the APA are unremarkable in that Congress designed the APA with the expectation of exceptions. This system that Congress created—its grandest and most ambitious reform of administrative law—is simply not working for immigration law, however. The removal adjudication system is broken. No APA-related doctrine has eased the tremendous challenges faced by immigration adjudication.

112. 8 U.S.C. § 1252(a)(1); ALEINIKOFF, *supra* note 107, at 1030.
113. 8 U.S.C. § 1252(b), (f), (g).
114. 8 U.S.C. § 1252(a)(2).
115. *Id.*
116. Other types of agency action did become subject to the APA. For example, immigration benefit decisions, such as the denial of an application for a green card, are subject to the APA's judicial review provisions. ALEINIKOFF, *supra* note 108, at 1030. *See also* Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 26 LEWIS AND CLARK L. REV. 71 (2021) (discussing immigration adjudication subject to the APA's judicial review provisions).
117. *See* Bremer, *supra* note 6.

Administrative law has failed immigration law because it has not produced removal adjudication that satisfies administrative law process values.

1. The Missing Constitution

The effectiveness of administrative law in immigration law is especially important because immigrants often are denied constitutional protections. The Due Process Clause does not apply to would-be immigrants outside of the United States seeking entry,[118] and the political branches have plenary power to determine the substance of immigration policy.[119] The exercise of plenary power is at best subject to a search for a facially legitimate reason.[120] For example, in reviewing the Trump administration's immigration ban aimed at Muslims, the Supreme Court expressed that as long as there was a facially legitimate reason for the ban, it would ignore evidence of illegitimate motivations.[121] The plenary power doctrine is steeped in ancient notions of sovereignty that reason that the political branches need special power over immigration law to protect the nation and to allow the nation to exist.[122]

The effects of the plenary power doctrine are felt in immigration adjudication. First, the extremely harsh and often racially motivated law that results from the plenary power doctrine must be applied in immigration adjudication.[123] The acceptability of the system is tainted by the substantive law it must apply. Second, the narrative around immigration promoted by the plenary power doctrine pervades immigration adjudication. One argument to keep immigration adjudicators under the thumb of the attorney general is that the President needs close control over immigration judges and the Board of Immigration Appeals (BIA) to protect the sovereignty of the country.[124] The argument asserts that more independent adjudicators would threaten the

118. Certain returning lawful permanent residents are not treated as seeking entry. 8 U.S.C. § 1101(a)(13).

119. Jill E. Family, *Removing the Distraction of Delay*, 64 CATH. U. L. REV. 99, 112–14 (2014).

120. *See* Fiallo v. Bell, 430 U.S. 787, 794 (1977).

121. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2418–23 (2018).

122. Family, *supra* note 119, at 112–14.

123. Jill E. Family, *Beyond Decisional Independence, Uncovering Contributors to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 551 (2011).

124. Jill E. Family, We Have Nothing to Fear but "Sovereignty Fear" Itself, YALE J. ON REG. (Aug. 5, 2021). https://www.yalejreg.com/nc/we–have–nothing–to–fear–but–sovereignty–fear–itself/

independence of the nation. Third, the politicization of immigration adjudication that results from the influence of the plenary power doctrine denigrates the reputation of and quality of immigration adjudication.[125] The position of the immigration judge is degraded, and immigration judges feel pressure to conform their decisions to please their supervisor, the attorney general.[126]

Additionally, the plenary power doctrine's blockade against constitutional challenges to immigration policy is amplified by the absence of administrative law doctrine permitting challenges to the substance of executive branch policy choices. Perhaps the best opportunity to challenge substance through administrative law doctrine is an argument that the choice of one policy over another is arbitrary and capricious.[127] Even that challenge, however, focuses on the way the agency thinks about a problem rather than the merits of the actual policy.[128] This means that even if the executive branch's interpretation of immigration law is subject to arbitrary and capricious review, that review is limited to errors in how the agency thinks about the problem. The agency may be free to adopt the exact same policy using a more careful, or perhaps more calculated, rationale.[129] The statutory grounds of removal are insulated from constitutional challenge through the plenary power doctrine. The executive branch's interpretations of those statutory grounds are at best subject to arbitrary and capricious review, which does not allow for true substance challenges.

The sub-constitutional procedures governing removal adjudication are supplied by Congress through the INA, and not the APA. The sub-constitutional procedures *are* subject to the Due Process Clause, at least as applied to those who are physically present in the United States and are not at the border, seeking entry.[130]

The approach amounts to a double void that amplifies government power. There are limited opportunities to challenge substantive

125. Family, *supra* note 123, at 569–72.

126. Family, *supra* note 102, at 1037–46.

127. 5 U.S.C. § 706(2)(a); *See, e.g.*, Judulang v. Holder, 565 U.S. 42 (2011) (holding the Board of Immigration Appeals' interpretation of a deportation statute to be arbitrary and capricious).

128. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.Ins. Co., 463 U.S. 29, 56–7 (1983); *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

129. Dep't of Homeland Sec. v. Regents, 140 S.Ct. 1891, 1916 (2020) (explaining that arbitrary and capricious review does not address the wisdom of policy but rather whether the agency has provided a "reasoned explanation" for the policy).

130. *See* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001).

policy choices under the Constitution coupled with at times limited application of procedural due process principles. Constitutional protections are diminished, and administrative law doctrine provides little reinforcement.

In the presence of limited constitutional protections and using the APA's generous exit opportunities, Congress developed procedures for removal adjudication through the INA. The system Congress created is a failure. As Alison Peck has argued, the current framework is a "bad idea."[131] She has explained that "[t]he compromises in immigration court independence through their location in [the Department of Justice] appear unnecessary, even counterproductive, to other plausible goals in administration of the immigration laws."[132] Additionally, she has concluded that "[t]he institutional design appears explainable only as collateral damage of the national security crises and propaganda-driven fears that dominated the eras in which the design was hastily created."[133]

The limited constitutional rights of noncitizens and the lack of constitutional review of substantive policy choices does not justify allowing a dysfunctional administrative adjudication system to fester. Constitutional demands are a floor and not a ceiling. If the system is failing measures of administrative process design, it should be fixed. The argument that we should not be concerned with good governance if the regulated parties are not citizens is spurious. Even if one holds steadfast to the idea that the citizenship of the regulated party matters, the system affects the rights of US citizens. For example, US citizen family members and employers are directly affected by adjudication whether noncitizens may remain in the United States.

It is possible that the status quo of a dysfunctional administrative system on the foundation of limited constitutional rights is a deliberate policy choice. Congress may favor a dysfunctional system as a political signal against fair process for immigrants. If so, Congress should be transparent about a desire to create a zone of regulation with few limits on government power.

131. Peck, *supra* note 45, at 150.
132. *Id.*
133. *Id.*

2. The Current State of Removal Adjudication

The Department of Justice, through EOIR, runs the administrative removal adjudication system.[134] Attorney employees of the Department of Justice called immigration judges conduct hearings to determine whether an individual is removable from the United States, either because the person is inadmissible or because the person was admitted but is now deportable.[135] Through an administrative appeals process, members of the BIA review the work of immigration judges.[136] Immigration judges are not ALJs.[137] BIA members also are attorney employees of the Department of Justice, and they also lack the job protections of ALJs.[138] The attorney general has agency head review over the system through the power to certify any matter to himself for decision.[139] The federal courts of appeals have limited judicial review over the agency adjudication system.[140]

DHS plays two important roles in the removal adjudication system. First, DHS is the agency that initiates removal proceedings. DHS holds the discretion to decide when an individual will be charged with removal and what removal charges to file.[141] DHS, holds great prosecutorial discretion power as the gatekeeper for the stream of individuals who need to appear in immigration court.[142] Second, the attorneys who appear in immigration court on behalf of the government work for DHS.[143] These attorneys work for Immigration and Customs Enforcement (ICE), which is a part of DHS.[144] ICE attorneys prosecute the charges of removal initiated by their agency. During removal proceedings, these attorneys wield the discretion to decide whether to continue to pursue removal and whether the agency believes that the individual is entitled to any relief from removal.

134. The United States Department of Justice, https://www.justice.gov/eoir/about–office (last visited October 11, 2022).

135. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. L. REV. 595, 599 (2009).

136. *Id.*

137. *Id.*

138. *Id.*

139. 8 C.F.R. § 1003.1(h).

140. 8 U.S.C. § 1252.

141. Enforcement and Removal Operations, U.S. Immigr. and Customs Enf't (May 13, 2022), https://www.ice.gov/about–ice/ero.

142. Professor Stephen Lee has explored how other actors in the criminal justice system affect the flow of cases into immigration adjudication. Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV 553, 556 (2013).

143. Office of the Principal Legal Advisor, U.S. Immigr. and Customs Enf't (Sept. 1, 2022), https://www.ice.gov/about–ice/opla.

144. *Id.*

The individuals subject to a removal charge, the respondents, may be represented during a removal hearing.[145] However, there is no statutory right to government funded counsel and the Supreme Court has not recognized a constitutional right to government funded counsel in removal proceedings.[146]

The removal adjudication system is severely troubled. No doctrine of administrative law has ameliorated its negative characteristics, and Congress has not taken action to fix it by statute. There are numerous problems with the system.

First, the system labors under immense, almost unimaginable, backlogs. As of November 2022, there are over 1.9 million cases awaiting adjudication in the immigration courts.[147] In 2016, the backlog was about 500,000 cases. In 1998, it was about 130,000.[148] Across the U.S. in Fiscal Year 2022, it took an average of 795 days to complete a case.[149] In Fiscal Year 2019, the average duration of immigration adjudication for detained individuals was 46 days.[150] Because immigration detention is indistinguishable from incarceration,[151] individuals spent an average of 46 days in prison while awaiting civil agency adjudication. Delay affects the BIA as well. In the first quarter of 2022, there were over 82,000 administrative appeals pending.[152] In 2017, there were around 12,000 cases pending.[153]

The backlogs worsened during the Trump Administration as ICE eschewed prosecutorial priorities in favor of a scattershot approach where every immigrant was a priority for removal.[154] Instead of adequately increasing the resources available to EOIR to meet the increased intake of cases, the Trump Administration tried to solve the backlog by forcing immigration judges to move faster and by incen-

145. 8 U.S.C. § 1362.

146. *Id.*

147. *Immigration Court Backlog Tool,* U.S., TracImmigr. (Nov. 2022), https://trac.syr.edu/phptools/immigration/court_backlog/.

148. *Id.*

149. *Id.*

150. *Immigration Detention in the United States by Agency*, Am. Immigr. Council 4 (Jan. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf.

151. *See infra* note 184.

152. Adjudication Statistics: Case Appeals Files, Completed, and Pending, Exec. Off. for Immigr. Rev. (Jul. 15, 2022), https://www.justice.gov/eoir/page/file/1248501/download.

153. *Id.*

154. The End of Immigration Enforcement Priorities Under the Trump Administration, Am. Immigr. Council 1 (Mar. 2018), https://www.americanimmigrationcouncil.org/research/immigration–enforcement–priorities–under–trump–administration.

tivizing judges to order more removals.[155] The administration used both procedural tools and interpretations of substantive law to work towards this objective.[156]

Second, the lack of government-appointed counsel in immigration court has profound problematic effects. One study concluded that only thirty-seven percent of individuals in removal proceedings are represented.[157] The lack of a lawyer affects a noncitizen's ability to succeed in immigration court. Representation means "dramatically more successful case outcomes" for noncitizens.[158] The lack of lawyers not only affects the fairness and accuracy of the proceedings, but also affects efficiency. Represented immigrants spend less time asking for continuances and are more likely to appear at hearings.[159]

Third, the system produces inconsistent results. The outcome in an individual case not only depends on whether the noncitizen can afford counsel, but also depends on which immigration judge is assigned to preside over the removal hearing. There are wide disparities in asylum grant rates, for example, from immigration judge to immigration judge.[160] Implicit bias plays a role as well.[161]

Fourth, immigration adjudicators lack adequate decisional independence. BIA members and immigration judges are attorney employees of the Department of Justice. Immigration adjudicators know that the attorney general, the country's top law enforcement official, has control over their pay and conditions of employment.[162] Additionally, the attorney general has the power to certify removal cases to himself if he does not like the work product of the immigration adjudication system.[163] Therefore, even if independent decision-making occurs, the attorney general may easily overrule it.

Concerns about the independence of immigration adjudicators are more than abstract. During the George W. Bush Administration,

155. Family, *supra* note 102 at 1037–46.
156. *Id.*
157. Ingrid v. Eagly and Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 7, 16 (2015).
158. *Id.* at 57.
159. *Id.* at 9–10, 32.
160. Andrew I. Schoenholtz, Jaya Ramji–Nogales & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 376 (2007); See also Rikha Sharma Rani, Trapped at the Border? Hope for a Female Judge, Politico (Jun. 15, 2018), https://www.politico.com/magazine/story/2018/06/15/immigration–court–judge–women–218824/.
161. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 New Eng. L. Rev. 417, 439 (2010).
162. Family, *supra* note 102, at 1030.
163. *Id.*

the Department of Justice Office of Inspector General found unlawful politicized hiring of immigration judges.[164] Also, President George W. Bush's Attorney General, John Ashcroft, fired BIA members in a move that eliminated board members with immigrant-lenient reputations.[165]

During the Trump administration, an immigration judge was removed from a case because the administration did not approve of how the judge was handling the case.[166] Additionally, the Trump administration imposed a case quota system on immigration judges and took away some of their docket management power.[167] The case quotas factored into job performance determinations. Removal was the clear policy objective and the Trump administration made it difficult for immigration judges to deviate from that goal, no matter if the individual was entitled to relief under the statute.[168] President Trump's rhetoric, which was extremely hostile to both immigrants themselves and the notion of providing them with any process at all, also sent signals to immigration adjudicators.[169]

Fifth, a shadow system of immigration adjudication has developed.[170] Most removal adjudications do not take place in immigration court.[171] Through various diversions, opportunities for a hearing before an immigration judge are limited for those facing removal.[172] Through expedited removal, various waivers, and the criminalization of immigration law, many are locked out of immigration court.[173]

The Trump administration developed even more methods of diverting individuals from immigration court.[174] The Trump administration implemented a metering system at the US-Mexico border. This policy artificially limited the number of asylum applicants who could approach the border per day.[175] Also, it implemented the "Remain in Mexico" program, which forced asylum applicants to wait in Mexico

164. *Id.*
165. *Id.*
166. *Id.* at 1043.
167. *Id.* at 1040.
168. *Id.*
169. *Id.* at 1038.
170. Family, *supra* note 135, at 597; *See also* Jennifer Koh, *Removal in the Shadows of Immigration Court,* 90 S. CAL. L. REV. 181 (2017); Shoba Sivraprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE AND LAW 1 (2014).
171. Family, *supra* note 102, at 1034.
172. Family, *supra* note 135, at 597–98, 609–32.
173. Id.
174. Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48 (2020).
175. Family, *supra* note 102, at 1044–45.

for a hearing before an immigration judge.[176] The dangerous conditions in Mexico discouraged some from pursuing their claims.[177]

A sixth challenge is that immigration adjudication includes a vast system of detention. The INA mandates the detention of many immigrants as a part of removal adjudication.[178] As Anil Kalhan has described, "[f]or many noncitizens, detention now represents a deprivation as severe as removal itself."[179]

Immigration enforcement relies on a national network of over 130 facilities to detain immigrants.[180] These facilities include immigration only detention centers, as well as prisons and jails that simultaneously house criminal defendants.[181] Immigration detention includes the confinement of children and families.[182]

As of September 25, 2022, ICE was holding over 25,000 individuals.[183] Sixty-six percent of these detainees had no criminal record, yet even those with no criminal record are held in conditions that do not meaningfully differ from those of convicted criminals.[184] Even for those with a criminal record, immigration detention is not meant to be criminal punishment. Immigration detention is civil detention for all immigrants.[185]

The detention of immigrants is problematic and presents challenges for administrative law. There are three main concerns with immigration detention: (1) that detention of immigrants is overused when less restrictive measures are available to achieve the aims of civil detention; (2) that detention conditions are unacceptable; and (3) that

176. *Id.*
177. *Id.*
178. 8 U.S.C. § 1226(c).
179. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010).
180. Detention Facilities, U.S. Immigr. and Customs Enf't (Jun. 7, 2022), https://www.ice.gov/detention–facilities.
181. *Id*.
182. Detention Watch Network, *Family Detention: The Unjust Policy of Locking Up Immigrant Mothers with Their Children*, https://www.detentionwatchnetwork.org/issues/family–detention (last visited Jan. 18, 2023).
183. TRAC Immigration, Immigration Detention Quick Facts, TRAC REPORTS, INC., https://trac.syr.edu/immigration/quickfacts/ (last updated Jan. 1, 2023) . In February 2020, prior to the pandemic, ICE held over 39,000 people.
184. *Id*.; César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1370, 1383–88 (2014); Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1442, 1444–45 (2010); ABA Civil Immigration Detention Standards at 1, https://www.americanbar.org/content/dam/aba/administrative/immigration/detention_standards/aba_civil_immigration_detention_standards_11_13_12.pdf.
185. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

detention significantly impedes an immigrant's access to justice.[186] Administrative law has not solved these problems and lacks the tools to do so.

Immigration detention is not meant to be punitive.[187] Its purpose, instead, is to guarantee an individual's appearance at their immigration hearing and to guarantee an individual's availability to be removed if there is a removal order.[188] Given those goals, organizations and scholars have argued that detention in prison conditions is excessive, and that alternatives are available.[189] Also, immigration detention is often mandatory,[190] and some argue that detention should not be the default position.[191] Immigration detention at times includes the detention of children (or sometimes even the forced separation of families),[192] and this is presented as another reason to temper the use of immigration detention.[193]

When immigrants are detained, they are detained in punitive conditions. Immigrants are detained in prisons, or in prison-like conditions.[194] Numerous objections have been raised to the conditions of confinement, including inadequate access to adequate healthcare, physical and emotional abuse, lack of protections from disease, and harmful conditions for children. A study of grievances filed by immigrants in immigrant detention facilities in Fiscal Year 2015 reports a wide range of concerns including mental and physical health com-

186. *See* Kalhan, *supra* note 179, at 42–43.

187. Hernández, *supra* note 184, at 1351–53.

188. *Id.* at 1352–54.

189. *See, e.g.*, Human Rights Watch, Dismantling Detention, International Alternatives to Detaining Immigrants (Nov. 3, 2021), available at https://www.hrw.org/report/2021/11/03/dismantling–detention/international–alternatives–detaining–immigrants; ACLU, Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock Up, available at https://www.aclu.org/other/aclu–fact–sheet–alternatives–immigration–detention–atd; LIRS, Alternatives to ICE Detention for Non–citizens of the United States (Jan. 27, 2021), available at https://www.lirs.org/alternatives–ice–detention–united–states/; Hernandez, *supra* note 184, at 1405–13; Mark Noferi, *Making Civil Immigration Detention "Civil,"and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. Civ. Rts. & Econ. Dev. 533, 576–82 (2014); ABA Civil Immigration Detention Standards at 2–3.

190. The number of individuals subject to mandatory immigration detention rose dramatically after 1996. *See* Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. Cal. L. Rev. 1, 7–8 (2018).

191. *See* Human Rights Watch, *supra* note 189.

192. Southern Poverty Law Center, *Family Separation under the Trump Administration– a timeline* (June 17, 2020), available at https://www.splcenter.org/news/2020/06/17/family–separation–under–trump–administration–timeline.

193. *See* Human Rights Watch, *supra* note 189.

194. Hernández, *supra* note 184, at 1370, 1383–88.

plaints, lack of telephone access, separation from family members, physical abuse, sexual abuse, and lack of access to legal counsel.[195]

One consequence of immigration detention is that it can impede an individual's ability to fight a removal charge or to pursue relief from removal. Many immigrants are held in facilities located in remote areas, far away from legal professionals or any kind of support system.[196] It is also common for a detained immigrant to be transferred across the country from detention facility to detention facility.[197] This makes it difficult to maintain contact with the outside world, including legal representation.[198]

Immigration removal adjudication is severely troubled. It faces a multitude of serious problems that administrative law has allowed to fester. The next section explores this failure.

### 3. The APA's Failures in Removal Adjudication

No current doctrine of administrative law, or even a combination of doctrines, has been powerful enough to demand a fair and functional removal adjudication system. Removal adjudication is not governed by the APA, but rather by the INA. The APA's feature of flexibility—the feature that allows Congress to deviate from the APA by enacting other statutes—has not served immigration law well. Congress has not enacted organic doctrines or requirements to resolve immigration removal adjudication's woes.

Even if the APA applied, however, that would not solve the system's problems. Application of even the APA's most formal adjudication provisions would not solve the problems facing immigration removal adjudication. No existing doctrine or provision of administrative law is sufficient. The APA is insufficient, and Congress has not used its ability to craft parallel standards to fix immigration removal adjudication.

The APA allows Congress to pick and choose when it wants certain agencies to follow the standardized procedures of the APA versus when it wants to tailor procedures. This flexibility makes sense in terms of the breadth and variety of administrative agencies and the difficulty of developing a centralized, one-size-fits-all approach. How-

195. Ryo & Peacock, *supra* note 190, at 47.
196. *Id.* at 51.
197. TRAC Immigration, Immigration Detention Quick Facts, TRACK REPORTS, INC., https://trac.syr.edu/immigration/quickfacts/ (last updated Jan. 1, 2023).
198. Ryo & Peacock, *supra* note 190, at 51–52.

ever, this core feature of the APA has failed immigrants in removal proceedings. This feature has allowed Congress to create a removal system by statute that does not satisfy administrative law process values.

Measures of administrative process design are not driving congressional action. Neither is a primary motive behind the APA, to promote fairness in administrative adjudication. For example, in 1996, Congress precluded judicial review of certain agency decisions and made the surviving judicial review more difficult to access.[199] These amendments to the INA were the result of a campaign against immigrants that characterized immigrants as malevolent for accessing procedural opportunities to prevent removal, including judicial review.[200] Additionally, Congress has not required government funded counsel,[201] and has placed the burden on (mostly unrepresented) immigrants to prove that they are entitled to relief from removal.[202] Proving eligibility for relief requires the application of extremely complex statutes that require advanced statutory reading skills and significant case law research to understand. The procedures of the INA are stacked against immigrants, which is antithetical to fairness

There are other examples of how Congress has remained silent in the face of unacceptable procedures, system inaccuracies, and ballooning inefficiency. It has not addressed the widely varied success rates of immigrants among immigration judges. It has not confronted the outrageous backlogs.

Congress also has not amended substantive immigration law in ways that would ease the problems facing removal adjudication. For example, Congress has, over time, restricted the ability of immigration judges to grant relief from removal.[203] The main statutory type of relief from removal, Cancellation of Removal, requires a noncitizen to show that a US citizen or lawful permanent resident spouse or child will experience "exceptional and extremely unusual hardship" if the noncitizen is removed. Congress tightened this standard from "extreme hardship" in 1996.[204] Being separated from a child is not consid-

199. 8 U.S.C. § 1252(a).
200. Family, *supra* note 119, at 106–07.
201. 8 U.S.C. § 1229a(b)(4)(a).
202. 8 U.S.C. § 1229a(c)(4).
203. Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 395–98 (2017).
204. 8 C.F.R. § 240.65.

ered an exceptional and extremely unusual hardship.[205] Congress accepts that a nuclear family must either live apart or that US citizen children or spouses must move to another country to keep the family intact.[206] If it were easier to meet the requirements for relief from removal, perhaps immigration prosecutors would concede to relief in more cases. Or perhaps ICE would issue fewer charging documents if relief were inevitable.

Congress also has not adjusted the penalties for immigration law violations. The one penalty is removal.[207] Congress has not implemented a proportional system of penalties. If other penalties were available, more noncitizens might be willing to resolve an immigration violation outside of immigration court. For example, if the penalty for a certain violation was to pay a fine instead of removal, the noncitizen might just pay the fine and eliminate the need for a hearing before an immigration judge. This not only would make the system more efficient, but it also would be more acceptable if the system had a graduated system of penalties.

Even if the APA applied, the structure of the APA would require congressional action to trigger its formal procedures. Even if Congress would trigger the formal procedures, the APA's formal procedures would not be sufficient for immigration removal adjudication. Scholars have identified eleven requirements of APA formal adjudication.[208] While some of those requirements, if incorporated, might improve removal adjudication, they would not fix removal adjudication.

Under the APA's formal adjudication rules, separation of functions within the agency is required.[209] Congress has already provided for separation of functions in removal adjudication between the Department of Justice and DHS. This has not created decisional independence and has allowed a shadow system of adjudication to develop

205. *In re MONREAL–Aguinaga*, 23 I. & N. Dec. 56 (B.I.A. May 4, 2001).
206. *Id*.
207. Juliet Stumpf, *Fitting Punishment*, 66 WASH & LEE L. REV. 1683 (2009).
208. Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 149 (2019). The eleven requirements are: Notice of Legal Authority and Matters of Fact and Law Asserted; Oral Evidentiary Hearing Before the Agency or ALJ Who Must Be Impartial; Limitations on Adjudicator's Ex Parte Communications with Parties and Within Agency; Availability of Legal or Other Authorized Representation; Burden of Proof on Order's Proponent; Party Entitled to Present Oral or Documentary Evidence; Party Entitled to Cross–Examine Witnesses if Required for Full Disclosure of Facts; Decision Limited to Bases Included in Hearing Record; Party Entitled to Transcript of Evidence from Exclusive Record for Decision; Decision Includes Reasons for All Material Findings and Conclusions; Agency Head Final Decision–Making Authority and De Novo Review of ALJ Decisions. *Id*.
209. 5 U.S.C. § 554(d).

within DHS.[210] The APA requires ALJs to preside over formal adjudication.[211] The civil service protections afforded to ALJs would be an improvement for immigration law. However, the independence of ALJs is diminishing in favor of political control.[212] Additionally, under formal adjudication, agency heads still have the power to substitute the agency head's judgment for the decision of the ALJ.[213]

Congress currently places the burden on the noncitizen to show that they are entitled to relief from removal. Additionally, there is no right to government funded counsel under the APA's formal adjudication provisions.[214] The APA would not demand government funded counsel in removal proceedings. Formal adjudication does put the burden of proof on the proponent of an order.[215] Perhaps that would shift the burden to the government to show that a noncitizen is not entitled to relief from removal and would alleviate somewhat the lack of counsel problem. That would not, however, be a substitute for individual representation.

Removal adjudication under the INA is highly problematic. Congress has activated its prerogative to create a system outside of the APA. The system is a failure and no feature of the APA has fixed it, despite various studies and recommendations.[216] Because removal adjudication is dysfunctional and weighted against fair hearings, it is not acceptable. The backlog shows it is not efficient. The wide variety in adjudication between immigration judges, and the lack of decisional independence of immigration judges also shows that the system is not adequately accurate. Congress has not fixed the system and administrative law has not forced Congress' hand. Therefore, administrative law has failed.

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210. *See infra* note 99 and accompanying text.
211. 5 U.S.C. § 7521.
212. *See, e.g.*, Lucia v. SEC, 138 S.Ct. 2044 (2018).
213. 5 U.S.C. § 557(b).
214. 5 U.S.C. § 555(b).
215. 5 U.S.C. § 556(d).
216. *See, e.g.*, Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (2012), available at –by–ch https://www.acus.gov/sites/default/files/documents/Enhancing–Quality–and–Timeliness–in–Immigration–Removal–Adjudication–Final–June–72012.pdf; American Bar Association, Reforming the Immigration System (2019), available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf; https://www.fedbar.org/government–relations/policy–priorities/article–i–immigration–court/.

## III. The Need for New Administrative Law Doctrines for Removal Adjudication

The immigration removal adjudication system is a failure and the current tools of administrative law have failed to course correct. Administrative law must not wash its hands of removal adjudication simply because the APA allowed Congress to create alternative rules for removal adjudication. If administrative law has permitted this failure, what needs to change?

The answer lies in something that was evident at the time of the creation of the APA: immigration law is a poor fit in discussions about regulation of business. A separate conversation is necessary regarding how the government should regulate immigrants. For the brainstorming part of that conversation, we should not force immigration law into existing doctrine that was developed for the regulation of business. The need for introspection includes both the development of doctrine that will guide agency action in immigration law, as well as new perspectives on judicial review.

While some doubt whether any area of administrative law is truly exceptional and deserves its own special treatment under administrative law,[217] immigration law is different enough.[218] Administrative law and immigration law should be in conversation, but that conversation needs to recognize that administrative law doctrines were not developed with immigration law in mind, and that removal adjudication needs to change. New administrative law doctrines are needed to achieve the goals of administrative law in immigration law.

Even the APA's prohibition on arbitrary and capricious agency behavior is not sufficient for immigration law. During the Trump administration, the APA's prohibition on arbitrary and capricious action was an important tool to blunt the effects of the Trump administration's immigration regulatory policies.[219] The Trump administration

217. Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 149 (2016); Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222 (2014); Christopher J. Walker, *The Costs of Immigration Exceptionalism*, YALE J. ON REG. NOTICE & COMMENT BLOG (Feb. 9, 2016). http://www.yalejreg.com/blog/the–costs–of–immigration–exceptionalismris–walker

218. Jill E. Family, *Immigration Law Exceptionalism and the Administrative Procedure Act*, *supra* note 21.

219. *See, e.g.*, Dept. of Homeland Security vs. Regents of the University of California, 140 S.Ct. 1891, 1910–15 (2020) (concluding that the Trump administration's recission of the Deferred Action for Childhood Arrivals program was arbitrary and capricious).

made many unforced administrative law procedural errors that left the substance of its policies vulnerable to challenge.[220]

The existence of arbitrary and capricious review, however, is not enough. While it is true that the arbitrary and capricious doctrine is a tool to overturn a particular immigration policy whose formulation process went awry, that same policy could simply be reimplemented using acceptable processes. A future administration with more administrative law savvy might not be as vulnerable to allegations of arbitrary and capricious behavior. Additionally, the type of "hard look" arbitrary and capricious review employed to stymie the Trump administration's policy changes is not guaranteed by the APA itself. "Hard look" arbitrary and capricious review instead stems from the Supreme Court's interpretation of the APA.[221] There is not a guarantee that the "hard look" review currently favored will always be prominent. A softer touch would be more deferential to policy changes. Even if "hard look" review remains favored, the judiciary might use it to undo rights granting executive policy changes.[222] Also, arbitrary and capricious review, at least as it is currently understood, is not an effective tool to address all of the problems of immigration removal adjudication. Arbitrary and capricious review cannot provide more independent adjudicators, for example.

Existing administrative law doctrine is failing immigration law because it cannot adequately handle the nature of regulation in immigration law. It lacks the capacity to manage mass detention or to reconcile the human rights implications of immigration law. The APA would never demand government funded counsel or blunt the political effects of agency head review. Also, it does not guarantee the level of independent adjudication necessary in immigration law, and it does not provide mechanisms to incorporate concerns about human rights.

Designing a system of regulatory principles for immigration law requires examination of how government power manifests in immigration law. In immigration law, the power imbalance between the government and the regulated party (the immigrant) is huge. This power imbalance should play a large role in designing administrative law doctrine applicable to immigration law.

220. Bethany A. Davis Noll, "*Tired of Winning:" Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 358–60 (2021).

221. *See e.g.,* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983).

222. *See e.g.,* Texas v. Biden, 20 F.4th 928 (5th Cir. 2021).

Also, this tremendous government power is exercised in the context of some of life's most basic questions, including whether someone will be able to live with their closest family members. The nature of what is at stake in immigration law is a crucial consideration in designing administrative law doctrine. It is time to recognize that the government is regulating humans (immigrants) as opposed to a concept (immigration).[223] Thus far, administrative law has failed to insist on an adequate role for human rights in immigration administration.

Another issue that needs to be addressed is how the prominent role of detention should influence new ideas about the governance of immigration regulation. Current administrative law doctrine has allowed a system of civil detention that is indistinguishable from criminal punishment.

