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## STUDENT NOTES

# Paying for Reparations

Jeremy Bearer-Friend[1]

*This Article proposes a novel approach to capitalizing a reparations fund worth trillions of dollars. Under the proposal, publicly traded firms on U.S. exchanges would be required to remit shares of corporate equity to a reparations trust fund in lieu of cash tax payments. Under the terms of this proposal, our federal government could successfully capitalize a multi-trillion reparations fund in less than a year.*

*The primary contribution of this Article is to offer a unique financing structure for reparations—a national effort expected by all estimates to require trillions of dollars. This Article describes the features of the in-kind tax proposal, the myriad design choices that would be necessary to ensure effective implementation, and its analogs in the private sector for capitalizing a fund. This Article also evaluates the limitations of an in-kind tax proposal, ultimately concluding that in-kind remittance remains preferable to other tax policy options.*

*The multi-trillion target size of the fund is based on the reparations amounts proposed by Neal (1990) and further elaborated by Darity & Mullen (2020). The beneficiaries of the fund are Black Americans with a formerly enslaved ancestor based on the eligibility criteria proposed by Darity & Mullen (2020). While the proportion of total outstanding shares to be remitted to the fund is a flexible aspect of the proposal—the tax rate is adjustable based on the preferred size of the fund—the Article does not propose issuing a controlling interest to the fund. A separate*

1. Associate Professor of Law, GW Law School. Thanks to Edith Brashares, Dorothy Brown, Luis Calderon-Gomez, Theresa Gabaldon, Lula Hagos, Viva Hammer, Cathy Hwang, Ariel Jurow Kleiman, Tom Lin, Jeremy McClane, Portia Pedro, Blaine Saito, Omari Scott Simmons, Alicia Solow-Niederman, Etienne Toussaint, Tania Valdez, Kate Weisburd, Isaac Wood, and the participants of the Loyola Law School 2023 Critical Tax Conference, the Northeastern Law School 2023 Junior Tax Conference, the NYU Law & Political Economy Association, and the 2023 National Tax Association conference for generous input, questions, and encouragement. I thank Xinyu Qiang & Harry Tianhou Huang for expert research assistance.

*mechanism would also be applied to privately held firms to address potential market distortions associated with the new tax.*

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## Introduction

The debate over reparations for the enslavement of Black Americans is older than emancipation.[2] It is a debate that continues.[3] In the wake of the Civil War, Black Americans immediately sought reparations but were denied.[4] The only reparations provided by the United States federal government were to the former owners of enslaved people who brought claims for 'lost property' as a result of emancipation.[5] Calls for reparations continued through the early 20th century,[6] the Civil Rights Movement in the midcentury, and further into the 20th century.[7] Reparations are now a major flashpoint in our 21st century.[8]

A recurring feature of the reparations debate is the amount of money to be spent on reparations—how should such a number be

2. *See, e.g.*, William A. Darity Jr. & A. Kristin Mullen, From Here to Equality 10 (2020) (describing debate between Frederick Douglass and Harriet Beecher Stowe in 1853). This article refers to "reparations" as redress for the atrocity of U.S. chattel slavery and its aftermath. For an essay-length elaboration on the definition of reparations, *see* Roy L. Brooks, *Getting Reparations for Slavery Right—Response to Posner and Vermeule*, 80 Notre Dame L. Rev. 251 (2004). *See also infra* Part I.

3. *See, e.g., Recognizing that the United States has a moral and legal obligation to provide reparations for the enslavement of Africans and its lasting harm on the lives of millions of Black people in the United States,* H.R. Res. 414, 118th Cong. (2023). Vincene Verdun organizes this history of reparations for slavery into five distinct eras. Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tul. L. Rev. 5987 (1993) ("There have been five major waves of political activism that promoted reparations since the emancipation of slaves: 1) the Civil War-Reconstruction era; 2) the turn of the century; 3) the Garvey movement; 4) the civil rights movement of the late 1960s and early 1970s; and 5) the post-Civil Liberties Act era beginning in 1989."). Since publication of her article, a sixth era can be added: the ongoing work of the Black Lives Matter Movement beginning in 2020.

4. *See, e.g.*, Darity & Mullen, *supra* note 2, at 13 (citing Reverend Frazier's 1865 request that land be given to the freedmen).

5. *See* Elizabeth Clark-Lewis, First Freed: Washington D.C. in the Emancipation Era 98, 102 (2002) ("The Secretary of the Treasury reported in 1864 that slaveholders were compensated for 2,991 slave men and women, for a total of about one million dollars."). For an account of reparations attempted and then clawed back in the aftermath of Lincoln's assassination, *see generally* Katherine Francke, Repair: Redeeming the Promise of Abolition (2019).

6. *See, e.g.,* Nikole Hannah-Jones, The 1619 Project: A New Origin Story 462 (2021) (describing the work of Callie House to enact "Slave Pension" legislation in the early 20th Century).

7. *See, e.g.*, James Foreman, Black Manifesto (1969) (seeking $15 per Black person in the U.S. from white churches and synagogues for a total of $500 million); Darity & Mullen, *supra* note 1, at 13 (describing "Black nationalist 'Queen Mother' Audley Moore, who advocated restitution for African Americans as early as 1950.").

8. *See, e.g.,* All Things Considered, *Cities May Be Debating Reparations, But Here's Why Most Americans Oppose the Idea*, NPR, at 5:00 AM (Mar. 27, 2023), https://www.npr.org/2023/03/27/1164869576/cities-reparations-white-black-slavery-oppose https://www.npr.org/2023/03/27/1164869576/cities-reparations-white-black-slavery-oppose; *see generally* Sonya Singh, *California Faces Backlash as It Weighs Historic Reparations for Black Residents,* Guardian (July 11, 2023), https://www.theguardian.com/us-news/2023/jul/11/california-historic-reparations-black-residents.

estimated?[9] One strategy is to look to tort law as a model for estimating harms and awarding damages based on a current dollar valuation of the costs imposed.[10] An alternative approach to arriving at the amount of funds needed is to estimate the dollars required to close the black-white racial wealth gap.[11] The consensus position across all of these different estimates is that reparations must be *trillions* of dollars.[12]

Once a dollar amount has been decided on, reparations advocates then arrive at the funding question—how to pay for reparations? This is the central question of this Article. Part of the difficulty in answering this question is due to the enormous scale of funding needed. The challenge of identifying a funding mechanism for reparations has been described as a "real and valid constraint" for actually achieving reparations.[13] Yet, despite its material significance, the question of funding is often left out of academic reparations proposals or only thinly sketched out.[14] When discussed, the funding mechanisms are typically borrowing, printing money, or taxes.[15]

If taxes are chosen as the primary policy instrument for financing reparations, there are limited options. For example, the 500 largest corporations representing over 85% of corporate earnings, reported a total profit of $765 billion in 2018.[16] Hence, it would take eight years of a 100% tax rate on corporate income to reach the lowest cost reparations target of $5.7 trillion—a tax policy that is neither appealing nor

9. Dana Sanchez, *Slavery Reparations Could Carry A $171 Trillion Price Tag. Or $51 Trillion. It Depends Who's Doing The Math*, The Moguldom Nation (July 25, 2019), https://moguldom.com/215536/slavery-reparations-price-tag-17-1-trillion-or-51-trillion-depends-whos-doing-the-math/.

10. *See generally* Larry Neal, ed., The Wealth of Races (1990) (collecting fifteen different essays estimating the unjust enrichment produced as a result of slavery. This amount would then be paid out as restitution.). *See also infra* Part I. For an account of this approach to reparations that looks to the example of "toxic torts," *see* Kyle Logue, *Reparations as Redistribution*, 84 B.U. L. Rev. 1319, 1329 (2004).

11. Darity & Mullen, *supra* note 2, at 263 ("We view the racial wealth gap as the most robust indicator of the cumulative economic effects of white supremacy in the United States.").

12. Darity & Mullen, *supra* note 2, at 263–70.

13. Jon D. Michaels, Testimony of Jon D. Michaels, *Testimony Before the AB 3121 Task Force* (Feb. 28, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4377869.

14. *See, e.g.,* Alfred L. Brophy, Reparations: Pro and Con 148 (2006). Brophy does not provide any specific mechanism but just states that a large trust for the benefit of all Black Americans would be "funded by the federal government." *See also* Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for African American Reparations?* 19 B.C. Third World L.J. 464, 470 (1998) ("The trust should be financed by funds drawn annually from the general revenue of the United States for a period not to exceed ten years."). *But see* Darity & Mullen, *supra* note 2, at 265 (identifying three separate categories for financing: borrowing; seigniorage; and tax).

15. *See infra* Part II.

16. Matthew Gardner, Lorena Roque & Steve Wamhoff, *Corporate Tax Avoidance in the First Year of the Trump Tax Law* 1, 10 (Dec. 2019), https://itep.org/corporate-tax-avoidance-in-the-first-year-of-the-trump-tax-law/.

politically viable.[17] The inadequacy of the corporate income tax, which is one of the most politically popular taxes but yields relatively low revenue as a share of the federal budget—helps illustrate the scale of the tax policy challenge for funding reparations.[18]

This Article attempts to answer the question of how the United States federal government can pay for reparations. It does so by proposing a unique tax funding mechanism: contributions of equity rather than cash. The policy choice to limit the menu of possible taxes to cash remittances places an extraordinarily effective, yet fundamentally unnecessary, ceiling on the capacity of public institutions.[19] In-kind taxpaying—tax liabilities remitted in noncash property—is both viable and, in some instances, preferable.[20] The proposal in this Article to capitalize a reparations fund using in-kind remittance is just one example of the potential of in-kind taxpaying.[21] Unlike past proposals to replace corporate tax remittances in cash with corporate tax remittances in equity, this Article proposes a remittance of equity that would be in addition to existing income tax bases.[22] Under the terms of this proposal, our federal government could successfully capitalize a multi-trillion reparations fund in less than a year.

To date, tax scholars have had a limited role in engaging with reparations for slavery. The most prominent tax figure to write on the subject is Boris Bittker, who offers a pessimistic, book-length account of the unlikelihood of achieving reparations in the United States.[23] In response,

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17. This estimate also does not consider the lost revenue from the 21% tax rate already allocated to other federal spending, or the inevitable tax avoidance that would result.

18. Other large-scale reinventions of the taxation of capital also presume that the new tax would replace existing taxes, rather than be in addition to the current income tax. *See, e.g.,* Mark P. Gergen, *How to Tax Capital*, 70 Tax L. Rev. 1, 3 (2016).

19. For example, the private sector regularly relies on noncash transactions to exchange value between parties. *See* Hillel Nadler, *Taxing Zero*, 26 Fl. Tax. Rev. 1, 5 (2023) (describing how zero price transactions are "[b]ecoming an increasingly important feature of economic life").

20. *See* Jeremy Bearer-Friend, *Tax Without Cash*, 106 Minn. L. Rev. 953, 989–1007 (2021).

21. *Id.* at 965–88 (describing effective in-kind tax remittances at the local, state, and federal level). The escalating impacts of climate change are also likely to require new scales of public investment that in-kind taxpaying affords.

22. *See* Joseph Bankman, *A Market-Value Based Corporate Income Tax*, Tax Notes (Sept. 11, 1995); Herwig Schlunk, *The Cashless Corporate Tax*, 55 Tax L. Rev. 1, 1 (2001). Herwig Schlunk states:

> The government's current rights to corporate cash flows, as set forth in the Code, are functionally a form of equity ownership. Accordingly, it should be possible to replace such rights with direct equity ownership interests in corporations. The primary challenge is to determine the quantity and quality of the equity ownership interests, which, if held by the fisc, would most closely resemble-in whatever ways the legislature or the author deems relevant- the current corporate income tax.").

Herwig Schlunk, *The Cashless Corporate Tax*, 55 Tax L. Rev. 1, 1 (2001).

*But see* Emmanuel Saez & Gabriel Zucman, *Wealth Tax on Corporations*, Econ. Pol'y 213, 213-15 (2022) (proposing an annual tax of .2% on corporate stock in addition to annual corporate profits tax).

23. *See generally* Boris I. Bittker, The Case for Black Reparations (1973).

Derrick Bell suggests that Bittker's efforts "constitute less a contribution to legal scholarship than the ultimate in societal conceit."[24] More recently Andre Smith and Carlton Whitehouse propose a more direct relationship between tax and reparations.[25] Rather than looking to tax policy as a "pay-for" to cover the associated public costs, they see tax policy as a potential policy instrument for disbursing reparations in the form of refundable tax credits.[26] Most recently, Dorothy Brown has analyzed whether reparations payments themselves should be taxable.[27] Each of these questions remains important—whether to have reparations, whether reparations should be in the form of tax expenditures, and whether reparations should be taxable—but they are not my questions. For this Article, I answer the question of how to raise over a trillion dollars to pay for reparations.

While many of my readers will come to this subject already in support of reparations, some may approach my conclusion about how to pay for reparations as a starting point in their assessment of the appeal of reparations for slavery. This is because one of the most repeated critiques of reparations is viability.[28] Reparations are obstructed, in part, because they are viewed as unrealistic due to financial constraints. Establishing a clear and specific financing mechanism for reparations is thus a gateway for moving reparations from an idea to a reality.[29] What is imaginable then becomes possible.[30] The proposal presented in this article could

24. Derrick A. Bell Jr., *Dissection of a Dream*, 9 Harv. C.R.-C.L. L. Rev. 156, 165 (1974) (reviewing Boris I. Bittker, The Case for Black Reparations (1973)) ("While Bittker's attitude is sympathetic, his book conveys a. . . . [m]essage that Black reparations. . . [i]s not preposterous—just impossible. That difference, even by the overly optimistic standards used in measuring civil rights advances, is not necessarily progress) ("The book reveals too many legal difficulties for which no solutions are offered because. . . . [n]o solutions exist.").

25. Andre Smith & Carlton Waterhouse, *No Reparation without Taxation: Applying the Internal Revenue Code to the Concept of Reparations for Slavery and Segregation*, 7 Pitt. Tax Rev. 159, 186–97 (2010); *see also* Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. Pa. L. Rev. 677, 715, 723 (1999) (describing a proposal to structure reparations as a multi-year tax exemption).

26. Smith & Waterhouse, *supra* note 25.

27. Dorothy Brown, *Testimony Before the California Task Force to Study and Develop Reparations Proposals for African Americans* (Jan. 27, 2023), https://oag.ca.gov/system/files/media/task-force-dbrown-witness-012023.pdf. For additional commentary on whether beneficiaries of reparations should also bear a tax burden related to financing reparations, *see infra* Part II. A.

28. *See, e.g.*, Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. Rev. 1177, 1189 (2004) ("[H]ordes of indignant taxpayers will rise forward asking, 'why should my tax dollars go to compensate for wrongs that I did not commit?'").

29. *See generally* Darity & Mullen, *supra* note 2, at 256–70 (2020) (demonstrating the viability of reparations by developing a concrete and specific plan).

30. *See* Judith Heumann, Being Heumann: An Unrepentant Memoir of a Disability Rights Activist 13 (2021); *see also* Urvashi Vaid, Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation (1996) ("A liberation movement seeks fundamental social change: We are for a just world in which racism, homophobia, sexism, economic injustice, and other

also be voluntarily adopted by the private sector as a form of corporate philanthropy in response to the Black Lives Matter Movement.[31]

The mechanism of funding reparations through in-kind remittance of equity rather than cash has a number of advantages. Most importantly, it is at the scale necessary to rapidly achieve a multi-trillion valuation because the taxable base is so enormous: the market capitalization of all firms in the United States. And because this taxable base is so vast, the statutory tax rate can be quite low, further adding to the political appeal. Additional advantages are that this is a new taxable base, so an in-kind remittance of equity does not crowd out the opportunity for a national Value Added Tax ("VAT") to finance other public priorities.[32] Relative to a cash tax liability for a wealth or property tax base, in-kind remittances do not have the same valuation challenges since merely a proportion of firm value is transferred.[33] In-kind remittance also does not create the same liquidity issues that a cash tax would. It would be a substantial cash flow challenge for many firms to free up an aggregated $5 trillion in cash, but equity issuances are routine and do not require cash on hand.

The tax proposal included here also nominally targets politically disfavored groups—large corporations, many multinationals—rather than individuals or households.[34] And the tax has a progressive incidence—it is effectively on the shareholders of firms. The top 1% of households in the United States hold 54% of all stock.[35] Nearly 40% of United States households have no shares of stock.[36]

Although the requirement that firms remit equity rather than cash may seem radical at first, the reliance on in-kind exchanges in lieu of

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systems of domination are frankly addressed and replaced with new models. Such a movement begins first of all with an act of faith that the movement and society are possible. Put another way, this faith in social change is what the theorist bell hooks has so elegantly termed "the power of disbelief." We must disbelieve in the permanence of things as they are in order to believe in our ability to launch a new gay and lesbian liberation movement.").