Finally, the lack of independent adjudicators has created a fundamentally flawed system. Even though immigration law eventually achieved separation of functions, separating functions within the executive branch has not fixed what ails immigration removal adjudication. Something more, or something different, is necessary. Also, given the recent erosion of the independence of ALJs and the APA's incorporation of agency head review,[224] even the most independent form of APA agency adjudication is not a great alternative for immigration law.

At the time of the APA's creation, the idea of more independent agency adjudication or increased judicial review was associated with a desire to neuter the New Deal. Seventy-five years later, efforts to restrain agencies or to increase judicial review still are seen through that skeptical lens. These efforts are viewed as an effort to hinder regulation on behalf of industry. The skepticism and criticism may be valid in some contexts, but administrative law must develop a method to recognize that immigration law needs something different.

## IV. Conclusion

Congress has never fully integrated immigration law into administrative law. Its grandest reform of administrative law—the Administrative Procedure Act—does not apply to immigration removal

223. J.C. Salyer, COURT OF INJUSTICE: LAW WITHOUT RECOGNITION IN U.S. IMMIGRATION, 10 (Stanford Univ. Press 2020) (stating that "[t]he scale at which immigration policy is administered and discussed erases the humanity of the people involved and lumps diverse individual human lives into categories of 'problems' that must be solved").

224. *See, e.g.*, Lucia v. SEC, 138 S.Ct. 2044 (2018).

adjudication. Congress created the APA to allow for agency action to be excepted from the APA and to be governed by substitute provisions supplied by Congress. This feature of the APA has allowed Congress to create a parallel system for immigration removal adjudication. This parallel system is extremely dysfunctional and has failed to live up to administrative design process values.

No doctrine of administrative law prevented the status quo. Even if the APA applied, the APA would not adequately address the problems with removal adjudication. The legislative history of the administrative law reform that culminated in the APA reveals that immigration law was not a major factor in the development of the APA. The APA was designed with alternative forms of regulation in mind. It was a reaction to the New Deal and expanded federal government power over industry. Immigration law is simply not a great fit for the APA.

It is time to consider new administrative law doctrines for immigration law. In creating new doctrines, we should operate from a clean slate. The discussion should be guided by the extreme power imbalance between the government and the regulated parties in immigration law, the effect of the regulation on fundamental human rights issues (such as whether someone will be able to live with immediate family members), the prominent role of detention in civil immigration adjudication, and the lack of decisional independence for immigration adjudicators.

# Adding More Sharks to the Shark Tank: Strategies for Allowing More Attorneys to Access Academia in Business Schools

David Nows[1]

Abstract

Becoming a law professor in a law school has become a difficult endeavor. For most candidates, the roughly 50% reduction in open positions over the past decade is discouraging. Nearly all successful candidates have completed another competitive credential in addition to their J.D. degree, like a federal clerkship, an advanced degree, or a faculty fellowship at a law school. The degree of difficulty attached to becoming a law professor is likely to drive away many stellar candidates, even those candidates that dislike legal practice and are actively seeking an alternative.

However, there is another home for some of these aspiring scholars that is often unexplored: becoming faculty within a business school. It turns out that two facts make this a viable solution. First, some business schools have difficulty recruiting faculty that are research-active and hold a terminal degree, like a Ph.D. Second, the accrediting body of top business schools considers the J.D. degree to be a "terminal degree" for purposes of becoming faculty within a business school.

1. Chairperson of Entrepreneurship, Central Michigan University. J.D. University of Pennsylvania Carey Law School, B.A. University of Michigan. David left the practice of law in 2019 after a little more than two years as an attorney to pursue a career teaching entrepreneurship in a business school. Today, David serves as the leader of an entrepreneurship department within an AACSB-accredited business school. This article is dedicated to Jeff Thomas, who David views as "the founder" of the ideas expressed in this paper. David and Jeff spent many hours talking about the ideas shared in this article. Unfortunately, Jeff passed away rather suddenly before an article could be written together. This article was written to celebrate Jeff's legacy. This article also seeks to continue to share Jeff's big ideas. The title of this article is inspired by a presentation given on this topic by Jeff Thomas, Joe Affholter, and David Nows at the 2019 United States Association of Small Business and Entrepreneurship (USASBE) Annual Conference.

This allows J.D. holders to help business schools meet a crucial accreditation requirement that compels the business school to have a minimum percentage of faculty in each discipline that hold terminal degrees and are research active. Thus, J.D. holders can provide business schools with another pool from which to recruit highly qualified faculty.

This article explores how business schools can take advantage of these accreditation criteria and better integrate J.D. holders as faculty within business disciplines like entrepreneurship, management, and finance. This article also explores the benefits of such an arrangement to various stakeholders like aspiring professors, business schools, business students, and the universe of legal scholarship. Lastly, this article shares specific ways business schools can work to train J.D. holding faculty and ultimately, assimilate them within traditional business disciplines.

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## Introduction

Many attorneys enter the practice of law only to quickly realize it is not a perfect career fit.[2] In fact, a 2018 report by The Florida Bar

2. *See, e.g.*, Leigh McMullan Abramson, *The Only Job With an Industry Devoted to Helping People Quit*, THE ATLANTIC (July 29, 2014), https://www.theatlantic.com/business/archive/

stated that seven out of ten attorneys would like to seek a new career path.[3] For these attorneys, an uncertain professional future often awaits.[4]

This article's main purpose is to advocate on behalf of such attorneys and suggest that some of them will be a great fit for a career they have never considered: a professor in a business school. While entry-level positions as a professor in law schools have declined dramatically over the past decade,[5] there have been steps taken to fix a shortage of qualified professors in business schools.[6] In addition, lawyers are one group of non-Ph.D. earners that can meet The Association to Advance Collegiate Schools of Business's (AACSB) top faculty status of "Scholarly Academic," allowing for business schools to consider that faculty member on the same level as a Ph.D. in their given discipline for purposes of meeting a key accreditation requirement.[7]

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2014/07/the-only-job-with-an-industry-devoted-to-helping-people-quit/375199/, (article discussing the industry that exists to help unhappy lawyers find new career paths).

3. *See* Michael Fox Orr, *70 percent of attorneys want to leave the profession*, JACKSONVILLE DAILY REC. (Apr. 2, 2018, 06:10 AM), https://www.jaxdailyrecord.com/article/70-percent-of-attorneys-want-to-leave-the-profession, (citing a study by The Florida Bar outlining profession-wide problems with suicide, substance abuse, and depression. The report also states that seven in ten lawyers would like to switch careers).

4. *See* Abramson, *supra* note 2 ("Attorneys who want to break into entirely new fields must sometimes also engage in additional education or at least lengthy volunteer or intern experience. For lawyers used to excelling and collecting accolades, as well as the cushy perks of having secretaries, firm-provided meals, and town cars, starting low on the totem pole can be a bitter pill to swallow").

5. *See* Sarah Lawsky, *Lawsky Entry Level Hiring Report 2021*, PRAWFSBLAWG (May 18, 2021), https://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report/ (sharing self-reported statistics of law professor hires in each year from 2006 through 2021. The reported number of hires remained above 150 per year until 2011. Since 2014, the number of new hires has ranged from a low of 62 to a high of 88).

6. *See, e.g.,* AACSB Endorses Innovative Programs Preparing Non-Business PhDs for Business School Faculty Positions, AACSB, https://www.aacsb.edu/events/bridgetobusiness/about (last visited Sept. 28, 2021) (discussing post-doctoral bridge programs, designed to qualify non-business PhDs to become the equivalent of a business PhD through additional training. These programs were developed to "address[ ] the shortage of academically qualified faculty that threatens the ability of business schools to meet the growing demand for high-quality business education and research"); *see also Post-Doctoral Bridge to Business*, UNIV. OF FLA. WARRINGTON COLL. OF BUS., https://v9d5g3j5.rocketcdn.me/post-doctoral-bridge/wp-content/uploads/sites/89/2021/11/2021-PDBP-Brochure.pdf (last visited Dec. 22, 2021) ( "The Bridge Program evolved from a 2003 report by AACSB's Doctoral Faculty Commission, which concluded that there would be a significant shortage of business Ph.D.'s. In response to this critical faculty shortage and rising enrollments in management education, AACSB International announced its endorsement of Bridge Programs that prepare experienced and new doctoral faculty from other academic disciplines for faculty positions in business").

7. *See* Stephanie Bryant, *Myths 7 and 8 About AACSB Accreditation Standards: Faculty Qualifications*, AACSB (Apr. 5, 2019), https://www.aacsb.edu/insights/2019/April/myths-7-8-aacsb-accreditation-standards-faculty-qualifications ("For the graduate degree in law, a J.D. is the usual credential that qualifies a faculty member as S[cholarly] A[cademic] or P[ractice] A[cademic] to teach business law and law-related classes").

This perfect storm means that business schools are regularly looking for qualified faculty to fill their ranks, and lawyers can be an attractive option. For example, lawyers regularly specialize in areas like transactional law, employment law, tax law, and cybersecurity.[8] These practice areas are closely related to key business topics, and business schools need faculty to teach these topics to their students.[9] Experienced lawyers have the ability to bring practical, real-world experience into the classroom, providing a strong complement to Ph.D.-trained faculty with robust quantitative research experience. Additionally, business schools can support these lawyers in publishing legal scholarship. This support would achieve the twin aims of diversifying the types of research produced in the business school setting while also helping the business school to meet its accreditation requirements for faculty scholarly and creative activity.[10] Of course, this research activity will further enrich the universe of legal scholarship as well by providing relevant and timely ideas in topics that are not regularly addressed by legal scholars.[11]

This article proceeds in four parts. First, Section I will assess the extent to which attorneys seek alternative employment outside of the practice of law. Then, in Section II, this article reviews the current opportunities available to attorneys as faculty in law schools and in business schools. Then, Section III sets forth the argument that attorneys are a good fit for a wide array of faculty positions in business schools. Section III also argues that expanding the business school opportunity to more attorneys will benefit business schools, their students, attorneys seeking faculty positions, and even legal scholarship. Lastly, Section IV suggests some ways that business schools can make these ideas a reality.

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8. *See, e.g.*, *Fields of Law, Pre-Law Advising*, BROWN UNIV., https://www.brown.edu/academics/college/advising/law-school/fields-law/fields-law (last visited Sept. 29, 2021) (listing various practice areas for lawyers, including transactional law and tax law).

9. *See, e.g.*, *Business Programs*, CENT. MICH. UNIV. COLL. OF BUS. ADMIN., https://www.cmich.edu/colleges/cba/students/services/Pages/Business-Majors.aspx (last visited Sept. 29, 2021) (listing 17 different programs in which students can major in within a business school. Many of these programs teach courses where an attorney's experience and knowledge would be useful).

10. *See generally* Robert C. Bird, *Advice for the New Legal Studies Professor*, 29 J. LEGAL STUD. EDUC. 239 (2012) (discussing the options for new faculty in business law with respect to publishing scholarship).

11. *See* David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html (discussing the lack of legal scholarship and providing useful insights to practitioners. Additionally, the article discusses the difficulties of finding a faculty position in a law school for attorneys with too much experience).

## I. Attorneys and Alternative Employment: A Common Scenario

One of the most common stories told about attorneys revolves around their happiness, or rather, their lack of happiness.[12] Previous literature has shared various data points to confirm this narrative.[13] For example, one study demonstrated that only half of the lawyers surveyed would become a lawyer again, assuming they had a do-over in life.[14] Another survey uncovered that "seven out of ten lawyers want to change their career."[15] In many cases, these negative feelings toward the profession are magnified for female and minority attorneys.[16]

Some observers would attribute this professional dissatisfaction to the adversarial nature[17] of litigation and legal practice, the significant hour requirements[18] placed on attorneys in private practice, and

12. *See* Lawrence J. Fox, *Money Didn't Buy Happiness*, 122 DICK. L. REV. 249, 250 (2017) ( "[I]nstead we learn that the entire scene is marred by dissatisfaction. Americans hold the profession in low esteem, and worse yet, for the first-time clients are dissatisfied with their own lawyers. And lawyers are an unhappy lot, leaving the profession in droves, or languishing in jobs they no longer enjoy, refusing to recommend law as a worthwhile calling for their children").

13. *See* Arthur M. Wolfson, *The Lessons of Narrative: A Review of How Lawyers Lose Their Way: A Profession Fails Its Creative Minds by Jean Stefancic and Richard Delgado*, 11 ROGER WILLIAMS U. L. REV. 431, 432 (2006) ("As many as twenty percent of lawyers are reported to be "extremely dissatisfied with their jobs." Forty thousand leave the profession each year. A recent study found that only half of its respondents would become lawyers, if they had it to do over again. One career counselor who works with young lawyers reported that "[a]t any given time, at least a third of the people I'm dealing with would walk out of the law tomorrow if they could." The rampant dissatisfaction among members of the legal profession is well documented").

14. *See id.* (citing Thomas D. Morgan, *Creating a Life as a Lawyer*, 38 VAL. U. L. REV. 37, 38 (2003)).

15. *See* Orr, *supra* note 3.

16. *See, e.g.,* Joni Hersch & Erin E. Meyers, *Why Are Seemingly Satisfied Female Lawyers Running for the Exits? Resolving the Paradox Using National Data*, 102 MARQ. L. REV. 915, 918–19 (2019) ( "The data indicate that for recently graduated lawyers, there is a substantial difference in overall job satisfaction between men and women, but no gender disparity for more-experienced lawyers. Statistics that combine lawyers across all experience levels will therefore tend to mute any actual gender disparities, as the bulk of any sample will be comprised of lawyers with more experience who have selected to remain as lawyers because they are satisfied").

17. *See* Kenneth A. Sprang, *Holistic Jurisprudence: Law Shaped by People of Faith*, 74 ST. JOHN'S L. REV. 753, 767 (2000) ("The ultimate price paid for this war-like, adversarial system is the personal suffering of human beings. Lawyers themselves are included among the sufferers as evidenced by the rise of lawyer stress and distress, the number of lawyers suffering from substance abuse and other conditions, and the continuous rise of the number of lawyers leaving the profession").

18. *See* Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105, 1113 (1997) ("Time cited a major increase in working hours and greater stress as contributing to the erosion of the quality of life for attorneys. Firms today often require that lawyers perform 2,000 to 2,500 hours of billable work —").

the immediate responsiveness many clients expect.[19] These structural challenges embedded within the practice of law present significant consequences for lawyers as a profession. For example, a 2016 study led by the American Bar Association (ABA) and the Hazelden Betty Ford Foundation demonstrated that lawyers encounter issues with mental health and substance abuse at alarming rates.[20] Certainly, one's profession does not need to negatively impact their life in such significant ways, which might explain why the legal profession has so much trouble retaining its members.

Previous literature has also sought to reveal the array of potential causes of dissatisfaction amongst attorneys. As mentioned previously, one major factor leading to attorney dissatisfaction is the volume of hours many attorneys are expected to work and the impact those hours have on an attorney's work/life balance.[21] For example, previous surveys have shown that a significant amount of private-practice attorneys bill over 2,400 hours per year.[22] Other surveys have shown that over half of both male and female attorneys feel that they have no time for family or themselves.[23] While many private practice firms have worked to launch flexible work schedules and part-time arrange-

19. *See* Katerina P. Lewinbuk, *Kindling the Fire: The Call for Incorporating Mandatory Mentoring Programs for Junior Lawyers and Law Students Nationwide*, 63 ST. LOUIS U. L. J. 211, 211 (2019) ("[S]tress levels, long work hours, and challenges that an attorney faces all negatively affect their well-being").

20. *See id.* at 215-16 ("Research indicates law students and lawyers are especially susceptible to experiencing substance abuse and mental health issues at some point in their legal careers. Specifically, attorneys are twice as likely to become addicted to alcohol or drugs as compared to other professions. In 2016, a groundbreaking study by the ABA and the Hazelden Betty Ford Foundation exposed these devastating statistics and, for the first time, captured nationwide data to reveal the serious problems involving substance abuse, mental health challenges and other issues").

21. *See, e.g.*, Patrick J. Schiltz, *On Being A Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 889–90 (1999) ("Mostly, though, they complain about the hours. In every study of the career satisfaction of lawyers of which I am aware, in every book or article about the woes of the legal profession that I have read, and in every conversation about life as a practicing lawyer that I have heard, lawyers complain about the long hours they have to work. Without question, "the single biggest complaint among attorneys is increasingly long workdays with decreasing time for personal and family life." Lawyers are complaining with increasing vehemence about "living to work, rather than working to live" —about being 'asked not to dedicate, but to sacrifice their lives to the firm'").

22. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1715 (1994) ("Whether there exists a culture of litigation, a culture of greed, or too many lawyers in too few places, lawyers often pile on too much work and bill too many hours in order to make more money. Over half of the lawyers in one survey report billing at least 2,400 hours a year").

23. *See id.* ("[L]awyers complained of intolerable daily stress, work overload, time pressures, poor interpersonal relationships at work, inadequate support, and too much competition. As many as fifty-five percent of the men and sixty-one percent of the women said they had no time for themselves or their families").

ments for attorneys in response to these issues, these programs do not make business sense for most law firms, given that flexible hours do not help firms meet client demands and part-time arrangements do not help firms bill more hours.[24] Due to this basic mismatch of incentives, attorneys rarely utilize these flexible work arrangements, often fearing the professional stigma that is attached to them.[25]

Other attorneys may not mind the long hours, but instead resent other aspects of legal practice. For example, some attorneys dislike the inability to be creative in their daily work.[26] Others may like the practice of law and its routine tasks but dislike the need to become "a rainmaker[27]" in order to have significant value to their law firm.[28]

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24. *See* Stephanie Russell-Kraft, *Law Firms Promote Flexible Work Arrangements Lawyers Don't Use*, BL (Mar. 22, 2017, 6:21 PM), https://news.bloomberglaw.com/business-and-practice/law-firms-promote-flexible-work-arrangements-lawyers-dont-use ("Even though many Big Law firms tout progressive flex-time, reduced hours and telecommuting policies, most of their attorneys aren't taking advantage of them, according to the Diversity and Flexibility Alliance, a think tank focused on diversity and inclusion in the legal industry. In a survey of 28 Big Law firms published Wednesday, the alliance found that nearly all (26) have formal flexibility policies with least one type of reduced hours or full-time flexible work arrangement. Seventeen offer flexible start and end times, and fifteen offer telecommuting and annualized hours. But only 8.8 percent of lawyers at firms with reduced hours policies actually have reduced schedules. Among those with reduced hours, women are over-represented (at 66.3 percent) while lawyers of color and LGBT lawyers remain underrepresented, according to the alliance"); *see also* Dan Packel, *Skepticism Remains Over Big Law's Remote Work Flexibility*, THE AMERICAN LAWYER (June 14, 2021), https://www.law.com/americanlawyer/2021/06/14/skepticism-remains-over-big-laws-remote-work-flexibility/ (discussing one scholar's skepticism that flexible work arrangements, including remote work, are sustainable within big law firms after the pandemic subsides).

In addition, the majority of attorneys who take reduced hours are not on the partnership track, the alliance found.

25. *See* Joan C. Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: New Models of Legal Practice*, 67 HASTINGS L. J. 1, 8 (2015) ("Virtually all large law firms now have part time policies, but the usage rate remains stubbornly low, and the stigma remains stubbornly high. Work-family scholars have come to the conclusion that the only way to deliver balanced work schedules without stigmatizing those who use them is to hard-bake work-life balance into the basic business model").

26. *See generally* JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (2005).

27. *See What is a Rainmaker*?, INVESTOPEDIA, https://www.investopedia.com/ask/answers/08/rainmaker.asp (July 18, 2022) (defining rainmaker as "any person who brings clients, money, business, or even intangible prestige to an organization based solely on his or her associations and contacts").

28. *See* Williams et al. *supra* note 25 at 19 ("Despite the increased status and money associated with rainmaking, the rainmaking mandate presents a serious problem: many lawyers hate rainmaking and are not good at it. A powerful force behind many New Models firms is that the founders do the rainmaking and leave the lawyers free to do what they like and do best: lawyering. Describing lawyers attracted to his firm, one New Models founder said, 'they loved the research, they loved the writing, but in the traditional law firm model they got to the point where they didn't have a lot of value unless they could do a lot of other things [like rainmaking]'").

Further, other attorneys may have the opposite problem—the desire to have work that allows them to be more entrepreneurial.[29]

The one-size-fits-all approach of private practice is not a fit for many attorneys due to one or more of these factors.[30] In total, the drawbacks to private practice depend on the individual, but nonetheless, take a significant toll on attorneys individually and the profession as a whole. In fact, scholars have shared wisdom with young attorneys in an effort to help them avoid this fate, including the advice to avoid practicing at a large law firm altogether.[31] This article stops short of such advice but instead, encourages attorneys that are unhappy to view their skills and experiences through an entrepreneurial lens, as those skills and experiences are useful in a variety of professional contexts.[32] For example, an attorney that has previously litigated conflicts as a family attorney might pivot to become a mediator.[33] Alternatively, an attorney that has expertise in employment law could quickly transition to serving as a human resources manager or recruiter, given the skillset and knowledge developed as an employment attorney.[34] The remaining sections of this article seek to further explore a specific alternative career path for ex-attorneys: a faculty position within a

29. *See id.* at 12 ("The critique of Big Law we heard articulated contains five basic elements: (1) lack of work-life balance; (2) pressure for every lawyer to be a rainmaker; (3) inability to control one's billing rate; (4) increasing economic uncertainties both in law firms and in-house; and (5) inability of Big Law to satisfy lawyers "bit by the bug" of entrepreneurship").

30. *See id.* at 22 ("What you measure is what you get for behavior, so when it comes to work-life balance issues and values, core values, if there are not metrics in place to measure it," the desired behavior won't happen. "You're going to get the behavior you motivate with your comp[ensation]." Another Innovative Law Firm founder reflected that "in a nutshell, the practice of law itself is and should be a fun and interesting job. You get to do different things all the time. You work with smart people. [B]ut so much of law firm life had turned into simply a race to see who could bill the most hours and who could get the most origination credit." The founder added that it "really became the only way to make money in a law firm . . . [and it] didn't matter how good you were or how efficient you were or what your results were").

31. *See* Schiltz, *supra* note 21, at 925–26 ("[A]lthough I understand the pressures and temptations to join a big firm, I nevertheless encourage you to resist them. If you have already accepted an offer from a big firm, I encourage you not to go to another big firm when you change jobs—which is likely to be sooner rather than later. As you look for a job (or as you look for a second job), weigh carefully the benefits and costs of practicing law in a big firm. I have already discussed the costs at length"); *see also* Williams et al., *supra* note 25, at 12 ("New Models have stepped in to fill the needs of lawyers who "love the work but hate the job." Founders reported over and over again being inundated with lawyers who wanted to join their firms or companies, and flooded them with resumes. A nearly universal common refrain for New Models founders is: 'I get tons and tons of people reaching out to me about jobs all the time'").

32. *See Leaving the law: 24 realistic alternative careers for lawyers*, BEYOND BILLABLES, https://www.beyondbillables.com/post/leaving-the-law-24-realistic-alternative-careers-for-lawyers (last visited Nov. 10, 2021) (sharing a list of potential second careers for ex-attorneys that ranges from start-up founder to journalist, to policy advisor).

33. *Id.*

34. *Id.*

business school. The author believes that experienced attorneys from a variety of practice areas and backgrounds could provide immense value to business schools and their students.

## II. Faculty Opportunities for Lawyers

A common narrative is that law school used to be a ticket to a lucrative career, sometimes outside of the legal industry entirely. However, today's reality is that most law students become lawyers.[35] With the proliferation of graduate business school[36] and public policy education, many of the logical career pivots for ex-attorneys are now occupied by professionals with more specialized training.[37] This story might lead you to believe the same is true for ex-attorneys seeking an academic position —it is law school teaching or bust. However, that is simply untrue. Attorneys are hired into faculty positions within business schools,[38] criminal justice programs,[39] public policy programs,[40] and more. This section explores faculty opportunities within law schools and business schools in greater detail, setting up a conversa-

35. *See* James G. Leipold &Judith N. Collins, *The Entry-Level Employment Market for New Law School Graduates 10 Years After the Great Recession*, THE BAR EXAMINER https://thebarexaminer.ncbex.org/article/winter-2017-2018/the-entry-level-employment-market-for-new-law-school-graduates-10-years-after-the-great-recession/ (last visited Dec. 29, 2021) (sharing statistics of J.D., graduates, by class year, listing the percentage of graduates employed in jobs requiring bar passage 10 months post-graduation. The percentage ranged from 64% to 77% percent in the years between 2007 and 2016).

36. *See The History of the MBA*, MBA CENT., https://www.mbacentral.org/history-of-the-mba/ (last visited Dec. 29, 2021) (discussing the proliferation of the Master in Business Administration (MBA) degree outside of the United States beginning in the 1950s).

37. *See, e.g.*, Ilana Kowarski, *Public Administration and Public Policy Degrees*, U.S. NEWS & WORLD REPORT: EDUC. (June 28, 2021), https://www.usnews.com/education/best-graduate-schools/articles/how-to-decide-between-public-administration-public-policy-degrees) (providing an example where students receiving a Master in Public Administration (MPA) or Master in Public Policy (MPP) degree are prepared "[F]or mission-driven jobs where ensuring and maximizing profitability aren't the primary objectives. The guiding purpose within these occupations is often to accomplish a specific humanitarian goal such as poverty reduction").

38. *See Meet the Business Law and Ethics Faculty*, IND. UNIV. KELLEY SCH. OF BUS., https://kelley.iu.edu/faculty-research/departments/business-law-ethics/faculty/index.html (last visited Nov. 16, 2021) (providing a list of business law and ethics faculty within Indiana University's Kelley School of Business. The terminal degree for most, if not all, of this department's faculty is a J.D., despite the academic program being housed in a business school).

39. *See, e.g.*, *Christopher E. Smith*, MICH. STATE UNIV. SCH. OF CRIM. JUST., https://cj.msu.edu/directory/smith-christopher.html (last visited Nov. 16, 2021) (providing a biography of a faculty member within a criminal justice department that primarily publishes in law journals. This particular criminal justice program is housed within the College of Social Sciences at its university).

40. *See, e.g.*, Robert Kaufman, PEPPERDINE SCHOOL OF PUBLIC POLICY, https://publicpolicy.pepperdine.edu/academics/faculty/robert-kaufman/ (last visited Nov. 16, 2021) (providing a biography of an attorney that is a faculty member within a school of public policy).

tion in the next section regarding the value attorneys can provide in a wider variety of business disciplines.

a. Faculty Jobs for Lawyers Within Law Schools

Of course, the most logical faculty post for a J.D. holder is within a law school. However, not all jobs that teach law are created equal. In fact, there are three main categories of law faculty positions that often ask for very different qualifications from potential candidates.[41] These main categories of law faculty positions are: (1) doctrinal faculty; (2) clinical faculty; and (3) legal writing faculty.[42] This subsection discusses each of these faculty positions in detail, including the path for an attorney to become a law school faculty member within each of these categories.

Doctrinal faculty are law faculty that are eligible for tenure at their institution, hold research and writing responsibilities as a main component of their job, and "may teach doctrinal" courses like those in the first-year curriculum (*e.g.*, contracts or torts[43]). These positions are typically the most coveted law teaching positions because they confer permanence in the form of tenure,[44] voting rights on matters of faculty interest, higher pay, and higher prestige within the law school. However, the number of entry-level positions in this category has significantly declined over the past fifteen years.[45]

41. *See* Yale Law School Career Development Office, *Entering the Law Teaching Market*, YALE LAW SCHOOL (2018-19) at *4, https://law.yale.edu/sites/default/files/area/department/cdo/document/cdo_law_teaching_public.pdf (last visited Nov. 23, 2021) ("Most applicants in the teaching market are aiming for tenure-track positions in classrooms or clinics, where they hope to progress from assistant professor to associate professor and, finally, to full professor. However, there are different types of teaching positions in law schools that vary in permanence, salary, voting status, and other issues. In addition to tenure-track teaching, three common types of positions that may be available to an entering law teacher are visitors, adjuncts, and legal research and writing instructors").

42. *See* Becoming a Law Teacher, ASSOCIATION OF AMERICAN LAW SCHOOLS, https://teach.aals.org/#overview (last visited Nov. 23, 2021).

43. *Id.* ("[T]enure-track and tenured faculty [ ] teach courses that focus on legal subjects . . .as well as the ethical, theoretical, historical, and social questions and assumptions that have shaped their subject area or field. Most of the courses that students take during law school traditionally have been taught by tenured or tenure-track faculty").

44. *See* Tenure, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, https://www.aaup.org/issues/tenure (last visited Dec. 29, 2021) ("[A] tenured appointment is an indefinite appointment that can be terminated only for cause or under extraordinary circumstances such as financial exigency and program discontinuation.").

45. *See* LAWSKY, *supra* note 5 (sharing self-reported statistics of law professor hires in each year from 2006 through 2021. The reported number of hires remained above 150 per year until 2011. Since 2014, the number of new hires has ranged from a low of 62 to a high of 88).

Given this lack of demand, there has also been a corresponding drop in the number of applicants seeking doctrinal faculty positions in law schools over the past decade.[46] It is unlikely that the decreased supply of new faculty members is due to lack of interest from J.D. holders. Instead, the lack of supply is likely due to the "credential arms-race" that has been created by the lack of available doctrinal faculty jobs within law schools. In the most recent year (2021) of self-reported data on the entry-level doctrinal faculty market, zero new hires were able to obtain a doctrinal faculty position without at least one of the following credentials: (1) an additional degree (master's level or higher); (2) a faculty fellowship within a law school; or (3) a clerkship with a federal judge.[47] Further, 26% of all entry-level doctrinal hires had all three credentials mentioned above, meaning, the candidate had at least one additional degree (master's level or higher), held a faculty fellowship position at a law school, and had previously clerked with a federal judge.[48] These statistics are not an anomaly for 2021, instead, they have been consistent over the past five years.[49]

These statistics should be cause for concern for prospective doctrinal faculty because of the time and financial commitment that has become required to have a chance at a doctrinal faculty position at a law school. The three credentials above each take at least one year to complete, and in the case of an additional degree that is a PhD, could take five or more years.[50] Beyond that, some of these credentials cost

46. *Id.* (stating that in 2011, 662 prospective faculty members filled out the first round Faculty Appointments Register (FAR) form, indicating their interest in a doctrinal faculty position within a law school. The number of prospective faculty members completing the FAR form hit a ten-year low in 2021, with only 297 prospective faculty completing the first-round FAR form).