31. *See infra* Section Part III.X. *See also* Bearer-Friend, *supra* note 20, at 991–94 (2021).

32. For example, a Value-Added Tax is regularly seen as an untapped public revenue bonanza for the US. *See* Michael J. Graetz, *The Tax Reform Road Not Taken—Yet,* 67 Nat'l Tax J. 419, 419 (2014).

33. *See infra* Section Part III.; *see also* Bearer-Friend, *supra* note 20, at 991–94 (2021).

34. Remittance obligations are distinct from the actual incidence of a tax, of course, but the public is generally unaware of this. For example, corporate income tax liability requires a remittance from the corporation to the IRS, but it is assumed that the economic incidence of this tax liability is spread across workers and shareholders. *See generally* Daniel. N. Shaviro, Decoding the U.S. Corporate Income Tax (2009). For an account of the longstanding popularity of taxing large corporations, *see generally* Vanessa Williamson, Read My Lips: Why Americans Are Proud To Pay Taxes (2017).

35. Jack Caporal, *How Many Americans Own Stock?,* Motley Fool (Aug. 15, 2023), https://www.fool.com/research/how-many-americans-own-stock/.

36. *Id*.

cash transactions is actually quite common in the private sector. Indeed, the reparations proposal could follow the mold of many private sector arrangements for capitalizing a fund.[37]

It is also common for the governments of capitalist economies to hold shares in private enterprises. Many countries have sovereign wealth funds where a publicly accountable fund, whose beneficiaries are also ultimately the public, holds equity interests in both domestic and global firms. The largest one of these is a $1.45 trillion retirement fund in Norway.[38] The Norwegian sovereign wealth fund is a "shareholder in more than 9,000 publicly traded companies."[39] Other countries are seeking to follow suit, with the recent corporate tax windfall in Ireland to be used to create such a fund.[40] In addition to both private and public analogs of public funds that own portions of private enterprise, we also have a variety of forms of in-kind remittance for tax obligations here in the United States.[41] These occur at the federal, state, and local levels.[42]

Beyond the administrative advantages of in-kind remittance, there is also a philosophical appeal to this proposal that relates to the underlying rationale for reparations. If we assume that the current arrangement of our economy is the direct result of the compounded racial inequality that originated with slavery, then a redress of that unjust enrichment requires a reordering of existing wealth.[43] The proposed multi-trillion reparations fund provides a limited share of equity in all firms to those previously excluded from and exploited by the United States marketplace.[44]

37. Executive compensation is another private sector setting where in-kind exchanges are common. Here, noncash consideration for labor aligns with the incentives of principals and agents. The equity compensation also grows in value faster than wages would, proving more lucrative to the employee while being less costly to the firm. For a more detailed description of these arrangements, and statistics on their frequency, *see infra* Part IV.

38. Terje Solsvik, *Norway's Wealth Fund Posts $84 Billion Quarterly Profit*, Reuters (Apr. 21, 2023, 5:42 AM), https://www.reuters.com/markets/europe/norways-wealth-fund-posts-84-billion-first-quarter-profit-2023-04-21/.

39. John Campbell, *How Will Irish Government Spend Corporation Tax Windfall,* BBC (May 14, 2023, 1:52 AM), https://www.bbc.com/news/world-europe-65570824.

40. *Id.*

41. *See* Bearer-Friend, *supra* note 20, at 965–88 (2021).

42. *Id.*

43. *See, e.g.,* Matthew Desmond, *Capitalism*, *in* The 1619 Project: A New Origin Story, Nikole Hannah-Jones, ed. 165 (Nikole Hannah-Jones et al. eds., 1st ed. 2021) ("slavery didn't just deny Black freedom but built white fortunes, originating the Black-white wealth gap that annually grows wider . . ."). The compounded economic consequences of slavery are also invoked by the concept of "'Racial Capitalism.'" Nancy Leong, *Racial Capitalism,* 126 Harv. L. Rev. 2151, 2152 (2013) (Racial Capitalism is "the process of deriving social and economic value from the racial identity of another person"). For an elaborate discussion of this account of racial capitalism, *see infra* Part I. *See also* Carmen Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & Pol. Econ.'y 127, 128 (2022).

44. *See* Carmen Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & Pol. Econ.'y 127, 128 (2022).

Once a tax base has been identified and the form of remittance has been selected, there are still many technical design choices to work out. Identifying these design choices and posing recommendations is one of the major contributions of this Article, moving from the idea of in-kind remittance of equity to a concrete proposal that could be enacted. The eleven design choices that I elaborate further are: the selection of firms that are included; the timing of the contributions; the class of stock to be remitted; whether there is a par value for the stock; whether the stock is convertible; if there is a buy-back option; if there is restriction on resale; the equity formula for firms with multiple classes of stock; the equity amount; the governance of the fund; and any potential registration requirement for the remitted securities. The versatility of in-kind remittance means that there are many different permutations of the proposal that could ultimately be introduced as legislation.

Despite the appeal of in-kind remittance to capitalize a multi-trillion fund, there are of course some challenges. The value transferred to the fund is the result of a dilution in value of the existing shareholders' stake in the impacted firms. Because many of the largest institutions that hold shares are pension funds, many household retirement accounts will lose value. An adoption of this proposal requires accepting this consequence. The value of the fund itself would also be more volatile than a fund with cash holdings or one with a dedicated annual income source.[45] As with the corporate income tax, firms will also try to avoid this new liability.[46] Some of the anti-abuse tools that already exist in the conventional income tax arena would also be available here, but some additional guardrails would be required.[47] One specific backstop on possible gaming of the new reparations tax is to require the new issuances be of identical proportion to existing outstanding classes of stock, so that a firm would not be able to target any dilution toward the specific classes remitted to the fund.[48]

One of the most conspicuous issues with this tax is constitutionality. I do not attempt to answer that question here. In the case of a wealth tax, multiple law review articles are entirely devoted to the specific question of constitutionality—a question that only arises once there is

45. For example, the Social Security Trust Fund or Medicare Trust Fund are impacted by the business cycle due to shifts in wages, but the value of traded firms is more volatile. Criticism of the George W. Bush proposal to substitute Social Security with individual investment in the stock market often focused on this issue.

46. *See infra* Part. V. C.

47. *See infra* Part V. D.

48. *See infra* Part III. C.

an actual proposal to be considered.[49] The ambition of this Article is on the mechanics of the reparations tax proposal. There is also a sufficient body of work on the constitutionality of wealth taxes that could extend to this proposal and provide colorable claims of constitutionality rather than position this idea as a pure thought experiment.[50]

This Article proposes an extraordinary tax that is commensurate with an extraordinary debt. The specific parameters of the tax are that the contributions would be in the form of firm equity rather than cash. This allows for remittance at the scale necessary to repay the debt and could be done rapidly. The requirement that all firms issue a proportion of ownership into a reparations trust fund managed for the benefit of descendants of enslaved people also comports with both the corrective justice and distributive justice foundations for reparations.

This Article proceeds as follows. Part I briefly describes the need for reparations, with an emphasis on the rationales that most directly inform the design choices to structure the financing of the fund and the scale of the problem—the amount of dollars required to adequately repair the harm of slavery. Part II gives an overview of the options available for financing reparations, including but not limited to, taxes. Part III is the heart of the paper and describes the original tax proposal, including eleven distinct design choices in structuring the in-kind remittance to capitalize the multi-trillion dollar fund. Part IV describes other private sector analogs to in-kind remittance, further demonstrating the routine nature of such remittances and the viability of structuring tax payments without cash. This Part IV also discusses the longstanding practice of sovereign wealth funds, wherein public entities hold equity interests in private firms. Part V discusses five potential criticisms of the proposal. After establishing the features of the proposal, its common usage in the private sector, and possible concerns with the proposal, the Article concludes in Part VI by summarizing the appeal of in-kind remittance to achieve reparations in the United States.

49. *See, e.g.,* David Gamage & John Brookes, *Taxation and the Constitution Reconsidered,* 76 Tax L. Rev. 75, 78 (2022); Ari Glogower, *A Constitutional Wealth Tax*, 118 Mich. L. Rev. 717, 717 (2020); Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 Ind. L.J. 111, 111–30 (2018); Calvin H. Johnson, *A Wealth Tax Is Constitutional*, 38 ABA Tax Times 4 (2019); Amandeep Grewal, *Billionaire Taxes and the Constitution*, 58 Georgia L. Rev. 249, 249 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4452626.

50. *See infra* Part V. A.

## I. The Need for Reparations

This Article presumes that reparations for the mass enslavement of Black Americans is a necessary policy goal. Accordingly, this Article does not seek to 'make the case' for reparations as that case is already a premise for this Article. Instead, this Article is about one method for harnessing the financial resources necessary to implement a goal of reparations for slavery—a multi-trillion-dollar endeavor worthy of its own analysis. Nevertheless, different rationales for reparations contribute to different design choices for paying for reparations. The purpose of this Part is to provide a brief overview of the rationales for reparations that most directly inform the design options for capitalizing a reparations fund using in-kind remittance.

The two primary moral foundations for pursuing reparations for slavery are corrective justice and distributive justice. Justifying reparations under these distinct principles of justice relies on different criteria. As Logue summarizes: "the difference between the corrective justice approach—which needs to have the link between present harm and past wrongful act—and the distributive justice approach—which needs only the observation of brute luck inequality."[51]

Under a theory of distributive justice, Logue concludes that "[g]iven th[e] strong correlation between racial status and relative well-being, the egalitarian argument for a substantial program of redistribution along racial lines—in particular, from whites to [B]lacks—is obvious and, in a sense, uncontroversial"[52] and that "there is a prima facie egalitarian case for some level of redistribution."[53] Logue's account of the luck egalitarian justification for reparations is a direct response to the question posed by Posner and Vermeule, demanding that "[s]ubstantive moral considerations must explain why nonwrongdoers—usually taxpayers or shareholders—should pay

51. *See* Logue, *supra* note 10, at 1372.
52. *Id.*
53. *Id.* This case is further based on the cause of the disparity. *See id.* at 1353–54:

> (a) the [B]lack-white wealth gap is probably attributable mostly to differences in patterns of inheritance between black families and white families over the generations, a quintessential example of luck-based inequality; (b) that wealth gap explains much of the overall inequality between [B]lacks and whites (given the importance of wealth on various other measures of well-being); therefore, (c) the overall [B]lack-white well-being gap is also largely an example of endowment-based, or luck-based, inequality.

And just as the harms have been inherited, so too have the benefits of prior unjust holdings.

reparations . . . ."[54] Here, distributive justice demands race-based redistribution from "nonwrongdoers."[55]

Posner and Vermeule's contention can also be addressed from within a theory of corrective justice.[56] A corrective justice approach requires the identification of harm, assigning responsibility for the harm, and estimating the necessary amount to allow for redress.[57] The common contention, then, is that those who did not commit harm themselves cannot be responsible for it. In response, many reparations scholars point to the long legacy of community responsibility to achieve corrective justice: "There is a rich tradition of use of the community's resources to repair damage done, even when there is no fault on the part of the community. . . . There are other precedents as well, for government payments to those who have been injured, or need assistance."[58] For example, the victims of 9/11 were compensated by the federal government out of general revenue, even though the taxpayers whose contributions enabled the compensation were not themselves personally responsible for 9/11.[59]

A theory of racial capitalism contributes to both a corrective justice and distributive justice rationale for reparations. Under racial capitalism, the current distribution of wealth in the United States economy is a direct result of centuries of racial exploitation.[60] Thus, the current value of firms in the United States economy is also derived from this exploitation.[61] A theory of racial capitalism also helps illustrate how corrective justice and distributive justice are not inherently in conflict, and both can overlap as rationales for reparations. A concern with racial capitalism would justify reparations under either corrective justice concerns or distributive justice concerns.

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54. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689, 736 (2003).

55. Logue also accepts race as an appropriate proxy for determining beneficiaries. Logue, *supra* 10, at 1372 (Describing the utility of using race as the primary category for public redistribution policy: "[S]o long as the racial or ethnic category (a) is correlated with differences in well-being, (b) is observable, and (c) is relatively immutable, it has the properties necessary to make it a potentially useful, although possibly politically explosive, redistributive proxy.").

56. A theory of "justice in holdings" also envisions the necessity for reparations for slavery, in that unjust holdings acquired through impermissible means would need to be addressed through some form of state intervention. *See* Robert Nozick, Anarchy, State, and Utopia, 149–53 (1974).

57. *Id.*

58. Daniel M. Filler, Kenneth M. Rosen & Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L., 497, 543 (2003).

59. *Id*.

60. *Id.*

61. An overlapping conception of the racism that is entwined with our economy is "structural racism." *See* Patrick L. Mason, The Economics of Structural Racism 337–41 (2023).

In determining the scope of reparations needed, most proposals address harms that continued even after slavery.[62] This is elaborated in Bittker's evaluation of reparations and Bell's subsequent review: "the racial inequities given legitimacy by government at every level under the 'separate but equal' doctrine of *Plessy* v. *Ferguson* offer more than ample proof of serious post-slavery racial injustice."[63] Inclusion of post-emancipation harms substantially increases the target size of a reparations fund, but all estimates still require trillions of dollars.[64]

Reparations can take many forms, including both monetary and nonmonetary approaches. Reparations can be in the form of "[s]overeignty, land, money transfers, tax breaks, educational scholarships, and medical and housing subsidies."[65] Although not the focus of this Article, nonmonetary approaches include recognition of past harm through some form of apology. This is a core component of the Christian justification for reparations.[66] In the indigenous context, reparations can also mean awarding greater political power and autonomy.[67] Affirmative action has also been conceived as a form of reparations.[68]

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62. *See* Bell, *supra* note 24, at 158. (Noting that most appeals for racial redress focus on slavery, he suggests that the implication that the only issue is the correction of ancient injustice—for which no living person is responsible—stultifies the discussion when, in fact, post-Civil War wrongs are more than sufficient to support today's compensatory proposals.)

For an account of post-emancipation harms in the context of civil produce, *see* Portia Pedro, *Resistance Proceduralism: A Prologue to Theorizing Procedural Subordination*, 80 Wash. & Lee L. Rev. (forthcoming 2024).

63. *See* Bell, *supra* note 24, at 158.

64. Darity & Mullen, *supra* note 2, at 259–65.

65. Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. Rev. 429, 473 (1998).

66. Daniel Philpott, *A Christian Case for Racial Reparations*, presented at Notre Dame Reparations Design and Compliance Lab (Dec. 2, 2022), available at https://arcoftheuniverse.info/wp-content/uploads/2023/04/Philpott-Reparations-April-2023.pdf ("reparations, apology, and forgiveness are components of a political theology of reconciliation, a Christian response to injustices that contains promise for healing our land, which is more divided than it has been in decades."). Reparations are presented as a portfolio of necessary policy initiatives, monetary and not, *in* Dayna Bowen Matthew, Just Health 233 (2022).

67. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 371–72 (1987) ("They request a formal recognition of the illegal destruction of Hawaiian sovereignty and an apology from the United States. They also seek resumption of Hawaiian rule, return of at least part of the lands and presently held by the federal and state governments, and monetary compensation."). Although not described as "reparations," Maggie Blackhawk describes important strategies for protecting minorities via powers rather than rights. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law,* 132 Harv. L. Rev. 1787, 1848 (2019). Such powers could be awarded through a program of reparations for slavery.

68. *See* Bell, *infra* note 75 at 164 ("Indeed, 'reparational,' connoting redress based on past grievances, is probably a more accurate, and certainly a less controversial, term for describing affirmative action programs than 'preferential,' with its emotion-provoking intimation that [B]lacks are being favored over whites simply because they are [B]lack.").

If reparations are monetary, some of the many potential options include cash payments to individuals,[69] payments earmarked for specific purposes,[70] the creation of securities to be held in trust until specified maturation dates,[71] or through investment in Black businesses.[72] All of these expenditures would be possible through the capitalization of a reparations fund. In the following Part, I discuss the financial means available for funding such monetary reparations.

## II. Revenue Options for Reparations

Reparations for slavery will require substantial fiscal outlays. In their landmark contribution to the reparations debate, Darity & Mullen draw from multiple approaches to assess the dollar amount necessary to adequately achieve reparations. They provide a range of estimates, all in the trillions. The lowest estimate is $5.7 trillion, and the highest is $42.2 trillion.[73] This wide range of estimates is the result of different assumptions about the value of property and labor stolen through the institution of slavery and the interest rates used to bring to present values. For example, estimates must determine the value of slave labor in current United States dollars.[74] Another key source of variation is which periods of racial harm are to be corrected. For example, one approach to reparations excludes slavery and just looks at post-emancipation harms.[75] These outlays are estimated to be in the trillions of dollars.[76]

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69. San Francisco Human Rights Commission, *San Francisco Reparations Plan* (Dec. 2022), www.sf.gov/reparations_report_final.pdf.

70. Associated Press, *Evanston Illinois Becomes First U.S. City to Pay Reparations*, NBC News (Mar. 23, 2021), https://www.nbcnews.com/news/us-news/evanston-illinois-becomes-first-u-s-city-pay-reparations-blacks-n1261791.

71. Matthew Lichtblau, *The Viability of Baby Bonds on the Road to Reparations*, Brown Political Review (Oct. 31, 2019), https://brownpoliticalreview.org/2019/10/the-viability-of-baby-bonds-on-the-road-to-reparations/.

72. *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 Harv. L. Rev. 1689, 1709 (2002) ("Prosperous Black-owned businesses, fueled by government subsidies and support, could invigorate the economy of both the local neighborhoods they inhabit and the nation.").

73. *Id*. at 260–262. (discussing different approaches to estimate the amount of reparations). *See also Id*. at 262 (estimating the present value of a promised forty acres of land).

74. T. Craemer, *Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies*, 96 Soc. Sci. Q. 639 (2015).

75. Derrick A. Bell Jr., *Dissection of a Dream*, 9 Harv. C.R.-C.L. L. Rev. 156, 165 (1974) (reviewing Boris I. Bittker, The Case for Black Reparations (1973)) ("Reminding the reader that courts often handle complicated issues concerning the assessment of damages, he suggests that the gap in the comparative earnings of Blacks and whites of the same age is a worthwhile starting point, supplemented perhaps by a formula for determining the measure of emotional injury inflicted by racial discrimination.").

76. Matsuda, note 67 and accompanying text.

Darity & Mullen divide the three options available for financing reparations as: issuing new money, borrowing, and taxes.[77] All three options are discussed below, though they are not comprehensive. In addition to these three options, I also describe a restitution model of financing where only those with traceable connections to slavery are liable for reparations, similar to a tort model.[78] Many of the self-imposed, private-sector attempts at reparations have followed this model, focusing on the entity's direct relationship to the institution of slavery and calibrating a response in proportion to the connection.[79] Additional funding options are to shift funding from other sources and to privatize federal assets.

This Part describes a menu of the primary options to pay for reparations. Because of the scale of funding needed, it is likely that a blend of methods will be necessary.[80] Any downside risks of the tax proposal in Part III can be mitigated by deploying additional methods discussed here. This Article does not foreclose considering additional finance mechanisms in conjunction with in-kind remittances.[81]

## A. Taxing

The government's ability to tax is foundational for its ability to spend.[82] Some have argued that taxation is a precondition for the very functioning of government, including the enforcement of property rights.[83] Political scientists have summarized the centrality of the taxing power for a state's fiscal capacity as follows:

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77. Darity & Mullen, *supra* note 2, at 265.

78. *See* Logue, *supra* note 10.

79. One reason why Darity & Mullen may not have included this in their own menu is that they explicitly state that the federal government is the one responsible and so do not indulge alternatives they view as undesirable.

80. This has already been the case at the local level. Both San Francisco, CA and Evanston, IL rely on a braided funds approach to reparations for slavery. *See* The Task Force to Study and Develop Reparations Proposals for African Americans, The California Reparations Report 571–72 (2023), https://oag.ca.gov/system/files/media/ch15-ca-reparations.pdf; *see also* San Francisco African American Reparations Advisory Committee, San Francisco Reparations Plan 11 (2023), https://sf.gov/sites/default/files/2023-07/AARAC%20Reparations%20Final%20Report%20July%207%2C%202023.pdf.

81. Some may also challenge the notion that reparations need a "pay-for" and should be adopted regardless of the financing mechanism. This Article does not propose waiting for a financing mechanism before demanding reparations, but it does posit that pairing a financing mechanism with reparations can improve the political viability of reparations and the longevity of a reparations program after enactment. The durability of Social Security can be instructive here. *See generally* Paul Pierson, *The New Politics of the Welfare State,* 48 World Politics 143 (1996) (describing the dynamics of retrenchment for social safety net programs).

82. *See generally* Miranda Stewart, Tax & Government in the 21st Century (2022).

83. *See generally* Liam Murphy & Thomas Nagel, The Myth of Ownership (2004).

> A government's power to tax undergirds to a large degree the scope of the country's activities in the other domestic policy areas. Governments must raise revenue to pay for the services they provide, but they can also finance these by going into debt. These options in turn are related to the state's general economic management, since the relative reliance on taxation and borrowing may affect employment and inflation rates.[84]

In the United States, federal taxes yielded nearly five trillion dollars of revenue in Fiscal Year 2022, with the remaining 20% of federal spending financed through debt.[85]

That the total amount of all federal revenue collected in a single year is toward the lower bound of the amount required to fully capitalize a multi-trillion reparations fund points directly at the potential role of a new tax. Taxes already account for the majority of federal funding and likely will account for the majority of spending on reparations since achieving a multi-trillion reparations fund could require a doubling of federal spending in a single year.

A common criticism of the use of tax policy to pay for reparations is the impact on those without direct culpability for chattel slavery being liable for the tax. As one scholar has summarized, "the working class whites whose ancestors never harbored any prejudice or ill-will toward the victim group are taxed equally with the perpetrators' direct descendants for the sins of the past."[86] Some have also noted the intergenerational impact on *future* taxpayers.[87]

The primary rejoinder to a concern with taxing 'the innocent' is that the federal obligation to pay for reparations is independent of any specific funding source, and government obligations are paid for by the citizens of that government. Put simply, "[g]overnments are liable for the judgments issued against them and, unfortunately, they have to

84. Arnold J. Heidenheimer, Hugh Heclo & Carolyn Teich Adams, Comparative Public Policy 183 (1990).

85. U.S. Treasury, *How much revenue has the U.S. government collected this year? U.S. Treasury*, Fiscal Data U.S. Treasury, https://fiscaldata.treasury.gov/americas-finance-guide/government-revenue/#federal-revenue-overview.

86. Matsuda, *supra* note 61, at 372. *See also* Posner & Vermeule, *supra* note 54, at 691 ("A reparations scheme might, for example, effect a transfer from taxpayers to identified individual victims, as in the case of Japanese American reparations.").

87. William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 Am. Indian L. Rev. 1, 80 n. 382 (2002) ("Because they are paid through general revenues, legislative reparations impose financial obligations on all taxpayers, including individuals yet-unborn at the time of the injury . . ."). For additional discussion of this concern, *see supra* Part I.

satisfy those judgments using taxpayer money."[88] Moreover, "[t]axpayers do not have a right to pick and choose among specific governmental expenditures they wish to support; nor should they."[89] The use of general taxes to compensate for past harms to specific groups is also how prior reparations have been paid. For example, the damages paid to Japanese Americans who were held in internment camps during World War II were paid out of general revenues acquired from all taxpayers.[90] Contemporary reparations paid at the local level have also relied on broad tax bases.[91]

A secondary criticism of the use of tax policy to pay for reparations is the impact on the beneficiaries of the fund: "if reparations are drawn from general revenue, beneficiaries who are also taxpayers will pay a part of their own redress."[92] Many advocates of using general revenue to pay for reparations prioritize the urgency of reparations above this minor overlap.[93] On net, the contributions to the fund will be smaller than the benefits awarded to most recipients. And the shared contribution may also improve the reputation of the fund.

A reliance on taxation does not preclude additional revenue sources and is not mutually exclusive with a multi-pronged strategy for capitalizing a reparations fund.[94] The remaining sections of this Part discuss additional funding options that could be combined with the tax proposal elaborated in Part III.

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88. Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DePaul L. Rev. 1181, 1204 (2004).

89. Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations,* 40 B.C. L. Rev. 429, 472 (1998) ("Reparations to Blacks isn't an obligation of the American government for its role in slavery and the violation of Black rights. Government obligations are paid with taxpayer funds."). *See also* Nancy Staudt, *Taxation Without Representation*, 55 Tax L. Rev. 556, 562–71 (critiquing the taxpayer "check-off" system).

90. Tuneen E. Chisolm, Commentary, *Sweep Around Your Own Door: Examining the Argument for Legislative African American Reparations*, 147 U. Pa. L. Rev. 677, 715 (1999) ("the monetary reparations paid to Japanese Americans were funded by the tax dollars of United States citizens.").

91. *See* City of Evanston, Establishing a City of Evanston Funding Source Devoted to Local Reparations, 126-R-19 (2019) https://www.cityofevanston.org/home/showpublisheddocument/80776/638072307707370000 (providing that the City may impose a tax upon all persons engaged in the business of selling cannabis in an amount not to exceed 3% of the gross receipts, other than the compassionate use of medical cannabis).

92. Westley, *supra* note 14, at 472.

93. Verdun, *supra* note 3, at 638 n. 116. (*quoting* Matsuda, *supra* note 67, at 375 n. 217. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 375–76 n.218 (1987) ("To the extent that victims are taxpayers, they will in a sense pay part of their own damages. The significance of setting aside part of the national budget for reparations, however, outweighs the incongruity of this overlap of roles.").

94. *See generally supra* note 77 (describing multiple funding sources for reparations at the local level).

## B. Borrowing

Alternatively, reparations could be funded by deficit spending. This is already the norm for many government outlays.[95] In Fiscal Year 2022, the federal government received 20% of GDP in tax revenue and spent 25% of GDP, leaving deficit spending to cover 20% of annual federal spending.[96] The total outstanding debt of the United States Government is currently $31.5 trillion as of June 1, 2023.[97] While deficit spending has many critiques, there is broader support for one-time outlays, such as emergency spending during a pandemic, and capital projects that create assets of enduring value rather than being immediately consumed, such as infrastructure.[98] The most common type of borrowing by the federal government is to issue securities.[99] This debt, held by the public who purchases them as investments, comprises $24 trillion of the total $31 trillion national debt.[100]

In the context of reparations, Matthew Yglesias has proposed that Congress direct the Federal Reserve to fund Black reparations either in part or in total. As described by Yglesias, "the Fed has vast capacity to provide the funds required for a properly designed and financed reparations program, particularly if the funds are disbursed over the course of three to five years."[101] The Fed could manage an annual outlay of $1.0 to $1.5 trillion, and this funding mechanism would not affect tax rates.[102] A $5.7 trillion issuance added to our current debt of $31.5 trillion would mean that the cost of reparations would be about 15% of the total national debt.[103]

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95. The Committee for a Responsible Federal Budget was formed in 1981 by former congressman worried about deficit spending. Their efforts have only grown over the subsequent forty years. Committee for a Responsible Federal Budget, https://www.crfb.org/about-us (last visited May 31, 2023).

96. U.S. Treasury Dep., *How much has the U.S. government spent this year*, https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/ (last visited Aug. 20, 2023).

97. U.S. Treasury Dep., *Debt to the Penny Data Set,* https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny/ (last visited June 1, 2023).

98. Emily DiVito, *The Scale We Need: How Deficit Spending Can Boost Biden's Infrastructure Investments,* Roosevelt Inst. (May 12, 2021), https://rooseveltinstitute.org/2021/05/12/the-scale-we-need-how-deficit-spending-can-boost-bidens-infrastructure-investments/.

99. Gov't Accountability Off., *America's Fiscal Future: Federal Debt*, https://www.gao.gov/americas-fiscal-future/federal-debt (last visited Aug. 20, 2023).

100. *See* U.S. Treasury *supra* note 97.

101. Darity & Mullen, *supra* note 2, at 266 (*citing* Matthew Yglesias). Darity and Mullen also support financing reparations with debt.

102. *Id*.

103. To many advocates of reparations, 15% of total national debt to compensate for the as yet unpaid debt of slavery is a relatively modest amount. There is also some poetry to this number. African-Americans comprise 16% of the US population, and under this approach, would have a proportionate repayment from the State.

There is an ongoing debate over the macroeconomic effects of deficit spending and the ideal ratio of a government's borrowing to GDP.[104] Additional economic growth from the stimulus to the overall American economy could generate tax revenues to fund the program after it is put into effect.[105] A one-off expenditure, like capitalizing a reparations fund, is also consistent with the scenarios where deficit spending is most broadly supported.

## C. Printing Money

Governments can also finance spending through printing new currency, sometimes referred to as seigniorage.[106] While conventional economic accounts discourage this type of spending because it is assumed to weaken the currency and be a form of dilution on all outstanding currency in the economy, recent scholarship in Modern Monetary Theory has sought to overturn this orthodoxy.[107] Tax scholars have sought to combine the insights of research traditions, concluding that the approach can be desirable under selective circumstances:

> Our key structural recommendations thus turn on what we see as the contingent nature of seigniorage. Opportunities to finance government cheaply without serious inflation risk are like mineral wealth: valuable but limited. We therefore propose institutions that treat monetary finance opportunities much as oil-rich countries treat their oil revenues. And we sketch ways in which central banks can decide when to employ monetary finance, while preserving their independence from political actors who would exploit it for temporary gains.[108]

The one-time capitalization of a reparations fund reduces many of the long-term risks associated with seigniorage.

## D. Shifting Federal Spending

The United States government currently spends 25% of GDP per year.[109] In Fiscal Year 2023, the United States spent $6.13 trillion.[110]

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104. *See, e.g.,* Jim Tankersly, *Debate Weighs Price of Biden Plan vs. Not Acting,* NY Times (Oct. 17, 2021), https://www.nytimes.com/2021/10/17/us/politics/biden-budget-affordability.html (last updated Oct. 19, 2021).

105. Darity & Mullen, *supra* note 2, at 267.

106. *Id.*

107. *See generally* Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, 109 KY. L.J. 229 (2020).

108. Brian Galle & Yair Listokin, *Monetary Finance*, 75 Tax L. Rev. 137 (2022).

109. *See supra* note 77.

110. U.S. Dep't of the Treasury, *How much has the U.S. government spent this year?*, https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/ (last updated Feb. 16, 2023).

A shift in priorities could enable the capitalization of a multi-trillion reparations fund over the course of multiple years. For example, one recurring proposal is to reduce Department of Defense spending in order to direct these funds toward healthcare, housing, education, and climate change mitigation.[111] Pentagon spending is nearly $1 trillion annually, with a substantial growth rate over time.[112]

The pace at which Congress would like to capitalize a multi-trillion reparations fund will decide the amount of annually shifted dollars. A straight-line shift of $500 billion per year would raise $5 trillion in 10 years. The payout timeline from the fund also guides the time pressure on capitalization. If the fund is structured under an endowment model where the growth of the fund is the primary baseline for annual disbursements while the underlying corpus is untouched, delayed capitalization has delayed benefits for beneficiaries.

Other social transfers that have been proposed at the scale of reparations—that is, in the trillions of dollars—consistently look to reducing other spending as a source of funding. This is common in proposals for Universal Basic Income ("UBI") in the United States. Most proposals arrive at multi-trillion in funding by cutting other spending.[113] The same technique is available for reparations funding.[114]

## E. Privatizing Federal Assets

The United States also possesses a vast set of properties, a proportion of which could be transferred to a reparations fund. This has previously been proposed in the context of reparations for indigenous people:

111. Bernie Sanders, *The Pentagon Doesn't Need $886 Billion*, The Guardian (July 24, 2023), https://www.theguardian.com/commentisfree/2023/jul/24/the-pentagon-doesnt-need-886bn-i-oppose-this-bloated-defense-budget.

112. Congressional Budget Office, *Long-term Implications of the 2023 Defense Budget*, Congressional Budget Office (Jan. 11, 2023), https://www.cbo.gov/publication/58579.

113. *See* Sarah Donovan, *Universal Basic Income Proposals for the United States,* Congressional Research Service 2 (Apr. 3, 2018) https://crsreports.congress.gov/product/pdf/IF/IF10865 (citing proposals by Charles Murray and by Andy Stern). *See also* Phillippe Van Paris & Yannick Vanderborght, Universal Basic Income: A Radical Proposal For A Free Society And A Sane Economy (2017).

114. Indeed, in Providence, Rhode Island, COVID grants from the federal government were allocated towards reparations efforts in the city. Gabriella Abdul-Hakim et al., *Providence Establishes Reparations Program to Praise and Criticism*, ABC News (Jan. 31, 2023), https://abcnews.go.com/US/providence-establishes-reparations-program-praise--criticism/story?id=96662287#:~:text=Rather%20than%20direct%20payments%20to,after%20applying%20for%20the%20program; Nicole Chavez & Justin Gamble, *Rhode Island's Capital City Will Spend $10 Million in Reparations, It Could Benefit White Residents*, CNN (Dec. 3, 2022), https://www.cnn.com/2022/12/03/us/providence-rhode-island-reparations-reaj/index.html.