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* Judicial Clerkship Guide, INDIANA UNIVERSITY ROBERT H. MCKINNEY SCHOOL OF LAW, https://mckinneylaw.iu.edu/careers/judicial-clerkships-guide.html (last visited Dec. 30, 2021) (stating that judicial clerkships "[u]sually last[ ] one to two years."); *see, e.g.*, Tracy Scott, *How Long Does It Take to Earn a Master's Degree?*, NORTHEASTERN UNIVERSITY GRADUATE PROGRAMS (Jan. 31, 2019), https://www.northeastern.edu/graduate/blog/how-long-earn-masters-degree/ ( "On average, a master's degree takes 1.5 to 2 years for full-time students to complete."); *see, e.g.*, Ilana Kowarski, *How Long Does It Take to Get a Ph.D. Degree?*, U.S. NEWS & WORLD REPORT: EDUCATION (Aug. 12, 2019, 10:20 AM), https://www.usnews.com/education/best-graduate-schools/articles/2019-08-12/how-long-does-it-take-to-get-a-phd-degree-and-should-you-get-one ( "According to the Survey of Earned Doctorates, a census of recent research doctorate recipients who earned their degree from U.S. institutions, the median amount of time it took individuals who received their doctorates in 2017 to complete their program was 5.8 years. However, there are many types of programs that typically take longer than six years to complete, such as humanities and arts doctorates, where the median time for individuals to earn their degree was 7.1 years, according to the survey.").

additional money for the prospective faculty member (*e.g.*, most master's degrees[51]), while others require a full-time professional commitment at a below-market wage (*e.g.*, a faculty fellowship[52] or a clerkship with a federal judge.[53]) Lastly, remember that it is quite rare for a law school faculty member to not have a J.D., so you can consider the time and financial cost of that degree in making your cost calculations as well.[54]

If we combine these hurdles into an actual life progression for a prospective faculty member, it might look something like this:

- **Years 1-3**: Attend law school, pay tuition and living expenses, and have limited paid employment opportunities.[55]
- **Year 4**: Hold a clerkship with a federal judge at a below-market wage[56] (compared to a private practice salary[57]). Pub-

51. *See* Kat Tretina, *How Much Does a Master's Degree Cost?*, STUDENT LOAN HERO BY LENDING TREE (May 8, 2020), https://studentloanhero.com/featured/how-much-does-a-masters-degree-cost-georgia-tech/ ("According to Peterson's, an educational services company, the average cost of a master's degree at a public school is almost $30,000 annually, just for tuition and fees. Comparatively, private school graduate students spend an average of nearly $40,000 per year on tuition and fees."). *But see* Graduate Student Assistantships, STANFORD GRADUATE SCHOOL OF EDUCATION, https://ed.stanford.edu/academics/doctoral-handbook/financial-support/assistantships (last visited Dec. 30, 2021) (sharing details on Stanford's program to reduce or eliminate graduate student tuition through assistantship programs).

52. *See* YALE LAW SCHOOL, *supra* note 41, at *87 (describing the University of Michigan's Research and Teaching Fellowship in Law and stating that "[e]ach Fellow has a three-year appointment as Assistant Professor in an affiliated department of the University and a three-year appointment as a Postdoctoral Scholar in the Society of Fellows. This appointment is not tenure-track. The current annual stipend is $55,000.").

53. *See* Judicial Clerkships, UNIVERSITY OF DAYTON SCHOOL OF LAW, https://udayton.edu/law/career_services/judicial_clerkships.php (last visited Dec. 30, 2021) ( "Clerkship salaries are reasonable, but not as competitive with salaries being offered by medium and large law firms; however, they offer excellent benefits. Law school graduates obtaining a federal clerkship should expect to be classified a JSP-11 and receive a starting salary of $65,000 or higher. If a new federal law clerk is a member of any state bar and has at least one year of full-time legal work experience, he/she could be classified as a JSP-12 with a starting salary of $78,000 or higher. (These pay scales are for the Dayton area.)").

54. *See, e.g.*, Student Expense Budget, NYU LAW, https://www.law.nyu.edu/financialaid/budgetandbudgeting/studentexpensebudget (last visited Dec. 30, 2021) (stating the estimated, non-discounted cost of attendance for the most recent academic year.)

55. *See* Jen Gordon, *How to Make Money During Law School*, LAWYER EXCHANGE (Dec. 17, 2018), https://www.lawyerexchange.com/blog/making-money-while-in-law-school ( "The ABA used to restrict full-time law students to working no more than 20 hours a week. The limitation has been dropped, but your law school might still honor this restriction.").

56. *See* UNIVERSITY OF DAYTON SCHOOL OF LAW, *supra* note 53.

57. *See* Dana Severson, *How Much Does a Private Sector Lawyer Make?*, CHRON. (Dec. 17, 2021), https://work.chron.com/much-private-sector-lawyer-make-9655.html ( "The ABA salary profile reported that salaries of lawyers in private practice varied by location and other factors. While the average salary for lawyers in 2019 was ?$145,300? private law firm salaries differ substantially by the size of the firm. Firms having 50 or fewer lawyers paid median first-year lawyer salaries of ?$98,750?, while the supersized firms with 700+ lawyers - primarily in New York City,

lish a law review article on personal time for no compensation;[58]

- **Year 5-6**: Receive a faculty fellowship at a law school at a below-market wage[59] compared to other faculty in the law school.[60] Teach courses and prepare future research in an effort to become a doctrinal faculty member.[61]
- **Year 7**: Begin as a doctrinal faculty member at a law school. 26% of those completing the first round Faculty Appointments Register (FAR) form were successful at this task in 2021.[62]

It turns out that this is actually a generous timeline – 86% of new doctrinal faculty hires in 2021 were five or more years removed from receiving their J.D. and 47% of new hires were 10+ years removed from receiving their J.D.[63] Unfortunately, the level of dedication required to pursue this career path means it is not accessible to all law graduates. First, some law graduates do not come from socio-economic backgrounds that will allow them to spend six or more years paying for experiences (*e.g.*, earning a J.D.) or receiving a below-market wage for others (*e.g.*, clerking for a federal judge) in order to become competitive for a doctrinal faculty position.[64] Secondly, it bears mention that our hypothetical candidate may have easily lived in four different geographic locations in a seven-year time period in order to "collect" the experiences necessary to become competitive for a doc-

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Los Angeles, Dallas and Washington DC - paid median first-year salaries of ?$180,000? or more. By their eighth year with the firm, the median salary rose to ?$204,000?.").

58. While professors employed by an academic institution might have financial incentives to publish law review articles, like a summer research stipend, aspiring professors have no such luck. *See, e.g.*, Equalizer, SOCIETY OF AMERICAN LAW TEACHERS (SALT) (Vol. 2019, Issue 1, Nov. 2019), https://www.saltlaw.org/wp-content/uploads/2015/03/SALT-salary-survey-2019-final-draft.pdf (last visited Dec. 30, 2021) (providing a salary survey of law schools for their tenured and tenure-track law professors and showing annual summer research stipends of up to $25,000 offered to faculty).

59. *See, e.g.*, YALE LAW SCHOOL, *supra* note 41, at *87.

60. *See, e.g.*, SOCIETY OF AMERICAN LAW TEACHERS (SALT), *supra* note 58 (showing starting salaries for tenure-track law professors routinely reaching $100,000 or more annually).

61. *See* YALE LAW SCHOOL, *supra* note 41, at *6 ("An increasing number of schools are offering Visiting Assistant Professor (VAP) positions, or academic fellowships that offer an equivalent experience, which provide emerging scholars a year or two to develop their teaching and scholarship with fewer institutional demands than those of an entering tenure-track assistant professor. VAPs generally teach one or two upper-level courses in their substantive interest areas, fewer than a tenure-track faculty member.").

62. *See supra* note 5.

63. *Id.*

64. *See generally* Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631 (2011) (finding that the vast majority of law students come from upper-middle class or above backgrounds, especially at top law schools).

trinal faculty position. Unfortunately, this type of sacrifice is also considered necessary for a chance at the job[65] but is not an option for all prospective candidates. Lastly, take note of the fact that many candidates that pursue this path will ultimately be unsuccessful in their quest for a doctrinal faculty position within a law school.[66] Where do these failed candidates turn next? Unfortunately, a pivot back to legal practice may be difficult, as the prospective candidate has just spent six or more years focused on skills (*e.g.*, developing scholarship) that have little relevance to the practice of law.[67]

Other types of faculty positions within law schools allow for less personal sacrifice across a number of years, but in many cases, these positions also come at a cost. For example, clinical faculty within law schools are typically experienced lawyers that have pivoted to academia over time.[68] In essence, law school clinics act as teaching law firms, and the clinical faculty member is the partner of that teaching law firm.[69] Clinical faculty find public interest clients to serve, staff their law firm with law students, and complete legal projects for their clients over the semester.[70] In a previous career, clinical faculty members were likely lawyers who developed a specialty within their

65. *See* YALE LAW SCHOOL, *supra* note 41, at *22 (The FAR form "also allows you to indicate a geographical restriction. Do so only if in good faith you must—if you are 100% certain that you would not consider any offer outside of your target area. The lack of geographical restrictions signals your seriousness about entering the law teaching profession, allows you a robust learning experience through the interview process, and adds to your marketability.").

66. *See* LAWSKY, *supra* note 5. Again, the success rate (for being hired into a doctrinal faculty position) for those completing the first-round FAR form in 2021 was 26%. This success rate was tied for the highest rate going back to 2020.

67. *See, e.g.*, Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, THE NEW YORK TIMES (Oct. 21, 2013), https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?_r=0 (statement of Chief Justice John G. Roberts Jr.) (quoting "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar"). *See also* (statement of Judge Dennis G. Jacobs) ("I haven't opened up a law review in years," he said in 2007. 'No one speaks of them. No one relies on them.'").

68. *See* YALE LAW SCHOOL, *supra* note 41, at *8 ("The qualifications for the job of clinical professor are also a bit different. First, even at law schools with a fully integrated faculty, those who do some clinical teaching need to be experienced lawyers. Thus, their career paths necessarily include significant practice (generally at least three or more years).").

69. *See* Clinics, UNIV. OF MICH. LAW SCH., https://michigan.law.umich.edu/academics/experiential-learning/clinics (last visited Dec. 30, 2021) ( "For more than 45 years, Michigan Law has offered clinics in which students take "first-chair" lead responsibility for real clients with real legal needs. Students represent these clients under the supervision of experienced faculty in small, intensive settings in classrooms, boardrooms, and courtrooms in Michigan and beyond.").

70. *Id.*

legal practice.[71] That specialized practice experience is quite useful in the world of legal practice, but also, it is useful when training law students and serving clients that need a particular type of legal assistance.

In theory, this means clinical faculty should be able to gain the necessary experiences for the job through their time as a practicing lawyer, while avoiding the "credential arms-race" discussed above. This is true to an extent, although, fellowships have become a common way for law schools to train future clinical faculty.[72] These fellowships provide useful training and networking opportunities,[73] but again, they come with a time commitment and financial sacrifice (compared to private practice) for the prospective clinical faculty member.[74] Additionally, the line between doctrinal faculty and clinical faculty has blurred at other law schools, where clinical faculty receive similar treatment with respect to job security, governance rights, salary, and research support.[75] Further blurring this line, these schools sometimes allow clinical faculty to teach doctrinal classes, while also permitting doctrinal faculty to try their hand at running a law clinic.[76] It remains to be seen if these blurred lines with respect to faculty duties and perks ultimately blur the line with respect to hiring

71. *See* YALE LAW SCHOOL., *supra* note 41, at *8 ("Although clinical teachers don't need to develop a narrow practice specialty, it certainly helps to have experience in the field(s) of practice in which the target schools already have, or plan to start, clinics. This is typically in public interest/poverty law areas, but more clinics are being established in other fields such as small business assistance estate planning, so a broader range of experience may be relevant for these positions.").

72. *See* Claudia Flores, *How to Become a Clinical Law Professor*, SUMMARY, JUDGMENT (June 25, 2020), https://www.summarycommajudgment.com/blog/how-to-become-a-clinical-law-professor ("Many top law schools offer clinical teaching fellowships aimed at early career lawyers interested in clinical teaching . . . Generally, these fellowships require some experience (2-5 years), impressive academic qualifications and a demonstrated interest in teaching in a clinic. Fellows work closely with students, provide support to the director and often supplement student research and writing. Some law schools prefer hiring directly from these fellowships because of the training fellows receive in clinical teaching. Others prefer to hire practitioners from the field.").

73. *Id.*

74. *See* G.S. Hans, *Clinical Fellowships, Faculty Hiring, and Community Values*, 27 CLINICAL L. REV. 253 (2021) ("[D]iscusses how lawyers become clinical faculty to reflect on whether and how prior clinical teaching experience should be assessed for entry-level clinical applicants in order to effectuate equity and inclusion within law schools and the clinical community.").

75. *See* YALE LAW SCHOOL, *supra* note 41, at *7 ("Although it used to be quite common for clinical faculty to be treated differently than academic faculty with respect to job security, governance, salary, leaves, and research support, in many U.S. law schools such status and salary distinctions are being eliminated. In these schools, clinical faculty may enjoy full tenure, including voting rights, and are expected to spend significant time producing published scholarship.").

76. *Id.* at *7.

clinical faculty, spreading the "credential arms-race" to this segment of the legal academy as well.

A third type of faculty within law schools are legal writing faculty, a group that is largely tasked with teaching first-year classes on research and writing.[77] Given the intensive nature of providing feedback on legal writing, working with students is typically the bulk of the job for legal writing instructors, meaning they are often not expected to engage in writing legal scholarship.[78] Also of importance, legal writing faculty are rarely afforded the same privileges and rights as tenured or tenure-track faculty,[79] making the job less desirable for some candidates.[80] Given the nature of these positions, the qualifications needed to obtain the job are more likely to revolve around legal practice experience and an interest in mentoring students closely.[81] Said differently, these positions are unlikely to fall prey to the "credential arms-race" mentioned above, in part because of the "lower status" they confer.[82]

In the next subsection of this article, I will discuss faculty jobs for lawyers within business schools. Interestingly, many current positions in business schools closely resemble the positions held by doctrinal

77. *Id.* at *5 ("Most law schools employ legal research and writing instructors. These individuals typically teach first-year classes on research and writing, and may have additional duties in this area.").

78. *Id.* (advising a prospective legal writing instructor that "you may be so busy with your new, demanding job that you have no time for your own research and writing.").

79. *Id.* ("According to a recent survey conducted by the Legal Writing Institute, 45% of legal writing programs in U.S. law schools have full-time non-tenure-track teachers, 36% use a hybrid staffing model, 5% use adjuncts, and 6% have tenured or tenure-track teachers hired specifically to teach legal writing. The use of term employment contracts is quite common.").

80. *See* Legal Research & Writing Faculty, AALS BECOMING A LAW TEACHER, https://teach.aals.org/lrw/ (last visited Dec. 30, 2021) ("Law schools employ full-time, short-term L[egal] R[esearch &] W[riting] faculty under contracts that are shorter than five years and are not presumptively renewable. Seventy-one of the 182 schools (39%) in the most recent Annual Legal Writing Survey reported employing faculty in this category. For a variety of reasons, law schools rarely conduct national searches for short-term legal research and writing faculty. Generally, faculty in this group have a very limited role in faculty governance").

81. *Id.* ("Traditional hiring criteria remain relevant, but practice experience tends to be of highest importance. Generally, law schools do not expect faculty in this category to produce scholarship; schools expect faculty in this category primarily to be focused on their teaching and service to the law school.").

82. *See* YALE LAW SCHOOL, *supra* note 41, at *5 ("There are concerns to weigh as well. Appointments committees seek candidates who want to be academic professors; research and writing instruction is quite different. In addition, you may be so busy with your new, demanding job that you have no time for your own research and writing. Finally, legal research and writing instructors may not be well-integrated into the faculty, thus impeding your ability to develop faculty mentors.").

faculty in law schools.[83] However, in subsequent sections of this article, I will advocate for the reimagining of lawyer faculty members within business schools.[84] In particular, this article presents a compelling case that a business school is a better home for prospective faculty that hope to avoid the "credential arms-race." Further, this article argues that the skill set possessed by clinical and legal writing faculty in law schools are woefully undervalued in the law school setting.[85] Lastly, this article argues that business schools can and should value the skills possessed by prospective clinical and legal writing faculty, particularly when their expertise aligns with a topic taught within the business school.[86]

b. Faculty Jobs for Lawyers Within Business Schools

Currently, business schools rely on attorneys for one primary purpose: to teach "business law" or "legal environment of business" courses (the "Business Law Courses").[87] Most business degrees will require an undergraduate student to take a Business Law Course, so historically, these courses have seen significant enrollment within business schools.[88] Depending on the business school, these courses may be staffed by tenured, tenure-track, or full-time non-tenure-track faculty who carry research and service obligations in addition to their course load.[89] Here, attorney faculty can provide immense value to the business school through activities like impactful research, curricu-

83. *See* Haskell Murray, *The Kelley School of Business at Indiana University - Legal Studies Professor Positions*, BUSINESS LAW PROF BLOG (Sept. 29, 2019), https://lawprofessors.typepad.com/business_law/2019/09/the-kelley-school-of-business-at-indiana-university-legal-studies-professor-positions.html (describing a job opening for a tenure-track law professor in an AACSB accredited business school).

84. *See infra* Section III.

85. *Id.*

86. *Id.*

87. *See generally* Carol J. Miller & Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?*, 28 J. OF LEGAL STUDIES EDUCATION 149 (2011) (examining the law-based curriculum within 404 universities accredited by the Association to Advance Collegiate Schools of Business (AACSB). The article extensively outlines the differences between "Legal Environment of Business" and "Business Law" courses and shares novel data on curricular requirements regarding Business Law Courses within AACSB accredited business schools). *See also* Bird, *supra* note 10 (sharing that professors with J.D. degrees within business schools typically teach "Business Law," the "Legal Environment of Business," or a more specialized elective in law).

88. *See* Miller & Crain, *supra* note 87.

89. *See, e.g.*, Business Law Faculty, UNIV, OF MICH. ROSS SCH. BUS., https://michiganross.umich.edu/faculty-research/directory?status=All&department=22&name=&last=&sort_by=Field_sort_name_value (last visited Nov. 30, 2021) (sharing a list of full-time faculty at a given business school. Selecting an individual's profile will provide further details on the teaching and research they perform as a part of the job).

lum development, and student mentoring. These faculty are sometimes, but not always, housed in business law and ethics departments.[90] In other, less common cases, law faculty may be housed within another department in the business school.[91] When a business school does not depend on full-time faculty to teach these courses, it usually relies on practicing attorneys to moonlight as adjunct faculty.[92] When this occurs, the business school typically views the Business Law Course as essential to staff with a faculty member but does not necessarily view the faculty member as someone who will make the contribution worthy of a full-time position in areas like research and service.[93]

For attorney faculty within business schools, this state of affairs may be enough to cause some anxiety. First, while it is a common narrative that business schools face a supply problem when filling faculty positions,[94] this story is less likely to be true with respect to

90. *See* INDIANA UNIVERSITY KELLEY SCHOOL OF BUSINESS *supra* note 38 (showing the faculty list in a "Business Law and Ethics" department); *but see* Finance and Law faculty, CENT. MICH. UNIV. COLL. OF BUS. ADMINISTRATION, https://www.cmich.edu/academics/colleges/college-business-administration/departments-schools/finance-and-law (last visited Nov. 30, 2021) (providing an example of a business school that has combined its business law faculty with finance faculty for departmental purposes).

91. *See* CENT. MICH. UNIV. COLL. BUS. ADMIN., *supra* note 90.

92. *See, e.g.*, Adjunct Faculty – Business Law (Pooled Position), WILLIAM & MARY RAYMOND A. MASON SCH. OF BUS., https://mason.wm.edu/employment/faculty-opportunities/adjunct-faculty-business-law.php (last visited Dec. 30, 2021) (providing an example of a call for adjunct professors in business law).

93. For example, few business school departments outside of "business law" departments value publications in law reviews for purposes of tenure and promotion decisions. The typical standard within business schools are peer-reviewed publications. *See, e.g.*, DEP. OF MGMT., HANKAMER SCH. OF BUS., BAYLOR UNIVERSITY, *infra* note 172. This author does not promote one type of publication as better or worse than the other, but instead, acknowledges that there are key differences in how these scholarly activities are created and published. With respect to service activities, it bears mention that most business schools focus any doctoral programs in areas outside of law. With respect to faculty mentorship of students in these programs, business schools might (correctly) view scholars with a PhD in that discipline as the correct folks to mentor students in these particular circumstances.

94. *See* Michael C. Villano, *AACSB, & Faculty Sufficiency in Troubling Economic Times* at *1, https://www-s3-live.kent.edu/s3fs-root/s3fs-public/Villano_M_handout.pdf (last visited Nov. 30, 2021) "The decline of doctorally-qualified business faculty and the increase in enrollments have created a supply and demand nightmare for higher education schools of business. Accounting faculty have been in short supply for several years. Further, the increasing number of baby-boomer faculty nearing retirement has intensified this problem for many institutions" and "[t]he number of available positions for accounting faculty is nearly 3 to 1—making the doctorate considerably valuable for job-market candidates. A large contributor to this situation is the Association to Advance Collegiate School of Business—simply known as AACSB. The combination of short supply, high salaries, and the need to meet AACSB faculty sufficiency standards has created a particularly challenging situation for many colleges of business.").

business law-related faculty positions.[95] In fact, at the time of this writing, a popular higher education job board shows its "Business Law" sub-category as having the second fewest postings within the "Business" category.[96] Additionally, other commenters have shared concerns that law-related faculty positions within business schools might be at risk, as business schools streamline curriculum requirements for their students (including the elimination of topics like calculus, and potentially, business law).[97]

While these data points would be a cause for concern for those viewing Business Law Courses as the only suitable role for attorneys within business schools, they are less concerning to this author. Given this disposition, the remainder of this article does not focus on the idea of attorneys as full-time business school faculty whose primary responsibility is to teach Business Law Courses. Instead, this article proposes that business schools could benefit from viewing attorneys with practice experience as potential faculty members in other topics like entrepreneurship, human resources, marketing, finance, accounting, cybersecurity, and more.[98] Implementing such a strategy could help business schools achieve myriad goals, including providing their students with a more practical education and diversifying the research that is produced by its faculty.[99]

## III. Why Business Schools Can Benefit from Additional Lawyers as Faculty

This Section III will advocate for attorneys as worthy of non-Business Law faculty positions within business schools. If business schools adopted this strategy for faculty hiring, the author believes that these institutions would move in the right direction with respect to three worthy goals. First, hiring experienced attorneys into a subject area in which they've specialized, instead of the generic Business Law discipline, can provide a business school with an expert that has

95. *See* Faculty Positions, HIGHERED JOBS, https://www.higheredjobs.com/faculty/ (last visited Nov. 30, 2021).

96. *Id.* (showing that Business Law faculty positions are in the second lowest demand in the "Business" category).

97. *See* Fall 2021 Newsletter, ACAD. OF L. STUD. BUS. (Fall 2021), https://alsb.wildapricot.org/resources/Fall2021%20Newsletter.pdf at *13 (last visited Nov. 30, 2021) (sharing concerns that as business school curriculum is revised, legal environment of business courses could be seen by administrators as expendable).

98. *See infra* Section III.

99. *Id.*

real-world experience.[100] For example, employment attorneys could leverage their vast array of practice experience to become effective human resources instructors with a catalog of knowledge that would enrich student learning of the subject.[101] Second, the hiring of attorneys within their area of specialization could help business schools meet accreditation requirements with AACSB by providing Scholarly Academic and Practice Academic faculty members to the business school.[102] For some business schools, this hiring strategy could make meeting these accreditation requirements easier, as there is a lack of prospective faculty members with terminal degrees in many business disciplines.[103] Lastly, providing full-time faculty positions to attorneys with a variety of practice experiences will help diversify the scholarship published in business schools and law journals.[104] This Section III addresses these topics in order.

a. Faculty with Relevant Expertise

Relevant professional experience[105] is one reason why business schools should consider attorneys as serious candidates for non-Business Law faculty positions. AACSB states its "philosophy" behind its accreditation standards as follows: "business schools must respond to the business world's changing needs by providing relevant knowledge and skills to the communities they serve."[106] One way in which business schools can provide such relevant knowledge and skills to their students is by employing faculty that have real-world experiences within the field they teach. For example, an attorney that has helped various entrepreneurial ventures raise capital from investors can serve as a fantastic resource to students taking an entrepreneurial finance or

100. *See infra* Section III (a).
101. *Id.*
102. *See infra* Section III (b).
103. *Id.*
104. *See infra* Section III (c).
105. *See* Professor Gary Bishop, *Everything You Need to Know About Becoming a Business Lawyer*, NEW ENGLAND LAW, https://www.nesl.edu/blog/detail/everything-you-need-to-know-about-becoming-a-business-lawyer (last visited Jan. 1, 2022) ("[A] business lawyer representing a bank in a lending transaction must draft the necessary documents, such as the loan agreement, promissory note, and security agreement, with an eye toward protecting the bank and ensuring that the borrower is obligated to pay the loan back in the manner requested by the bank. The business lawyer must also anticipate the scenario where the borrower defaults on the loan and must provide remedies for the lender if that scenario arises.").
106. *See* 2020 Guiding Principles and Standards for Business Accreditation, AACSB, https://www.aacsb.edu/-/media/documents/accreditation/2020-aacsb-business-accreditation-standards-july-2021.pdf?rev=80b0db4090ad4d6db60a34e975a73b1b&hash=D210346C64043CC2297E8658F676AF94, at *9 (last visited Dec. 6, 2021). [hereinafter *Guiding Principles*].

entrepreneurship law course. In this case, the attorney-turned-faculty member can help students to navigate the complex opportunities and hurdles that present themselves to an entrepreneur in these real-world scenarios.[107] A similar benefit is provided to students when learning human resources (from an employment attorney), cybersecurity (from a cybersecurity attorney), tax topics (from a tax attorney), marketing concepts (from an attorney that has consulted advertising campaigns), and finance topics (from an attorney that has worked on relevant corporate finance transactions). Through the above examples, one can quickly begin to see how attorneys can provide value in the classroom in virtually every department housed within a business school.

For business schools that find this line of reasoning convincing, the next question becomes: "where do we find these prospective faculty members?" One source of attorneys-turned-faculty would be from the ranks of practicing attorneys.[108] As discussed thoroughly in Section I, practicing attorneys often have an interest in alternative employment outside of legal practice that comes with more flexible hours and more rewarding work.[109] Working as a professor within a business school can certainly meet these criteria for candidates that value the self-motivated work of academic research, as well as providing mentorship to students in the classroom and through extracurricular activities like student organizations, competitions, and simulations.

While many strong candidates may come directly from legal practice, the similarities between the attorneys discussed above and clinical faculty in law schools should be noted. In fact, business schools may find that clinical faculty from law schools (or those that have completed fellowships in law school clinics) are particularly good candidates to provide relevant teaching within the business school classroom.[110] For example, clinical faculty have consulted with live business clients and trained law students on how to advise those business clients.[111] In fact, it is often the case that clinical faculty and their student counselors combine their legal advice to clients with more

107. *See, e.g.*, Bishop, *supra* note 105 ("[A] business lawyer representing a company engaged in an IPO like Facebook's must ensure that the necessary documents are filed with the appropriate governmental authorities and that the documents contain all the information and disclosures required by law.").

108. *See supra* Section I.

109. *Id.*

110. *See supra* Section II (b).

111. *Id.*

practical business strategy advice.[112] When this occurs, clinical faculty are building a resume of work with real-life businesses in their area of expertise that has immense value in the business school classroom. For these reasons, the teaching component of the clinical faculty job may give clinical faculty a "leg up" on attorneys coming directly from practice, given the goal of providing "relevant knowledge and skills" to business students.[113]

Additionally, it is possible that business schools may value the skills and contributions of the typical clinical faculty member more than their law school did. As an example, many law schools do not make clinical faculty positions tenure-eligible,[114] even if the faculty member is active in publishing law journal articles. However, business schools that choose to hire a similar faculty member into a non-Business Law discipline have the ability to define from scratch how they value this person and their contributions. Thus, business schools could provide tenure-eligible positions to clinical faculty that fit their needs, providing a new, and potentially better, alternative for such practice-oriented law faculty. In fact, given the desire to provide "relevant knowledge and skills" to business students, clinical faculty turned business professors could engage in more practical legal research projects that have direct applications to the training of their business students.[115] This knowledge would, in turn, make the faculty

112. *See, e.g.*, Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463, 492-93 (2015) ( "The primary characteristic of any advice students give to clients is that it should add value to the client. Before delivering any advice, I ask students to ask themselves two questions: (1) is the client better off after receiving your advice than before? And (2) can the client easily implement your advice? If the answer to both questions is yes, the students have usually added value. Pragmatism is an important consideration in any solution a lawyer presents to a client. Too often in law school the academically creative answer is given much credit only to have no real-world application. In the ELC, the universe of solutions are limited to those that are practical and executable by the client. Over-lawyering is a common critique of business lawyers. I try to teach students that just because something is possible does not mean that it is useful or necessary. In the ELC we try hard not to create problems where one does not already exist or turn a simple problem into a complicated one.").

113. *See Guiding Principles*, AACSB *supra* note 106.

114. *See* Clinical Faculty, AALS BECOMING A LAW TEACHER, https://teach.aals.org/clinical/ (last visited Jan. 1, 2022) ("Law schools adopting this model employ clinical faculty for set term of years—most commonly 5 years, but sometimes 7 or more—under contracts that are presumptively renewable. Often, there is a shorter probationary term that may last one to three years before converting to the longer-term contract. The ability of faculty in this category to participate in faculty governance tends to be more limited than for tenured faculty. The CSALE survey reports that 67% of law schools have a long-term contract track.").

115. *See, e.g.*, David Nows &Jeff Thomas, *Delaware's Public Benefit Corporation: The Traditional VC-Backed Company's Mission-Driven Twin*, 88 UMKC L. Rev. 873 (2020); David Nows, *Supporting Rural Entrepreneurship with Legal Technology*, 17 N.Y.U. J. L. & Bus. 391 (2021); David Nows, *Acquisition Entrepreneurship: One Solution to the Looming Business Succession*

member better equipped to teach more practical business schools courses (versus theory-based doctrinal classes in a law school setting.)

In fact, for business schools that struggle to recruit and retain traditional PhD-holding faculty in various disciplines, a viable faculty recruitment strategy could be to recruit and retain faculty with experiences related to a given business discipline who hold an unrelated terminal degree.[116] For example, in the author's discipline of entrepreneurship, a business school can recruit terminal degree holders from a wide variety of academic disciplines, as long as those terminal degree holders have relevant experience as a part of an entrepreneurial ecosystem or team. Thus, an entrepreneur, an investor, or an advisor supporting an entrepreneur are all examples of skillsets that, when paired with a terminal degree, could make for a high-potential faculty member in entrepreneurship. Of course, J.D. holders that have advised entrepreneurs or been an entrepreneur themselves are one example of potential entrepreneurship faculty that could meet AACSB's faculty qualification guidelines in the Scholarly Academic or Practice Academic category,[117] but there are many other examples too. PhD holders in areas like computer science, engineering, chemistry, and more could all be well suited to become entrepreneurship faculty if they have relevant experience working in an entrepreneurial setting.[118] Other terminal degree holders (for example, an M.D.) could also be viable options for an entrepreneurship department.[119] In fact, the author believes that the strongest department one could assemble would include terminal degree holders with a wide variety of academic, professional, and research-related experiences. Of course,

*Crisis*, 97 IND. L.J. SUPP. 1 (2021); David Nows, *Modernizing Charitable Fundraising Regulation*, 14 DREXEL L. REV. (2022); and David Nows, *The Local Nature of Equity Crowdfunding*, 24 U. PA. J. BUS. L. (2022). Note that the purpose of this research stream is not to share abstract theories with the world. Instead, the author's goal is to provide relevant and novel insights into how entrepreneurs can (and do) use the law strategically to fund their ventures.

116. AACSB explicitly endorses this as a viable way for business schools to retain Scholarly Academic (SA) qualified faculty. As an example, AACSB states that an M.D. could be qualified to teach in a healthcare management program housed within a business school. Specifically, AACSB states that "[i]t is the closeness to the field of teaching and relevant ongoing activities in the field of teaching that, combined with a terminal degree, that establishes the appropriate faculty qualification status. The less related the terminal degree is to a faculty member's field of teaching, the more important it is for that faculty member to demonstrate sustained, substantive academic and/or professional engagement to support currency and relevancy in their field of teaching and contributions to other mission components." *See Guiding Principles*, AACSB *supra* note 106, at *14-15.

117. *See infra* Subsection III (b).

118. *See Guiding Principles*, AACSB *supra* note 106, at *14-15.

119. *Id.*

that vision includes J.D. holders as a part of the team, but not as the entire team.

The next subsection of this article will discuss a topic that was mentioned briefly in this subsection: AACSB accreditation and its requirements for faculty.[120] AACSB requires academic programs within business schools to have a certain percentage of faculty holding a terminal degree to maintain accreditation.[121] Attorneys can contribute to individual programs meeting those standards. Subsection III (b) explores this topic in further detail.

### b. Attorney Faculty Can Assist in Meeting AACSB Accreditation Requirements

AACSB is an educational organization tasked with ensuring that business schools meet rigorous accreditation standards.[122] One area in which AACSB evaluates business schools is with respect to the academic and professional engagement of its faculty.[123] AACSB accreditation requirements regarding faculty qualifications are meant to ensure "[the business] school maintains and strategically deploys sufficient participating and supporting faculty who collectively demonstrate significant academic and professional engagement that, in turn, supports high-quality outcomes consistent with the school's mission" and "[that f]aculty are qualified through initial academic or professional preparation and sustain currency and relevancy appropriate to their classification."[124]

To effectively evaluate business schools and their faculty, AACSB has created four categories in which to classify faculty members, based on their academic background, professional background, and continuing professional activities.[125] Those categories are titled: Scholarly Academic (SA), Practice Academic (PA), Scholarly Practi-

120. *See infra* Section III (b).

121. *Id.*

122. *See generally AACSB Business Accreditation Standards*, AACSB, https://www.aacsb.edu/educators/accreditation/business-accreditation/aacsb-business-accreditation-standards (last visited Dec. 21, 2021).

123. *See Guiding Principles*, *supra* note 106, at 10.

124. *Id.* at 30.

125. *See id.* at 30 ("Faculty qualifications status refers to one of four categories designated to demonstrate current and relevant intellectual capital or professional engagement in the area of teaching to support the school's mission and related activities. Categories for specifying faculty qualifications are based on both the initial academic preparation or professional experience, and sustained academic and professional engagement within the area of teaching.").

tioner (SP), and Instructional Practitioner (IP).[126] AACSB instructs both business schools and discipline-specific programs within the business school to have at least 40 percent of their faculty meet the SA standard and 90 percent of their faculty meet any of the four standards to meet accreditation requirements.[127] Importantly, classification within the SA and PA categories require faculty to hold "a terminal degree related to the field of teaching."[128] Typically, this would mean a PhD in the business discipline in which the faculty member teaches courses.

Interestingly, the J.D. degree can also be relevant to many fields of teaching within a business school, qualifying an attorney as SA or PA faculty in a discipline related to their research or legal practice.[129] The main difference between the two classifications is that SA[130] faculty maintain their classification "through scholarship and activities related to the field of teaching" and PA[131] faculty "sustain currency and relevancy through professional engagement, interaction, and activities related to the field of teaching." For newly-minted terminal degree holders (including J.D. holders), the so-called "five-year rule" applies, which allows these individuals to maintain SA status for five years after receiving the degree,[132] after which they must meet AACSB's criteria for maintaining SA or PA status.[133]

126. *Id.*

127. *Id.* at 34 ("Normally, a minimum of 40 percent of a school's faculty resources are SA and 90 percent are SA+PA+SP+IP at the global level (i.e., across the entire accredited unit) and in disciplines defined by the school in alignment with degrees or majors" and "the ratio of SA faculty at the discipline level may be less than the 40 percent minimum if the school makes appointments to drive new, innovative, or interdisciplinary initiatives. In these instances, the burden is on the school to make its case as to how it maintains high- quality outcomes. Peer review judgment and discretion is called upon to determine when such exceptions are appropriate.").

128. *Id.* at 33 ("For initial classification of SA or PA, a terminal degree related to the field of teaching is appropriate. Note that a faculty member can be considered SA or PA for five years from the date of conferral of the terminal degree.").

129. *Id.*

130. *Id.* at 30 ("Scholarly Academics (SA) are faculty who have normally attained a terminal degree in a field related to the area of teaching and who sustain currency and relevancy through scholarship and activities related to the field of teaching.").

131. *Id.* at 31 ("Practice Academics (PA) are faculty who have normally attained a terminal degree in a field related to the area of teaching and who sustain currency and relevancy through professional engagement, interaction, and activities related to the field of teaching.").

132. *Id.* at 33 ("For initial classification of SA or PA, a terminal degree related to the field of teaching is appropriate. Note that a faculty member can be considered SA or PA for five years from the date of conferral of the terminal degree.").

133. *Id.* at 34 ("Subsequent to initial classification, there must be ongoing, sustained, and substantive academic activities (for SA) or professional engagement activities (for PA) supporting qualification status.").

These accreditation requirements have important implications for J.D. holders hoping to teach within business schools. For these individuals, it is important to think about one's training and experiences holistically. In doing so, J.D. holders may find that they can qualify as SA or PA faculty in a discipline other than Business Law.[134] In fact, AACSB views the J.D. degree as one that can serve as a terminal degree in a variety of topics, like sustainability, ethics, and other topics that are related to the J.D. holder's legal training.[135]

An example can be provided by the author's career path and current course load.[136] After law school, the author practiced law for two years, working as outside counsel for businesses, including startup ventures.[137] Upon joining the faculty at a business school, the author began a significant number of research projects on the transactions used to finance entrepreneurial ventures.[138] That combination of practice and research experience allows the author to qualify for SA status while teaching courses like "Legal Aspects of New Ventures," "Crowdfunding,[139]" "New Venture Formation and Governance,[140]"

134. *Id.* at 33 ("Examples of commonly accepted terminal degrees in business include: doctoral degrees in business or a closely-related business discipline (PhD or DBA); a graduate degree in law (LLM) and/or taxation (MST) for those teaching taxation[;] a law degree (LLM, or JD) for those teaching courses or modules related to law or aspects related to the legal environment of business (e.g., ethics, sustainability, etc.). [ ] Additional terminal degrees may also be appropriate for SA status when the degree is closely related to the field of teaching and the faculty member sustains currency through scholarly activities in that field consistent with this standard."); *see also* 2020 *Interpretive Guidance for AACSB Business Accreditation*, AACSB, at 14, https://aacsb.edu/-/media/documents/accreditation/business/standards-and-tables/2020-interpretive-guidance-july-2021.pdf (last updated July 1, 2021) [hereinafter *Interpretive Guidance*] (stating that "Scholarly Academic (SA) faculty normally possess a terminal degree in a field related to the area of teaching. The standard specifically includes a PhD or DBA, MST, LLM, or JD, but other terminal degrees may also be appropriate as described below. Other terminal degrees may be appropriate for SA or PA status. For example, an MD teaching in a healthcare management program may be appropriately classified as SA or PA if the faculty member engages in ongoing sustained activities consistent with the school's criteria for SA or PA classification. We envision a future environment where terminally qualified faculty outside of business are increasingly common as SA and PA faculty, and they bring a broad and rich perspective to business education in ways that truly accelerate innovation, foster engagement, and amplify the impact of business education.").

135. *See Interpretive Guidance*, *supra* note 134.

136. *See* David Nows' CV (on file with author and journal.).

137. *Id.*

138. *See id.*

139. *See* ENT 650: Crowdfunding, CENT. MICH. UNIV. GLOB. CAMPUS, http://cmich.smartcatalogiq.com/en/2022-2023/Graduate-Bulletin/Courses/ENT-Entrepreneurship/600/ENT-650 (last visited Dec. 21, 2021).

140. *See* ENT 620: New Venture Formation and Governance, CENT. MICH. UNIV. GLOB. CAMPUS, http://cmich.smartcatalogiq.com/en/2022-2023/Graduate-Bulletin/Courses/ENT-Entrepreneurship/600/ENT-620 (last visited Dec. 21, 2021).

and "New Venture Hires, Filings and Reports[141]" within an entrepreneurship department.[142] Certainly, similar pathways into the profession could be available for attorneys who leverage their practice experience into expertise in teaching and research applicable to other business disciplines like management, finance, or information systems.

The accreditation requirements promulgated by AACSB also have important implications for business schools wishing to meet these accreditation standards. Importantly, these requirements provide an opportunity for business schools to think strategically about the types of faculty the school utilizes within its academic programs. Within the past decade, AACSB and its member schools have worked to address a perceived shortage of terminal degree-holding faculty.[143] This supply issue has emerged due to myriad factors, ranging from financial constraints limiting the number of funded PhD programs in business disciplines,[144] to a significant number of retiring faculty.[145] In response to this supply shortage, new academic programs have emerged to create a greater number of terminal degree holders.[146] One example is the Doctor in Business Administration (DBA), which allows Master's level degree holders to complete a terminal degree in business in a condensed period of time.[147] Another example of such a program are the now extinct, but AACSB-endorsed Post-Doctoral

141. *See* ENT 625: New Venture Hires, Filings and Reports, CENT. MICH. UNIV. GLOB. CAMPUS, http://cmich.smartcatalogiq.com/en/2022-2023/Graduate-Bulletin/Courses/ENT-Entrepreneurship/600/ENT-625 (last visited Dec. 21, 2021).

142. *See* David Nows' CV *supra* note 136 (on file with author and journal.).

143. *See* AACSB, *supra* note 6.

144. *See, e.g.*, AACSB International Doctoral Faculty Commission, *The Promise of Business Doctoral Education: Setting the pace for innovation, sustainability, relevance, and quality*, AACSB INT'L (2013), at 10-11, https://www.aacsb.edu/-/media/publications/research-reports/the-promise-of-business-doctoral-education.pdf (last visited Jan. 1, 2022) ("In an era of increasing financial constraints, attention to the financial models for doctoral education takes on greater importance. Business schools are compelled to enhance efficiency in the delivery of doctoral education. For schools that offer doctoral degrees, questions exist about financial viability, resource utilization, and more. The same challenges can deter other schools from starting new programs. Yet attention must not rest solely on the capacity to deliver doctoral education to more individuals; of equal importance is capacity to deliver the highest possible quality educational experience.").

145. *See, e.g.*, Robert S. Owen, *Managing a U.S. Business School Professor Shortage*, 2 RSCH. IN HIGHER EDUC. J. 1, http://www.aabri.com/manuscripts/08091.pdf (last visited Jan. 1, 2022) ("The business school accreditation agency, AACSB, has been predicting a future shortage of professors in U.S. business schools. Factors that have been advanced in support of a looming shortage include increased future student enrollments, mass retirements of aged professors, decreased production of fresh doctoral graduates, and the taking of faculty employment outside of academe or the U.S.").

146. *See* AACSB, *supra* note 6.

147. *See, e.g.*, Doctoral (DBA) Programs, CLEVELAND STATE UNIV., https://business.csuohio.edu/doctoral/doctoral (last visited Oct. 17, 2022.).

Bridge programs, which allowed faculty holding a terminal degree in a discipline unrelated to business (and presumably, without the requisite real-world experience to become SA or PA faculty) to become qualified as if they hold a terminal degree in business after a five-month "bridge" program.[148]

Each of these solutions to the problem have merit, as they convert someone with valuable experience into faculty that are qualified for SA or PA status according to AACSB.[149] However, an alternative to these solutions lies in business schools viewing J.D. holders as another valuable source of SA and PA qualified faculty in a variety of business disciplines.[150] J.D. holders are automatically qualified as SA faculty for five years after their degree is conferred[151] and can maintain SA or PA status through: (1) completing SA or PA status maintenance activities as prescribed by AACSB and their home institution;[152] or (2) by completing an AACSB-endorsed Doctoral Bridge program.[153]

Interestingly, these options create three "types" of J.D. faculty within business schools, each of which could have an incredible impact on their institution and their students. First, J.D. holders that work to maintain SA status will do so by creating new scholarly works in an area of expertise related to their teaching assignment (*e.g.*; advertising law; cybersecurity; or entrepreneurial ventures.) This presents an excellent opportunity for the SA faculty member to provide the business school with an expert in a practical topic related to one of its disciplines. For example, a J.D. holder teaching in a cybersecurity program could become an expert in the emerging legal requirements an organization must meet when responding to a data breach. Having such a differentiated expert within the business school provides new

148. *See, e.g.*, *Post-Doctoral Bridge*, UNIV. OF FLA WARRINGTON COLL. OF BUS., https://warrington.ufl.edu/post-doctoral-bridge/ (last visited Dec. 22, 2021).

149. *See Guiding Principles*, *supra* note 106, at 30-31.

150. *See id.* at 33; *see also Interpretive Guidance*, *supra* note 134 at 14.

151. *See Guiding Principles*, *supra* note 106 at 33 ("For initial classification of SA or PA, a terminal degree related to the field of teaching is appropriate. Note that a faculty member can be considered SA or PA for five years from the date of conferral of the terminal degree.").

152. *See id. at* 34 ( "Subsequent to initial classification, there must be ongoing, sustained, and substantive academic activities (for SA) or professional engagement activities (for PA) supporting qualification status.").

153. *See* UNIV. OF FLA. WARRINGTON COLL. OF BUS. *Supra* note 6 at 2 ("The program, endorsed by AACSB International—the premier accreditation agency for business schools worldwide—certifies graduates as Scholarly Academic (SA) for five years. The SA is an important credential for employment in AACSB-accredited business schools. The SA status will continue beyond five years as long as one remains academically active by publishing, teaching, and conducting research, per institutional guidelines.").

knowledge to the business school's students and a valuable resource to other faculty. Subsection III (c) will contemplate the value of legal scholarship written by scholars like this in further detail.

A second group of J.D. holders that would provide incredible value in the business school environment are those who strive to maintain PA status. Here, the faculty member would not focus on traditional academic scholarship, but instead, would focus on "professional engagement, interaction, and activities related to the field of teaching."[154] Examples of maintenance activities in the PA category could include: (1) dedicating a significant amount of time to a student activity within the business school; (2) maintaining sustained professional work (like serving as an attorney) outside of one's academic appointment; or (3) serving on a board of directors for a corporation or nonprofit.[155] Clearly, the faculty member's focus here is on engagement with relevant student-centered or real-world business activity. In this case, the J.D. holder that has elected to pursue PA status brings a different type of expertise to the classroom, focusing on the practice of business instead of a focused scholarly area of pursuit.

Lastly, J.D. holders that have been outside of the academic world and allowed their SA or PA status to lapse may find the AACSB-endorsed Post-Doctoral Bridge program to be the best path to SA status. In this program, formerly hosted at the University of Florida, terminal degree holders from non-business disciplines[156] could obtain SA status for five years[157] (before maintenance requirements apply) by completing a four-month program "designed to prepare participants for teaching and research careers in business schools."[158] Participants received SA status in either accounting and finance or management and marketing through this program.[159] Program participants performed most learning virtually, though there were five weekend sessions held in-person.[160] The academic program itself con-

154. *See Guiding Principles*, *supra* note 106, at 31.

155. *See, e.g.*, AACSB International Faculty Qualification Guidelines, CENT. MICHIGAN UNIV. COLL. OF BUS. ADMIN. *https://www.cmich.edu/docs/default-source/colleges/college-of-business-administration/aacsb-cba-faculty-qualification-standards_public71b8643e-f53b-4b08-a3d0-e7a74823793d.pdf?sfvrsn=Ebe7857f_3 (Feb. 27, 2017), https://www.cmich.edu/colleges/cba/faculty/Documents/AACSB%20CBA%20Faculty%20Qualification%20Standards_PUBLIC.pdf.*

156. *See* Bridge Program, AACSB, https://www.aacsb.edu/events/bridge-program (last visited Dec. 22, 2021).

157. *See* UNIV. OF FLA. WARRINGTON COLL. OF BUS., *supra* note 6, at 2.

158. *See id.* at 148.

159. *See id.* at 2.

160. *See id.* at 148.

sisted of four courses, teaching and research sessions, and one-on-one meetings with program faculty.[161] This program presented an interesting path for J.D. holders to learn how to perform traditional research in a business discipline, rather than performing legal research that is relevant to a business discipline. While the University of Florida's program has been discontinued as of 2022, it assisted J.D. holders who were interested in making this shift in academic focus for fifteen years.[162]

All three of these options for J.D. holders to maintain SA or PA status fulfill the spirit of AACSB Standard 3.1, which requires business schools to "maintain[ ] and strategically deploy[ ] sufficient participating and supporting faculty who collectively demonstrate significant academic and professional engagement that, in turn, supports high-quality outcomes consistent with the school's mission."[163] Thus, business schools that are thinking strategically have the opportunity to diversify their faculty with respect to their academic backgrounds and qualifications. J.D. holders can play a pivotal role at business schools that are open to this strategy, providing a practical perspective through teaching, research, and real-world experience. Next, in Subsection III (c), this article narrows its focus to the potential impact of research performed by J.D. holders that focus on a specific business discipline.

c. New and Unique Scholarly Works

An expanded array of business law scholarship is one additional benefit of a having a broader range of business school faculty positions available to J.D. holders. The author predicts this expanded range of scholarship would have two significant consequences. First, the footprint of business law scholarship that appears in law reviews and business law journals would see a significant expansion, providing for a deep exploration of new and important areas of the law. Secondly, the genres of scholarship produced by business faculty would become more diverse, which in turn, would help business schools achieve their goal of bringing more "relevant knowledge and skills" to its faculty.[164] This subsection III (c) explores these topics.

161. *See id.* at 4.
162. *Id.*
163. *See Guiding Principles*, AACSB, *supra* note 106, at *30.
164. *See id.* at *9.

One important benefit of having attorneys as faculty in various disciplines within a business school is that the expertise of these faculty will create new and unique scholarship that can enrich scholarly discussions in law, thereby expanding the footprint of legal scholarship. This would be especially true in cases where faculty have come directly from practice or from a clinical faculty setting because those faculty may choose to focus their scholarship on more practical legal issues compared to the typical scholar. For example, a legal scholar housed in an entrepreneurship department may choose to tackle legal issues relevant to early-stage startup companies that have received relatively little popular press coverage,[165] rather than legal issues currently being encountered by mature startups that are heavily financed by private investors (or even publicly traded.)[166] Of course, the author does not believe that one type of scholarship is more valuable than the other, but rather, believes that the world is a better place with both types of scholarship present, since this new knowledge has value to scholars, students, and the general public. Thus, it appears beneficial to the world of legal scholarship to have new business law scholars that are focused on a specialized discipline within a business school, as those scholars could create new knowledge in a host of new subject matter areas previously unexplored by legal scholars.

Secondly, an added benefit of the scholarship produced by legal scholars in business disciplines would be the diversification of scholarship produced by business faculty. The typical business scholar works much like a researcher in the social sciences, using data to prove correlations between variables.[167] Thus, a business scholar might, for example, seek to learn whether founders that have previously sold a company are more successful at raising capital from investors com-

165. *See, e.g.*, Nows, *supra* note 115 (providing examples of the author's work in this space); *see also* Jeff Thomas, *Equity Crowdfunding Portal Should Join And Enhance The Crowd By Providing Venture Formation Resources*, 42 NOVA L. REV. 375, 378-79, 381-82 (2018) (providing an example of another similar work from a business school professor with a legal background).

166. *See, e.g.*, Anat Alon-Beck, *Alternative Venture Capital: The New Unicorn Investors*, 87 TENN. L. REV. 983, 990-94 (2020), Matthew Wansley, *Taming Unicorns*, 97 IND. L. J. 1203, 1208-10 (2022), and Elizabeth Pollman, *Private Company Lies*, 109 GEO. L. J. 353,360 (2020) (providing recent examples of excellent law review articles in entrepreneurship written by law professors. In all cases, the articles focus on companies that have matured past early-stage startup status). *Compare* Nows *supra* note 115 (providing examples of articles written on early-stage startups, which are far less common in the scholarly literature).

167. *See, e.g.*, *Engaging donors in creative acts can boost charitable fundraising*, UNIV. OF ILL. URBANA-CHAMPAIGN GIES COLL. OF BUS. (Nov. 11, 2021), https://giesbusiness.illinois.edu/news/2021/11/11/engaging-donors-in-creative-acts-can-boost-charitable-fundraising (describing recent research by professor Ravi Mehta demonstrating the link between engaging nonprofit donors in "creative activities" and the subsequent volume of donations received from those donors).

pared to first-time entrepreneurs. Clearly, the answer to this question might have practical value to an entrepreneur seeking determine if they need to add a more experienced person to their founding team.

J.D. holders within an entrepreneurship department may research the same issue of founding teams pitching to investors but approach the topic from a different perspective. Instead of wondering how the experience of the founding team impacts investor interest, the legal scholar might explore how different exemptions to the securities laws accommodate (or restrict) entrepreneurs pitching to investors.[168] Here, the legal scholar provides different value to his or her students, colleagues, and society in general. Instead of providing an answer to a useful and important question, the legal scholar provides a roadmap on navigating an important situation.[169] The legal scholar could share this new knowledge with his or her students in entrepreneurship courses,[170] with attorneys that advise entrepreneurs, with local entrepreneurship outreach organizations, and others. In fact, this new knowledge derived from legal research is particularly valuable in the business school environment because students are often seeking guidance on how to achieve certain goals in the professional world.[171] Insofar as a legal scholar within a business discipline synthesizes new knowledge that is applicable to the goals of his or her students, the legal scholar's expertise can provide immense value within the business school environment.[172] That benefit, paired with a differentiated value proposition when compared to traditional, PhD-holding business school faculty makes legal scholars within traditional business disciplines incredibly valuable to business schools.

168. *See, e.g.*, David Nows, *The Local Nature of Equity Crowdfunding*, 24 U. PA. J. BUS. L. 475, 491-92, 494 (2022) (providing an example of legal research that explores how equity crowdfunding regulations impact entrepreneurs pitching to potential investors).

169. *Id.* at 491-92. In the previous example, the author points out that entrepreneurs are restricted from in-person pitching to potential investors when using the equity crowdfunding exemption from securities registration. This creates a barrier for the entrepreneurs featured in the article, who are mainly seeking to receive investment from local investors but are forced to seek such investment entirely online.

170. *Id.* As an example, the author of this article also teaches a course related to equity crowdfunding for entrepreneurs. *See* CENT. MICH. UNIV. GLOB. CAMPUS *supra* note 139.

171. *See, e.g.*, *New Venture Challenge*, CENT. MICH. UNIV. COLL. OF BUS. ADMIN., https://www.cmich.edu/colleges/cba/academic_programs/departments/ent/new_venture/Pages/default.aspx (last visited Jan. 5, 2022) (providing an example of a business school extracurricular program where students seek to raise capital to launch a business).

172. The value provided to students in this scenario appears similar to the value clinical faculty provide to their students in law schools. Insofar as business schools are willing to provide such legal scholars with tenure-eligible positions within business schools on a consistent basis, the business school could become an attractive home to clinical faculty with a business law expertise.

## IV. How Business Schools Can Make These Proposals Reality

This Section IV focuses on how business schools can make the big idea featured in this article a reality. By making a few minor, yet meaningful changes, business schools can make each academic discipline within their school accessible to J.D. holders with the research and teaching skills necessary to have a significant positive impact on students. Three strategies for implementing these initiatives are outlined in the following paragraphs.

First, business schools must be proactive in reimagining faculty qualifications regarding scholarship if they'd like to utilize attorneys outside of a Business Law department. The typical department hosting a business discipline (*e.g.*, management; finance) within a business school has rigid standards with respect to scholarship: publish in a peer-reviewed journal or forgo research credit toward tenure and promotion with respect to your research.[173] Of course, this presents a problem for most J.D. holders that produce academic research, given that student-edited law reviews account for many of the outlets through which law faculty publish their scholarship.[174] Today, this type of policy effectively excludes J.D. holders that conduct legal research from being able to serve as tenure-track faculty members within most business school departments.

An easy solution to this problem occurs if departments representing business disciplines within business schools choose to value a wider array of research relevant to the particular discipline, including law review articles, for purposes of promotion and tenure requirements. As an example, the entrepreneurship department at Central Michigan allows for research credit toward tenure and promotion for any research published "in quality peer-reviewed journal articles or

173. *See, e.g.*, *Standards for Faculty Appointment, Tenure and Promotion Decisions, and Annual Performance Review*, DEP'T OF MGMT., BAYLOR UNIV. HANKAMER SCH. OF BUS., (Feb. 16, 2021), https://provost.web.baylor.edu/sites/g/files/ecbvkj506/files/2022-05/entrepreneurship_department_tenure_and_promotion_guidelines.pdf at *5-6 (the top priority for faculty in this management department "should be to publish full-length articles in refereed journals. Whenever possible, faculty should target their work [for what are generally perceived to be premier] journals." The document continues by stating that most other forms of scholarship "are significantly less value[d by] the department than refereed journals" and should not be a major emphasis for faculty. Presumably, this would include law review articles, effectively preventing this department from diversifying its faculty with J.D. holders).

174. *See* W&L Law Journal Rankings, (July 15, 2022), https://managementtools4.wlu.edu/LawJournals/Default.aspx (citing 701 of a total 1559 ranked journals are student edited).

law review or law journal articles published by ABA accredited law schools."[175]

The above requirement prioritizes flexibility above all else in evaluating research produced by our faculty. First, faculty that produce peer-reviewed research receive credit for that research output with respect to tenure and promotion.[176] However, it is important to notice that there is no requirement that said peer-reviewed research be published in an entrepreneurship-specific journal.[177] Instead, our faculty may publish in a peer-reviewed journal in any academic subject area. This allows for our department to value Ph.D.-holding faculty in entrepreneurship, other business disciplines, and even non-business disciplines (when the faculty member has significant entrepreneurship related expertise or experience). Additionally, our department also values non-peer-reviewed research when it is published in a law review or law journal, allowing for legal scholars with significant entrepreneurship related expertise or experience to be a member of our team in a tenure-track faculty role.[178] In fact, our job postings for open faculty positions reflect this reality, calling for applications from scholars with any terminal degree, as long as their teaching, research, or professional experiences will provide significant value to our entrepreneurship students.[179] Departments in business disciplines at business schools throughout the world can mimic this template to create a more academically diverse team of faculty that includes J.D. holders as a key contributor.

A second important task for a business school to undertake is to analyze how it sees practice-oriented faculty fitting into the school's mission to educate students. Given AACSB's directive for business schools to "provid[e] relevant knowledge and skills to the communi-

175. *See Department of Entrepreneurship Departmental Procedures, Criteria, Standards, and Bylaws*, CENT. MICH. UNIV. COLL. OF BUS. ADMIN. (Jan. 16, 2017) at *15 (on file with author).

176. *Id.*

177. *Id.*

178. *Id.*

179. *See* Entrepreneurship (Tenure-Track, Assistant Professor), CENT. MICH. UNIV. (Nov. 12, 2021), https://www.jobs.cmich.edu/postings/35049 (last visited Dec. 27, 2021) ("Candidates must have a terminal degree: (i) a Ph.D. or D.B.A in entrepreneurship or a related business field (from an AACSB accredited institution); or, (ii) a J.D. (from an ABA accredited institution) with significant entrepreneurship-related experience; or, (iii) other relevant terminal degree with significant entrepreneurship-related experience."). *See also* Entrepreneurship Faculty – Lecturer, CENTRAL MICHIGAN UNIV. (Nov. 15, 2021), https://www.jobs.cmich.edu/postings/35050 ("The candidate must have: (i) an earned a master's degree in a business or other discipline related to entrepreneurship; or, (ii) a relevant terminal degree (such as a Ph.D. or D.B.A in entrepreneurship or related business field or a J.D.).").

ties they serve[,]" business schools should identify courses and programs where practice-oriented faculty members could make a significant impact.[180] Then, the business school should identify the characteristics of the practice-oriented faculty they are looking to recruit. Often, that group may include J.D. holders who have PA status by virtue of their work with live clients or within business organizations. Of course, in utilizing this process business schools may find themselves seeking out not just J.D. holders, but faculty members with PA status from a diverse array of other academic backgrounds. In the process, business schools will align the student experience more closely with the experience students will have upon entering the business world after graduation.[181]

Lastly, business schools should dedicate resources to imagining new programs to train these unique populations of faculty, including J.D. holders that wish to become faculty in a non-business law discipline. In some cases, this will involve working to align a new faculty member's teaching and research with the more traditional approaches used within a business school.[182] A great example of this type of program lies in the aforementioned Post-Doctoral Bridge program at the University of Florida, which was geared toward prospective faculty holding a terminal degree in a non-business discipline who were seeking SA status in the business school setting.[183] In this instance, the academic program seeks to acclimate a prospective faculty member with unique skills outside of business into a business discipline.[184] Of course, this program has a large benefit to business schools seeking to hire uniquely skilled faculty members that can diversify the academic expertise of their faculty team.

Another example of a current program that works to acclimate prospective faculty members into the business school setting are Doc-

180. *See Guiding Principles*, AACSB *supra* note 106.

181. *See, e.g.*, Simone Flueckiger, *5 tips for building an interdisciplinary team to drive innovation*, WORLD ASS'N OF NEWS PUBLISHERS (Nov. 13, 2019), https://wan-ifra.org/2019/11/5-tips-for-building-an-interdisciplinary-team-to-drive-innovation/ ("More and more news organi[z]ations are embedding interdisciplinary teams in their newsrooms, be it data analytics teams working on business intelligence or interactive teams experimenting with new forms of storytelling.").

182. *See, e.g.*, UNIV. OF FLA. WARRINGTON COLL. OF BUS. *supra* note 148 (providing an example of a program that provides training in business to terminal degree holders from non-business disciplines). https://warrington.ufl.edu/post-doctoral-bridge/admissions/

183. *Id.*

184. *Id.*(providing examples of graduates of the program with degrees in non-business disciplines who now teach in business programs after completing the PDB).

tor of Business Administration (DBA) programs.[185] These programs allow business professionals holding a one or two-year Master of Business Administration (MBA) degree to essentially count that coursework toward their doctorate and earn the DBA degree in three years[186] (compared to a traditional four or five-year PhD program[187]). DBA programs also differ from PhD programs in that they focus on research that has direct application on how business is done,[188] versus research that advances theories about how business is done.[189] The DBA degree is typically earned in a specific business discipline (e.g., a DBA in Finance[190]). Various AACSB-accredited institutions have DBA programs, some of which have some in-residence components mixed into a mostly remote program.[191]

The programs mentioned above clearly provide a roadmap for creating a more diverse faculty group within business schools. In the

185. *See, e.g.*, CLEVELAND STATE UNIV., *supra* note 147 (providing an example of a Doctor in Business Administration (DBA) program).

186. *See Executive DBA Admission Information*, PEPPERDINE GRAZIADIO BUS. SCH., https://bschool.pepperdine.edu/programs/doctor-of-business-administration/admission/ (last visited Jan. 6, 2022) (stating that "[a] business-related masters degree or a doctoral degree is required for admission to the Executive DBA program."). *See also How the DBA Program Works*, PEPPERDINE GRAZIADIO BUS. SCH., https://bschool.pepperdine.edu/programs/doctor-of-business-administration/curriculum/how-the-dba-program-works.htm (last visited Jan. 6, 2022) (stating that the DBA program at Pepperdine is three years long).

187. *See PhD in Entrepreneurship FAQ*, UNIV. OF LOUISVILLE COLL. OF BUS., https://business.louisville.edu/academics-programs/graduate-programs/eandi-phd/eandifaq/ (last visited Jan. 6, 2022) ("[a] A fifth year may be spent either as a research assistant or a graduate teaching assistant. Approval for a fifth year of study may be granted on an individual basis but is expected not to be the norm.").

188. *See Is An Executive Doctorate Right for Me?*, PEPPERDINE GRAZIADIO BUS. SCH., https://bschool.pepperdine.edu/programs/doctor-of-business-administration/dba-vs-phd/ (last visited Jan. 6, 2022) ("[w]While both programs develop research skills, an Executive Doctor of Business Administration is directed at research that advances business practice, while a PhD is directed at research that contributes first and foremost to theory. DBA research examines critical contemporary questions within their broader organizational and economic context with a focus on practical implementation.").

189. *See, e.g.*, *Doctorate in Entrepreneurship FAQ*, BAYLOR UNIV. HANKAMER SCH. OF BUS., https://www.baylor.edu/business/entrepreneurship/phd/index.php?id=927276 (last visited Jan. 6, 2022) ("The PhD program prepares students for careers as entrepreneurship researchers, teachers, analysts, policymakers, and other scholarly positions. It is not a practitioner degree. Specifically, we equip students with the skills to conduct rigorous research that meaningfully advances the discipline, eventually launching high-impact careers as faculty members at leading research-oriented universities or in equivalent academic, industry, or policy positions.").