> Compensation at a per capita rate of $10,000 for nearly two million Indians would total $20 billion. Some or all might be paid through grants in fee simple of federal surplus lands and resource rights to Indian tribes [or] [r]evenue-sharing from sales of lease of natural resource rights on former Indian land…[115]

The conversion of publicly held resources to private ownership is consistent with the principle that the responsibility for redressing the harm of slavery is the responsibility of the federal government that protected and enabled slavery.[116] The liquidation of publicly-held assets is the primary funding mechanism for local reparations in Asheville, North Carolina.[117]

## F. Damages

As noted previously, one paradigm of reparations is to pair a specific harm with a specific perpetrator of the harm. This is essentially a tort theory of reparations, where injured parties then receive compensatory damages from tortfeasors to make them whole.[118] This conception of reparations then limits the pool of potential revenue to those entities or individuals directly responsible for the harm. The resulting revenue pool need not be small, however. If the federal government is deemed to be responsible for the harm, then the pool of revenue is as large as the fiscal capacity of the federal government. A conception of unjust holdings that views the current distribution of the U.S. economy as the direct result of compounded harms from slavery would also lead to a broad pool of potential revenue—any person or entity with any wealth at all. Most accounts of a tort theory of reparations are much narrower, however, and generally pessimistic.[119]

One proposal for reparations in this vein is from V. P. Franklin, who would capitalize a reparations fund with "contributions made by institutions and organizations that benefited from slavery, Jim Crow, and

115. William Bradford, "*With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 Am. Indian L. Rev. 1, 171 n.806 (2002).

116. Darity & Mullen, *supra* note 2.

117. Ashley Traynum-Carson, *Asheville City Council Makes Initial $2.1 Million in Reparations Funding Appropriation*, Asheville News (June 8, 2021), https://www.ashevillenc.gov/news/asheville-city-council-makes-initial-2-1-million-in-reparations-funding-appropriation/#:~:text=At%20their%20June%208%20meeting,of%20East%20End%2FValley%20Street; *see* Buncombe County Budget Office, *2023 Recommended Annual Budget in Brief*, at 28, https://www.buncombecounty.org/common/Commissioners/20220519/FY23%20Budget%20in%20Brief.pdf (Buncombe County of Asheville recommended FY2023 investment in reparations total $2 million).

118. *See, e.g.*, Epstein, *supra* note 28 (analyzing the desirability of reparations from the standpoint of tort law).

119. *See* Bittker, *supra* note 23; Epstein, *supra* note 28.

the continued subordination of Black Americans."[120] Logue also describes a series of hypothetical "special taxes" designed to approximate a taxable base limited to those with direct connections to the institution of slavery.[121]

## III. Capitalizing A Multi-Trillion Reparations Fund

The current market capitalization of United States based public companies listed on the New York Stock Exchange, Nasdaq Stock Market, and OTCQX U.S. Market is $46.5 trillion.[122] $31.7 trillion of this total figure is comprised of the top 500 companies.[123] A one-time remittance of corporate equity, using a tax rate that applied to the total amount of outstanding shares of a liable firm, could capitalize a multi-trillion reparations fund within a year. Indeed, any rate above 2.2% would raise over $1 trillion.

This Part moves through eleven design choices necessary for implementing such a reparations tax, including the firms liable, the timing of liability, the form of equity to be remitted, and its amount. Although each subsection makes a recommendation as to the preferred specification for the reparations tax, the broader evaluation of each design feature demonstrates the many potential iterations of this tax proposal. In order to address the newly expanded incentives for a firm to go private as a result of this proposal, the tax would also apply to privately held firms.[124] The applicable rate would be equivalent to the public firm rate,

120. Mary Frances Berry, *We Need a Reparations Superfund*, N.Y. Times (June 9, 2014), *citing* V.P. Franklin, *Reparations Superfund: Needed Now More Than Ever*, 97 J. Af-Am. Hist. 371–75 (2012).

121. *See* Logue, *supra* note 10, at 1338–39 ("For example, imagine a regime of special taxes to be imposed on the descendants of slave owners and slave traders. Alternatively, if such a tax were considered impractical, because of the difficulty of identifying who is descended from slave owners, perhaps a special tax on families whose ancestors lived in the south during the slavery period would be close enough. Or, to make things even simpler (albeit less accurate), a special tax could be imposed on whites living in the south today, or maybe on the state governments that were members of the Confederacy and their current taxpayers. All of these alternative proposals would at least represent an attempt to assign blame roughly to those individuals—or, more accurately, to the descendants of those individuals—who were responsible for, or directly benefited from, the slave trade."). For additional discussion of taxes as source of revenue to fund reparations, *see supra* Part II.F.

122. Total Market Value of the U.S. Stock Market, https://siblisresearch.com/data/us-stock-market-value/ (last visited Nov. 1, 2022). These data are based on the combined values of shares of all the listed companies, a figure that of course changes throughout the course of a since day. "Market capitalization" is the total value of a firm, calculated by taking the share price and multiplying it by the number of outstanding shares.

123. *Id*.

124. While not the central focus of this article, the general features of the tax applied to privately held firms is elaborated *infra* Part V.D. Moreover, one-time taxes generally avoid these incentive effects since there is no advantage to a future change in behavior once the tax has been

and the features of the equity remittances would follow the design of the ULTRA proposal.[125]

## A. Firms Liable for the Tax

In any tax policy design, determining the eligibility of the individuals or entities liable for the tax is a first-order question. The proposed tax is on all publicly traded firms listed on United States exchanges. This could be further narrowed to United States-based firms, to firms initially incorporated in the United States, or both.[126] Under the current United States income tax provisions, firms incorporated in the United States are liable for income tax on both United States-source and foreign-source income. Firms incorporated abroad only have a tax liability on United States source income.[127]

The prototypical taxpayer for this proposal is an incorporated entity that is publicly traded in on a United States exchange. As this Article is just the prototype for a multi-trillion dollar tax, the design features prioritized here are for publicly traded, United States-incorporated firms. Nevertheless, for the proposal to avoid unnecessary market distortions or tax avoidance, the tax must also deal with privately held firms and unincorporated firms, such as large partnerships. The design choices for these firms are discussed in Part V.[128]

## B. Timing of Tax Liability

The reparations tax can be a one-off tax that applies only once, a one-off tax that applies once but also is retained for any newly created firms, or a recurring tax that applies periodically to firms. The first two

levied. The tax can also be levied retroactively. This feature was one of the appeals of the deemed repatriation included in TCJA. *See* commentary on TCJA deemed repatriation.

125. *See generally* Brian Galle, David Gamage & Darien Shanske, *Solve the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth*, 72 Duke L. J. 1257 (2023).

126. *See generally*, J. Clifton Fleming, Jr., Robert J. Peroni & Stephen Shay, *Defending Worldwide Taxation with a Shareholder-Based Definition of Corporate Residence,* 2016 BYU L. Rev. 1681, 1683 (2017) (describing the "unavoidable challenge" that arises when taxing multinationals under an income tax regime).

127. This tax policy choice motivated U.S. firms to "invert" by merging with foreign firms and claiming foreign nationality for federal income tax purposes. *See generally* Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 Brook. L. Rev. 807 (2015).

128. Other proposed taxes on the total value of a firm's market capitalization also rely on "complementary taxes" to address this concern. *See* Gergen, *supra* note 18.

design choices each have appealing qualities. The third possibility, periodic assessments of all firms, should be rejected.[129]

The third possibility has the most obvious conclusion and is worth addressing first. Because the reparations fund is not intended to replace (or even compete) with private investment, a recurring remittance requirement would not comport with the goals of the proposal. There is no intention in this proposal to gradually convert the United States economy to state-owned enterprises through a permanent vesting schedule. Were there to be recurring remittances over an indefinite time horizon, the inevitable consequence would be for the fund to eventually hold a controlling interest in firms. This would directly undermine the goals of the proposal, which envisions an ongoing and thriving private sector of enterprise. Reparations for slavery and reparations for slavery financed through in-kind remittance of corporate equity are not at odds with a private marketplace.

The alternative two design options are more relevant to what might occur should this proposal be adopted. One design option is that it applies to all existing firms. This connects with the underlying rationale that the current distribution of wealth is the direct result of compounded inequality derived from the enslavement of Black people.[130] From the newly reset starting point resulting from the remittances, the debt will have been paid. An additional advantage of a one-off tax liability is that the market disruptions are more limited. While there could be a fear of future legislation, it does not create the same deterrent for private investment that a recurring tax would.

Another design option is that the tax remains in place for all new initial public offerings going forward. This approach recognizes that the debt cannot be paid in full. Many critiques of "apologies" for slavery are that they imply that the harm is now entirely over—there is a false finality.[131]

Another advantage of an ongoing liability for new firms is that this provides for even greater growth of the fund, not just by the appreciation of current assets, but by the regular infusion of new capital.[132] This

129. This is also a clear point of contrast with other wealth tax proposals on corporate equity. *See, e.g.*, Emmanuel Saez & Gabriel Zucman, *Wealth Tax on Corporations*, 2022 Econ. Pol'y 213 (2022) (proposing an annual tax of .2% on corporate stock).

130. *See supra* Part I on justifications for reparations.

131. That the fund would continue to exist after the initial capitalization may help ameliorate this concern. The lifespan of the fund is a separate issue from remittance, and can be required to spend down, can exist until spending is, or have a sustained revenue stream. All options that are common in trust fund arrangements/private foundations.

132. Larry D. Soderquist & Theresa A. Gabaldon, Securities Law 25 (6th ed. 2018).

design choice could also address potential distortions of firms waiting to IPO until after whatever timespan is set for the one-time imposition. A sunset of a ten-year window would encourage waiting till after the window closes.

### C. Common and Preferred Stock

United States stock can be organized into two general classes of stock:, preferred stock and common stock.[133] While both forms of stock represent an ownership interest in a firm and a claim to current and future profits, preferred stock can include additional provisions like expanded voting rights and guaranteed dividend distributions.[134]

In designing the reparations tax, the required remittance could require exclusively common stock, exclusively preferred stock, or some combination of the two. This question has implications for the ultimate value of the reparations fund, the voting rights of the fund, and avoidance opportunities for remitting firms.

If the remittance were limited to common stock, an abuse concern would be that firms would preempt the remittance by allowing all current shareholders of common stock to trade in their stock for some type of preferred stock that could make the common stock issued to the fund worthless.[135] Firms would have an incentive to devalue the common stock and would design new preferred stock shares to achieve this goal.

The preferred structure for the tax is to require remittances in exact proportion to current outstanding shares of both common and preferred stock. That is, if a firm had 100 shares of preferred stock outstanding and 900 shares of common stock, then the new issuances would mirror those proportions, regardless of what the tax rate was determined to be.[136] This approach ensures an equitable impact across different firms, which might have different compositions of preferred stock and thus be disparately impacted by all-common stock or all-preferred stock

133. *Id*.

134. *Id*. at 25–26.

135. For an account of some of the strategies used by managers to dilute the value of stock held by shareholders, *see* Niccolo Calvi, *Toward Shareholder Vote on Equity Issuances*, 10 Am. U. Bus. L. Rev. 1, 23 (2021).

136. At a hypothetical tax rate of 3%, that would mean remitting three shares of preferred stock and twenty-seven shares of common stock. Firms would be allowed to issue the stock directly to the reparations fund or remit shares it repurchased from the market or already held in its Treasury. Because issuing new shares dilutes the value of the remitted stock, while buying back shares and then remitting them does not, the total market cap of the fund can only be estimated in advance of firms making this election. The implications of this distinction are further elaborated *infra* Part III.H on the applicable tax rate.

remittances. This approach also ensures that the remitted shares will retain the same tradability as the already outstanding shares of the firm. Were some bespoke type of share required, firms would have new opportunities to devalue the share class relative to other outstanding shares. By remitting shares of existing classes, there is a guardrail against future devaluation techniques.

### D. Convertible Stock

When a firm issues preferred shares, it must decide whether those shares will be convertible. A convertible share is one that becomes common stock rather than preferred stock upon some pre-determined triggering event specified at the time of issuance.[137] Most commonly, conversion is at the election of the shareholder based on a conversion price set at the time of issuance.[138] Early-stage firms often issue this type of share, luring investors with a preferred dividend payment until the firm is more established and the trading value of the common stock exceeds the value of the preferred shares.[139]

The shares issued to the reparations fund should match the existing ratios of convertible shares already issued by the firm. Rather than require a bespoke issuance with terms specific only to the requirements of the fund, the remitted shares should simply mirror existing outstanding share terms. Hence, firms with as yet unconverted convertible stock already outstanding would remit some such shares to the fund. Firms without outstanding convertible stock would not remit such shares. The fund's overall portfolio would include a mix of convertible and nonconvertible shares.

### E. Par Value

Par values for issued shares are typically set by corporate charter and are the lowest possible price the firm will pay the shareholder for the stock.[140] Hence, par values are not the trading value of the share. They are the amount that the issuer would be required to pay if the

137. Holger Spamann, Scott Hirst & Gabriel V. Rauterberg, *Corporations & Corporate Law,* Univ. of Mich. L. & Econ. Rsch. (July 18, 2020), https://ssrn.com/abstract=3655213. Holger Spamann, Scott Hirst, & Gabriel V. Rauterberg, Corporations & Corporate Law, in Corporations in 100 Pages (2020).

138. *Id*.

139. *Id*.

140. *See* A. A. Berle Jr., *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049, 1056 (1931).

shares were redeemed. The current convention for publicly traded firms in the United States is for par value to be zero or one cent.[141]

For shares issued under the proposed in-kind remittance tax, the par value should match the existing par values of outstanding stock.[142] This is consistent with the goal of making the trading value of any shares remitted to the fund equivalent to shares already held by private investors.

If matching the newly remitted shares to preexisting par values is not pursued, then the par value should be zero for multiple reasons. First, low par value is the current convention, making the securities commensurate with what is typically traded on the open market. A general principle of treating these new issuances as equivalent to any other prior issuances is maintained for each share. Second, the proposal to require in-kind remittance to capitalize the fund rather than cash tax liability is also motivated by a concern with the liquidity of firms liable for the tax. If the issued shares had a high par value and the fund then sought to cash in on that value, the purpose of the in-kind remittance would be undermined and would be more equivalent to a cash tax liability. Third, if a firm were to go bankrupt and be unable to pay its creditors, shareholders with par values greater than trading value could be liable to pay the difference. This outcome would also undermine the goal of capitalizing the fund. For all three reasons, the par value should be set to zero.

### F. Restriction on Resale

Some stock is issued with restrictions on resale. This is especially common with shares issued as consideration in a merger.[143] Typical share restrictions limit the proportion of shares that can be sold over the course of multiple months.[144]

The shares remitted to the Reparations Fund should match the restrictions on existing outstanding shares. The proportion of restricted shares outstanding will be commensurate with restricted shares remitted to the Fund. Most outstanding shares are likely to be unrestricted, meaning the Fund will also have mostly unrestricted shares. If this

141. *Id*. at 1055.

142. Even if a corporate charter required a higher par value, the amount would still likely be lower than the trading value of the share and thus the managers of the reparations fund would not seek to cash in on the share.

143. *See infra* Part IV. A.

144. There are limited exceptions to these restrictions under Rule 144.

approach is not followed, then the shares should all be unrestricted. It is important that the remitted shares are tradeable. This is essential to their value.

## G. Buy Back Options

With all publicly traded stock that is unrestricted, firms can "buy back" the stock, also referred to as "repurchasing."[145] This typically increases the share price of the remaining outstanding stock and has become a preferred form of distributing profits to investors, partially due to the elective tax impact on shareholders.[146] Although the buyback typically increases the value of outstanding shares, because of the realization requirement under federal income tax rules, this increase in value is not taxable to the shareholder until they ultimately decide to sell, whereas a dividend would be taxable the year received.[147] Many shareholders then time their realizations to tax years when they also realize losses, optimizing their after-tax incomes.[148] A shareholder also benefits from the elective tax liability of a share buyback by simply holding onto the stock until death, in which case any built-in gain disappears from income tax liability due to the step-up in basis under section 1014.[149]

Because the shares issued to the fund would mirror the outstanding shares of the firm, most would be unrestricted for sale and could be bought back.[150] Firm managers would decide, based in part on the amount of liquidity available, whether they would like to counteract the dilution created by the in-kind remittance by buying back an equivalent number of shares, either through a tender offer or on the open market. The alternative of disallowing buybacks and instead requiring new issuances to the fund presents additional constitutional issues.[151] Requiring some type of bespoke issuances could also make the shares of these

145. Soderquist & Gabaldon, *supra* note 132.

146. *See* William Lazonick, *Profits Without Prosperity*, Harv. Bus. Rev., Sept. 2014, at 46–55, 46.