190. *See e.g.*, *DBA in Finance*, CLEVELAND STATE UNIV., https://business.csuohio.edu/doctoral/finance-dba (last visited Jan. 6, 2022) (providing an example of a DBA in Finance program. This university has DBA degrees in other business disciplines like management too).

191. *See How the DBA Program Works*, PEPPERDINE GRAZIADIO BUSINESS SCHOOL *supra* note 183 ("Residential sessions are scheduled once per trimester and will typically occur in October, February, and June. New coursework is presented during these sessions and is continued throughout the trimester through online instruction or individual assignments. Residentials will be six full days, and most will require arrival the day before the session begins.").

case of the Post-Doctoral Bridge program, any terminal degree holder could bring their degree and real-world business experience into the program and emerge four months later as a job candidate with SA status.[192] DBA programs take this a step further by presenting MBA holders without a terminal degree with an expedited path to a terminal degree and SA status.[193] The author endorses such programs as useful for business schools looking to hire practice-oriented faculty, as well as faculty with differentiated expertise, to pair with more traditional PhD-holding faculty. In doing so, business schools can create a diverse team of experts to share knowledge with their students.

One group of prospective faculty that are notably absent from the discussion above are J.D. holders that wish to publish their scholarly works in traditional law reviews. Both the Post-Doctoral Bridge programs and DBA programs are tailored toward training prospective faculty members to produce traditional business research that would fit neatly within any business school's requirement to produce peer-reviewed research.[194] However, these programs are not geared toward helping J.D. holders create a scholarly agenda that would set them up for success with respect to publishing scholarly works in law reviews and law journals.

My final proposal for business schools is to consider a version of a DBA program for J.D. holders, with the explicit goal of helping attorneys that have been removed from the academic setting to turn their practice experience into teaching and research expertise (the "Attorney DBA Program" or the "Program"). An Attorney DBA Program would allow attorneys to take the time to translate their practice experience (which is likely to confer PA status) into knowledge to share with students in specific course offerings and with the world through academic research (conferring SA status). The Program would also allow for the attorney to work with existing faculty to create a scholarly agenda that leverages the attorney's expertise into a plan of action to make unique scholarly contributions over time. The Program would provide business schools with a more formal way of training J.D. holding faculty to operate within traditional business disciplines, which could provide business schools with the encouragement they

192. *See* UNIV. OF FLA. WARRINGTON COLL. OF BUS. *supra* note 148 ( "In just four months, you can attain Scholarly Academics (SA) status and find a faculty position anywhere in the world!").

193. *See, e.g.*, *Executive DBA Admission Information*, PEPPERDINE GRAZIADIO BUS. SCH. *supra* note 183.

194. *See infra* Section IV.

need to recognize lawyers as worthy of a pathway into the faculty of any business discipline. Given the precedent set by the Post-Doctoral Bridge program and many DBA programs, the Attorney DBA Program appears to be another way to make business education more interdisciplinary.

This article will not go into specific detail regarding what an Attorney DBA Program should look like in practice. Instead, I will point out some relevant issues for a business school to consider in creating such a program, like: (1) length of the program; (2) host institution and location of the program; (3) program curriculum; and (4) program faculty and staffing. These are important issues to consider in creating a program that successfully trains attorneys to become faculty within a business discipline.

With respect to the length of the proposed Attorney DBA Program, there are many options, ranging from the four months of a Post-Doctoral Bridge program[195] to the nearly three years of a typical DBA program.[196] Certainly, the four-month format of the Post-Doctoral Bridge program would be attractive to many potential students, given its condensed nature. However, this author believes that an Attorney DBA Program would require at least one year in program length in order to adequately serve students that wish to develop a robust research agenda prior to becoming business school faculty. While more time in the program would certainly prove useful in developing scholars, business schools should weigh that benefit carefully against the monetary and opportunity cost to the student. This author believes that a three-year program is likely too long, for this reason.

Secondly, it is important to develop a unique program like the Attorney DBA Program in conjunction with a university and/or a geographic location that will best accommodate prospective students. In fact, location may be the single largest hurdle to creating a successful Attorney DBA Program. Many name-brand universities regularly host executive education programs in large cities[197] away from their

195. *See* UNIV. OF FLA. WARRINGTON COLL. OF BUS. *supra* note 148 ("In just four months, you can attain Scholarly Academics (SA) status and find a faculty position anywhere in the world!").

196. *See How the DBA Program Works*, PEPPERDINE GRAZIADIO BUS. SCH., *supra* note 186.

197. *See, e.g.*, *Finance – Chicago (MSF)*, UNIV. OF NOTRE DAME MENDOZA COLL. OF BUS., https://mendoza.nd.edu/graduate-programs/finance-chicago-msf/ (last visited Jan. 10, 2022) ( "The in-depth, 36-credit-hour curriculum delivers specialized financial skills in a rigorous yet manageable one-year format at our downtown Chicago campus. As a working professional committing only to weekend classroom time, you'll be able to retain a full-time job and earn while you learn."). *See also MBA Program for Executives*, THE WHARTON SCH. – UNIV. OF PENN.,

main campus for this reason. Thus, any institution wishing to begin an Attorney DBA program would be wise to consider such an arrangement, if at all possible. For example, if the author's home institution (Central Michigan University) wished to launch an Attorney DBA Program, it's' home location of Mount Pleasant, Michigan might prove too remote[198] to attract mid-career professionals with families for a short-term move. However, the University's satellite locations in Detroit,[199] Grand Rapids,[200] or Traverse City[201] may prove to be an excellent hub for the Attorney DBA Program and its activity.

Another consideration for the successful implementation of Attorney DBA Programs will be identifying an appropriate host institution, or set of host institutions, for such a Program. With respect to the Post-Doctoral Bridge program, the University of Florida was the only university with an active program (until it was discontinued in 2022), although other universities had a similar program in the past.[202] Given the niche nature of the Attorney DBA Program, it may be appropriate for host institutions to coordinate the scale of such programs with AACSB to ensure successful implementation.

Third, a university seeking to launch an Attorney DBA program must determine an appropriate curriculum for such a program. Like most doctoral programs, an Attorney DBA Program should not be coursework-heavy, as it should instead provide for ample time for a student to develop a research agenda and begin writing in their area of academic interest. However, coursework early on in the program would be useful, both to familiarize the student with how research for law review articles is completed, and to build on the student's expertise in a particular area. For example, the author's home institution (Central Michigan University) could leverage its Master in En-

https://sf.wharton.upenn.edu/wharton-mba/ (last visited Jan. 10, 2022) (stating that Wharton offers its Executive MBA to working professionals in both Philadelphia and San Francisco).

198. As an example, Mount Pleasant is roughly a 45-minute drive away from the nearest airport and about a two-hour drive to large cities in Michigan like Detroit and Grand Rapids.

199. *See Campus Locations*, CENT. MICH. UNIV., https://www.cmich.edu/about/locations (last visited Jan. 10, 2022) (sharing Central Michigan University's satellite locations, including those in Detroit, Grand Rapids, and Traverse City).

200. *Id.*

201. *Id.*

202. *See* Sookhan Ho, *Pamplin College program helps develop new business faculty*, VA. TECH PAMPLIN COLL. OF BUS. (July 29, 2010), https://vtechworks.lib.vt.edu/bitstream/handle/10919/63445/072910-pamplin-bizfaculty.html?sequence=1&isAllowed=y (stating that AACSB approved post-doctoral bridge programs "at Tulane University, the University of Florida, University of Toledo, Grenoble Ecole de Management in France, and Virginia Tech's Pamplin College of Business.").

trepreneurial Ventures program[203] and its courses to assist Attorney DBA Program students with finding their niche in law and entrepreneurship. Alongside a student's research-oriented coursework, they could choose to complete coursework on seed financings, venture capital, sharing equity, protecting intellectual property, or equity crowdfunding to gain a deeper understanding of a research area of their choosing.[204] Of course, courses that create an overlap with law and other business disciplines (like marketing or management) are likely to exist at other institutions, and those institutions could build similar Attorney DBA Program coursework that applies to those business disciplines.

Lastly, a critical aspect of building an Attorney DBA Program is faculty staffing. Any doctoral program needs to have highly qualified faculty to guide new student research. Of course, those faculty members need to be experts in their field too. This creates a potential issue for Attorney DBA Programs seeking to create faculty in business disciplines like marketing or entrepreneurship, given that most business schools have law faculty within Business Law departments (and nowhere else[205]). Given this reality, it may be difficult for most business schools to build out an Attorney DBA Program in one business discipline, let alone many business disciplines, since most law faculty within business schools do not specialize in a specific business discipline. This creates a couple of realistic pathways for Attorney DBA Programs. First, the Programs could be condensed within a few business schools with large Business Law departments that have a diverse set of faculty studying law and business topics. In these cases, a business school may be able to build an Attorney DBA Program with multiple specializations mapping onto specific business disciplines. Alternatively, Attorney DBA Programs could be spread amongst a greater number of institutions, allowing for universities with deep specializations with a given field to host an Attorney DBA Program related to that discipline. There are pros and cons to each approach. Certainly, all parties involved (including AACSB) would benefit from a robust discussion of the benefits and drawbacks of each approach, rather than leaving the evolution of such Programs in the hands of the first movers.

203. *See, e.g.*, *Master of Entrepreneurial Ventures*, CENT. MICH. UNIV., https://www.cmich.edu/program/Master-of-Entrepreneurial-Ventures (last visited Jan. 19, 2022).

204. *Id.*

205. *See, supra* Section II (b).

## Conclusion

This article has sought to explore a new career path for attorneys that are not satisfied with the practice of law. While faculty positions within business schools are sometimes available to J.D. holders in Business Law departments, it is atypical to see faculty positions in traditional business disciplines like entrepreneurship, management, and finance available to prospective faculty with a J.D. This article proposes that business schools remove the barriers that cause such restrictions.

There are a few good reasons to do so. First, attorneys can qualify as SA faculty according to the premier accrediting body of business schools, AACSB, which allows those business schools to count attorney faculty active in publishing scholarship toward a crucial accreditation requirement that can be difficult to meet in some business disciplines. Secondly, attorneys have practical experience that serves students well in the classroom. This practical experience provides a strong complement to the theoretical and quantitative rigor many PhD-holding faculty bring to the business school classroom. Lastly, the legal scholarship produced by these prospective faculty members stands to be unique, which will enrich the universe of scholarship produced by business schools and published in law reviews. Given these factors, the author advocates for the inclusion of attorneys as part of a well-rounded group of faculty within business disciplines that includes business PhD holders, Master's degree holders with relevant experiences, and non-business PhD holders with relevant experiences.

# Maternal Health: Attacking a Structurally Discriminatory Health Care System Through Advancing the Reproductive Justice Movement

NICOLE STROMBOM*

Abstract

Maternal mortality statistics in the United States show a stark contrast between Black women and White women. This contrast is attributable to structural discrimination within the health care system. Laws inadequately address this disparity; changes to the legal system are needed to advance health equity, lower deleterious maternal health outcome statistics for Black women, and provide anti-racist health care.

The Reproductive Justice Movement strives to acknowledge the need for health equity in reproductive treatment but currently does not go far enough in providing solutions. Expansion and renewal of this movement are needed.

Changes to Title VI of the Civil Rights Act and the Emergency Medical Treatment and Active Labor Act (EMTALA) could drastically improve health equity and change the structural discrimination maternal mortality narrative. A private right of action is needed

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within Title VI of the Civil Rights Act. The Emergency Medical Treatment and Active Labor Act should expand the definition of stabilization before and after labor.

## Maternal Health: Attacking a Structurally Discriminatory Health Care System Through Advancing the Reproductive Justice Movement

### Section I: Introduction

The documented differing maternal mortality rates racial disparity for White mothers versus Black mothers provides clear evidence of a race-based gap in health care provision.[1] Structural discrimination influences the maternal mortality gap. Structural discrimination refers to the power used by a dominant group—here, White populations—to advantage dominant group members while disadvantaging the outgroup—here, Black populations—or non-dominant group.[2] An example of structural discrimination is the federal legislative power White males use to establish laws that ignore the intersectionality of being both Black and female. Structural discrimination is systemic to the United States.[3] Maternal mortality is an area where structural discrimination has a historical health care gap based on an individual's gender and race.

This gap can be traced back to the origins of American slavery and lack of any health-related regard for Black people, especially Black women. Specifically, during slavery, federal laws providing health care for slaves were nonexistent, including laws related to the birthing process.[4] This allowed slaves to be used in health-related experimentation, including experimentation in the early women's health field. Experimentation on slaves included the work of James Sims

1. *Pregnancy Mortality Surveillance System,* CDC: CTR. FOR DISEASE CONTROL & PREVENTION, *https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-mortality-surveillance-system.htm?CDC_AA_refVal*$^{H}_{T}$*tps://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html* (last updated June 22, 2022).

2. *See* Rebecca M. Blank, Marilyn Dabady & Constance Forbes Citro, MEASURING RACIAL DISCRIMINATION 60 (2004).

3. Ruqaiijah Yearby, *Racial Disparities In Health Status and Access to Healthcare: The Continuation of Inequality in the United States Due to Structural Racism*, 77 AM. JOURNAL OF ECONS. AND SOCIOLOGY 1113, 1113–52 (2018). ; *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* 1989 U. CHI. LEGAL F. 139 (1989).

4. Jeneen Interlandi, WHY DOESN'T THE UNITED STATES HAVE UNIVERSAL HEALTH CARE? THE ANSWER HAS EVERYTHING TO DO WITH RACE. THE N.Y. TIMES (2019), https://www.nytimes.com/interactive/2019/08/14/magazine/universal-health-care-racism.html (last visited Nov 12, 2022).

who is considered the "father of modern gynecology."[5] Sims experimented on slaves without anesthesia or consent.[6] Sims' experiments lead the way for advancements in women's health care and reproductive knowledge including gynecological procedures.[7] These experiments, as well as the epistemological view, on enslaved Black women disseminated a structural discriminatory pattern of looking at Black women as less than White women in the field of gynecology.

The first major federal legislation that delved into the topic of health care, the Hill-Burton Act, lacked anti-discrimination language and allowed White women and Black women to continue to be viewed differently by physicians that perpetuated structural discrimination.[8] This Act did not provide a remedy for the past harm Black women suffered for the sake of establishing the gynecology field.[9] Action to remedy structural discrimination Black women encounter—within the field of gynecology—has not occurred. Instead of addressing the historical roots causing structural discrimination within gynecological practices, today, scientists continue to search for a biological or genetic difference between White mothers and Black mothers.[10] Structural discrimination persists within gynecology despite modern efforts in Title VI of the Civil Rights Act to eliminate discrimination. The modern Reproductive Justice Movement begins a conversation about addressing the intersectionality between being a woman and Black that can begin to dismantle the continued structural discrimination within the United States' gynecological system.[11]

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5. Brynn Holland, *The 'Father of Modern Gynecology' Performed Shocking Experiments on Enslaved Women*, HISTORY, https://www.history.com/news/the-father-of-modern-gynecology-performed-shocking-experiments-on-slaves (last updated Dec. 4, 2018); Durrenda Ojanuga, *The Medical Ethics of the 'Father of Gynaecology', Dr J Marion Sims.*, 19 J. OF MED. ETHICS 28, 29 (1993).

6. *Id.*

7. *Id.*

8. *See generally* Emily A. Largent, *Public Health, Racism, and the Lasting Impact of Hospital Segregation,* 133 PUB. HEALTH REP. 715 (2018).

9. *Id.*

10. Allison S. Bryant et al., *Racial/ethnic disparities in obstetric outcomes and care: Prevalence and determinants*, 202 American Journal of Obstetrics and Gynecology 335–43 (2010); Richard David & James Collins, *Disparities in infant mortality: What's genetics got to do with it?*, 97 AM. JOURNAL OF PUB. HEALTH 1191, 1191–97 (2007); Systemic Racism, A Key Risk Factor for Maternal Death and Illness, NAT'L HEART LUNG AND BLOOD INST. (2021), https://www.nhlbi.nih.gov/news/2021/systemic-racism-key-risk-factor-maternal-death-and-illness (last visited Nov 13, 2022).

11. *Reproductive Justice*, SISTER SONG, https://www.sistersong.net/reproductive-justice (last visited Oct. 13, 2022); Loretta Ross, *What is Reproductive Justice?*, PRO-CHOICE PUB. EDUC. PROJECT, https://www.protectchoice.org/section.php?id=28 (last visited Oct. 13, 2022).

The Reproductive Justice Movement blossomed out of frustration with the history of gynecology, women's health, and maternal health in the United States.[12] Gynecology and women's health come from the same need to understand a woman's body and provide appropriate care for reproductive organs. The Women's Health Movement, a movement that occurred prior to the Reproductive Justice Movement, and developed in the 1960s and 1970s, is a movement where women as a collective pushed back on structural discrimination that defines health care by the White male body.[13]

Gynecology is the reproductive science aspect within women's health.[14] The Reproductive Justice Movement stems from the understanding that women are disparately treated regarding both their health care rights and human rights.[15] The Reproductive Justice Movement adds intersectionality, inclusion, equity, and race to the past women's health movement. The movement advocates for comprehensive treatment and holistic care for women. Women are the focus of the Reproductive Justice Movement, which promotes women making personal decisions about having children, the treatment they receive while pregnant and in labor, the treatment they receive regarding contraception and pregnancy termination, and the eventual decisions about raising a child.[16] The movement started in 1994 and comes from the realization that the Women's Health Movement from the 1960-70s does not represent all women.[17] While this movement stems from people of color and identifies analyzing power systems as a means to promote reproductive justice, the movement does not address historical contexts that create structural discrimination and leads to a lack of culturally competent maternal health care.[18] To become a more effective movement, the Reproductive Justice Movement must fight not only to break down injustices seen today, but challenge the historical components of structural discrimination that enable the cur-

12. *Id.*

13. *See generally* Francine H. Nichols, *History of the Women's Health Movement in the 20th Century*, 29 J. OF OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 56, 56–64 (2000); J. Norsigian, *The Women's Health Movement in the United States*, 39 NEWSL. WOMEN'S GLOB. NETWORK REPROD. RTS. 9 (1992), https://www.ncbi.nlm.nih.gov/pubmed/12285927.

14. Kellie Walsh, *Faces of Healthcare: What's an OB-GYN?*, HEALTHLINE, https://www.healthline.com/find-care/articles/obgyns/what-is-an-obgyn (last updated May 27, 2016).

15. Ross, *supra* note 11.

16. *Reproductive Justice*, *supra* note 11; Cspera, *HLSRJ presents "Reproductive Justice is. . ."*, HARV. L. STUDENT ALL. REPROD. JUST., (Nov. 7, 2016), https://orgs.law.harvard.edu/reprojustice/2016/11/07/hlsrj-presents-reproductive-justice-is/.

17. *Reproductive Justice*, *supra* note 11.

18. *Id.*

rent injustices all women, and disproportionately Black women, face in gynecological health care. In order to begin the process of dismantling historical shackles that prevent the Reproductive Justice Movement from fully providing justice for people of color, the laws that perpetuate structural discrimination must be identified and understood.

Laws are a power construct and are foundational to health care processes in hospital systems. Hospital systems were founded on segregationist ideas that have not been corrected through retributions for structural discrimination that caused harm to Black women.[19] Structural discrimination is apparent in the system of laws that govern how health care institutions function and provide maternal care.[20] The Hill-Burton Act, Title VI of the Civil Rights Act, and the Emergency Medical Treatment and Active Labor Act perpetuate a system of structural discrimination and lack language to address the intersectionality between biological sex and race allowing for continued disparities in maternal mortality.[21]

This paper lays out a foundation for understanding the historical components and laws that allow for structural discrimination in maternal health care that causes the racial disparity in maternal health and lays a framework for updating the Reproductive Justice Movement. Although the Reproductive Justice Movement is a step forward, it does not go far enough in addressing the legacy of structural discrimination in the field of Gynecology that leads to disparate maternal health care provided to Black women, which must be remedied through the provision of doula services, licensure processes, legal changes to Title VI, administrative regulations regarding reporting, and community engagement. Section II discusses health impacts related to reproductive justice and covers information concerning statistics and agency projects to monitor maternal health disparities. This section provides a brief discussion of medical education and the scapegoating of biology/genetics as the cause of the maternal health race-based disparities. Section III provides a legal discussion regarding laws, specifically, the Hill-Burton Act, Title VI of the Civil Rights Act, and the Emergency Medical Treatment and Active Labor Act, that support the continued structural discrimination within gynecological health care. Section IV analyzes a legal case describing the actual

19. Largent, *supra* note 8, at 715.
20. *Id.*
21. *Id.*

impact structural discrimination has on Black women. Section V provides a proposed solution that utilizes changing cultural norms regarding discrimination legally. The solution advances the Reproductive Justice Movement and entails five-parts (1) doula coverage; (2) state-based personnel licensures; (3) Title VI changes; (4) federal administrative regulations regarding surveillance; and (5) community involvement and discussions to find the most effective solution for individuals utilizing maternal health facilities. Finally, section VI provides a conclusion.

## Section II: Reproductive Justice and Health Impacts of Structural Discrimination

Black women are three times more likely than White women to die during labor.[22] This distinction is exacerbated based on the state where a woman lives.[23] While this race-based distinction continues, a White woman can expect a better health outcome during labor than a Black woman.[24] Further, this gap persists when we look at historic statistics, and the disparity grew between the 1990s and 2010s.[25] There is an upward trend in pregnancy-related deaths per 100,000 live births, meaning that more Black women are dying during labor and the postpartum period.[26] Structural discrimination is a cause of these disparities.[27] Structural discrimination is the power a dominant group uses to benefit dominant group members while disadvantaging the nondominant group.[28] Examples of structural discrimination are: (1) performing research that looks for a genetic distinction between the dominant group and nondominant group instead of funding changes in social determinants of health (economic stability, education, neighborhood, social context) that cause disparate maternal mortality rates;

22. *Pregnancy Mortality Surveillance System*, *supra* note 1; Marian F. Macdorman, Eugene Declercq & Marie E. Thoma, *Trends in Maternal Mortality by Socio-Demographic Characteristics and Cause of Death in 27 States and the District of Columbia*, 129 OBSTETRICS & GYNECOLOGY 811, 817–18 (2017).

23. Macdorman, *supra* note 22, at 815–18; Mary Beth Flanders-Stepans, *Birthing Briefs: Alarming Racial Differences in Maternal Mortality*, 9 J. PERINATAL EDUC., 50–51 (2000).

24. Flanders-Stepans, *supra* note 23, at 50.

25. *Pregnancy Mortality Surveillance System*, *supra* note 1.

26. *Id.*

27. *See generally* Systemic Racism, A Key Risk Factor for Maternal Death and Illness, *supra* note 10; Latoya Hill, Samantha Artiga & Usha Ranji, *Racial Disparities In Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF, https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/ (last visited Nov 13, 2022).

28. *See* Blank, *supra* note 2 at 63–65.

and (2) tracking maternal mortality through White world experiences, while the dominant group assumes the nondominant group is homogeneous and defined solely by Black women.[29]

Gynecologists' education plays a role in the structural discrimination that persists in maternal health today. For centuries, medical education focused on educating White males about how to treat the White male body.[30] This fact illustrates structural discrimination because the White male-centric view structured medical education. Further, each United States medical institution has roots in structural discrimination because no institution fought against the foundational systems, resulting in systematically teaching medical student cohorts how to treat White men often utilizing a White male cadaver.[31] For example, gynecologists' education starts from a generalist medical education, focused on the White male body, and is then governed by the legacy of Sims.[32] The education of physicians being White male-centric poses a three-part problem in that: (1) many doctors do not fully understand women's health; (2) many doctors do not train for culturally competent interactions; and (3) doctors do not learn about or train for mistrust in medical practices that affects many Black women due to structural discrimination that historically did not protect Black women from past injustices—including Sims' work. Structural discrimination persists in medical education and allows the nondominant group, Black women, to be treated differently from White women.

Structural discrimination is seen in genetic research. With continued scientific advances, humans learn more about our genetic material that can provide insight into hereditary diseases but not structural discrimination. As of today, we know that more genes are likely shared between White and Black individuals than between two Black individuals who are non-related.[33] However, despite this knowledge that White and Black individuals do not have a genetic-based difference

29. *Social Determinants of Health*, HEALTHY PEOPLE, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health (last updated Feb. 6, 2022).

30. Alan Bleakley, *Gender Matters in Medical Education*, 47 MED. EDUC. 59, 63 (2012).

31. Gabrielle M. Finn, Adam Danquah & Joanna Matthan, *Colonization, Cadavers, and Color: Considering Decolonization of Anatomy Curricula*, 305 The Anatomical Record 938–51 (2022).

32. Holland, *supra* note 5; Ojanuga, *supra* note *5*; Max J. Romano, *White Privilege in A White Coat: How Racism Shaped My Medical Education*, 16 The Annals of Family Medicine 261–63 (2018).

33. D. J. Witherspoon, S. Wooding, A. R. Rogers, E. E. Marchani, W.S. Watkins, M.A. Batzer & L. B. Jorde, *Genetic Similarities Within and Between Human Populations*, 176 GENETICS 351, 353 (2007).

and that a biological difference does not exist, funds continue to be wastefully funneled into studies to show that something is biologically or genetically different for Black women versus White women that would cause Black women to have more gynecological health risks during labor.[34] This needless funneling of funds into research instead of addressing economic stability—a social determinant of health—is a structural discriminatory action that oppresses Black women because dominant group power is directly linked to money and spending.[35] The waste of funds to continue researching a biological or genetic-based difference between Black women and White women continues a course of blaming the victim instead of providing retributive payments for past structural discriminatory harms to Black women.

In response to the known disparity between Black and White people's health outcomes, the United States Department of Health and Human Services (HHS) formed the Office of Minority Health in 1986.[36] Additionally, the Centers for Disease Control and Prevention (CDC) created a Pregnancy Mortality Surveillance System.[37] Unfortunately, the intersectionality of minority health and women's health is not fully addressed by either institution.[38] The CDC's surveillance system gathers information on health problems and does not offer solutions.[39] This data provides that from 2016 to 2018, 41.4 Black mothers died for every 100,000 live births, and only 13.7 White mothers died for every 100,000 live births.[40]

34. Witherspoon, *supra* note 33; René Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities,* 7 MICH. J. RACE & L. 79, 80–81 (2001).

35. *See Social Determinants of Health*, *supra* note 29.

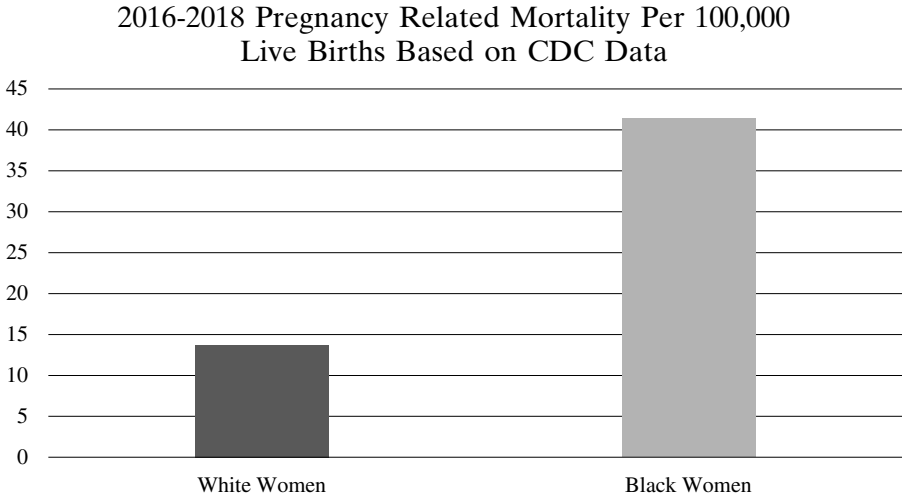
36. *About the Office of Minority Health*, U.S. DEP'T HEALTH & HUM. SERV., https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=1&lvlid=1 (last visited Oct. 15, 2022).

37. *Pregnancy Mortality Surveillance System*, *supra* note 1.

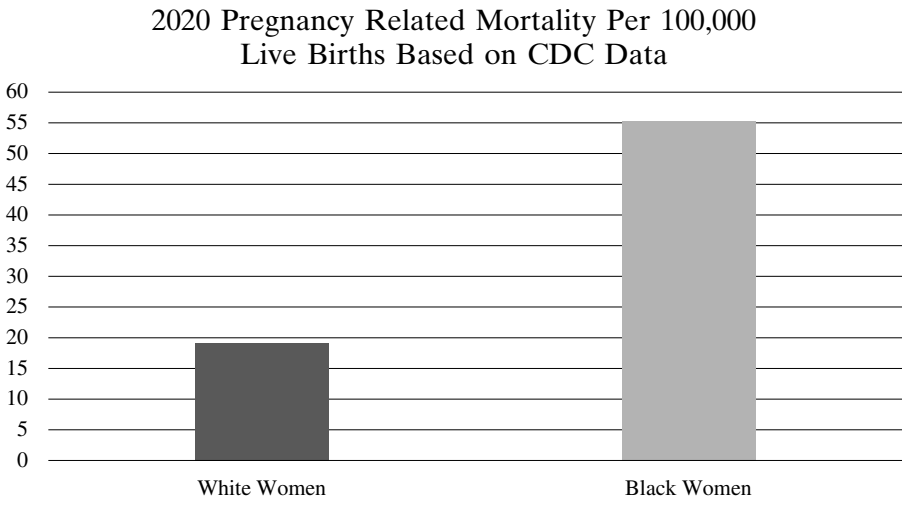
38. *See* Crenshaw, *supra* note 3, at 140.

39. *See Pregnancy Mortality Surveillance System*, *supra* note 1.

40. *Id.*




Further, CDC data provides that in 2020, 55.3 Black mothers died for every 100,000 live births, and only 19.1 White mothers died for every 100,000 live births.[41]




Maternal mortality increased during the COVID-19 Pandemic, and the disparity in maternal mortality was exacerbated as an increase of

41. Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, NAT'L CTR. HEALTH STAT., https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm (last visited Mar. 19, 2022).

13.9 Black mother deaths occurred compaired to an increase of 5.4 White mother deaths.[42] While COVID-19 itself played a role in the increase in maternal mortality, persistent structural discrimination effects, such as closing rural maternity wards, played a role in the increase in Black mother deaths.[43] The CDC's data is disaggregated based on race but is not transparent on the definition of race and how data is collected.[44] Structural discrimination penetrates the early (2011-2014) data because the data takes a White perspective in not defining Black women and women of other races; instead, the group with power, White women, assumes that anything other than White women fits nicely into two nondominant categories.[45] Additionally, the CDC's system is a voluntary reporting system.[46] Therefore, CDC's data is limited because it is based on states' deciding to report.[47] Allowing states to decide how and if to report is structural discrimination because, under the Constitution's Article I spending power, the federal government—controlled by the dominant White male population—could have promulgated a policy—that mandated reporting due to the importance of preserving human life. Women are a nondominant group and Black women are an even less dominant group, here the White male dominated federal government, did not mandate or incentivize state reporting.[48] CDC's surveillance system for maternal mortality is a highly visible implemented federal action regarding maternal mortality.[49] Disparities in maternal mortality are difficult to accurately portray because the CDC surveillance is on a voluntary basis and is not transparent about reporting categories (i.e.

42. *See Pregnancy Mortality Surveillance System*, *supra* note 1; *Id.*

43. Roni Caryn Rabin, *Maternal Deaths Rose During the First Year of the Pandemic*, N.Y. TIMES, https://www.nytimes.com/2022/02/23/health/maternal-deaths-pandemic.html?smid=url-share (last updated Feb. 24, 2022); *The Pandemic Is Making America's Maternal Mortality Rate Worse*, NAT'L PUB. RADIO, (Mar. 9, 2022, 3:58 PM), https://www.npr.org/2022/03/09/1085534156/the-pandemic-is-making-americas-maternal-mortality-rate-worse.