147. *See* Eisner v. Macomber, 252 U.S. 189, 203–04 (1920).

148. *See generally* Noel Cunningham, *The Taxation of Capital Income and the Choice of the Tax Base,* 52 Tax L. Rev. 17, 29 (1996–1997) (describing how a sophisticated investor uses losses to offset the gains in their portfolio).

149. 26 U.S.C. § 1014 (2015). For an account of how wealthy individuals take advantage of this benefit through the strategy of "buy, borrow, die," *see* Edward McCaffery, Fair Not Flat (2002).

150. For example, some vesting schedules require the shareholder to maintain their position for a certain period of time. This prohibition on resale is not specific to repurchases by the firm, but applies to any party seeking to purchase the shares.

151. For a discussion of the takings concerns related to this proposal, *see infra* Part V.

issuances vary from most outstanding stock, likely decreasing the value of the shares and undermining the goal of the proposal.

## H. Tax Rate

Just as a corporate income tax rate can be set at many different rates—and has been over its history in the United States—the rate of the reparations tax is not a fixed aspect of the proposal. The proportion of a firm's total equity to be remitted to the fund is an adjustable feature of the design. Ultimately, the enacted rate is most likely to be determined by political factors, but some considerations are worthy of discussion.

First, guiding the selection of a rate would be the total size of a fund that needs to be capitalized. With a target of above $1 trillion, the rate would need to be above 2.2%.[152] A separate question would be whether a flat rate would be imposed or graduated rates. The proportion of equity to be remitted could vary based on the size of the firm or other criteria. A limiting factor on any selected rate is that the proportion of ownership remitted to the fund should not be a controlling interest. This number is not the same for all firms, however.[153] Setting the rate low enough would be one strategy for avoiding this problem.

In Part IV, this Article describes the regularity of issuances for acquisitions of target firms, for employee compensation, and for joint ventures. This is in addition to standard issuances for raising new capital. The reparations tax rate could also be set at an amount that is within the routine median for firms.

## I. Equity Formula

All publicly traded firms keep track of how much outstanding stock they have and the breakdown of the type of stock if there are multiple classes of outstanding stock. The proposed tax rate should apply to each of these outstanding stock amounts as a separate calculation. If a firm decides to make new issuances, the new issuances should mirror

152. *See supra* note 122 and accompanying text.

153. There is no uniform percentage of equity ownership that would constitute a "control" since because a party can achieve control over >50% of voting stock without owning 50% of a firm. In the U.S., the proportion of ownership to be the majority shareholder of a publicly traded firm can be lower than 15%. *See, e.g.,* John C. Coffee Jr., *Liquidity Versus Control: The Institutional Investor As Corporate Monitor*, 91 COLUM. L. REV. 1277, 1309 n.134 (1991). Of course, substantive control of a firm is also not just limited to shareholders. *See, e.g.,* Jeremy McClane, *Reconsidering Creditor Governance in a Time of Financial Alchemy*, 2020 COLUM. BUS. L. REV. 192, 221–24 (2020).

the existing ratios of outstanding stock, with the tax rate applied to each separate class.[154] Since this will likely lead to partial shares, the number of shares remitted should be rounded up to the nearest share.

When determining whether a tax liability has been met, the equity formula will be based on outstanding stock amounts at the time of remittance rather than on a specific date prior to remittance. This prevents a tax advantage for firms with sufficient cash to repurchase stock and remit to the fund rather than issue new shares. If the tax rate simply applied to the current ownership ratios immediately prior to any new issuance, the amount remitted would reflect the dilution of the new issuances and no longer be for the full amount of assessed tax.

An example helps illustrate the importance of this design choice. Firm XYZ has 100 shares outstanding of common stock. A tax is imposed requiring 3% of XYZ's equity to be remitted to the reparations fund. Were XYZ to buy back thirty-three outstanding shares from the open market and then remit these three shares to the fund, 3% of ownership would be remitted. However, were the firm to issue three new shares, the remittance of three shares to the fund would no longer be 3% of ownership, but only 2.91%.[155]

## J. Governance of the Fund

Like many sovereign wealth funds, the reparations fund would be governed by a board.[156] This board could be appointed, elected by beneficiaries of the fund, or comprise a mix of both types of board members. Board members would have fiduciary duties to the fund, and would be subject to enforcement actions by the state or claims brought by beneficiaries of the fund.

In the design of the reparations fund board structure, the underlying priority is self-determination for the beneficiaries of the fund.[157]

154. This approach should mean consistency in the percentage of profit interest transferred, value transferred, and control.

155. This is the difference between 3/100 and 3/103.

156. By contrast, U.S. public "trust funds" are in fact just an accounting mechanism for describing allocated tax revenues, such as the Social Security "trust fund." *See Budget Basics: Federal Trust Funds, Peter G. Peterson Foundation* (2023), https://www.pgpf.org/budget-basics/budget-explainer-what-are-federal-trust-funds. *See also infra* Part IV. B.

157. *See* Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparation*s, 40 B.C. L. Rev. 429, 470 (1998) ("The guiding principle of reparations must be self-determination in every sphere of life in which Blacks are currently dependent. To this end, a private trust should be established for the benefit of all Black Americans. The trust should be administered by trustees popularly elected by the intended beneficiaries of the trust."). The independence of the fund is a consistent priority in reparations efforts. *See, e.g.,* Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice on Trial—Again: African*

Full freedom from the initial bondage of slavery would demand that the management of the fund not be handed over to those initially responsible for the harm. This guiding principle leads to a preferred structure of an elected board that oversees the work of hired professionals paid out of the annual yield of the fund. If the fund is formed prior to the election of the board, a temporary steward could be appointed with limited powers over the fund. Presumably, fund managers would seek to diversify the investments of the fund under the general principles of prudent fund management.[158]

## K. Registration

A longstanding feature of American securities regulation is to require various disclosures that allow investors to make independent determinations about the value of offered shares.[159] One mechanism for disclosure is the securities registration process.[160] The securities remitted to the reparations trust fund could potentially be exempt from registration, consistent with current exemptions for offerings to a limited number of institutions or to the federal government, and could mirror the registration requirements that previously applied to the issued shares that the current remittance are based on, or simply require all securities to be registered.[161]

Based on a variety of factors, registration is the preferred requirement for all issued shares to the reparations fund. This avoids any type of taint associated with the remitted shares that might limit their tradability down the road. Registration also enables public oversight to ensure that firms are not playing games with the remitted shares. Registration could also make existing investors less anxious about dilution by at least informing them of what is going on. An intermediate option that would preserve the nondisclosure of a subset of previously unregistered share classes would be to limit registration to those shares that are remitted in proportion to previously registered shares, while the shares

*American Reparations, Human Rights, and the War on Terror*, 101 Mich. L. Rev. 1269, 1301 (2003) ("... the team aims to secure a trust fund that administers money received through its claims, and an independent commission to distribute those funds to the poorest members of the black community, where damage has been most severe.").

158. *See generally, e.g.*, Uniform Prudent Management of Institutional Funds Act.

159. *See* The Securities Act of 1933 ("An Act To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.").

160. *Id.*

161. For an overview of the types of exemptions for registration under the Securities Exchange Act, *see* Soderquist & Gabaldon, *supra* 132 at 86.

that are remitted in proportion to previously unregistered shares could continue to receive consistent treatment.

## IV. Private and Public Analogs

The private sector regularly relies on non-cash consideration in its transactions, including for executive compensation and corporate mergers. Meanwhile, the public sector—within democratic, capitalist economies—has a robust history of acquiring equity interests in firms in service of public goals. This Part will describe models of private sector firms that rely on in-kind remittances in lieu of cash to successfully create shared value. This Part then describes sovereign wealth funds, wherein a public entity holds interests in private industry. Taken together, the capitalization of a multitrillion reparations fund through in-kind remittance of corporate equity is consistent with longstanding practices in both the public and private sectors, though as yet not directed towards the goals of reparations for slavery.

### A. Private Sector Models

#### 1. Firms Are Accustomed to Issuing Shares and Buying-Back Shares

Issuing new stock is already a routine occurrence for publicly traded firms and does not impose an extraordinary administrative burden on firms. It is common for publicly traded companies to choose to do a follow-on stock issuance after issuing the initial public offerings to acquire additional capital.[162] This is commonly referred to as a second or follow-on offering.[163] Based on statistics provided by a report from the Securities Industry and Financial Markets Association (SIFMA), the respective numbers of deals in secondaries in 2019, 2020, and 2021 were 653, 864, and 897.[164] The number of preferred stock offerings from 2019 to 2021 was eighty-two, eighty-five, and one hundred and one, respectively.[165] If we take the year 2021 as an example, we can see that there were a total of 1290 issuance of common stock (including initial

162. *See* 3A Harold S. Bloomenthal & Samuel Wolff, Securities And Federal Corporate Law Securities and Federal Corporate Law § 8:4 (2d ed. 2023).

163. *See* 1 Harold S. Bloomenthal & Samuel Wolff, Going Public Handbook § 3:1 (2022).

164. Sifma., 2022 Capital Markets Fact Book 53 (July 2022), https://www.sifma.org/wp-content/uploads/2021/07/CM-Fact-Book-2021-SIFMA.pdf. Here, the word "secondaries" means secondary offerings or follow-on offerings in common stock.

165. *Id*.

and follow-on public offerings).[166] The frequency of common stock issued is 1,290 per year in 2021.[167] Using the same approach, we can get the frequency for preferred stock issuance as one hundred one per year in 2021.[168]

In remitting shares to the reparations fund, a firm could also choose to buy-back shares and contribute the purchased shares rather than issuing new shares. Buying back stock is also a routine transaction for publicly traded firms.[169] Based on a series of reports published by Verity, the total price of stock buyback in the year 2021 was $965.8 billion.[170] As for the year 2022, 1,228 companies repurchased shares with a total price of $316.8 billion in Q1.[171] 1,323 companies had stock buybacks with a total price of $272.9 billion in Q2, 2022.[172] 1,192 companies repurchased their shares worth $241.4 billion in Q3 2022.[173] According to an S&P 500 report, 439 companies of the S&P 500 companies repurchased some of their shares in the year 2022.[174]

2. Firms Are Accustomed to Stock-Based Compensation

Equity is also a common form of executive compensation, with both firms and employees preferring to include a non-cash component of their employment contracts.[175] Employee stock options (ESOs) are contracts giving employees and directors the right to buy the company's common stock at a specified exercise price after a specified vesting

166. *Id.*
167. *Id.*
168. *Id.*
169. *See* William Lazonick, *Profits Without Prosperity*, Harv. Bus. Rev. Sept. 2014, at 46, 46–55 (2014). An electronic copy of the magazine article may be found here: https://hbr.org/2014/09/profits-without-prosperity.
170. Ali Ragih, *Stock Buybacks: 2021 Macro Trends*, Verity (Mar. 21, 2022), https://verityplatform.com/resources/stock-buybacks-2021-trend-report/.
171. Ali Ragih, *Q1 2022 Stock Buybacks: Trend Report*, Verity (June 9, 2022), https://verityplatform.com/resources/q1-2022-stock-buybacks-trend-report/.
172. Ali Ragih, *Q2 2022 Stock Buybacks: Trend Report*, Verity (Sept. 13, 2022), https://verityplatform.com/resources/q2-2022-stock-buybacks-trend-report/#:~:text=A%20total%20of%201%2C323%20companies,1%2C400%20companies%20bought%20back%20stock.
173. Ali Ragih, *Q3 2022 Stock Buybacks: Trend Report*, Verity (Dec. 21, 2022), https://verityplatform.com/resources/q3-2022-stock-buybacks-trend-report/#:~:text=Buyback%20volume%20for%20U.S.%20companies,of%20%24316.8B%20in%20 buybacks.
174. S&P Dow Jones Indices, *S&P 500 Q4 2022 Buybacks Tick Up, As 2022 Sets a Record; Proforma Buyback Tax Would Have Reduced Operating Earnings by 0.51% for 2022*, S&P Global Public (Mar. 21, 2023), https://www.spglobal.com/spdji/en/documents/index-news-and-announcements/20230321-sp-500-buyback-q4-final-press-release.pdf.
175. Lucian A. Bebchuk & Jesse M. Fried, *Paying for Long-Term Performance*, 158 U. Pa. L. Rev. 1915, 1923 (2010) (discussing compensation arrangements that usually include stock options, restricted stock, or a combination of the two) ("compensation arrangements usually include stock options, restrict stock, or a combination of the two.").

period.[176] Restricted stock units (RSUs) are vested over time and are typically offered after a private company goes public or reaches a more stable valuation.[177] Equity is especially popular with tech companies, in part because of the high growth rate associated with a startup industry where stock value growth generally outpaces wage growth rates.[178]

The practice of equity compensation has been increasing in popularity over time. In 2012, 15% to 20% of public companies offered stock options to employees within their compensation arrangements, and over 10 million employees received them.[179] In 2015, equity-related remuneration amounted to $30.4 billion, or 12.1% of pre-tax income at the sixty-seven technology companies in the S&P 500.[180] For the twenty-five top-paid CEOs, with packages exceeding $35 million, "equity accounted for 78% of their total compensation" in 2021.[181] On average, stock options made up about 86% of a Silicon Valley startup staffer's net worth in 2023.[182]

3. Firms Are Accustomed to Stock as Consideration in M&A

An all-stock deal, or stock-for-stock merger, is a kind of transaction in which companies pay for their acquisitions with stocks instead

176. James M. Bickley, Employee Stock Options: Tax Treatment and Tax Issues, Congressional Research Service 1 (2012), https://www.everycrsreport.com/files/20120615_RL31458_d3d988bf23a81e2964d264cc23e417339012cf36.pdf. James M. Bickley, Cong. Rsch. Serv., RL31458, Employee Stock Options: Tax Treatment and Tax Issues 1 (2012).

177. Bebchuk & Fried, *supra* note 175; Daniel Lee, *Everything You Need to Know about Stock Options and RSUs*, Harv. Bus. Rev. (Aug. 5, 2021), https://hbr.org/2021/08/everything-you-need-to-know-about-stock-options-and-rsus.

178. *See* Richard Teitelbaum, *Stock-Based Pay on the Rise at Tech Companies*, Wall St. J. (Apr. 12, 2016, 3:57 PM), https://www.wsj.com/articles/BL-CFOB-10287; *see also* Dina Bass, *Microsoft will Boost Pay and Stock Compensation to Retain Employees*, Bloomberg (May 16, 2022, 1:01 PM), https://www.bloomberg.com/news/articles/2022-05-16/microsoft-to-boost-salaries-to-keep-workers-cope-with-inflation (stating that Microsoft Corp. planned to boost the range of stock compensation it gave some workers by at least 25% as "an effort to retain staff."). Daniel Lee offered an example to illustrate how RSUs work for employees. If a company offers an employee a $75,000 cash salary with $20,000 worth of RSUs that vest over the next four years, the employee can expect to receive $5,000 of company stock each year, bringing the cash-plus-stock compensation to $80,000 annually under the assumption that the value of the company stock stays consistent. *See, e.g.*, Daniel Lee, *Everything You Need to Know about Stock Options and RSUs*, Harv. Bus. Rev. (Aug. 5, 2021), https://hbr.org/2021/08/everything-you-need-to-know-about-stock-options-and-rsus.

179. Bickley, *supra* note 176.

180. Teitelbaum, *supra* note 178.

181. Theo Francis, *Pay Packages for CEOs Rise to Record Level*, Wall St. J. (May 15, 2022, 5:30 AM), https://www.wsj.com/articles/ceo-pay-packages-rose-to-median-14-7-million-in-2021-a-new-high-11652607000.

182. Priya Anand, *Startup Workers' Dreams of Big Payouts are Put on Hold*, Bloomberg (Jan. 19, 2023, 7:00 AM), https://www.bloomberg.com/news/articles/2023-01-19/tech-downturn-startup-workers-dreams-of-big-payouts-are-put-on-hold.

of cash.[183] In these transactions, an acquiring corporation issues new shares of its stock to the old shareholders of the target, in exchange for the target. The general features of an all-stock deal include (1) the shareholders of the acquiring company share the risk of stock dilution from the issuance of new stocks, and (2) the acquiring company will generally be "much larger than the target."[184]

In tax law, these transactions are generally referred to as "reorganizations" or "reorgs."[185] One additional advantage of this type of structure for parties to the deal is that it is subsidized by our current income tax rules. In deals where consideration for an acquisition is all stock, the Code allows shareholders to defer any gain on the exchanged stock until future sale.[186]

A recent example of an all-stock deal is Just Eat Takeaway's $7.3 billion acquisition of Grubhub. For the acquisition, new Just Eat Takeaway shares (represented by Just Eat Takeaway American depositary receipts, ADRs) were issued for the benefit of Grubhub shareholders, representing approximately 30% of Just Eat Takeaway's issued share capital.[187] Under the terms of the acquisition, Grubhub shareholders would receive ADRs "representing 0.6710 Just Eat Takeaway.com ordinary shares in exchange for each Grubhub share, representing an implied value of $75.15 for each Grubhub share."[188] As a result, the New York Stock Exchange delisted Grubhub's common stock and suspended the trading of Grubhub's common stock, and then the New Just Eat Takeaway ADRs started to trade under the ticker symbol "GRUB."[189]

In 1998, 50% of the value of large deals over $100 million was paid for entirely in stock, increasing from less than 2% in 1988.[190] In 2017,

183. Alfred Rappaport & Mark L. Sirower, *Stock or Cash?: The Trade-Offs for Buyers and Sellers in Mergers and Acquisitions*, Harv. Bus. Rev. (Nov. 1999), https://hbr.org/1999/11/stock-or-cash-the-trade-offs-for-buyers-and-sellers-in-mergers-and-acquisitions.

184. *See id.*

185. *See* 26 U.S.C. §368(a)(1)(B).

186. *See* 26 U.S.C. 354(a)(1). This provision is regularly criticized as an unnecessary subsidy. *See Yariv* Brauner, *A Good Old Habit, Or Just an Old One? Preferential Tax Treatment for Reorganizations*, 2004 BYU L. Rev. 1, 3–4 (2004); David J. Shakow, *Wither, "C!*," 45 Tax L. Rev. 177 (1990).

187. Press Release, *Just Eat Takeaway.com Completes Acquisition of Grubhub*, Bloomberg (June 15, 2021), https://www.bloomberg.com/press-releases/2021-06-15/just-eat-takeaway-com-completes-acquisition-of-grubhub.

188. Press Release, *JET to Combine with Grubhub*, Financial Times (June 10, 2020), https://markets.ft.com/data/announce/detail?dockey=1323-14573213-0M7T4H9GPM6PP-D87QSELE3M3NF.

189. Bloomberg, *supra* note 187.

190. Alfred Rappaport & Mark L. Sirower, *Stock or Cash?: the Trade-Offs for Buyers and Sellers in Mergers and Acquisitions*, Harv. Bus. Rev. (Nov. 1999), https://hbr.org/1999/11/stock-or-cash-the-trade-offs-for-buyers-and-sellers-in-mergers-and-acquisitions.

all-stock deals took up 22.5% of U.S. public mergers.[191] In 2018, all-stock deals took up 25.7% of U.S. public mergers.[192] 2019 was a "mega year" for mergers and acquisitions, as well as "mega deals" valued at $10 billion or greater.[193] Six of the fifteen mega deals announced and completed in 2019 were all-stock deals.[194] Of all U.S. public mergers in 2019, 32% of them were all-stock deals.[195] With strains on businesses in 2020, all-stock deals.

With strains on businesses in 2020, all-stock deals comprised less than 27% of all completed deal volume.[196] The announced value of all-stock deals varied; for example, Analog Device's $21 billion acquisition of Maxim Integrated Products in 2020 and Uber's $2.65 billion acquisition of Postmates.[197]

Beyond M&A, stock is often used in the joint venture context.[198] Here, two companies may want to collaborate without acquiring each other. In one type of structure, a new entity is created, with one party simply making equity contributions to the new joint venture. This newly created fund then borrows against the shares that are contributed to it to have liquidity for the operations needed.

* * *

The discussion of private sector models contributes to the argument for in-kind remittance in two ways. First, the broad reliance on noncash transfers in the private sector helps demonstrate that limiting tax to cash remittances prevents the public from enjoying the innovation and value creation common in the marketplace. Were firms to stop offering stock to employees or only conduct mergers in cash, we would

191. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Alert, *M&A at a Glance: 2017 Year-End Roundup*, (Jan. 17, 2018), https://www.paulweiss.com/media/3977566/17jan18-maag-yer.pdf.

192. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Alert, *M&A at a Glance: 2018 Year-End Roundup*, (Jan. 17, 2019), https://www.paulweiss.com/media/3978389/17jan19-year-end-maag.pdf.

193. Grace Maral Burnett, *Analysis: U.S. M&A Mega Year in Review*, Bloomberg Law (Jan. 10, 2020, 6:01 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-u-s-m-a-mega-year-in-review.

194. *Id.*

195. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Alert, *M&A at a Glance: 2019 Year-End Roundup*, (Jan. 16, 2020), https://www.paulweiss.com/media/3979255/16jan20-maag-2019-year-round-up.pdf.

196. Grace Maral Burnett, *Analysis: All-Cash M&A Deals are Getting Pandemic Boost*, Bloomberg Law (Mar. 10, 2021, 7:04 AM), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-analysis/XB1H1VO000000?bna_news_filter=bloomberg-law-analysis#jcite.

197. *See Chipmaker Analog Devices to Buy Rival Maxim for about $21 Billion*, Reuters (July 13, 2020, 10:02 PM), https://www.reuters.com/article/us-maxim-intg-m-a-analog-devices/chipmaker-analog-devices-to-buy-rival-maxim-for-about-21-billion-idUSKCN24E14B; *see also* Eric Newcomer, Liana Baker & Katie Roof, *Uber to Buy Postmates for $2.65 Billion to Expand Delivery*, Bloomberg (July 6, 2020, 8:09 AM), https://www.bloomberg.com/news/articles/2020-07-06/uber-to-buy-postmates-for-2-65-billion-to-expand-food-delivery.

198. *See e.g.*, Michael I. Sanders, Joint Ventures Involving Tax-Exempt Organizations, 168–69 (4th ed. 2013).

expect to see a net utility *loss*. Yet this loss is the current baseline for tax policy. The advantages of in-kind transfers that benefit private-to-private transactions can also be useful for public-private transactions, like the capitalizations of a multi-trillion reparations fund. Second, the routine reliance on noncash compensation and noncash consideration in merger deals demonstrates that firms are capable of managing this type of issuance. The requirement to remit equity, while new for the federal government to be imposing, would not be entirely foreign to most firms that nevertheless issue stock regularly. There are existing ways that firms issue stock, and these practices can be the foundation for how a remittance to the reparations fund could be structured.

## B. Public Sector Models

The most common form of public ownership of publicly traded securities is conducted by sovereign wealth funds (hereinafter "SWFs"). Generally speaking, SWFs are "government-owned vehicles that invest domestically or internationally to seek commercial profits."[199] SWFs manage state revenues from natural resource exports, as well as returns from the export of manufactured goods, proceeds of privatization, and foreign exchange reserves.[200] The general features of SWFs are: (1) a SWF is an investment fund rather than an operating company; (2) a SWF is wholly owned by a sovereign government but organized separately from the central bank or finance ministry to protect it from excessive political influence; (3) a SWF makes international and domestic investments in a variety of risky assets; (4) a SWF is charged with seeking a commercial return; and (5) a SWF is a wealth fund rather than a pension fund that is financed by pensioners.[201]

SWFs have grown dramatically in size since the establishment of the Kuwait Investment Authority, an oil-based SWF, in 1953.[202] The Singapore government established non-commodity SWFs to invest its fiscal surpluses outside of the small domestic markets, and in the 1990s, Malaysia followed suit and created an SWF of the same nature.[203] The 1980s and 1990s witnessed downward oil prices, which drove countries

199. Veljko Fotak et al., *A Financial Force to be Reckoned with? An Overview of Sovereign Wealth Funds*, *in* 2 The Oxford Handbook of Sovereign Wealth Funds 17 (2017).

200. Douglas Cumming et al., *Introducing Sovereign Wealth Funds*, *in* 1 The Oxford Handbook of Sovereign Wealth Funds 4 (2017).

201. Fotak et al., *supra* note 199.

202. Alberto Quadrio Curzio & Valeria Miceli, Sovereign Wealth Funds: A Complete Guide to State-Owned Investment Funds 4 (2010).

203. *See id.* at 5–6.

to establish the SWFs fueled by proceeds from natural gas fields and the Norwegian Government Pension Fund.[204] In the late 1990s, the currency crisis made East Asian countries systematically accumulate foreign exchange reserves to be allocated to new SWFs that were able to prefer yields over liquidity, and in 2004, the total assets held by SWFs were estimated at $895 billion.[205] Following the 2008 financial crisis, SWFs substantially contracted and rebounded to be the major players in the international financial markets.[206]

The number of SWFs has grown steadily over the past two decades from sixty-two funds in 2000 to one hundred and twenty-five by 2012 to one hundred and seventy-six in 2023.[207] In 2022, major SWF holdings include private equity (72.53%), real estate (10.73%), infrastructure (5.15%), public equities (10.73%), and fixed income and treasuries (0.86%).[208] Currently, the largest SWF is Norway's $1.4 trillion SWF, which is a commodity-based SWF with revenue from Norway's large oil and gas industry. It received $217 billion crowns in fresh government funds during the first quarter of 2023.[209] As of March 31, 2023, 70% of the Norway Government Pension Fund Global's assets were held in stocks, while 27.3% was in fixed income, 2.4% in unlisted real estate, and 0.1% in unlisted renewable energy infrastructure.[210] The $853 billion Abu Dhabi Investment Authority's ("ADIA") SWF is the fourth largest SWF in the world.[211] ADIA is one of the biggest investors in US real estate, and it also invested in German railcar lessor VTG AG, North American energy, and Indonesia's biggest internet firm, GoTo Group.[212] Although the United States does not have a federal sovereign wealth fund, there are some state funds (also known as "permanent funds"), including the Alabama Trust Fund, Texas Permanent School Fund, Permanent Wyoming Mineral Trust Fund, New Mexico State Investment Council,

204. *See id.* at 6.
205. *See id.* at 8–9.
206. *Id.* at 13.
207. William L. Megginson, Asif I. Malik & Xin Yue Zhou, *Sovereign Wealth Funds in the Post-Pandemic Era*, J. Int'l Bus. Pol'y 1, 6 (2023).
208. *See id.* at 8.
209. *Top 100 Largest Sovereign Wealth Fund Rankings by Total Assets*, Sovereign Wealth Fund Inst. https://www.swfinstitute.org/fund-rankings/sovereign-wealth-fund (last visited Jan. 13, 2024) (the total assets of Norway Government Pension Fund Global is $1,477,729,733,526); Terje Solsvik, *Norway's Wealth Fund Posts $84 Billion Quarterly Profit*, Reuters (Apr. 21, 2023, 5:42 AM), https://www.reuters.com/markets/europe/norways-wealth-fund-posts-84-billion-first-quarter-profit-2023-04-21/.
210. Solsvik, *supra* note 209.
211. Sovereign Wealth Fund Inst., *infra* note 213.
212. Nicolas Parasie, *Abu Dhabi's Biggest Wealth Fund is Pushing Deeper into the US*, Real Estate, Bloomberg (Oct. 27, 2022, 2:00 AM), https://www.bloomberg.com/news/articles/2022-10-27/abu-dhabi-s-biggest-wealth-fund-is-pushing-deeper-into-the-us-and-real-estate.

and the Alaska Permanent Fund Corporation.[213] The largest one is the $77.63 billion Alaska Permanent Fund Corporation, which has investments in equities ($27.76 billion), fixed income ($14.42 billion), private equity ($10.83 billion), real estate ($6.87 billion), hedge funds ($5.32 billion), infrastructure, and natural resources.[214]

Critics have raised several concerns about sovereign wealth funds. First is the uncertainty stoked by SWFs' non-transparency of their sizes or holdings, which constitutes a large blind spot in the markets for potential large price movements.[215] Second, is the concern of detrimental impact on the host company's capitalist system and national security from SWFs' direct investments like acquisitions of controlling stakes in domestic companies in the United States.[216] This concern originates from the idea that SWFs were thought to be potential tools of state capitalism to secure stakes in strategic areas such as telecommunications and energy resources.[217]

Scholarship notes the economic benefits of welcoming SWFs achieved by giving foreign nations a stake in United States domestic welfare, which in turn increases the economic gains from trade.[218] Following the economic benefits, welcoming SWFs also has political benefits because the level of economic dependency would encourage foreign countries to take steps that compromise the position of the United States.[219] As a tool for macroeconomic purposes, sovereign wealth funds can solve economic problems based on their policy objectives, such as stabilizing budgets for commodities and transforming resources into financial assets.[220] Some have argued for establishing a sovereign wealth

213. *Does the United States Have a Sovereign Wealth Fund?,* Sovereign Wealth Fund Inst. (Aug. 12, 2021), https://www.swfinstitute.org/news/87828/does-the-united-states-have-a-sovereign-wealth-fund.

214. *Alaska Permanent Fund*, Pitchbook, https://my.pitchbook.com/profile/11543-95/limited-partner/profile#asset-allocation (last visited Nov. 2023).

215. Simon Clark et al., *The Trouble with Sovereign-Wealth Funds*, Wall St. J. (Dec. 22, 2015, 9:04 PM), https://www.wsj.com/articles/the-trouble-with-sovereign-wealth-funds-1450836278.

216. *See* Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 Stan. L. Rev. 1345, 1349 (2008) (arguing regulation on "government attempts to ensure that company-level behavior results in country-level maximization of economic, social, and political benefits"); Lawrence Summers, *Funds That Shake Capitalist Logic*, Fin. Times (July 29, 2007), https://www.ft.com/content/bb8f50b8-3dcc-11dc-8f6a-0000779fd2ac (ringing bells by asking the effects of owning foreign stakes through SWFs' direct investment on the host company).

217. *See* Paul Rose, *Regulating Strategic Sovereign Wealth*, 48 BYU L. Rev. 1345, 135 (2023).

218. Richard A. Epstein & Amanda M. Rose, *The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow*, 76 U. Chi. L. Rev. 111, 131 (2009).

219. *See id.* at 132–33 (noting that denying SWFs would cost the U.S. to lose the opportunity to strengthen peaceful ties with the holding nations).

220. *See* Rose, *supra* note 217, at 1354–56.

fund in the United States to support businesses and individuals through (1) bailouts for struggling companies and (2) distribution of profits to individuals and small businesses during the pandemic.[221] A reparations fund, capitalized through the in-kind remittance of equity in publicly traded firms on United States exchanges, could mirror the many successes of the many thriving sovereign wealth funds already in operation.

## V. Challenges

This Part describes a series of potential challenges to the proposed reparations tax. Each challenge, while worthy of consideration, is insufficient to overcome the enormous need for reparations.

### A. Constitutionality

The constitutionality of wealth taxes is a question unto itself; entire law review articles are written on that one specific concern.[222] Given the scale of technical work required to propose a multi-trillion dollar tax proposal, this Article does not attempt to resolve the constitutionality of wealth taxes. Nevertheless, this subsection describes some of the contours of the constitutional analysis relevant to the design of the reparations tax.

One initial matter in assessing a new reparations tax proposal is determining whether the new obligation to remit would be imposed under the taxing power or some type of regulation under the police power.[223] If imposed under the taxing power, the received funds would need to be for the general welfare.[224] Confiscation of private property is more difficult under police power but is permissible under narrow circumstances.[225]

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221. *See* Nir Kaisser, *The U.S. Would Benefit from a Sovereign Wealth Fund*, Bloomberg (May 1, 2020, 6:00 AM), https://www.bloomberg.com/view/articles/2020-05-01/coronavirus-u-s-would-benefit-from-a-sovereign-wealth-fund.

222. *See supra* note 49.

223. Some have argued that reparations through a tax would receive more favorable constitutional scrutiny than reparations through affirmative action. *See* Posner & Vermeule, *supra* note 54, at 714 ("Imposing the costs of the [reparations] scheme on (some class of) taxpayers, rather than on applicants for jobs or places in educational instructions, enables reparations schemes to sidestep the most serious constitutional objections that lie against remedial affirmative action schemes.").

224. *See* U.S. Const. art. I, § 8, cl. 1.; Nicol v. Ames, 173 U.S. 509, 515 (1899) ("The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.").