44. *See Pregnancy Mortality Surveillance System*, *supra* note 1; Hoyert, *supra* note 41.

45. *See id.*

46. *Id.*

47. *The Pandemic Is Making America's Maternal Mortality Rate Worse*, *supra* note 43.

48. *See Pregnancy Mortality Surveillance System*, *supra* note 1; Kristen Bialik & Jens Manuel Krogstad, *115th Congress Sets New High for Racial, Ethnic Diversity*, PEW RSCH. CTR. (Jan. 24, 2017), https://www.pewresearch.org/fact-tank/2017/01/24/115th-congress-sets-new-high-for-racial-ethnic-diversity/; Peggy McIntosh, *White privilege and male privilege: A personal account of coming to see correspondences through work in women's studies (1988) 1*, On Privilege, Fraudulence, and Teaching As Learning 17–28 (2019); *Women in elective office 2022*, Center for American Women and Politics (2022), https://cawp.rutgers.edu/facts/current-numbers/women-elective-office-2022 (last visited Nov 13, 2022).

49. *Pregnancy Mortality Surveillance System*, *supra* note 1.

Black and Hispanic are not defined and people must fit into predetermined categories) .[50]

As a result of the Preventing Maternal Deaths Act's relatively recent passage (discussed later in this analysis), HHS will take a more robust approach to tracking and limiting maternal mortality.[51] Limited past action regarding maternal mortality provides evidence that these deaths have gone unnoticed, likely due to structural discrimination because those with power ignored the need for political policies related to women's health. Dominant White male power controls the federal government and this power acts to limit legislation on maternal mortality and, more specifically, Black maternal mortality because women and Black women are nondominant groups.[52] Additionally, the limited effect maternal mortality has on the White population (as evidenced by the rave based maternal mortality gap) may be a reason there is limited legislation in this area.[53] Recent legislation was the result of several lobbying efforts including a movement based on the tragedy that occurred to Kira Dixon Johnson (whom comes from a high-profile Black family); this family's experience with maternal mortality led the federal government to address the issue—without a race-based distinction.[54]

## Section III: Discrimination and the Law

Unfortunately, the current United States health care system is formed by laws like the Hill-Burton Act, Title VI of the Civil Rights Act, and the Emergency Medical Treatment and Active Labor Act, which are laced with discriminatory policies that contribute to structural discrimination that leads to disparate health outcomes for Black women. The original policy of not treating slaves as people allowed Sims to nonchalantly experiment on Black women's bodies.[55] If our

50. *Id.*

51. *See generally* Preventing Maternal Deaths Act of 2018, H.R. 1318, 115th Cong. (enacted).

52. Bialik, *supra* note 48; *See* Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with The 117th Congress*, Pew Rsch. Ctr. (2021), https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/ (last visited Nov 13, 2022); *Women in elective office 2022*, supra note 48.

53. Hill, *supra* note 27.

54. *Pregnancy Mortality Surveillance System*, *supra* note 1; *See Who Are We*, 4Kira4Moms, https://4kira4moms.com/who-are-we/ (last visited Sept. 30, 2022); H.R.1318 lobbying profile, OpenSecrets (2018), https://www.opensecrets.org/federal-lobbying/bills/summary?id=HR1318-115 (last visited Nov 13, 2022).

55. Holland, *supra* note 5; Ojanuga, *supra* note 5.

White male forefathers identified Black individuals as people, the vial experiments Sims performed on Black women would not have occurred because these women would need to provide consent instead of their owner.[56] This foundation of extreme non-dominance in the form of enslaving the Black body set the foundation for structural discrimination in gynecological health care policies in the United States. Sims, as the father of Gynecology, set the foundation for all future gynecological education and his idea that Black women were less than White women created a legacy of structural discrimination.[57] Federal policy today is still largely crafted by a White male legislature, which often does not have a regard for the female body and does not understand a woman's gynecological needs; therefore, legal remedies to address historical structural discrimination have yet to occur.[58]

Title VI of the Civil Rights Act of 1964 was a supposed remedy to the discrimination permitted by the Hill-Burton Act.[59] The promulgation of the Hill-Burton Act was the first true leap the United States legislature took in the realm of health care; however, this Act directly led to continued racial discrimination because, in order to pass with bipartisan support, Democrats demanded that hospitals remain segregated.[60] Title VI was promulgated as an antidiscrimination remedy for health care policy.[61] However, Title VI does not provide for private claims of health care discrimination.[62] Title VI, instead, provides for a system for an individual to file a complaint with HHS for health care discrimination and hope that HHS acts.[63] HHS does not allow Medicare Part B physicians to fall under Title VI enforcement.[64] In limiting individuals' ability to bring a case regarding their private experience with health care discrimination, Title VI belittles the structural discrimination that a Black mother might encounter in a maternity ward because a Black mother cannot directly sue her physi-

56. *Id.*; Ojanuga, *supra* note 5, at 29–30.

57. *Id.*

58. *See* Bialik, *supra* note 48; *Women in elective office 2022*, supra note 48.

59. Largent, *supra* note 8, at 715, 718.

60. *Id.* at 715.

61. *Your Civil Rights to Health Care. Your Rights Under Title VI of the Civil Right*, NAT'L HEALTH L. PROGRAM (July 23, 2013), https://healthlaw.org/resource/your-civil-rights-to-health-care-your-rights-under-title-vi-of-the-civil-right/.

62. *Title VI of The Civil Rights Act Of 1964 42 U.S.C. § 2000D ET SEQ.*, U.S. DEP'T JUST., https://www.justice.gov/crt/fcs/TitleVI-Overview (last updated Apr. 25, 2022).

63. *Id.*

64. Sara Rosenbaum, Anne Markus & Julie Darnell, *U.S. Civil Rights Policy and Access To Health Care By Minority Americans: Implications For A Changing Health Care System*, 57 Medical Care Research and Review 236–59 (2000).

cian for using disparate gynecological protocols.[65] The effectiveness of Title VI to curtail discrimination in health care practices is limited. Title VI does not provide an effective remedy for structural discrimination because it ignores the fact that structural discrimination, within gynecological practices, causes disparate maternal health outcomes and is historically rooted in all gynecological education because of Sims' work and his continued praise. Title VI does not offer any remedy for the harms resulting from the structural discrimination against Black women during the era of the Hill-Burton Act and slavery.[66] In not addressing harms from structural discrimination, a level playing field is not established and, instead, Black women begin a new era—that is supposed to be based on antidiscrimination policies found in Title VI—which continues to disadvantage them when compared to their White women counterparts.

In response to women being turned away from hospitals, health care provision during labor was included in the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA) .[67] EMTALA relies on Medicare as the hook to make hospitals serve individuals that do not have health insurance.[68] Through EMTALA, those in emergencies can receive care at a hospital if they are uninsured, but the care is limited to stabilization.[69] To qualify for EMTALA services, an individual must be experiencing an emergency medical condition, which includes labor.[70] Stabilization for a pregnant mother in labor extends through delivery of the child and the placenta.[71] During the passage of EMTALA, legislators missed an opportunity to address the lack of comprehensive maternal health care because stabilization could have included postpartum care. Providing postpartum care can potentially lower maternal mortality rates considering that hemorrhaging and infection are two leading causes of maternal mortality that may occur after delivery.[72] Additionally, the White male legisla-

65. *Id.*

66. *Id.*

67. Joseph Zibulewsky, *The Emergency Medical Treatment and Active Labor Act (Emtala): What It Is and What It Means for Physicians*, 14 BAYLOR UNIV. MED. CTR. PROC. 339 (2001).

68. *Id.* at 340.

69. *Id.*

70. *Id.*

71. *Id.*

72. Donna Murray, *Maternal Mortality Rate, Causes, and Prevention*, VERYWELL FAMILY, https://www.verywellfamily.com/maternal-mortality-rate-causes-and-prevention-4163653 (last updated June 24, 2022).

tor[73] ignored the possibility that prenatal care for a mother can effect both the mother and unborn child's health. EMTALA does not address the reality that an insurance status race-based disparity, due to structural discrimination, exists; historically, due to discrimination in employment, health insurance was reserved for White individuals.[74] EMTALA recognizes that there is a problem with pregnant women being turned away from hospitals while they are in labor, but falls short from providing an effective remedy for poor maternal health outcomes and does not address the increased maternal mortality risk associated with the intersectionality of being Black and a woman.[75] EMTALA does not address structural discrimination that allows disparate maternal health outcomes for Black women versus White women, but does offer an avenue for future legislation expansion.

## Section IV: Health Impacts of Discrimination

Immeasurable amounts of Black women have died due to structural discrimination. It is estimated that 700–900 pregnancy-related deaths occurred in 2016.[76] Many obituaries for these mothers omit the fact that they died due to complications from childbirth. Kira Dixon Johnson, a Black woman, died in what was supposed to be a normal cesarean section procedure due to hemorrhaging.[77] Kira is among 134 mothers that died in 2016 that have been identified.[78] In 2020, Dr. Chaniece B. Wallace, an individual who had expertise in the medical field through her role as Pediatric Chief Resident, died several days after an emergency cesarean section from pregnancy complication.[79] Tracking mothers' deaths, let alone tracking based on race, is not common procedure because, as noted earlier, the CDC's tracking system is voluntary.[80]

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73. Schaeffer, *supra* note 52; Prenatal care, (2021), https://www.womenshealth.gov/a-z-topics/prenatal-care (last visited Nov 13, 2022).

74. Ruqaiijah Yearby, *The Impact of Structural Racism in Employment and Wages on Minority Women's Health,* 43 Am. Bar Ass'n (2018).

75. *See generally* Zibulewsky, *supra* note 67, at 339–45; Crenshaw, *supra* note 3.

76. Nina Martin, Emma Cillekens & Alessandra Freitas, *Lost Mothers*, ProPublica (July 17, 2017), https://www.propublica.org/article/lost-mothers-maternal-health-died-childbirth-pregnancy.

77. *Id.*

78. *Id.*

79. *Dr. Chaniece Wallace (1990-2020),* Contemporary OB/GYN (Lindsey Carr ed., Oct. 30, 2020) https://www.contemporaryobgyn.net/view/dr-chaniece-wallace-1990-2020-.

80. *Pregnancy Mortality Surveillance System*, *supra* note 1.

Kira Dixon Johnson's husband filed a malpractice lawsuit against the hospital and doctors that provided her care.[81] Wrongful death claims can occur after maternal mortality but few cases provide the mother's race.[82] This case was filed in 2017 and a settlement with the doctor occurred, but the hospital case currently has a pending status.[83] The case complaint alleges that doctors knew about internal bleeding and waited too long to properly treat Kira.[84] Nothing within the complaint suggests that discrimination, within the hospital, was to blame for Kira's death.[85] However, perhaps the fear of Black women's maternal health outcome statistics can be attributed to why Kira elected to have an elective cesarean section. Unfortunately, Kira's death inherently means it is impossible to know if maternal stress from discrimination and/or structurally discriminatory medical practices played a role in her death.

In response to Kira's death, 4Kira4moms was launched.[86] This movement strives to increase transparency for all maternal mortality.[87] The organization led legislators to pass the 2018 Preventing Maternal Deaths Act .[88] This law established a grant program to provide funding to states to review maternal deaths, create maternal mortality review committees, establish provider education, create a case reporting system, and ensure that state reports on maternal mortality are publicly disclosed.[89] Unfortunately, this law does not provide a remedy for structural discrimination that permits Black women, a nondominant group, to experience worse maternal mortality outcomes. This law may alleviate some race-based disparities in maternal health outcomes.

81. Martin, *supra* note 76; Complaint, Johnson v. Cedars-Sinai Med. Ctr., 2017 WL 1157300 (Cal.Super. Mar. 22, 2017) (No. BC655107).

82. *Id.*

83. *Johnson*, 2017 WL 1157300; Carolyn Johnson & Phil Drechsler, *After His Wife Died, Man Pushing to Change Laws to Protect More Women From Pregnancy-related Deaths,* NAT'L BROAD. CO. L.A. (July 16, 2020) https://www.nbclosangeles.com/investigations/wife-died-giving-birth-change-laws-to-protect-more-women-pregnancy-related-deaths/2395401/.

84. Johnson, 2017 WL 1157300.

85. *Id.*

86. 4KIRA4MOMS, http://4kira4moms.com/#mission (last visited Oct. 16, 2022).

87. *Id.*

88. 4KIRA4MOMS, *supra* note 54; Preventing Maternal Deaths Act of 2018, H.R. 1318, 115th Cong. (enacted).

89. See Preventing Maternal Deaths Act of 2018, *supra* note 88.

## Section V: Solution

A five-part solution is needed to remedy structural discrimination's impact on maternal mortality. The Reproductive Justice Movement takes a step forward in solving structural discrimination and must recognize the historical frameworks that create structural discrimination to be successful. Further, the solutions proposed bolster the inclusion ideas that frame the Reproductive Justice Movement.

Provide doula services to all pregnant persons. Doulas act as an advocate for a mother and can help ensure mothers receive quality care.[90] For Black mothers, providing doula services can help improve care because there is a second individual present. The doula can help break down structural discrimination because the doula can call a doctor out for utilizing racist or sexist ideals learned during Gynecology training. For example, a doula knows standard maternal health procedures for epidural treatment[91] and can help ensure a Black woman's pain is not ignored, and her epidural is provided at the appropriate time. At a federal level, legislation should be introduced to ensure that all hospitals receiving federal funding, through the Medicaid or Medicare program, provide a doula. Three states already provide doulas within their Medicaid program.[92] This could be done with new legislation, or this could be addressed through legislation that amends EMTALA. Doula services can help to ensure proper birth weight and can help to decrease complications.[93] Doula services can help alleviate stress that a pregnant mother is feeling. These services will decrease maternal mortality as a whole, which in turn will decrease Black women's mortality rate. This may be a problematic solution, if proper screening does not occur, because potentially the doula them-

90. *Become a Doula*, Jamaa Birth Village (2022), https://jamaabirthvillage.org/doula-training-program/ (last visited Nov 13, 2022).

91. Robin Elise Weiss, Why you should hire a doula if you want an epidural, VERYWELL FAMILY (2021), https://www.verywellfamily.com/hire-doula-epidural-2758678 (last visited Nov 13, 2022); Lauren Foster, Doulas & Epidurals Orange County Doula — Postpartum — Birth — Infant Sleep (2018), https://www.doulasoforangecounty.com/blog/2018/8/20/doulas-epidurals (last visited Nov 13, 2022).

92. Cara B. Safon, Lois McCloskey, Caroline Ezekwesili, Yevgeniy Feyman & Sarah H. Gordon, *Doula Care Saves Lives, Improves Equity, and Empowers Mothers. State Medicaid Programs Should Pay for It*, HEALTH AFF. (May 26, 2021), https://www.healthaffairs.org/do/10.1377/hblog20210525.295915/full/.

93. Kenneth J. Gruber, Susan H. Cupito & Christina F. Dobson, *Impact of Doulas on Healthy Birth Outcomes*, 22 J. PERINATAL EDUC. 49, 53–55 (2013).

selves could be racist.[94] Therefore, provision of doula services alone cannot remedy structural discrimination that causes a disparity in maternal health outcomes.

Another remedy to decrease the disparities within maternal health would be to provide training to doctors—as part of their licensure process—that breaks down structural discrimination, including implicit bias, found in medical professional trainings (inclusive of Gynecology). Training can help to end the cycle of scapegoating biology or genetics when, in fact, there is not a biological/genetic race-based difference between Black mothers and White mothers. For Gynecologists, this training is crucial to break down the legacy of idolizing Sims. In breaking this cycle of blaming biology/genetics, training can help eliminate structural discrimination. Training professionals to see discrimination and prevent it is an important aspect of intervening to dismantle structural discrimination. To effectuate this solution, it is important to understand that health care personnel are licensed on a state basis.[95] A state can help to ensure the maternal health disparities between Black women and White women become narrower by providing, as part of the licensure process, anti-racist training. Gynecologists should be subject to this training, and, for this practice, the training should focus on eliminating the race-based differences in maternal health that Sims' legacy produces. This training will likely not dissuade racists from continuing to discriminate in their medical practice, but the training will put health care professionals on notice that this is unacceptable behavior. Further, adding health equity metrics to team goals, which often are linked to compensation, may increase the likelihood that anti-racist training will be effective.[96] In order to continue the necessary work to combat structural discrimination, continuing education related to discrimination in health care should be required for renewing all health care personnel licenses.

94. Mzp, *Doula Training Spotlight: Intuitive Childbirth*, RADICAL DOULA, https://radicaldoula.com/2013/05/21/doula-training-spotlight-intuitive-childbirth/ (last updated Feb. 19, 2014).

95. *Legal Differences Between Certification and Licensure*, NAT'L REGISTRY EMERGENCY MED. TECHNICIANS, https://www.nremt.org/rwd/public/document/certification_licensure (last visited Oct. 16, 2022).

96. *See* Michele Cohen Marill, *Raising the Stakes to Advance Equity in Black Maternal Health*, HEALTH AFF. 325 (2022), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2022.00036?utm_medium=Email&utm_source=newsletter&utm_campaign=Hat&utm_content=March2022issue&utm_term=marill&vgo_ee=%2Byv7ZPeVbBK4WvAbTHrjrVjolV2EWWoStsTlweqWXjk%3D.

Next, Title VI must be amended to allow a private legal claim when structural discrimination occurs. Currently, Title VI does not allow a private lawsuit for structural discrimination in maternal health care Black women receive and is not applicable to physicians.[97] Rather, to have a case, Black women need to go through an HHS process. Gynecologists, other health care workers, and hospitals need to be held accountable for providing different care to White women versus Black women. Fines imposed on Gynecologists, health care workers, and hospitals will dissuade others in the health care professions from acting in discriminatory ways. Allowing a private lawsuit against physicians will help break down structural discrimination that currently occurs by adding a check on hospitals, which are not held directly accountable for disparities in maternal mortality. Private lawsuits against physicians must result in punitive damages for structurally discriminatory practices.

A true solution to structural discrimination—that causes a disparity in maternal mortality based on race—cannot be achieved until the full extent of the problem is understood. Establishing a proper reporting system will help break down structural discrimination. While a proxy metric can be obtained for maternal mortality based on race, uniformity in reporting and federal reporting data are needed to comprehend the extent of disparities in maternal mortality based on race.[98] Amendments to federal administrative regulations to include a standard reporting procedure for maternal mortality and data disaggregation based on race are needed. This data can continue to be collected by the CDC, but the data must be transparent, with clear definitions, to ensure the magnitude of the race-based disparities in maternal health outcomes are monitored and remedied. This may be addressed by the Preventing Maternal Deaths Act of 2018, but HHS rule making and implementation have yet to fully occur (this is an area of increased focus in HHS' 2023 budget).[99] Additionally, in 2019 the Black Maternal Health Caucus formed to provide legislation to combat disparities in maternal mortality and may address reporting.[100] Through the Black Maternal Health Caucus, the Momnibus package

97. Rosenbaum, *supra* note 64.

98. Marill, *supra* note 96.

99. See Preventing Maternal Deaths Act of 2018, *supra* note 88; *HHS FY 2023 budget in brief*, HHS.gov (2022), https://www.hhs.gov/about/budget/fy2023/index.html (last visited Nov 13, 2022).

100. Lauren Underwood, *Saving Moms, Saving Lives*, HEALTH AFF., (Apr. 27, 2020), https://www.healthaffairs.org/do/10.1377/forefront.20200423.488851/full/.

of legislation was introduced twice, once in 2020 and another time in 2021.[101] The first bill from this package, Protecting Moms Who Served Act, passed into law;[102] however, the rest of the package, incorporated into the Build Back Better Act package of legislation, has yet to pass.[103] Despite these bills, CDC's surveillance system should be enhanced through a federal provision that makes maternal mortality reporting mandatory. While this might still result in some states not providing maternal mortality data to the CDC, the CDC will likely have the ability to better understand the disparities in Black women's versus White women's maternal health outcomes. Specifically, remedying this lack of appropriate data can occur through an administrative notice and comment rule making processes. In collecting this data, it must be made clear that the data is not being used to show that a distinction exists between Black/White maternal health outcomes but is being collected to understand if the health equity gap, resulting from structural discrimination, is decreasing. HHS may take on this role, instead of the CDC, due to the passage of the Preventing Maternal Deaths Act.[104]

To fully address maternal mortality disparities, community engagement must occur and involve discussions related to the medical treatment Black women receive. A community survey of Black women's experiences during labor and suggestions on how the maternal health care system can better serve Black woman should occur. Distribution of a survey would allow for self-identification because 'who is Black' is an arbitrary social construct. Also, community input about experiences during labor can help to create unique health care programs to address structural discrimination. Further, community input will ensure that funding is not being prioritized for programs that do not effectively address the problem. Instead, through community engagement, funding can be used to address the social determinants of health that the community identifies as leading to poor maternal health outcomes, such as lack of social support, lack of proper nutrition, low-income, or societal stress due to structural discrimination

101. *Id*.; Black Maternal Health Momnibus Act of 2021, H.R. 959, 117th Cong. (1st Sess. 2021).

102. Anne Branigin, *The First 'Momnibus' Bill was Signed into Law. Other Strides for Black Maternal HealthCould Follow.*, LILY (Dec. 6, 2021), https://www.thelily.com/the-first-momnibus-bill-was-signed-into-law-other-strides-for-Black-maternal-health-could-follow/.

103. *Id*.; *Black Maternal Health Momnibus,* BLACK MATERNAL HEALTH CAUCUS, https://Blackmaternalhealthcaucus-underwood.house.gov/Momnibus (last visited Oct. 16, 2022).

104. Preventing Maternal Deaths Act of 2018, H.R. 1318, 115th Cong. (enacted).

both inside and outside health care facilities.[105] In providing a community engagement aspect to the five-part solution, the Reproductive Justice Movement's inclusive mentality can be upheld.

Based on the above discussion, the proposed remedy for addressing race-based maternal mortality distinctions is through a five-part process that can be amended based on community input. This five-part solution should be added to Reproductive Justice Movement efforts in order for the Reproductive Justice Movement to connect historical frameworks that caused structural discrimination to current movements related to women's rights.

## Section VI: Conclusion

As a society, we must recognize that structural discrimination persists despite how politically correct or 'woke' the culture seems today. Structural discrimination leads to discriminatory actions that, in this case, result in higher maternal mortality rates for Black women versus White women. The Reproductive Justice Movement started to dismantle structural discrimination and needs to ensure historical causes are understood and appropriate solutions applied. To eradicate the legacy of discrimination that perpetuates itself in poor health outcomes for pregnant Black women, the foundational health care laws must be amended including Title VI. Until the health care system stops funding redundant research projects focused on finding a biological or genetic based scapegoat for the maternal health disparity between Black women and White women and instead funnels this money into community-based solutions and doula services, the United States will continue to see poor health outcomes for Black women. Gynecology must address the legacy of racism that Sims' research produced. A history of discriminatory laws—without true retribution for past harms—continues to harm Black women today.

To address these harms within our health care system, a five-part solution can begin to tackle the injustices generations of Black women have suffered. Providing doula services will help to increase proper care for Black women going forward because another individual will be available, during labor, to advocate for the Black woman's health. Through adjusting state-based physician licensing processes—including Gynecologists—to require racial bias training, society can ensure that all physicians are aware of potential race-based decisions physi-

105. *See generally Social Determinants of Health*, *supra* note 29.

cians make and medical education can be reformed. Amending Title VI to allow private claims against physicians will increase physician accountability. Mandating that all hospitals report maternal health outcomes for all patients will help to ensure that Gynecologists are communicating and working with primary care physicians to ensure the long-term care of their patients. Additionally, having accurate mandatory data reporting requirements will allow the CDC and/or HHS to understand the severity of disparate maternal health outcomes. Such an understanding of disparities in maternal health will help to effectively address the problem, as such reporting will make the magnitude of the problem of maternal mortality known. The magnitude of disparate maternal health outcomes for Black women versus White women can only be properly addressed if accurate data is collected. The 2018 passage of the Preventing Maternal Deaths Act may address some of these solution techniques, but implementation of the Act has yet to fully occur.[106] Like many solutions to race and gender-based problems, the communities affected by the problem are not consulted regarding the solution; therefore, Black women should be consulted about their maternal health experiences and surveyed to establish best practices for Gynecologists, physicians, and other health care workers. Each solution in this five-part recommendation plays a role in dismantling structural discrimination. In adopting these solutions as part of their policy advocacy tools, the Reproductive Justice Movement's members and advocates can begin making strides to break down the legacy of structural discrimination in maternal health care.

106. See Preventing Maternal Deaths Act of 2018, *supra* note 88; See *HHS FY 2023 budget in brief, supra* note 99.

# Frisk First, Develop Reasonable Suspicion Later: The Court's Evisceration of the Fourth Amendment and Unwillingness to Exclude Evidence is Contributing to Dysfunctional Policing

Lauren Reedy

Abstract

The Terry Frisk has become a powerful tool of oppression. As Paul Butler notes, for Black and Latino men, frisk is a form of government — the most visceral manifestation of the state in their lives.

In *Terry*, the Court allowed for a slight deviation in established legal procedure by accepting the lower showing of reasonable suspicion as justification for a search where previously probable cause had been required. As the *Terry* opinion reads, this slight deviation was justified for the sole purpose of neutralizing weapons to ensure officer safety. But in practice, officers are regularly using the Terry Frisk for a different purpose: to gather evidence, to circumscribe the probable cause requirement the Fourth Amendment sets forth for evidentiary searches.

Because the bar for reasonable suspicion has been set so low, and the Court's deference to law enforcement is so high, this "narrow exception" has not been kept narrow at all. And the widespread use of frisk comes with enormous costs. It is inflicting emotional and psychological harms on individuals and communities that will impact generations to come. Tolerance of this short-cut method of policing is impairing the enduring effectiveness of law enforcement. And the use of evidence produced by these questionable searches is degrading judicial integrity.

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The use of frisk must be reined in. Legislation excluding evidence from reasonable suspicion searches would eliminate its evidence gathering utility and restore the Terry Frisk to its intended status as a narrow exception and its intended purpose of officer safety.

Because it is unlikely the Court will overturn *Terry*, we need legislation that will at least return the Terry Frisk to what was expressly authorized in the *Terry* opinion and jealously guard the gate to this "narrow exception" to the probable cause requirement of the Fourth Amendment.



## Introduction

"[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."[1]

-Justice Bradley in *Boyd v. United States*

1. Boyd v. United States, 116 U.S. 616, 635 (1886).

"Nothing can destroy a government more quickly than its failure to observe its own laws."[2]

- Justice Clark in *Mapp v. Ohio*

The first proceeding I observed as a legal intern for the Federal Defenders Organization was a suppression hearing. We were cautiously optimistic about our chances of getting the fruits of a frisk thrown out because the officer did not have the requisite justification to pat down our client. We had footage of the traffic stop. Our client was a back seat passenger, and there were two women in the front seats. During the encounter, our client was respectful, cooperative, and kept his hands raised. One of the two officers was completely at ease as he laughed and joked with our client while the other officer conducted the traffic stop and conversed with the women in the front seat. The driver of the car consented to a vehicle search, so the officer asked the front seat occupants to get out of the vehicle and walk to the hood of the police cruiser.[3] The other officer had just finished asking our client to do the same — to join the women on the hood of the police cruiser — when the other officer stepped in and said: "I'm going to need to pat you down first."

When he conducted the pat down, the officer found a weapon. The gun was lawfully registered to our client's brother. His brother had left the gun at our client's house, and our client, who was on his way to return it to his brother, was now on his way to prison instead. A high crime area, at night, an uncorroborated claim by just one officer that he smelled weed, and the fact that our client was not a white woman wearing a sun dress like the women in the front seat, but a Black man in a hoodie. That was all it took to convince the judge that it was reasonable to assume our client must have been armed and dangerous. That was all it took to deem reasonable this subversion of our client's body autonomy and Fourth Amendment expectation of privacy. Needless to say, we lost that suppression hearing.

The Fourth Amendment secures the right to be free from unreasonable searches and seizures.[4] The Founders adopted this protection precisely because they had seen how the government's unfettered dis-

2. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

3. Ordering occupants to get out of the vehicle during a traffic stop is a lawful and frequently employed police procedure aimed at ensuring officer safety. *See* Pennsylvania. v. Mimms, 434 U.S. 106, 111 (1977).

4. U.S. CONST. amend. IV.

cretion to search and seize its people had been used as a powerful tool of oppression in England.[5] Today, the Court's evisceration of the Fourth Amendment has allowed search and seizure to once again return to its place as a powerful tool of oppression.[6]

Perhaps no case is more infamous for eroding Fourth Amendment protections than *Terry v. Ohio*.[7] It was in this landmark case that the practice of stop-and-frisk was legitimized.[8] Prior to *Terry*, officers needed to satisfy the probable cause requirement of the Fourth Amendment to justify stops and searches.[9] Absent probable cause, a search was considered unlawful, and any evidence obtained from it was inadmissible in court.[10] But *Terry* carved out what was, in theory, a narrow exception to the Fourth Amendment's probable cause mandate and lowered the standard of justification required to just reasonable suspicion for limited searches in certain situations.[11] In theory, this deviation was only granted for the purpose of ensuring officer safety. In theory, a *Terry* frisk search, supported by just reasonable suspicion, should only be conducted if there are facts particular to the individual suspect that give rise to the inference that the suspect is armed and presently dangerous.[12]

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5. Brian Frazelle & David Gray, *What the Founders Would Say About Cellphone Surveillance*, ACLU (Nov. 17, 2017, 1:45 PM), https://www.aclu.org/blog/privacy-technology/location-tracking/what-founders-would-say-about-cellphone-surveillance.

6. *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 83, 115 (2017) (stating that for Black men "stop-and-frisk is a form of government. It is the most visceral manifestation of the state in their lives" and "a primary means of racial subordination. . .. In allowing police to forcibly detain and search based on innocent conduct, the Supreme Court opened the door to giving the police the kind of power they should not have in a free country"); *see also* JOSEPHINE ROSS, A FEMINIST CRITIQUE OF POLICE STOPS 5 (2021) (stating "[t]he Supreme Court has quietly gutted the Bill of Rights to support police power").

7. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

8. "Stop-and-frisk" is often used as a single phrase, but a *Terry* stop, and a *Terry* frisk, are two separate Fourth Amendment events that require separate justifications. *See* ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 234 (6th ed. 2021). A stop is a type of seizure while a frisk is a type of search. *See id.* A *Terry* stop, also referred to as an investigatory stop, allows an officer to approach and detain a suspect for a brief period of time to ask investigatory questions that will confirm or dispel the officer's suspicions. *Id.* A *Terry* frisk is a pat down of the suspect's outer clothing. *Id.* An officer needs reasonable suspicion that crime is afoot to conduct a *Terry* stop and needs reasonable suspicion that the suspect is armed and presently dangerous to conduct a *Terry* frisk. *Id.*

9. David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 975 (1998).

10. *See* Harris, *supra* note 9, at 977–79.

11. *Terry*, 392 U.S. at 24–28; *see also* Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.").

12. *Terry*, 392 U.S. at 30–31.

While that is the rhetoric of *Terry*, it is not the reality. In reality, that "narrow" exception has morphed into a wide-open door inviting officers to "[s]top first" and "develop reasonable suspicion later."[13] The fact that only seven percent of frisks conducted in New York in 2019 actually produced a dangerous weapon[14] is just one objective indicator that officers have strayed from the intended "officer safety" purpose of the *Terry* frisk. In 2011, at the peak of the New York Police Department's reliance on stop-and-frisk,[15] nine out of ten New Yorkers stopped by the police were completely innocent: no ticket was issued, no arrest resulted, and no contraband was found.[16] Given the high volume of police stops, that equates to 1,658 instances per day, in New York alone, where an innocent person was seized and subjected to a privacy intrusion.[17] This ninety percent error rate is unreasonable and cannot be justified under the Fourth Amendment's guarantee of freedom from unreasonable search and seizure. Although New York may be the most well-known for its stop-and-frisk practices, its implementation of stop-and-frisk is by no means unique.[18] The practice is widely used in police departments across the

13. Ligon v. City of New York, 925 F. Supp. 2d 478, 538 (2013); Utah v. Strieff, 579 U.S. 232, 251 (2016) (Sotomayor, J., dissenting); *see also* Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIAMI L. REV. 1, 12-13, 16 (2018) (discussing the widespread, programmatic use of the *Terry* frisk).