225. *See* Joseph J. Darby, *Confiscatory Taxation,* 38 Am. J. Comp. L. 545, 546–47. ("Confiscation is an exceptional but constitutionally permissible method to achieve public policy goals. It is

By some accounts, "the courts see no constitutional impediment to extensive Congressional use of the commerce and taxing power to regulate and suppress a wide range of national and local activity."[226] Ambiguity over this limit, however, also calls for reform.[227] Others have argued that "Congress has virtually plenary power to establish a program of Black reparations."[228] Reparations are also potentially a requirement under an expansive reading of the public debt clause of the 14th Amendment.[229]

The tax could also potentially be categorized as an excise tax on the issuance of securities rather than a direct tax on property, with the taxable base being the total value of outstanding shares. The constitutionality of excise taxes is generally uncontroversial, with such taxes designed as *ad volorem* or per unit.[230] Here, the excise tax is *ad valorem*, based on the value of the outstanding shares of the firm liable for the tax.[231]

Two additional design choices could assist in inoculating the tax from constitutional challenges. First, the tax may be less likely to be deemed a taking if the tax allows firms to choose whether to issue new stock, buy back stock, and then remit the purchased shares, or contribute the cash value of the assessed equity. Second, the tax legislation could include some type of "fallback" that is triggered in the event that

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reserved for extraordinary circumstances such as war, national emergency, pestilence, conflagration and certain types of organized and acquisitive crime. In such situations a legislative decision is made that the government should exercise the police power to take away or destroy without compensation private property that, left in the proprietor's hands, poses an unacceptable risk to the common good.").

226. *Id.* at 552 n.32 (citing Wickard v. Fillburn, 317 U.S. 111 (1942); Sonzinsky v. United States, 300 U.S. 506 (1937); United States v. Sanchez, 340 U.S. 42 (1950); United States v. Kahringer, 345 U.S. 22 (1953); Zwak v. United States, 848 F.2d 1179 (1988)).

227. Ann Norton Gale, *The Limitless Federal Taxing Power*, 8 Harv. J. L. & Pub. Pol'y 591, 592 (1985) ("Relying solely on elected officials to halt excessive taxation. If existing constitutional provisions fail to provide workable standards, we should consider this fact in evaluating the need for future constitutional amendments.").

228. Bittker, *supra* note 23, at 85.

229. Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 Tulsa L.J. 561, 612 (1997). ("For example, some might argue that the Clause provides support for mandating reparations for descendants of slaves, though the Framers did not contemplate this result, which would require that one consider moral obligations to be part of the public debt.").

230. For a description of the wide range of excise taxes already in force in the U.S., s*ee* Joint Committee on Taxation, Overview of the Federal Tax System as in Effect for 2023 (May 22, 2023), https://www.jct.gov/publications/2023/jcx-9r-23/.

231. Alternatively, the tax might be compared to the fifteen states that apply a capital stock tax to corporations in their taxing jurisdiction, basing the tax on the net worth of the company. Janelle Fritts, *Does Your State Levy a Capital Stock Tax?*, Tax Foundation (Mar. 24, 2021), https://taxfoundation.org/data/all/state/state-capital-stock-tax-2021/.

the initial legislation is struck down.[232] This helps deter litigation and also ensures reparations even if the first-choice tax instrument must be replaced.

### B. Volatility of the Fund

A fund capitalized with equity in publicly traded securities will be subject to the volatility of the stock market. While this market has demonstrated reliable growth over time, there are also regular shocks. Nevertheless, there are many ways that fund managers can deal with the potential risks of market downturns. Most importantly, the fund would diversify beyond just the stocks initially remitted. A portion of stocks would be sold or borrowed against to then purchase bonds, treasuries, and other investments. Managers could also seek hedges by fixing prices using derivatives.

Were the fund initially capitalized with cash, a prudent manager would also pursue a similar strategy of diversification, as the pressures of inflation and the time value of money would necessitate seeking a higher return above holding only cash. The other alternative baseline to capitalization with equity is a dedicated tax revenue stream, like a flat tax on wages that currently funds the Social Security Trust Fund. This choice is also somewhat unstable to the extent that wage revenue or another dedicated tax base is impacted by the business cycle. All tax-based revenue sources will have some volatility.

### C. Avoidance

Tax avoidance and tax evasion of the corporate income tax are common. Many of the techniques are well established, while new innovations continue to be motivated by the ongoing financial reward of not paying taxes. There is a substantial gap between the statutory rate of corporate income tax liability versus the effective tax rate.[233] Much of this tax avoidance is facilitated by cross-border tax planning.[234]

232. Neil Buchanan, *Can We Tax Wealth*, VERDICT (Feb. 7, 2019), https://verdict.justia.com/2019/02/07/can-we-tax-wealth-yes-and-even-if-not-still-yes.

233. Matthew Gardner & Steve Wamhoff, *55 Corporations Paid $0 in Corporate Taxes*, INST. FOR TAX'N AND ECON. POL'Y (Apr. 2, 2021), https://itep.org/55-profitable-corporations-zero-corporate-tax/.

234. *See* Kimberly Clausing, *The International Agreement of 2021: Why It's Needed, What It Does, and What Comes Next?*, PETERSON INST. (Apr. 18, 2023).

A concern with avoidance is one justification for our two-tiered tax at both the corporate and shareholder level.[235]

The planning, avoidance, and evasion of the corporate tax are reminders that the baseline for evaluating a new multi-trillion dollar tax liability is not a world of total compliance. Nevertheless, potential revenue losses through avoidance or evasion should be anticipated and preempted, where possible.

Because the shares remitted to the fund will be in proportion to all the outstanding shares already issued, delaying dividends or avoiding buybacks would not effectively target the fund relative to other investors. One possible risk is some kind of stock split game where a firm seeks to reduce the value of the shares in the fund without issuing new ones to the fund. This reduction in value might occur through some type of recapitalization or new issues of debt to get value out of the firm. Because the vast majority of shares will not be held by the reparations fund, the shares in the fund will precisely match the proportion of outstanding shares, and firms will have difficulty targeting the fund relative to other shareholders who will also be holding the firm accountable.

If the adopted reparations tax does not have a complementary tax for non-publicly traded firms, there will need to be some type of exit tax for firms that choose to leave the United States exchange or go private. If the reparations tax includes privately held businesses, there will also need to be a rule that on dissolution, a proportion of assets have to go to the fund since there are closed-end funds with limited life. This type of structure is common in real estate.

Many of the anti-abuse doctrines in tax, enacted and applied long before this reparations proposal was even conceived, could also still cover many of the types of games that taxpayers might pursue. The IRS is already used to wack-a-mole of tax shelters, and so existing rules have already had to be versatile and durable rules across time.

### D. Market Effects

One expected effect of a required remittance of equity from all publicly traded firms to a new reparations fund is that firms would now have a greater incentive to be privately held. This does not replace the primary driver for choosing to be public, however.[236] The scale of capital

235. *See* David M. Schizer, *Between Scylla and Charybdis: Taxing Corporations or Shareholders (or Both)*, 116 Colum. L. Rev. 1849 (2016).

236. *See* Soderquist & Gabaldon, *supra* note 132, at 25. ("Perhaps the best reason the owners of a privately held company take it public is to "cash in" by selling some of their stock.").

investment available for a publicly traded firm listed on a United States exchange is not interchangeable with the capitalization options for private firms. After an IPO, however, this incentive isn't as strong, and there is a risk of a large exodus to other exchanges or to going private.

The new incentive to go private would be in addition to the pre-existing benefits of being privately held. Some of the disadvantages of being publicly traded are the overhead expenses, the required disclosure of information, the limits on freedom of action, and the income expectations for present quarterly earnings rather than long-term growth (this is described by some as 'short-termism').[237] It is not uncommon for firms to go from publicly held to private, even without the added incentive of a new reparations tax.

The most effective strategy for removing the new incentive to be privately held would be to create parity between the impact on private and public firms. This parity could be achieved in multiple ways. First, the notional interests required under the ULTRA proposal could be deployed for all firms that aren't publicly traded.[238] A second approach would be to require some type of mirrored ownership interest to the current outstanding interests in the privately held firm. Just as the primary proposal requires issuances commensurate with existing outstanding shares, the existing ownership structure would need to be mirrored in a proportionate term with identical partnership or membership agreements that already exist. Third, although not equivalent, a complementary tax could require payment in cash. It would be challenging to value the firm against the tax rate that would be applied and would need to be paid out over time to deal with liquidity challenges, but this approach would address the incentive issues since now there is a deterrent to avoiding the in-kind remittance by taking a firm private.

The reparations tax could also impact the appeal of future listings on the United States exchange. Current listings would not be impacted since the tax imposed could be retroactive to a certain date. This deterrent would be weighed against the appeal of United States capital markets. One of the top deal firms in the United States, Skadden, Arps, Slate, Meagher, & Flom LLP ("Skadden"), describes the incentives as follows:

> Active trading, superior liquidity, attractive valuations for growth companies, and a deep pool of sophisticated investors have made the New York Stock Exchange and Nasdaq desirable listing venues for many international companies in a range of sectors, including

237. *Id.* at 29–30.
238. *See* Galle, Gamage & Shanske, *supra* note 125.

technology, consumer goods, education, pharmacology, biotechnology, oil and gas, and shipping.[239]

According to Skadden, the United States is "the destination of choice for many non-U.S. companies."[240] Moreover, the impact of the reparations tax is speculative relative to the known advantage of listing on U.S. markets. The disincentive would also be counterbalanced by the macroeconomic effect of public investment in the Black community at a scale never seen in the United States.

The dilution of the new issuances would also impact earnings per share ratios, important for executive compensation packages and for firm trading value. But because this tax would be imposed on all publicly traded firms equally, there is no competitive disadvantage to any one firm. That is, all EPSs would be affected to the same degree, so the relative firm position on EPS would not change.

### E. Contract Claims and Shareholder Actions

Because the capitalization of the fund through the in-kind remittance of equity is expected to dilute the value that other stakeholders have in the firm, those impacted by the dilution will look for ways to bring claims against any new issuances to prevent the dilution. Firms may have pre-existing contractual obligations, or obligations in their own firm bylaws, that scope the type of equity that can be issued and when. For example, lenders may have acceleration clauses if new equity is issued by the borrower. Investors may have enforceable assurances about voting power. Executives may have negotiated certain terms of employment tied to their equity interests. Each of these arrangements could produce litigation risk in the event of a compulsory issuance of new equity. The resolution of any claim will depend on the specific pleas that are made. That the issuances were the result of a federal mandate should mitigate much of the litigation risk.[241]

239. Ryan J. Dzierniejko et al., *Key Considerations for Non-US Companies Listing in the US,* SKADDEN (June 17, 2020), https://www.lexology.com/library/detail.aspx?g=127915be-4302-4d45-88ae-fe5e6bd5f6b4.

240. *Id.*

241. For example, under the Mandatory Reparation Tax enacted as part of the Tax Cuts and Jobs Act, a one-time tax was imposed on corporations through a deemed repatriation. This tax liability produced litigation challenges related to the constitutionality of the tax, but the defendant was the U.S. Government, not the firms who remitted payment. *See* Moore v. United States, 36 F.4th 930, 938 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023).

### F. Non-Financial Harms

An additional limitation of the proposal to capitalize a multi-trillion reparations fund is that it is principally focused on the financial harms associated with slavery and financial compensation for those harms. For example, the dollar amount of the fund could be based on the current scale of the Black-White wealth gap, and direct transfers from the fund would close that gap.[242] Although these are extraordinary harms as yet without redress, the intergenerational trauma and dignitary harms of pervasive anti-Black racism descending from slavery are also substantial harms that may not be fully addressed with cash transfers. The ongoing mortality crisis for Black mothers is an additional example of contemporary harms not directly calculated in the estimation of the Black-White wealth gap or not fully addressed through cash payments.[243] Ultimately, the directors responsible for managing the fund and the beneficiaries who play a role in deciding on the distribution of the funds may decide to consider these broader harms. Congress enacting legislation to recognize the atrocity of slavery and provide for its redress may also be part of the repair of dignitary harms.[244]

## VI. The Appeal of In-Kind Remittance for Reparations

This Article has proposed a strategy for capitalizing a multi-trillion reparations fund in less than a year. The advantages of this proposal span multiple criteria.

First, the reparations tax is at the scale necessary to quickly achieve a multi-trillion capitalization. As noted previously, even a 100% tax rate on all corporate profits would not achieve this. The total value of all publicly traded firms on United States exchanges provides an enormous tax base. Market capitalization in the United States is consistently larger than gross national income, making it a larger taxable base.[245]

Second, because the proposed tax base is so large, the required tax rates to achieve a fixed revenue target can be relatively low. Under conventional tax policy principles, lower rates are generally preferred

242. Darity & Mullen, *supra* note 2, at 263.

243. *See* Dayna Bowen Matthew, Just Health (2022).

244. *See* Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 Geo. L.J. 1263, 1266–67 (2021).

245. *Global Market Cap to GDP Ratios By Country*, Siblis Research https://siblisresearch.com/data/market-cap-to-gdp-ratios/ (last visited Aug. 15, 2023). As is further discussed in *supra* Part III. B, this Article proposes a one-time tax, so the GNI of a single year is the relevant comparison base rather than ten years of GNI as a possible taxable base for an annual tax.

because they produce less distortion in economic behavior.[246] The one-time nature of the tax also limits the market distortions associated with the tax, principally impacting economic choices already made rather than new firm decisions.[247]

Third, the low tax rates allowed by the large tax base improve the political appeal of the proposed reparations tax.[248] This public appeal is also furthered by the fact that the nominal taxpayers for the new liability are generally disfavored groups: large, multinational corporations listed on Wall Street exchanges.[249] Many of the shareholders who will be impacted by the subsequent dilution will also be outside of the United States altogether.

Fourth, the tax has a progressive incidence since it dilutes the value of current shareholders in publicly traded firms. These shareholders are at the highest end of the income spectrum.[250] Hence, this tax proposal satisfies both a pursuit of progressivity as an end in itself or progressivity as a single criterion among many for evaluating tax policy.

Fifth, from an administrative standpoint, in-kind remittance does not create the liquidity issues of cash tax liabilities or the valuation issues associated with wealth taxes. Because the remittance is modeled after the private sector, the issuance procedures are routine for the taxpayer and do not require substantially new overhead costs.[251] This alignment of the reparation fund's interests with that of private shareholders also helps reduce non-compliance. Investors know how to get paid, often much more effectively than the federal government. If both private and public investors have the same equity interests, then the factors that ensure holders of capital get their cut can also be used by the

246. This effect on behavior and its aggregate effect on the economy is typically categorized under the tax policy criterion of "efficiency." *See, e.g.* N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. Econ. Persps. 147, 150 (2009). *But see* Jeremy Bearer-Friend et al., *Taxation & Law & Political Economy*, 83 Ohio St. L. J. 471 (2022) (describing the critiques of efficiency as a criterion for evaluating tax policy).

247. For a discussion of the advantages of one-time taxation, such as deemed repatriation, *see* Edward Kleinbard, We Are Better Than This: How Government Should Spend Our Money (2014).

248. For an example of how politicians are able to use low rates to make potentially radical tax proposals broadly appealing, consider Senator Warren's description of her wealth tax as "just two cents" on every dollar above $50 million. Greg Rosalsky, *Wealth Tax Showdown*, Planet Money, National Public Radio, (Oct. 1, 2019), https://www.npr.org/sections/money/2019/10/01/765736947/wealth-tax-showdown.

249. Of course, the ultimate distributions from the fund will also impact the level of public support. *See* Thomas Craemer, *Framing Reparations*, 37 Pol'y Stud. J. 275–298 (2009).

250. *See supra* Part III. H on tax rates.

251. *See supra* Part IV. A on private sector analogs.

state.[252] The vast majority of shareholders are now watchdogs to make sure that the reparations fund is receiving its apportioned returns.

And lastly, even if, in some cases, cash is preferred to in-kind remittance, cash remittance remains an option. The proposal does not require new issuances to the reparations fund because the treasurer of the liable firm can simply buy the stock back from the open market and remit the repurchased shares. This makes the possible dilution *elective*.

Should the federal government fail to enact a reparations program, the private sector could independently pursue the capitalization of a reparations fund through in-kind remittance of equity. One appeal to investors for this approach is that such remittances, often given in-kind, would be eligible for the charitable deduction.[253] Although corporate giving is at times challenged by shareholders as a breach of fiduciary duty, corporate philanthropy is regularly upheld by courts as covered by the Business Judgment Rule.[254] This is due in part to the deductibility of the contributions and the long-term corporate goodwill created by the donation.[255] As part of the corporate sector's continued response to the urgency of the Black Lives Matter movement, companies could pursue a shared effort to electively capitalize a reparations fund following the terms of this Article.[256]

## VII. Conclusion

This Article has provided a unique tax policy tool for capitalizing a multi-trillion reparations fund. The level of detail provided in this proposal also contributes to the broader literature demonstrating the

252. An additional administrative convenience of the proposal is that much of the compliance obligation is managed by firms rather than the IRS. While the terms of the shares would need to be reviewed, the remitted shares would just mirror preexisting issuances. The information gathering and structuring of the remittance would be done by firms and the IRS would solely be responsible for checking that the distributed shares match the outstanding shares based on the documentation provided by the liable entity.