14. *Stop-and-Frisk in the De Blasio Era (2019)*, NYCLU (Mar. 14, 2019), https://www.nyclu.org/en/publications/stop-and-frisk-de-blasio-era-2019. At the end of the Bloomberg era, the number of frisks conducted in New York that produced a weapon was even lower: less than two percent. *Stop and Frisk in Chicago*, ACLU OF ILLINOIS 16, 20 (Mar. 2015), https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf. *See also* BUTLER, *supra* note 6, at 94 (reporting that only twenty-five guns were recovered in the fifty thousand stops conducted in Brownville, New York, between 2006 and 2010). One would expect a much higher percentage of suspects to, in fact, turn out to be armed if officers are truly frisking only when there is reasonable suspicion that a suspect is armed and dangerous. Suspicion that turns out to be wrong ninety-three percent of the time cannot be considered reasonable.

15. Christopher Dunn, *Stop-and-Frisk in the de Blasio Era*, NYCLU 1, 4 (Mar. 2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf ("Stop-and-frisk peaked in 2011, when NYPD officers made nearly 700,000 stops.").

16. Steven G. Brill, *Mayor Bloomberg's Stop and Frisk Policy: Heads I Win, Tails You Lose*, SULLIVAN — BRILL (May 14, 2012), https://www.sbcriminallawyers.com/blog/2012/may/mayor-bloombergs-stop-and-frisk-policy-heads-i-w.

17. In 2011, eighty-eight percent of the 685,724 people stopped by the NYPD were innocent. *See id.*; *Stop and Frisk in Chicago*, *supra* note 14, at 15. Crunching the numbers, that means 605,328 innocent people were stopped that year, which equates to 1,658.43 per day. *See also* BUTLER, *supra* note 6, at 81 (reporting that in one 8-block residential neighborhood in Brooklyn, young male citizens are stopped about five times per year).

18. *See, e.g.*, *Stop and Frisk in Chicago*, *supra* note 14, at 19-23 (discussing the pervasiveness of stop and frisk in various cities, including Newark, Philadelphia, Seattle, Boston, and Los Angeles). "Chicago stops a shocking number of people. Last summer, there were more than 250,000 stops that did not lead to an arrest. Comparing stops to population, Chicagoans were stopped more than four times as often as New Yorkers." *Id.* at 3.

nation in a programmatic fashion.[19] In theory, frisking is a narrowly drawn means of protecting officers by allowing them to neutralize dangerous weapons. In reality, frisks are a regular tool police departments use to hunt and gather evidence, while asserting their dominance and omnipotence, and oppressing marginalized communities.[20]

Frisk has resulted in unfettered police discretion which directly contradicts the Fourth Amendment. And by examining the racial disparities and discriminatory intent in stop and frisk application, yet another constitutional contradiction becomes apparent, a contradiction under the Fourteenth Amendment's equal protection guarantee.[21] These contradictions constitute a government's blatant failure to observe its own laws. And yet, the courts sit on the sidelines and watch, swallowing their whistle, and neglecting their duty "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[22]

The exclusion of evidence unlawfully obtained is known as the exclusionary rule, and it is the courts' whistle, their primary means of ensuring law enforcement's evidence gathering behaviors conform to the rules of play.[23] By eliminating an incentive for conducting a

19. Cooper, *supra* note 13, at 12–13, 16.

20. *See* Harris, *supra* note 9, at 1017 (discussing the "conversion of *Terry* from a . . . limited tool to be used selectively . . . in fast developing situations to a standard technique police use to search for contraband — precisely what the court has always sworn — and still swears — it will never allow"); *see also* BUTLER, *supra* note 6, at 9, 57 (explaining how "police tactics such as stop and frisk . . . are designed to humiliate African American males — to bring them into submission" and how, through "a series of cases, the conservatives on the Court have given police unprecedented power, with everybody under-standing that these powers will mainly be used against African Americans and Latinos").

21. *See* Evan D. Bernick, *Policing as Unequal Protection* 50, 63, 74 (May 21, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850829; Cooper, *supra* note 13, at 77 (stating that "police departments [have] developed data-driven, aggressive profiling of young men of color in the name of crime prevention"). There is no shortage of statistics documenting the racial disparities in the application of stop and frisk. *See e.g.*, *Stop and Frisk in Chicago*, *supra* note 14. For example, Boston's population is just twenty-four percent Black, but sixty-three percent of documented stops and searches involved Black residents, and even when controlling for confounding factors, Black Bostonians were more likely to be subjected to stops and frisks. *Id.* at 22. Similarly, in New York, between 2014 and 2017, eighty-four percent of the total frisks conducted were conducted on Black or Latino people while only nine percent were conducted on white people, and yet, people of color were less likely to be armed. Dunn, *supra* note 15, at 16-17 (reporting that "a weapon was found on just six percent of [B]lack and Latino people frisked, compared to a weapon being found on nine percent of white people frisked"). These statistics are at the very least at odds with the spirit, if not also the letter and original meaning, of the Equal Protection Clause. *See* Bernick, *supra* note 21, at 74.

22. *See* Mapp v. Ohio, 367 U.S. 643, 647 (1961).

23. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 765 (2012); *see also* H. Mitchell Caldwell, *Fixing the Constable's Blunder: Can One Trial Judge in One County in One State Nudge a Nation Beyond the Exclusionary Rule*, BYU L. REV. 1, 60 (2006).

search without the proper justification, the exclusionary rule encourages law enforcement, policymakers, and agents "to incorporate Fourth Amendment ideals into their value system."[24] By contrast, when courts refuse to exclude evidence obtained without proper justification, "they reward 'manifest neglect if not an open defiance of the prohibitions of the Constitution.'"[25] A court ruling that admits evidence "has the effect of legitimizing the conduct which produced the evidence."[26] Excluding evidence sends the opposite message. The courts' unwillingness to exclude evidence is rewarding, reinforcing, and contributing to dysfunctional and oppressive police behavior.

The courts must be willing to more readily exclude evidence obtained in order to restore the reasonable suspicion frisk to the narrow Fourth Amendment exception it was intended to be.[27] Nevertheless, this important task should not be left in the hands of the courts alone. Legislation should be passed to return the frisk to the purpose for which it was legitimized: officer safety. This legislation should allow the use of a frisk for the sole purpose of neutralizing weapons, not for evidentiary purposes. It should, therefore, categorically exclude all evidence obtained from a frisk. The exclusion of evidence is imperative to rein in the practice of frisk to the narrow purpose for which it was legitimized.

Part I of this Note will explore the role of the courts in regulating and reforming policing behaviors by tailoring their interpretation and application of constitutional criminal law. Part II will explain how the Court redefined the Fourth Amendment reasonableness standard to declare reasonable suspicion searches lawful and allow the fruits of such searches to be used as evidence. Part III will describe how the Court miscalculated when it found that reasonable suspicion struck the appropriate balance between the government's need to frisk and the intrusion the frisk imposes on the privacy interest of individuals. Part IV will lay bare the enormous costs of the Court's miscalculation. Part V will combat critiques of the exclusion of evidence and highlight

24. Utah v. Strieff, 579 U.S. 232, 245 (2016) (Sotomayor, J., dissenting) (citing Stone v. Powell, 428 U.S. 465, 492 (1976)).

25. *Id.* (citing Weeks v. United States, 232 U.S. 383, 394 (1914)).

26. *Terry*, 392 U.S. at 13.

27. Harris, *supra* note 9, at 977 (expressing concern about the disconnect between the *Terry* rhetoric and reality and advocating for correction. Stating "[a]nything less allows just the type of wide-open police discretion that *Terry* tried to limit. Unless the Supreme Court corrects this problem, *Terry* becomes a decision which legally permits a stop and a frisk of almost anyone, for almost any reason. And whatever the Court meant in *Terry* by "reasonable suspicion," surely it did not mean that").

the effectiveness of excluding evidence on police behavior. Part VI will advocate for legislation excluding evidence produced by a *Terry* frisk to ensure the frisk is confined to its originally stated purpose and to restore Fourth Amendment protections.

## PART I THE COURT'S ROLE IN REGULATING POLICING

There is an undeniable relationship between the Court's interpretation of constitutional rights and policing behaviors. The Warren Court marked an era of dramatic expansion of constitutional rights and judicial authority.[28] During this era, the Court was "watchful for the constitutional rights of the citizen," and had a profound impact on the interpretation and enforcement of a multitude of individual constitutional rights, including Fourth Amendment rights.[29] Dissatisfied with the failure of police departments to self-regulate, as well as the failure of other political players (states, prosecutors, legislators, agencies, etc.) to adequately supervise police activity and protect constitutional rights, the Warren Court, whether rightly or wrongly,[30] took on that responsibility itself.[31]

The Warren Court redefined the scope of what police conduct the Constitution could reach and expanded the remedies available for victims of police misconduct. In *Katz v. United States* and *Miranda v. Arizona*, the Court expanded what police activities the Constitution could reach.[32] In *Katz*, the Court expanded Fourth Amendment protections beyond just physical intrusions into a private area to include any intrusion on a reasonable expectation of privacy, including nonphysical intrusions, such as wiretaps and GPS trackers, and areas ac-

28. The Warren Court refers to the Supreme Court from 1953 to 1967, while Earl Warren was Chief Justice. Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5; Robert Longley, *The Warren Court: Its Impact and Importance*, THOUGHTCO. (Feb. 2, 2021), https://www.thoughtco.com/the-warren-court-4706521.

29. *See* Mapp v. Ohio, 367 U.S. 643, 647 (1961); Horowitz, *supra* note 28, at 8–9 (other contributions of the Warren Court include incorporation of many provisions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment, working to end racial segregation through Brown v. Board of Education, reapportionment, etc.); Harmon, *supra* note 23, at 765–68.

30. Some would argue the Warren Court exceeded the powers of the judiciary. See Geoffrey Stone & David A. Strauss, *Book Talk: The Enduring Constitutional Vision of the Warren Court*, AM. CONSTITUTION SOC'Y (Feb. 11, 2020), https://www.acslaw.org/expertforum/democracy-and-equality-the-enduring-constitutional-vision-of-the-warren-court-oxford-university-press-2020/.

31. Harmon, *supra* note 23, at 766–67.

32. Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Harmon, *supra* note 23, at 766.

cessible to the public.[33] In *Miranda*, the Court brought police interrogations under the reach of the Constitution,[34] thus, broadening the scope of police conduct that falls under Constitutional purview.

In *Monroe v. Pape* and *Mapp v. Ohio*, the Court expanded the available remedies. *Monroe* expanded the civil remedy through its interpretation of §1983, which allowed state actors to be sued for denying citizens their federal constitutional rights. As a result, state police had to conform their behavior to honor individual rights so as to avoid lawsuits. *Mapp* expanded the criminal remedy by applying the exclusionary rule to state courts and law enforcement where it previously only applied to the federal courts and law enforcement, thus making evidence produced from an illegal search and seizure by police inadmissible by any court. As a result, police departments across the nation had to alter their normal course of dealing.[35] Officers had to align their behaviors and practices with the Fourth Amendment because it would be counterproductive to use unlawful means to gather evidence if it meant that that evidence could not be used. Together, *Monroe* and *Mapp* made the Fourth Amendment "newly consequential" for law enforcement with the potential for civil liability acting as the stick to deter misconduct and the expansion of the exclusion of evidence eliminating the carrot for conducting illegal searches.[36]

The Warren Court assumed the role of regulating the police and expanded constitutional rights and remedies, but since then, the Court has changed composition and doctrine as it relates to using the Constitution to keep police behavior in check.[37] Post 1967, the trend has been toward affording law enforcement increasing deference and toward restricting the remedies available to victims of police misconduct.[38]

Post *Mapp*, the law has evolved to create numerous loopholes in the exclusionary rule. For example, the attenuation doctrine permits the admission of evidence if intervening circumstances break the causal chain between the police misconduct and the production of evi-

33. *Katz*, 389 U.S. at 351–53.

34. Harmon, *supra* note 23, at 766.

35. Ross, *supra* note 6, at 73-74, 193 n.38. The impact the *Mapp* decision had on police behavior is a historical fact. *Id.* According to one New York City detective, "with Mapp . . . [a]ll of a sudden you couldn't stop a guy on the street and give him a toss. You had to have probable cause . . ." Harris, *supra* note 9, at 978-79.

36. *See* Harmon, *supra* note 23, at 765.

37. *Id.* at 767.

38. *See id.* at 767, 767 n.15; Harris, *supra* note 9, at 999.

dence.[39] Similarly, courts refuse to exclude illegally obtained evidence that would ultimately have been discovered by lawful means[40] or that was discovered by an officer acting in good faith.[41] The impeachment exception, allows illegally obtained evidence to be presented to a jury for the purposes of impeaching a witness.[42] Likewise, the prosecution is permitted to consider illegally obtained evidence for the purpose of generating questions to ask a grand jury witness.[43]

These examples demonstrate a clear trend toward the curtailment of the exclusionary rule by way of numerous exceptions.

The creation of these exceptions is another example of the relationship between the Court's interpretation of constitutional rights and policing behaviors. The Court influenced police behaviors through the creation of these exceptions because these exceptions add back some of the evidence gathering incentive of unlawful searches. By agreeing to look the other way, the Court invites police to engage in more constitutionally questionable searches. As a result, the fruits of unreasonable searches slip into the courtroom, contributing to a stealthy encroachment upon our Fourth Amendment rights. Legislation excluding evidence from reasonable suspicion searches would function similarly to the exclusionary rule's exclusion of evidence from unlawful searches — both curb dysfunctional policing by *eliminating the evidence gathering incentive* of conducting certain harmful searches. Because of its similarity to the exclusionary rule, drafters of this legislation should also consider what to do with — whether to embrace or reject — the traditional exclusionary rule exceptions.

Through cases such as *Katz*, *Miranda*, *Monroe*, and *Mapp*, the Warren Court established a paradigm, whereby courts use the Constitution as the primary means by which to constrain the police.[44] But while establishing its primacy, it also "shoehorned" the task of regulating police "into the narrow confines of constitutional criminal procedure"[45] and "allocated wholesale the responsibility for solving the problem of policing to courts."[46] Therefore, the role of the courts in

39. Wong Sun v. United States, 371 U.S. 471, 487–88 (1963); Caldwell, *supra* note 23, at 15–16.
40. Nix v. Williams, 467 U.S. 431, 444 (1984); Caldwell, *supra* note 23, at 17–18.
41. United States v. Leon, 468 U.S. 897, 920-22 (1984); Caldwell, *supra* note 23, at 18.
42. United States v. Havens, 446 U.S. 620, 626-28 (1980); Caldwell, *supra* note 23, at 17.
43. United States v. Calandra, 414 U.S. 338, 349-52 (1974); Caldwell, *supra* note 23, at 16.
44. Harmon, *supra* note 23, at 765, 767.
45. *Id.* at 763.
46. *Id.* at 765.

establishing and/or condoning dysfunctional policing should not be ignored. Nevertheless, we cannot rely on the courts alone to regulate police behaviors. We cannot continue to allow this task to be allocated wholesale to the courts. Some would argue taking on this role was not an appropriate exercise of judicial authority from the outset, but regardless, there is a more practical concern with continuing to rely on the courts to keep police in check: they simply are not getting the job done. As such, this Note focusses on a legislative solution rather than a judicial one.

## PART II *TERRY*: "A SILENT APPROACH AND SLIGHT DEVIATION FROM THE LEGAL MODE OF PROCEDURE" – REDEFINING REASONABLE TO "BALANCE" COMPETING INTERESTS

Perhaps the clearest demonstration of the Court's influence over police conduct comes from *Terry v. Ohio*. *Terry*, another post-*Mapp* case, curtailed the exclusionary rule and weakened the Fourth Amendment in another way: by changing the definition of an unlawful search and thereby restricting what the exclusionary rule can reach.[47] By expanding what is considered reasonable and lawful, *Terry* made a larger class of searches wholly untouchable by both the exclusionary rule and §1983. Decisions that had previously made the Fourth Amendment "newly consequential," and which encouraged law enforcement to incorporate Fourth Amendment ideals into their practices, were undone by a silent approach and slight deviation from the legal mode of procedure: a deviation from the probable cause requirement.

The Fourth Amendment provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."[48] Like many other constitutional provisions, the inclusion of the Fourth Amendment was a direct response to the Framers' grievances against British rule.[49]

The Framers had seen a system of unreasonable searches and seizures be used as a tool of oppression in England.[50] The British sys-

47. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).
48. U.S. CONST. amend. IV.
49. Frazelle, *supra* note 5.
50. *Id.*

tem of "general warrants" gave government agents the authority to search citizens whenever, wherever, and for whatever reason.[51] This unchecked executive power left everyone vulnerable to unwarranted government intrusions and gave government agents a mechanism of targeting and terrorizing religious minorities and political opponents.[52] The Fourth Amendment's requirement that officers need probable cause to search is a direct and intentional departure from the system of general warrants' subversion of liberty.[53] Given this historical context, the intent of the Fourth Amendment is to deny "executive agents the unfettered discretion to conduct searches because of the pervasive insecurity that such discretion creates and the abuses of power it enables."[54]

For nearly 200 years, the reasonableness and probable cause components of the Fourth Amendment were read together, with probable cause defining reasonableness. In other words, what qualified a search as reasonable was that it was supported by probable cause. Probable cause is not a precisely defined degree of certainty but a fluid and flexible concept, which as the name suggests, deals with probabilities.[55] Probable cause exists where the totality of the circumstances provides a substantial basis for concluding that there is a fair probability that a search will result in the discovery of evidence.[56] Although the definition of probable cause has always been somewhat hazy, historically it was clear that it was required to qualify a search as reasonable.

Even when courts separated the warrant requirement from reasonableness, allowing warrantless searches in certain situations where it would be impractical or unreasonable to obtain a warrant prior to conducting the search, they still declined to divorce probable cause from reasonableness.[57] For example, in *Carroll v. United States*, the Court made a distinction between the practicality of obtaining a warrant prior to searching a dwelling versus searching a vehicle.[58] The Court determined that it would be impractical and unreasonable to

51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. Legal Information Institute, *Probable Cause*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/probable_cause (last visited Apr. 18, 2022); Illinois v. Gates, 462 U.S. 213, 232 (1983).
56. Legal Information Institute, *supra* note 57; *Gates*, 462 U.S. at 246.
57. *See* Carroll v. United States, 267 U.S. 132, 153, 156 (1925).
58. *Id.* at 153.

require a warrant prior to searching a vehicle because a vehicle, unlike a dwelling, could quickly be moved out of the locality or jurisdiction where the warrant is sought, thus placing it out of the reach of the warrant.[59] So, the Court separated the warrant requirement from reasonableness, and found that a warrantless search is reasonable under certain circumstances.[60] The Court went on to explain, though, that even in cases where it is reasonable to search without first obtaining a warrant, "the seizing officer acts unlawfully . . . unless he can show the court probable cause."[61] Therefore, the Court maintained the union between probable cause and reasonableness. It just allowed for the official showing of probable cause to come after the search. For years, the probable cause and reasonableness components of the Fourth Amendment were united, but *Terry* dissolved that long-recognized union.

In *Terry*, an experienced officer assigned to patrol an area in downtown Cleveland for shoplifters watched as two men standing on a street corner took turns walking back-and-forth past a row of stores about a dozen times, each time stopping to look into a particular store window.[62] Suspecting that the men were casing a job for robbery, the officer followed and approached the men and asked for their names.[63] When one of the men "mumbled something" in response to the officer's request, the officer grabbed the man, spun him around, and patted down the outside of his clothing.[64] Upon feeling a pistol, the officer removed the man's overcoat and took the gun out of its pocket.[65] Mr. Terry sought to suppress the evidence of the gun because it was the product of a search conducted without probable cause.[66]

The Court framed the question presented as "whether it is always unreasonable for police to seize a person and conduct a limited search for weapons without probable cause."[67] To answer this question, the Court first addressed whether a "limited" stop-and-frisk even consti-

59. *Id.*
60. *Id.*
61. *Id.* at 156.
62. Terry v. Ohio, 392 U.S. 1, 5–6 (1968).
63. *Id.* at 6–7.
64. *Id.* at 7.
65. *Id.*
66. *See id.* at 7–8.
67. *Id.* at 15.

tutes a Fourth Amendment event, that is, a search or seizure.[68] At the time, state law and treatises were trending toward keeping stops-and-frisks outside the purview of the Fourth Amendment by failing to recognize them as true searches and seizures.[69] The Court "emphatically reject[ed]" this notion.[70] The Court stated, "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over [the] body in an attempt to find weapons is not a 'search.'"[71] Further, the Court criticized as fantastical the characterization of a frisk as a mere "petty indignity" and instead characterized the frisk "as a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and [which] is not to be undertaken lightly."[72]

Although the Court determined that stops-and-frisks do come under the purview of the Fourth Amendment, the Court declined to subject the practice to the warrant clause containing the probable cause standard. Instead, the Court reasoned that because the police conduct at issue consists of "necessarily swift action" based on "on-the-spot observations," which historically had not been and practically could not be subjected to the warrant procedure, the conduct "must [only] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[73] Without explaining why excusing the conduct from the warrant procedure also necessitated excuse from the probable cause component, the Court separated reasonableness from probable cause and articulated a new test for reasonableness.

The new test consisted of balancing the government interest in the search against the individual interest in privacy.[74] In other words, balancing the nature and extent of the government interest served by the search, against the extent of the invasion on the individual's privacy interest, as determined by the nature and scope of the search.[75]

68. *See id.* at 16; *see also* Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 56-58 (2010).

69. *See* Miller, *supra* note 68, at 56–57.

70. Terry v. Ohio, 392 U.S. 1, 16 (1968).

71. *Id.*

72. *Id.* at 16–17.

73. *Id.* at 20.

74. *Id.* at 20–21.

75. *Id.* at 22, 24.

The Court then sought to apply their newly articulated balancing test for reasonableness to Mr. Terry's case. It first considered whether the nature and extent of the government interest in conducting the search of Mr. Terry justified the initiation of the intrusion, such that the search and seizure may be deemed reasonable at its inception.[76] As for the seizure, the Court held that the suspicious behavior the officer witnessed triggered the legitimate government interest in crime detection and prevention, which justified an investigatory stop of Mr. Terry.[77] As for the search, the Court held that the assumption that robbers tend to have weapons triggered the legitimate government interest of ensuring officer safety, which justified a frisk for weapons.[78] Therefore, the Court found that the initiation of these Fourth Amendment events was reasonable given the nature and extent of the government interests which the events served.[79]

Turning to the privacy invasion side of the scale, the Court considered whether the search, as conducted, was sufficiently confined in scope so as to remain reasonably related to the justification for its initiation.[80] Because the justification for the search was officer safety, the Court reasoned that the search must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the officer."[81] The Court found it significant that the officer in *Terry* limited his initial search to a pat down of the outer clothing, only reached under Mr. Terry's outer garments after he felt the gun during the pat down, and even then, limited his search to the pocket where he had already felt the gun.[82] Because the officer did not conduct "a general exploratory search for whatever evidence of criminal activity he might find," but rather the officer "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered weapons," the Court concluded the scope of the search was reasonably related to the officer safety justification, and was therefore lawful.[83]

76. *See id.* at 22–23, 28.
77. *Id.* at 22–23.
78. *Id.* at 28.
79. *See id.* at 23, 28, 30.
80. *Id.* at 24, 28–29.
81. *Id.* at 29.
82. *Id.* at 29–30.
83. *Id.*

This new balancing test allowed the Court to displace the probable cause standard, a standard with roots "deeply imbedded in our constitutional history,"[84] and construct a new standard for reasonableness out of thin air: reasonable suspicion. Reasonable suspicion is a lower and even squishier concept than probable cause.[85] It is something more than a hunch but less than probable cause.[86]

However, the Court, explicitly stated this new authority to search was to be a "narrowly drawn" one.[87] Mindful of the dangers posed by this new grant of authority, the Court attempted to construct boundaries that would limit its reach and therefore limit law enforcement discretion.[88] First, the officer must have reasonable suspicion that the suspect is engaged in criminal activity to stop and reasonable suspicion that the suspect is armed and presently dangerous to frisk.[89] Second, that suspicion must be based upon articulable facts that are particularized to the individual suspect.[90] Third, the frisk can go no further than a pat down of the suspect's outer clothing necessary to reveal weapons.[91] By imposing limits such as these, the Court attempted to strike a balance between the government's need to search and the individual's right to be free from governmental intrusion and sought to prevent unfettered police discretion. But, as will be discussed in the next section, the Court miscalculated.

In *Terry*, the Court allowed for a slight deviation in established legal procedure by accepting the lower showing of reasonable suspicion as justification for a search where previously probable cause had been required. However, the Court unambiguously stated this deviation was intended to be a narrow one.[92] The reasonable suspicion search was only authorized for the narrow purpose of ensuring officer safety. The Court rejected that the reasonable suspicion search could properly be used as an evidence gathering tool, when it found it significant that the officer in *Terry* "confined his search strictly to what was minimally necessary to learn whether the men were armed and to dis-

84. *Id.* at 37 (Douglas, J., dissenting).

85. *See* Ross, *supra* note 6, at 26; *see also Fourth Amendment Search and Seizure*, U.S. Government Information (last visited Apr. 19, 2022), https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf.

86. *See Terry*, 392 U.S. at 21–22, 27; *see also* Harris, *supra* note 9, at 975, 982.

87. *Terry*, 392 U.S. at 27.

88. *See id.* at 21–30; Harris, *supra* note 9, at 975–76, 984–85.

89. *See* Taslitz, *supra* note 8, at 234; *see also* Terry, 392 U.S. at 22, 24, 30.

90. Harris, *supra* note 9, at 975–76, 987; *see also* Terry, 392 U.S. at 21, 27.

91. Harris, *supra* note 9, at 975; Terry, 392 U.S. at 26, 29.

92. *Terry*, 392 U.S. at 27.

arm them" rather than conducting "a general exploratory search for whatever evidence of criminal activity he might find."[93] But today frisk is often conducted as the very "general exploratory search" that the Court implied would not have been appropriate.[94]

Thus, probable cause is the true and proper standard for an evidentiary search. According to the language of *Terry*, the sole purpose of authorizing frisk and the deviation from probable cause, was officer safety. It was not authorized to be used as an evidence gathering tool. But we have departed from that purpose. This purpose departure has allowed frisk to be used as a tool for gathering evidence — a use for which it was not authorized. Legislation excluding evidence from reasonable suspicion searches would prevent the use of frisk for this unauthorized purpose by eliminating its evidence gathering utility.

## PART III THE COURT'S MISCALCULATION

Not only did the Court get the initial rebalancing wrong, but subsequent cases have magnified that initial imbalance, turning the aforementioned safeguards into "little more than speed bumps" through interpretations and applications that are highly deferential to law enforcement.[95] First and foremost, the Court got the initial balance wrong because the scales were already properly balanced by the probable cause requirement.[96] Probable cause already gave fair leeway to law enforcement while still safeguarding the privacy rights of citizens.[97] According to Justice Douglas's dissent in *Terry*, probable cause "is a practical, non-technical conception affording the best compromise that has been found for accommodating these often-opposing interests. Requiring more would unduly hamper law enforcement. To afford less would be to leave law-abiding citizens at the mercy of the officers' whim."[98] The scales did not need to be rebalanced when *Terry* arrived at the Court.

To make matters worse, subsequent cases have magnified the initial imbalance by straying from the rhetorical safeguards the Court imagined would prevent unfettered police discretion. You will recall that the Court said the deviation was to be a narrowly drawn one, and

93. *Id.* at 29–30.
94. *See* Ross, *supra* note 6, at 126.
95. *See* Cooper, *supra* note 13, at 55.
96. *See Terry*, 392 U.S. at 38 n.3 (Douglas, J., dissenting).
97. *Id.*
98. *Id.*

authorized frisk only for neutralizing weapons that could be used to harm the officer. But *Minnesota v. Dickerson*[99] chipped away at the safeguard limiting the purpose of a *Terry* frisk to neutralizing weapons. *Dickerson* established the "plain feel" rule, which allows for the seizure of drugs, not just weapons, produced from a *Terry* weapons search.[100] This blessed a departure from the original purpose of frisk justified by *Terry* and set the stage for programmatic use of frisk as a new weapon to support the war on drugs. Now officer training on frisking teaches a search that goes far beyond what is necessary to discover weapons and is instead designed to maximize the possibility of finding drugs, making frisks increasingly invasive, harmful, and humiliating.[101] Now, only seven percent of searches produce weapons. That means officers' suspicion that the suspect is armed and dangerous is wrong at least ninety-three percent of the time, or officers are frisking when they do not really have a basis to believe the suspect is armed and dangerous in hopes of finding other contraband. Frisk in practice has clearly strayed from the theoretical justification of officer safety.[102] By flattening this purpose and scope safeguard, officers have gained greater discretion and the *Terry* frisk has become more dangerous than the language of the *Terry* opinion let on.

This purpose departure was evident in the client case I reference in the introduction section. Our client was not truly frisked for officer safety. Our client was respectful to both officers and calm throughout the entire encounter. He had his hands raised for a significant portion of the encounter, only lowering them once he and one of the officers had developed a rapport and that officer's laughing and joking indicated to our client that he was not being perceived as a threat. That officer had just directed our client to join the women on the hood, manifesting no intention to first frisk our client. This officer clearly did not suspect that our client was dangerous. And why should he? Our client had not said or done anything that would give rise to that suspicion. Given how comfortable this officer was with our client, it is difficult to imagine that the other officer initiated the frisk because he truly suspected our client was presently dangerous. The frisk was not conducted for the purpose stated in *Terry*. It was more likely an at-

99. *See* Minnesota v. Dickerson, 508 U.S. 366, 375–76 (1993) (allowing the seizure of items that are not weapons so long as it is immediately apparent from the pat-down that the item is contraband).

100. *Id.*

101. Ross, *supra* note 6, at 126.

102. *See Stop-and-Frisk in the De Blasio Era (2019)*, *supra* note 14.

tempt to recover drugs. This type of departure from the intended purpose, was encouraged by the Court's decision in *Dickerson* to allow evidence other than weapons produced by a frisk to be introduced as evidence.

While *Dickerson* chipped away at the purpose and scope safeguard, other cases, such as *Whren v. United States*[103] and *U.S. v. Cortez*[104], chipped away at the threshold for reasonable suspicion and the articulable facts requirement. *Whren* blessed pretextual stops, such as using minor traffic violations or minor misdemeanors as an excuse to look for drugs and established that subjective (racial or otherwise) motivations of an officer should not be considered.[105] After this case, officers no longer had to actually have suspicion, they just needed to be able to articulate that one could have been suspicious. And they no longer had to articulate the facts that actually led to their decision to stop a suspect, they just needed to be able to articulate facts that *could* have led to the decision. It made it possible to stop and search anyone at any time because, as even officers admit, they can follow any driver for a few blocks and find some minor traffic violation that would justify a stop.[106] In essence this revived the general warrant system.

Furthermore, *U.S. v Cortez*, instructing courts to defer to the judgement of police in determining the appropriateness of a *Terry* stop and/or frisk encouraged a "stop now, develop reasonable suspicion later" philosophy.[107] In *Cortez*, the Court stated that it is imperative to recognize that "when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be [used] . . . to form a legitimate basis for suspicion of a particular person and for action on that suspicion."[108] Thus, the facts the officer articulates to support his suspicion do not actually have to create suspicion for an ordinary person. And because the courts are so deferential, the facts articulated do not even need to be corroborated or tested for accuracy — the officer's word is enough. By diluting reasonable suspicion and weakening the articulable fact requirement, officers can search almost anyone without interference from the courts. As it turns out, the Court's

103. Whren v. United States, 517 U.S. 806 (1996).
104. United States v. Cortez, 449 U.S. 411 (1981).
105. *See Whren*, 517 U.S. at 811–13; BUTLER, *supra* note 6, at 59.
106. BUTLER, *supra* note 6, at 59.
107. Harris, *supra* note 9, at 999–1000; *see also Cortez*, 449 U.S. at 418–19.
108. *Cortez*, 449 U.S. at 419.

carefully calculated and narrow *Terry* exception, is not so narrow after all.

The holdings from both of these cases manifested themselves in our client's case as well. The search arose from a minor traffic stop. The stop was initiated because the driver of the car had her high beam lights on and did not dim them when approaching traffic was within 500 feet. Although there were three persons in the vehicle, the only one searched was our client, the Black man. The two white women, including the driver, whose conduct produced the stop, were not searched. And to make the decision of who to frisk even more suspicious, the officers had determined that the driver was driving without a license, and she claimed the open container of alcohol in her cupholder. Meanwhile, there was no evidence prior to the frisk that our client had committed any crime at all. But the judge in our client's case took seriously the *Cortez* instruction to defer to the judgement of the police. For instance, the judge took the frisking officer at his word that he smelled marijuana in the car, overlooking that no marijuana was actually found in the search of the car, and that the other officer testified that he did not recall smelling marijuana. And the judge took the frisking officers word that our client was presently dangerous, overlooking the fact that he had not done anything to appear dangerous, and that the other officer's actions were inconsistent with considering our client dangerous. Because of *Whren*, the court looked the other way on the racial component of the decision to frisk, and because of *Cortez*, it pretended not to see evidence that calls into question the integrity of the officer's testimony.

Numerous other cases have weakened what constitutes reasonable suspicion in part through departures from the particularization standard by allowing overbroad categorical judgements to serve as the basis of reasonable suspicion.[109] These categorical judgements include presence in a high crime area, the time of day, incongruity, and behavior demonstrating a desire to avoid the police.[110] None of these are good indicators of guilt nor are they particularized to the individual in question and yet they are often used as the basis of reasonable suspicion.

These overbroad categorical judgements were precisely what served as the basis of reasonable suspicion in our client's case. The

109. Harris, *supra* note 9, at 990–1000.
110. *Id.*

officer testified that the stop occurred in a high crime area, although he was unable to testify to the bounds of the region considered a high crime area or to any statistics to support that the area was in fact a high crime area. The officer also cited that the stop occurred at night to support his suspicion, despite the fact that the stop occurred in a well-lit parking lot. Incongruity generally refers to a person of color being "out of place," present in a "white" area. Although the officer did not explicitly testify to incongruity in this case, it seems likely that our Black client being present in a white woman's car factored into the equation. And none of these facts were particular to our client. As an initial matter, the crime rate, the time of day, and the racial demographics of an area are not characteristics of our client or his behavior — they are just factors which are completely out of our client's control. Moreover, the white women our client was stopped with were also present in the same "high-crime" area and so were countless other individuals. Likewise, the white women were also stopped at night.

Perhaps the most troubling support the officer proffered, was that our client "used language consistent with prior interactions with law enforcement." Specifically, our client asked, early on in the encounter, "don't you need probable cause or something?" This basis of suspicion is particularly problematic because the law has become extremely picky about what words an individual has to use in order to successfully exercise their right to withhold consent. For example, if in response to an officer's request to search, an individual replies, "I have a plane to catch," the court will not interpret that as an indication that the suspect did not want to be searched or an attempt to exercise their right not to be searched.[111] Instead, the court will interpret that statement as consent to being searched and a request that it be conducted quickly.[112] If a person gives an officer consent to search, then the officer is permitted to conduct the search without any level of justification or suspicion of wrongdoing.[113] This creates a real problem for individuals stopped by the police. If the individual does not use the right words, the legally significant words to exercise the right not to be searched based on consent, then they are searched based on having consented to be searched. But if the individual does use the right words, the legally significant words, then they are suspicious be-

111. United States v. Mendenhall, 446 U.S. 544, 559 (1980).
112. *Id.*
113. TASLITZ, *supra* note 8, at 278–79.

cause they sound like they have experience with law enforcement and are searched based on reasonable suspicion. Searched if they do, searched if they don't.

The particularization standard has also been weakened by expanding the "always frisk" categories of crimes, such as robbery[114] and narcotics crimes,[115] as well as "always frisk" categories of persons, such as companions of an arrestee or a person present at the execution of a warrant.[116] If an individual falls into one of these "always frisk" categories, then that person can be frisked regardless of that person's particular behavior. The rationale being that people who commit "X" crime usually have weapons, I suspect this person of "X" crime, therefore, I can assume this person is armed regardless of this person's particular behavior. But that logic is generalization — the opposite of particularization. Again, this dilution of the particularization safeguard the Court set forth in *Terry* has magnified the Court's miscalculation. Instead of being in a state of balance between government and individual interests, *Terry* and subsequent cases have left our scales bending toward unfettered police discretion.

These subsequent cases have turned the limiting boundaries set in place by the Court in *Terry* into "little more than a speed bump for aggressive police departments."[117] The net result is that the exception

114. Robbery is the original "always frisk" category set forth in *Terry*. *See* Terry v. Ohio, 392 U.S. 1, 28 (1968). The Court reasoned that "people who commit robbery in daylight generally have weapons," the officer suspected Mr. Terry was casing a shop for a robbery; therefore, Mr. Terry was likely armed and thus was "friskable" regardless of whether he personally behaved in a way that would indicate he posed a threat to the officer. *See id.* This reasoning is problematic because it contradicts two important components of the rule *Terry* set forth. First, it strays from the particularization requirement, because it requires no facts specific to Mr. Terry that suggest he is, in fact, armed. Second, this reasoning only discusses the "armed" component of reasonable suspicion, it says little of the "presently dangerous" component.

115. Harris, *supra* note 9, at 1001-03 n.111. Cases have used the *Terry* formula — people who commit X crime usually have weapons, I suspect this person of X crime, therefore, I can assume this person is armed regardless of this person's particular behavior — to expand the category of "always frisk" crimes. *See* United States v. Anderson, 859 F.2d 1171, 1177 (3d Cir. 1988) (holding that because the defendant possessed a large amount of cash that "might be drug money" and "persons involved with drugs often carry weapons" the frisk was "the very essence of the practice sanctioned by *Terry*"); United States v. Oates, 560 F.2d 45, 62 (2d Cir. 1977) (stating a frisk is proper even if the agent "received no specific information that [the suspect] was armed" and "even if the belief that [the suspect is armed] rested upon fragile grounds" when dealing with a suspected narcotics violator because firearms are "tools of the trade" for narcotics violators and "the standard of suspicion necessary to allow a frisk for weapons is not a difficult one to satisfy"); Williams v. Commonwealth, 354 S.E.2d 79, 87 (Va. Ct. App. 1987) (narcotics distribution or mere possession justifies the automatic inference of dangerousness, and makes a suspect automatically "friskable"). By stretching the always frisk category of crimes to drug possession, the courts transformed *Terry* into a new weapon in the war on drugs.

116. Harris, *supra* note 9, at 1107–11.

117. *See* Cooper, *supra* note 13, at 55.

has swallowed the rule; the Fourth Amendment has been eviscerated, leaving citizens in the very state of terror from which the Founders sought to protect. Because the safeguards set forth in *Terry* are not keeping the probable cause exception narrowly drawn, legislation to rein in reasonable suspicion searches is required.

## PART IV THE COST OF THE COURT'S MISCALCULATION

Frisk has created emotional and phycological harms to individuals and communities that will impact generations to come.[118] New York police commissioner Ray Kelly stated that stop-and-frisk focused on Black and Latino men because he "wanted to instill fear in them, every time they leave their home they could be stopped by the police."[119] Thus, the practice can be fairly characterized as "torture-lite" given the injuries it has inflicted and fear-based behavioral changes it was intended to and has, in fact, elicited.[120] Many individuals have shifted their innocent behavior out of fear of being subjected to the indignity and danger of yet another stop-and-frisk.[121] Measures these individuals may take to avoid being frisked include making decisions about clothing, hairstyle, car, neighborhood, and routes with officers in mind. For some, the high probability of subjugation to a police encounter gives rise to the question of whether it is even worth it to leave the house.[122] These are innocent individuals restricting their freedom out of fear of being terrorized once again.[123] In the words of Paul Butler, "[e]ffecting this type of community-wide behavioral change is the essence of terrorism."[124] This a level of power police should not have in a free country.[125] And yet, through *Terry* and subsequent cases, the Court has granted this level of power to the police.

Even if it were possible to justify this level of harm by some offsetting benefit, such a benefit is not conferred by frisk searches. Stop-and-frisk's effectiveness in reducing crime has been professed but never proven. In fact, a study from the National Institute of Health ("NIH") found that while increases in probable cause stops and

118. ROSS, *supra* note 6 at 146, 150–51.
119. BUTLER, *supra* note 6, at 111.
120. *Id.* at 97, 107, 112.
121. *Id.* at 112.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 115.

searches are associated with crime reduction, increases in reasonable suspicion searches are not.[126] Thus, the NIH study concluded that "crime reduction can be achieved with more focused investigative stops."[127]

Data from Brownsville, an eight-block area of Brooklyn, New York, where stop-and-frisk was aggressively implemented, further supports the conclusion that the use of stop-and-frisk is largely ineffective at reducing violent crime.[128] From 2006 to 2010 officers made more than fifty thousand stops and recovered only twenty-five guns.[129] The following year, at the peak of stop-and-frisk in New York, and as nationwide gun violence was declining,[130] shootings in Brownsville increased thirty-nine percent.[131] Therefore, aggressive stop-and-frisk was ineffective at reducing violent crime in Brownsville, meaning officers stopped thousands of innocent people in vain.

Notably, from 2012, when NYPD began curtailing stop-and-frisk, to 2015, the murder rate in New York dropped by thirty-two percent, and in 2016, major crime in New York reached a record low.[132] Proponents of stop-and-frisk often point out that there was a reduction in crime in New York after the implementation of an aggressive stop-and-frisk policy and suggest that reduction is proof of the policy's effectiveness.[133] However, crime rate statistics show that at the time New York began relying heavily on stop-and-frisk, both New York and jurisdictions that did not adopt the aggressive stop-and-frisk practices experienced a similar reduction in crime.[134] Therefore, that reduction in crime cannot be fairly traced to the implementation of an aggressive stop-and-frisk policy, no causal connection exists.

There has been a severe miscalculation of the effectiveness of stop-and-frisk. This miscalculation means that the result of the Court's delicate balancing was a solution that never struck the appropriate balance to begin with. The costs of aggressive frisk practices

126. John MacDonald, Jeffrey Fagan & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, PLoS ONE (June 16, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4911104/.

127. *Id.*

128. *See* BUTLER, *supra* note 6, at 94.

129. *Id.*

130. Michael Planty & Jennifer L. Truman, *Firearm Violence, 1993-2011*, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST. 1 (May 2013), https://bjs.ojp.gov/content/pub/pdf/fv9311.pdf.

131. *See* BUTLER, *supra* note 6, at 94.

132. BUTLER, *supra* note 6, at 115.

133. *See* BUTLER, *supra* note 6, at 93.

134. *Id.*

outweigh the benefits. As such, legislation to reduce the pervasive use of the frisk search is desirable.

Many scholars assert that *Terry* should be overturned. I agree, but I find it unlikely that this will happen anytime soon. Thus, this note seeks to stop and reverse the extension of *Terry* beyond what the Court in *Terry* authorized. In *Terry*, the Court said this grant of authority to stop-and-frisk on just reasonable suspicion should be narrowly drawn and that frisks should only be employed for the purpose of ensuring officer safety. The only way to ensure the frisk is truly being used for officer safety and not for evidence gathering is to exclude all evidence produced by reasonable suspicion searches. Legislation to that effect is needed while we wait for the Court to overturn *Terry*.

## PART V EXCLUDING EVIDENCE CHANGES POLICE BEHAVIOR

As we left the courthouse after losing our suppression hearing, my supervising attorney told me he had been a federal defender for seventeen years, and that in that time he has probably averaged one suppression hearing per month. Yet, he has only walked away with a real win for his client *twice*. This alarming rate of defeat is not because police are always acting reasonably to obtain evidence and it is not due to a lack of competent and zealous advocacy on behalf of the defense. It is due to the courts' unwillingness to exclude evidence. By continually restricting the exclusionary rule while expanding officer discretion to stop and search individuals, the courts have placed the nation on a dangerous path toward unchecked law enforcement authority. Legislation is needed to course correct.

There are two primary rationales for the exclusion of evidence, deterrence of unlawful police conduct and judicial integrity.[135] The deterrence rationale is that when courts exclude unlawfully obtained evidence they disincentivize unlawful searches and encourage "those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system."[136] However, when courts admit illegally obtained evidence, they legitimize the practice that produced it and reward "manifest

135. Caldwell, *supra* note 23, at 13–14.

136. Utah v. Strieff, 579 U.S. 232, 245 (2016) (Sotomayor, J., dissenting) (citing Stone v. Powell, 428 U.S. 465, 492 (1976)).

neglect if not an open defiance of the prohibitions of the Constitution."[137]

The deterrent effect of the exclusionary rule is a historical fact evidenced by change in police conduct before and after *Mapp*.[138] According to one New York City detective, "with Mapp . . . [a]ll of a sudden you couldn't stop a guy on the street and give him a toss. You had to have probable cause . . . . The exclusionary rule essentially shut down police procedure that had been going on for a hundred years."[139]

The deterrent effect of the exclusionary rule is further confirmed by the admission of police themselves. Studies aimed at gauging "police officer motivation to avoid illegal searches" have found that more than half of officers said that the possibility of exclusion "frequently," "very frequently," or "reasonably often" kept them from making a search.[140] Another study found that nearly sixty percent of officers consider the exclusion of evidence to be an important concern influencing their conduct.[141] Excluding evidence will influence police decision-making and deter the use of frisks for purposes other than the sole purpose the Court approved of in *Terry*, officer safety.

The judicial integrity rationale is that it would be paradoxical, incongruous, and hypocritical for the very institution charged with upholding justice and guarding the constitutional rights of citizens to utilize, in its administration of justice, evidence that was itself unlawfully or unjustly obtained. How could anyone have any faith in such a system of irony, whose conclusions of justice were supported by unjustly obtained information? The Court found that the exclusion of evidence strikes an appropriate balance because it "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary to the true administration of justice."[142]

Like unlawful searches, the reasonable suspicion search represents a weakening of the individual rights which the Court is trusted to protect. And like unlawfully obtained evidence, there is an injustice

137. *Id.* at 245–46.
138. Ross, *supra* note 6, at 73–74, 193 n.38.
139. Harris, *supra* note 9, at 978–79.
140. Caldwell, *supra* note 23, at 21 (discussing the Orfield study).
141. Caldwell, *supra* note 23, at 25 (discussing the Perrin, Caldwell, and Chase study).
142. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

associated with evidence obtained from frisk searches, especially in the programmatic, racially motivated, fish-for-evidence manner in which frisk is employed today — which, as previously discussed, goes far beyond what the Court authorized by the language of the *Terry* opinion. Thus, allowing evidence obtained from frisk searches to be used in court threatens their integrity in much the same way that allowing unlawfully obtained evidence does. Legislation to exclude evidence produced by reasonable suspicion searches is necessary for both deterrence and judicial integrity.

Critics of the exclusionary rule often suggest that under the exclusionary rule it is the community that ultimately suffers for the officer's conduct because excluding evidence allows the offender to go free.[143] But this critique was rejected by the Court in *Mapp* as a justification for foregoing exclusion, and with good reason. In *Mapp*, the Court recognized that sometimes the exclusion of evidence will mean that a criminal will go free, but found this outcome preferable to the alternative — the degradation of judicial integrity and a wholly inconsequential Fourth Amendment.[144]

The constable's blunder critique is problematic because it condemns citizen unlawfulness and forgives the police unlawfulness when it is the latter that should be found more repugnant. It is the latter that is ultimately more dangerous. It is as the Court's response to this critique in *Mapp* suggests:

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[145]

The police unlawfulness should be more repugnant because the police are charged with the upholding of the law. And considering that many of the "criminals" that would go free as a result of excluding evidence from frisk searches are minor drug possessors, community-

143. *Mapp*, 367 U.S. at 659; *see also* Charles Alan Wright, *Must the Criminal Go Free if the Constable Blunders*, 50 TEX. L. REV. 736, 738, 742 (1972).

144. *Mapp*, 367 U.S. at 659 ("[T]here is another consideration – the imperative of judicial integrity").

145. *Id.*; *see also* Utah v. Strieff, 579 U.S. 232, 245 (2016) (Sotomayor, J., dissenting) ("It is tempting . . . where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment. Two wrongs don't make a right. When 'lawless police conduct' uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence.").

wide contempt for the law is more dangerous than these individuals going free.

The constable's blunder critique also fails to recognize that the community suffers more from an unwillingness to exclude evidence obtained in a questionable manner. An unwillingness to exclude evidence communicates tolerance of the means in which it was gathered and "the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness."[146] While the refusal to exclude evidence might have the instant pay off of being able to take the instant offender off the street, it is not worth the tradeoff of degrading the enduring effectiveness of law enforcement.

More importantly, the constable's blunder argument ignores the enormous harm and suffering aggressive frisking practices have on the community — harms such as those discussed in Part IV. Even "lawful" searches have seriously harmful effects. By excluding evidence produced by reasonable suspicion searches, we eliminate the incentive to aggressively search. Prosecutors and police chiefs will no longer celebrate officers with a high frisk rate and will instead be forced to consider officer hit rates.[147] Exclusion of evidence will change the programmatic use and therefore reduce the number of innocent individuals being frisked. In that sense, the innocent benefit when the guilty go free.[148] The exclusion of evidence changes dysfunctional policing behaviors and the refusal to exclude evidence is costly. Therefore, legislation excluding evidence obtained from frisk searches is desirable.

## PART VI LEGISLATION TO EXCLUDE EVIDENCE FROM REASONABLE SUSPICION SEARCHES

*Terry* created a law enforcement shortcut that will continue to undermine the enduring effectiveness of the law if we tolerate its widespread use. The Supreme Court is unlikely to change courses but that shouldn't be the end of the conversation. Likewise, the executive branch is unlikely to quickly turn the ship. The Department of Justice investigations and consent decrees that have been implemented in cities like Los Angeles, Baltimore, Fergusson, New York, and Cincinnati

146. *Mapp*, 367 U.S. at 658.

147. Hit rates, or arrest efficiency data, are the rates at which police find evidence of criminal activity during a frisk. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145 (2012).

148. ROSS, *supra* note 6, at 74.

have had a positive impact, but those reform efforts are reactionary and limited because they are time-consuming and costly and cannot be scaled to reach all police departments throughout the nation.[149] Therefore, action from the legislative branch is needed. Legislation should allow frisk to be used for officer safety only, and therefore, exclude evidence produced by a reasonable suspicion search so that frisk cannot be used as an evidence gathering tool. This legislation is a win for everyone; officers remain safe, and our individual rights regain a little bit of their strength.

This legislation will be effective in reforming police behavior because it would eliminate the evidence gathering incentive for misbehavior. Since only seven percent of frisks actually produce weapons, officers are clearly frisking for purposes other than safety.[150] If officers are truly only frisking when there is reasonable suspicion that a suspect is armed and dangerous, one would expect a much higher percentage of suspects to, in fact, turn out to be armed. Surely, one's suspicion is not reasonable if that suspicion turns out to be wrong ninety-three percent of the time. Therefore, officers are not only frisking where there is reasonable suspicion that a suspect is armed and dangerous. They are not only frisking for the purpose of ensuring their safety, they are frisking for another purpose: to gather evidence. By excluding evidence produced by a frisk, the evidence gathering purpose of frisking is eliminated. If officers limited their initiation of a frisk to situations where they truly thought they were in danger and limited the scope of the frisk to only what is necessary to discover weapons, this would greatly reduce the pervasiveness and harmfulness of frisks. Legislation can accomplish exactly that.

There are a variety of places where legislators could choose to draw the line to exclude a greater or smaller sphere of evidence. Some of the potential variations are described below. In all the options proposed below, contraband discovered during a frisk can be seized, the variability in the options concerns the degree to which the contraband can be used as evidence after being seized. Under all the approaches below, the officer is still permitted to conduct the frisk, so

149. BUTLER, *supra* note 6, at 194.

150. *See Stop-and-Frisk in the De Blasio Era (2019)*, *supra* note 14. This already low accuracy rate only confirms the suspicion that the suspect is armed, it does not also necessarily confirm that the suspicion that the suspect was presently dangerous. An officer is supposed to have reasonable suspicion of both before frisking.

the officer remains safe, and the contraband is still seized and taken off the streets, so the community is safer.

### A. Option One

The first option, and the option that would offer the greatest fortification to the Fourth Amendment rights of individuals, is that evidence seized from a reasonable suspicion search cannot be used for any purpose. It cannot be introduced at any trial against any suspect. It cannot be used to impeach witnesses or for other purposes where an exception to the exclusionary rule applies. It cannot be used as a steppingstone to more evidence. The officer is simply allowed to neutralize the contraband and take it to the property room at the station. The prosecutor can do nothing with it.

Option one would be the most effective at eradicating aggressive frisking as it eliminates the evidence gathering incentive altogether. However, some might protest against this approach, saying that this approach takes an important tool out of officers' toolbox, and that under this approach, officers can't use frisk as an investigatory technique to solve crimes. Exactly, because that is not what frisk is for. The Court in *Terry* gave a specific purpose for which the reasonable suspicion search was justified: officer safety.[151] Officer safety, not investigation or evidence gathering, is what frisk is for. Under *Terry*, a stop is investigatory, the frisk search is not. If an officer suspects an individual has committed a crime or possesses contraband, the officer can stop that individual and ask investigatory questions that will confirm or dispel the officer's suspicions, but that officer needs to develop probable cause before searching that individual, unless there is reasonable suspicion that the suspect is armed and presently dangerous. The officer should not be able to use a frisk to sidestep developing probable cause because that is not the purpose for which frisk was legitimized in *Terry*.

Recall the client story that has been referenced throughout this Note. Our client's brother left a firearm, which the brother was lawfully permitted to carry, at our client's house. Our client, who had a young child and a baby on the way, did not own any guns and thus, had no gun safe or comparable equipment in the house to properly

151. Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.").

contain the weapon and ensure the safety of his child. Unable to reach his brother by phone, our client decided he would take the gun to his brother to get it out of the house. He was stopped along the way. Despite his cooperation with the officers and his efforts to remain calm and nonthreatening throughout the stop, he was frisked, and the gun was recovered. Our client, who was forbidden to possess a firearm because of a prior conviction, was sentenced to three years in prison to be followed by three years of supervised release.

Under Option one , it is likely that our client would not have been subjected to a frisk in the first place. As discussed in Part III, the officer did not truly frisk our client because he thought our client was armed and dangerous. But rather, the officer knew he could use the high crime area and time of day to convince a highly deferential judge that it was reasonable to believe our client was armed and he decided to capitalize on the opportunity to go on a fishing expedition for contraband.

However, assuming the officer who frisked our client still conducted the frisk, under Option one , the officer would have been able to seize the gun from our client, neutralizing any potential threat while the officers completed the encounter, thus officer safety is achieved. After the encounter, the officer would take the weapon with him to the property room, so the potential danger to the community of having a felon in possession of a firearm is also alleviated. Now this is arguably an example that is most sympathetic to the frisking officer, and one of the worst examples for making the case for exclusion because our client turned out to be one of the 7% of frisked individuals that are in fact armed. But even with this worst-case scenario, officer safety is still achieved and the danger to the community is neutralized as well. And Option one starts to change aggressive policing behaviors that threaten Fourth Amendment freedoms and inflict emotional and psychological harms on communities. The net result is better than our current state. However, if this option seems too draconian, legislation could take a less exclusive approach.

### B. Option Two

A second option would be almost identical to the first except that it would incorporate the standing doctrine in the same way standing currently affects the exclusion of unlawful evidence. For purposes of the exclusionary rule, only the person whose rights were violated can challenge the evidence produced by that unlawful intrusion even if the

evidence produced incriminates another individual. The other individual is said to lack standing. Thus, this approach would only offer relief for the individual that was frisked. Under this approach, the evidence produced from a frisk would not be admissible in any trial against the suspect on which it was found but could be used against other suspects.

This approach would be unfavorable and should be avoided because the evidence gathering incentive of frisking would remain too high. The only real benefits of this approach as compared to Option one would be to make the impact on law enforcement less drastic and to foster greater consistency between the treatment of unlawfully obtained evidence and evidence produced by frisking. However, the effectiveness of legislation to exclude evidence is inextricably linked with eliminating the evidence gathering incentive of frisking. If the evidentiary value of the frisk remains high, the legislation will not effectively change dysfunctional policing behaviors. Thus, Option one is the better option.

This approach would have also benefitted our client. Because he was the one who was frisked, the weapon could not be used as evidence against him. However, suppose the gun was not lawfully registered to our client's brother and that the brother was actually forbidden from possessing a firearm, under this approach, the gun would be admissible against the brother. Because it is not that unusual for contraband found on one individual to implicate another individual in a crime, officers would not be as strongly deterred from aggressive frisking under Option Two. Thus, Option one is preferable.

### C. Option Three

A third option would be that evidence produced from a reasonable suspicion search is still excluded at any trial against any suspect, but unlike option one, the exclusionary rule exceptions would apply. Therefore, the evidence can be used to impeach a witness or to generate questions for a grand jury witness. The evidence could also escape exclusion if it would inevitably have been discovered by other lawful means. Additionally, under this approach, unlike option one, the evidence produced by a frisk can be used as a steppingstone to more evidence. For example, law enforcement could lift prints from the contraband or run the serial number on the firearm in hopes of finding more suspects.

This approach, while better than Option Two is still less preferable than Option one , and for similar reasons. While this approach may be less drastic and seem more comfortable from a law enforcement perspective than Option one , this approach will not be as effective as option one because it only weakens, it does not eliminate the evidence gathering incentive for frisking. It would, however, be preferable to option two because it weakens the evidence gathering incentive more than Option Two.

This approach would have also benefited our client as none of the exclusionary rule exceptions would be applicable in his case. But so many exceptions have been made to the exclusionary rule that one scholar suggests that the Supreme Court has made the Fourth Amendment into "Swiss cheese — more holes than protection."[152] Because option three leaves the protections envisioned by this legislation susceptible to being turned into swiss cheese, Option one is superior.

## D. Option Four

A fourth option would be that evidence produced from a frisk cannot be introduced at a trial for possession of that contraband but could be introduced as evidence of a more serious crime. For example, if an officer frisks and finds an illegal gun, that gun could not be used as evidence at a trial for possession of an unlawful firearm. But if it turns out that the suspect had committed murder or assault with that gun, then the gun could be introduced as evidence at a murder trial or on the charge of assault with a deadly weapon. By the same token, if drugs are found while frisking a suspect, the drugs could not be used as evidence on a drug possession but could be used as evidence on a continuing criminal enterprise charge.[153]

Because this option does still leave some evidence gathering incentive on the table, this Note suggests Option one remains the most effective. However, this option does eliminate the evidence gathering incentive to a great enough degree that it is a viable option. As such, Option Four would be much preferred over options 2 and 3.

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152. Ross, *supra* note 6, at 166.

153. If option three were selected, possession with intent to distribute should be grouped with simple possession rather than with continuing criminal enterprise. Allowing drugs found from a frisk to be introduced as evidence of possession with intent to distribute would increase the evidence gathering incentive to a level that would jeopardize the effectiveness of the legislation.

This option would have also benefited our client, who was simply returning the firearm to his brother, and whose only crime was possessing the gun; he did not use and had no intention to use the weapon. This option should also help quell the fears of constable's blunder advocates because it would allow for the use of the evidence to prosecute more severe crimes that pose a greater threat to the community.

E. Lethal weapon exception or modifier

Given that frisk is intended to neutralize weapons, there is arguably a basis for treating lethal weapons obtained by a frisk differently than other contraband recovered. This different treatment could take the form of an exception, meaning lethal weapons are not touched by the new legislation and are therefore not excluded as evidence. Or the different treatment could take the form of a modifier, whereby an individual found with a lethal weapon is afforded a lesser degree of protection by the legislation than an individual who is found with other contraband.

To afford lesser protection to lethal weapons, legislation could prescribe that lethal weapons be treated under one of the options above that excludes a smaller sphere of evidence than other contraband. For example, perhaps Option one is the general rule with a modifier that lethal weapons are treated under Option Four. As a result, contraband recovered that is not a lethal weapon, such as drugs, would be afforded the greatest protection; it would be inadmissible in any court proceeding, against any person. But a lethal weapon would be afforded less protection, because it could be used as evidence in the prosecution of a crime more severe than possession.

Some would suggest that lethal weapons should be left out of the legislation altogether not just given lesser protection. I disagree. Frisk was not intended as a general warrant for law enforcement to uncover weapons, it was only to neutralize weapons for officer safety. It is entirely possible that an officer has enough factors to convince a judge that there was reasonable suspicion that the suspect was armed and dangerous and yet not truly believe that suspect poses a threat. A frisk in that situation may be in line with the letter of the law but not with the spirit of the language of *Terry*. A frisk in that situation would not truly be conducted for the purpose of officer safety. Therefore, legislation should also seek to deter a frisk in that situation. If legislation leaves lethal weapons out altogether, it fails to deter that conduct.

All of the above options offer exclusion of evidence and, admittedly, exclusion alone is an important albeit incomplete remedy. Exclusion will only directly reach officers that are abusing their search discretion for the purpose of gathering evidence. Exclusion will only indirectly reach officers that abuse their search discretion for the purpose of asserting dominance and maintaining social control over communities of color. Additionally, exclusion will directly benefit criminal defendants but will only indirectly benefit innocent victims of aggressive police search schemes. Exclusion will indirectly benefit innocent victims by changing the regularity with which frisk is used. Fewer overall frisks mean fewer innocent victims. However, additional legislation that will more directly benefit individuals that do not have any contraband is also desirable.

## CONCLUSION

The Court's evisceration of the Fourth Amendment has left certain communities in the very state from which the Founders sought to protect when they drafted the Fourth Amendment. We are in a state of wide-open police discretion, where law enforcement is permitted to stop-and-frisk almost anyone for almost any reason. We are in a state where that unchecked power is being used as a tool of racial oppression.[154] The practice of stop-and-frisk has morphed from a narrow exception to ensure officer safety into a programmatic tool used to fish for evidence, and communities are suffering as a result. Because the courts have repeatedly demonstrated their unwillingness to exclude evidence produced by this practice in order to disincentivize this blatant disregard for the Fourth Amendment rights of individuals, legislators and their constituents need to exercise their power. Through legislation that allows officers to conduct reasonable suspicion searches for the purpose of neutralizing weapons but excludes all evidence produced from the frisk, we can at least restore *Terry* to its originally stated purpose of being a narrow exception to the Fourth Amendment probable cause requirement. This is a much-needed restoration because our current policies and practices regarding stop-and-frisk are communicating to citizens "that your body is subject to invasion while courts excuse the violation of your rights. It implies

154. *See* Bernick, *supra* note 21, at 50, 63, 74; Cooper, *supra* note 13, at 77 (stating that "police departments [have] developed data-driven, aggressive profiling of young men of color in the name of crime prevention"); *Stop and Frisk in Chicago*, *supra* note 14; Dunn, *supra* note 15, at 16–17.

that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[155]

155. Utah v. Strieff, 579 U.S. 232, 245 (2016) (Sotomayor, J., dissenting).