253. I.R.C. Section 170.

254. *See, e.g.,* Hanrahan v. Kruidenier, 473 N.W.2d 184, 188 (Iowa 1991) ("We find the gift well within the ambit of the business judgment rule and agree with the trial court's rejection of plaintiffs' challenge to the gift of the artwork.")

255. *Id.*; *see also* Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare & Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 Cornell L. Rev. 1195, 1226 (1999) (explaining that "The law's general refusal to interfere with philanthropic decisions within the firm is tolerable as well, given the overall benefits of philanthropy to the firm, the general sense that profit maximization motivates most philanthropy, and the difficulty of distinguishing profit maximization from utility maximization.").

256. For an account of recent efforts by the private sector to respond to the Black Lives Matter Movement, *see generally* Tom C. W. Lin, The Capitalist & The Activist: Corporate Social Activism and the New Business of Change (2023).

viability of a federal reparations program at the scale required to address the enduring harms of slavery that continue to define our social and economic life. Unlike scholars that have sought to justify reparations, or scholars that seek to estimate the necessary size of reparations, this Article offers a proposal for how such reparations funds can be collected. Under the terms of this proposal, our federal government could successfully capitalize a multi-trillion reparations fund in less than a year.

# A History of Fruit of the Poisonous Tree (1916–1942)

Daniel Yeager*

Earl Warren Professor & Associate Dean of Faculty Research
California Western School of Law
619-807-9240
dby@cwsl.edu

Abstract: This is a history of a little-known stage within an otherwise well-known area of criminal procedure. The subject, "fruit of the poisonous tree," explains the exclusion from trial of evidence (the fruit) derived from unconstitutional police practices (the tree). The Supreme Court first deployed the metaphor in 1939; exclusion of fruits by any other name, however, dates to before the Court began reviewing state convictions. While academic interest in the 1963-to-present phase of fruits is keen, the first quarter of what is now a century of history is taken as given, described in only the most conclusory terms. The 1916–1942 era began with a recently expanded federal criminal law, followed by an expanded review of convictions in the Supreme Court, whose energies Prohibition would divert to other issues of enforcement. As a result, development of fruits doctrine was taken up by the lower federal courts, led by the Second Circuit, which in turn was led by Judge Learned Hand. As the first to articulate the admissibility of so-called derivative evidence (as in copies of illegally seized papers), Hand & Co. were ahead of their time, extending their insights to related matters (harmless error, standing), some of which remain undeveloped to this day (as in evidence derived from coerced confessions). Mostly, the Second Circuit manifested a sensibility toward fruits that is distinct from the wooden, causal, torts-based angle the Supreme Court would come to adopt.

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## Introduction

The Supreme Court's exclusionary rule is a restitutionary remedy that prevents prosecutors from deriving adversarial gains from police wrongdoing.[1] Shot-through with exceptions,[2] the rule—where it still applies—excludes as "fruit of the poisonous tree" any evidence sufficiently traceable to, *inter alia*, illegal searches and seizures.[3] In its original form, the rule was a purposely flexible device by which courts were to approach the admissibility of evidence said to have been discovered by way of unconstitutional state action.[4]

In the past half-century, however, the Court has nicked its approach from tort law,[5] which locates responsible parties through judgments about conditions versus causes, which in turn are characterized as but-for versus proximate, and as dependent versus superseding.[6] This torts approach to adjudging the relation between police wrongdoing and

1. *See, e.g.,* Rohith V. Srinivas, *The Exclusionary Rule as Fourth Amendment Judicial Review*, 49 Am. Crim. L. Rev. 179, 213 (2012) ("[T]he exclusionary rule . . . functions as a sort of restitution to the extent that it forces the executive to disgorge the benefit that it gained by violating the Constitution."); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 Geo. L.J. 799, 850 (2000) ("The disgorgement framework does not capture all features of exclusion. It does, however, capture those that are most important."); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct,* 2000 B.Y.U. L. Rev. 1443, 1443 (2000) ("Apart from its constitutional status, the exclusionary rule is nothing more than an instance of the common law remedy of restitution.").

2. *See generally* 1 Wayne R. LaFave, Search & Seizure § 1.6(i) (6th ed. Dec. 2021 Update), Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence,* 111 Colum. L. Rev. 670 (2011), Sharon L. Davies & Anna B. Scanlon, Katz *in the Age of* Hudson v. Michigan: *Some Thoughts on "Suppression as a Last Resort,"* 41 U.C. Davis L. Rev. 1035, 1042–58 (2008), *and* Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 Ohio St. J. Crim. L. 341, 343–48 (2013) (explaining how the rule became so porous).

3. *See* United States v. Crews, 445 U.S. 463, 471 (1980); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 Geo. L.J. 1077, 1099–1100 (2011).

4. *Cf.* Albert Alschuler, *Regarding Re's Revisionism: Notes on the Due Process Exclusionary Rule*, 127 Harv. L. Rev. F. 302, 308 (2014) (concluding that proximate cause is whatever courts want to treat as a cause); George M. Dery III, *Allowing 'Lawless Police Conduct' in order to Forbid 'Lawless Civilian Conduct': The Court Further Erodes the Exclusionary Rule in* Utah v. Strieff, 44 Hastings Const. L.Q. 393, 423–24 (2017) (stating the virtues of a flexible notion of proximate cause); Eric A. Johnson, *Dividing Risks: Toward a Determinate Test of Proximate Cause*, 2021 U. Ill. L. Rev. 925, 932–34, 942, 945 (2021) (explaining that by focusing on foreseeability, proximate cause is a normative, not descriptive matter); Richard Re, *The Due Process Exclusionary Rule*, 127 Harv. L. Rev. 1885, 1953 (2014) (Fruits "analysis has become like proximate causation in tort law, such that whether a sufficient causal connection is found depends on normative considerations.").

5. *See* David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 Am. Crim. L. Rev. 1, 41–42 (2013); Utah v. Strieff, 579 U.S. 232, 257–58 (2016) (Kagan, J., dissenting), *citing* W. P. Keeton et al., Prosser and Keeton on the Law of Torts 312 (5th ed. 1984).

6. *See generally* Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 Colum. L. Rev. 1399 (1980).

evidence has suffered a "hailstorm of criticism,"[7] much of it justified.[8] That criticism calls out the Court not so much for creating the three doctrinal boxes on which its admissibility rulings have come to depend, but for shoving ill-fitting cases into them.[9] Those three boxes act as "exceptions to the exclusionary rule—the 'independent source,' 'inevitable discovery,' or 'attenuation' doctrines,"[10] which either deny or negate any causal connection between police wrongdoing and evidence. In 2006, the Supreme Court added to those doctrinal boxes a judicial discussion on whether "the interest protected by the constitutional guarantee that has been violated would . . . be served by suppression of the evidence obtained."[11] That went over no better with the legal academy.[12] When in 2016 the Court made clear that its doctrinal boxes remain intact,[13] their fit to cases remained poor, and the criticism continued.[14]

The exclusionary rule's use-ban on fruit of the poisonous tree comes with a canon dating back to before the Court began reviewing state convictions. While academic interest in the 1963-to-present phase of that canon is keen, the first quarter of what is now a 100-year history is taken as given, described in only the most conclusory terms. By burrowing down into that first quarter-century, this Article takes the position that a better approach to fruit of the poisonous tree can be found in cases of the United States Court of Appeals for the Second Circuit between 1916 and 1942.

Part I decodes the technical vocabulary of exclusion, undertaking the overdue task of identifying what, exactly, the fruit/tree metaphor signifies. Part II examines the evidentiary consequences of police wrongdoing from pre-prohibition to repeal, with an emphasis on decisions that began or ended in the Second Circuit, which made

7. Crews v. United States, 389 A.2d 277, 288 (D.C. 1978).

8. *See generally* Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 Iowa L. Rev. 1741 (2008).

9. *See, e.g.*, 6 Wayne R. LaFave, Search & Seizure § 11.4(d) & n.41 (6th ed. Dec. 2021 Update) (describing Utah v. Strieff as "out of touch with reality"); *id*. at § 11.4(a) (Hudson v. Michigan "deserves a special niche in the Supreme Court's pantheon of Fourth Amendment jurisprudence, as one would be hard-pressed to find another case with so many bogus arguments piled atop one another.").

10. United States v. Crews, 445 U.S. 463, 469–70 & n.11 (1980); *see also* Kerr, *supra* note 3, at 1099 (providing additional doctrinal boxes pertinent to the exclusionary rule).

11. *See* Hudson v. Michigan, 547 U.S. 586, 593 (2006).

12. *See* 6 Wayne R. LaFave, Search & Seizure § 11.4(a) n.43 (6th ed. Sept. 2020 Update); Sharon L. Davies, *Some Reflections on the Implications of* Hudson v. Michigan *for the Law of Confessions,* 39 Tex. Tech L. Rev. 1207, 1215–16 (2007); *see generally* Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. Rev. 113 (2008); Laurin, *supra* note 2, at 715–16 nn.234–35.

13. *See* Utah v. Strieff, 579 U.S. 232, 238 (2016) (reciting three exceptions to the exclusionary rule).

14. *See* LaFave, *supra* note 9, at § 11.4(d) n.336.

still-unheralded headway on the scope of exclusion within the war on booze. Part III tracks the path of the exclusionary rule within Frank Carmine Nardone's seven-year wiretapping litigation in which the Second Circuit, on its third remand, read the Supreme Court's take on the rule as entailing judgments that are more moral than causal. Part IV places the Supreme Court's approach—which reverts to causative judgments—in opposition to the more open, less "scientific" approach that the Second Circuit pioneered. In sum, it is the controlling purpose of this Article to develop not a *theory* of fruits doctrine, but the historical background against which theorizing about fruits doctrine can take place.

## I. The Basic Conceit of the Rule: What is a Fruit?

In 1939, the Supreme Court came up with "fruit of the poisonous tree"[15] as a "figure of speech"[16] to explain the in-court consequences of unconstitutional police practices. The "poisonous tree" part Justice Frankfurter likely came up with himself (though a credible rumor credits a Frankfurter clerk);[17] the "fruit" part is a play on "fruits of crime," a term that has long presumed that those who possess them do not do so innocently.[18] Already a "time-worn metaphor" a half-century ago,[19] this "famous,"[20] "felicitous,"[21] "poetic"[22] locution now conjures up over 35,000 cites when tapped into Westlaw. Yet apart from a generalized sense that some evidence derived from police wrongdoing is inadmissible at trial, the locution remains so open that it operates more as a folksy idiom than as a precise technical term.[23]

15. Nardone v. United States, 308 U.S. 338, 341 (1939).

16. Oregon v. Elstad, 470 U.S. 298, 305–06 (1985).

17. *See* Orin Kerr (@orinkerr), Twitter (Mar. 3, 2021, 4:10), https://twitter.com/OrinKerr/status/1367782569404555265.

18. *See* State v. Simons, 17 N.H. 83, 88 (1845) ("So the law presumes against him who is in the possession of the fruits of crime recently after its commission, that he is its author."); *see also* State v. Laundy, 103 Or. 441, 493–94 (1922) (arguing that "fruits of crime" can be searched for, seized, and admitted at trial). The earliest glimpse of "fruit" as a product of police wrongdoing may be in United States v. Maresca, 266 F. 713, where is the pincite? (S.D.N.Y. 1920) ("Detectives and the like, of course, regard their frauds as pious, and the law has used the fruits thereof time out of mind.").

19. Harrison v. United States, 392 U.S. 219, 222 (1968).

20. United States v. Desist, 277 F. Supp. 690, 693 (S.D.N.Y. 1967).

21. Mark S. Bransdorfer, Note, Miranda *Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, 62 IND. L.J. 1061, 1069 (1987).

22. Sharon L. Davies, *The Penalty of Exclusion–A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1299 n.118 (2000).

23. Commentators ran with the metaphor, perhaps a bit too far: "The poisonous character of the tree is generally recognized, . . . but our legal chemists are busily at work to perfect formulae which will ascertain whether the fruit is contaminated or fit for judicial consumption." Nahum A. Bernstein, *Fruit of the Poisonous Tree–A Fresh Appraisal of the Civil Liberties Involved in Wire Tapping and Its Derivative Use*, 37 ILL. L. REV. 99, 100 (1942).

It is clear enough that the metaphor means to separate tree from fruit. "A confession," after all, "cannot be 'fruit of the poisonous tree' if the tree itself is not poisonous."[24] What is unclear is which is the tree, which is the fruit.[25] Is the tree the constitutional wrong itself (as in an illegal search) and the fruit *all* evidence derived from the wrong (as in drugs found in the search plus a confession thereafter from the search victim)? Or is the tree in the example above the drugs found in the search and the fruit the confession, which somehow follows from discovery of the drugs?

In one of his many influential articles on confessions,[26] Professor Yale Kamisar gives his student, Professor Robert Pitler, partial credit for decoding the idiom.[27] Pitler posits both that "evidence *initially* obtained by virtue of the illicit conduct becomes the 'poisonous tree,'"[28] and that "fruits" refers "to secondary evidence gleaned from illegally obtained primary evidence."[29] On this account, an illegal search or seizure would be *neither* tree nor fruit. Earlier in the article, however, Pitler took the position that the "initially seized evidence . . . of some illicit governmental activity" is *both* "'poisonous tree'" *and* "first generation fruit."[30]

To clear things up, Kamisar credits only Pitler's "terminology," under which there are two types of fruits: "first generation" (as in the drugs

24. Colorado v. Spring, 479 U.S. 564, 571–72 (1987).

25. Some attempts to decode the locution leave the tree undefined. *See, e.g.*, Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to the Wisconsin Supreme Court's Critics,* 91 Marq. L. Rev. 425, 431 n.44 (2007) ("'Fruit of the poisonous tree' refers to evidence gathered with the aid of information obtained illegally."); Joseph G. Casaccio, Note, *Illegally Acquired Information, Consent Search, and Tainted Fruit*, 87 Colum. L. Rev. 842, 844 n.20 (1987) ("The term 'fruit of the poisonous tree' refers to evidence obtained indirectly through the use of illegally acquired evidence or information."); Michael A. Cantrell, *Constitutional Penumbras and Prophylactic Rights: The Right to Counsel and the "Fruit of the Poisonous Tree,"* 40 Am. J. Crim. L. 111, 113 (2013) ("[A] compelled confession is inadmissible in evidence . . . and any evidential 'fruit' subsequently obtained from that confession is likewise suppressed."). Some designate neither tree nor fruit. *See, e.g.,* Quentin Burrows, Note, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 Val. U. L. Rev. 1079, 1119 n.321 (1997) ("Fruit of the poisonous tree means that evidence which is spawned by or directly derived from an illegal search is generally inadmissible against the defendant because of its original taint.").

26. *See* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 Mich. L. Rev. 929, 942 & n.51 (1995).

27. *Id*.

28. Robert M. Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, 56 Cal. L. Rev. 579, 581 (1968) (emphasis added); *see also* John Brunetti, *Criminal Procedure*, 48 Syracuse L. Rev. 517, 520 n.10 (1998) ("The very use of the phrase 'fruit of the poisonous tree' denotes two typical types of evidence, the tree as primary evidence and the fruit as secondary evidence.").

29. Pitler, *supra* note 28, at 581.

30. *Id.* at 579, 581, 588–89, 629. From then on, Pitler never uses the term "first generation fruit" or its synonym, "primary fruit." Instead, he refers to "primary evidence," and "first generation evidence," usages that would make sense if for Pitler no item of evidence could be at once both primary and fruit. But for Pitler it can.

found in the illegal search) and "second generation" (as in the confession that follows discovery of the drugs).[31] From there, Kamisar turns to Professors Wayne LaFave and Jerold Israel, who substitute for "first generation" fruits the words "direct or primary," and for "second generation" fruits the words "secondary or derivative."[32] Joined on the hornbook by Professors Nancy King and Orin Kerr, LaFave and Israel continue to insist that the poisonous tree is the unconstitutional action itself and the fruit its byproducts, whatever their type.[33] Absent in their sensible reading is Pitler's peculiar notion that evidentiary items could be both fruit and tree at once.

The Court has expended minimal effort on the grammar of its fruits metaphor. And whatever the Court has expended to that end is contradictory. At times, the Court takes the position that primary evidence is every bit a fruit as much as secondary evidence.[34] At other times, the Court takes the position that only secondary, not primary, evidence can be labeled a fruit.[35] Truest to the origins of the metaphor is that primary

31. Kamisar, *supra* note 26, at 942 n.51.

32. *Id.* (quoting 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 9.3(a), at 734 (1984)).

33. 3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S. Kerr, Criminal Procedure § 9.3(a) (4th ed.) (Nov. 2021 Update) ("[T]he 'poisonous tree' can be an illegal arrest or search, illegal interrogation procedures or illegal identification practices."). For a discussion of fruits of confessions taken contrary to the protocol of *Miranda*'s protection of the Fifth Amendment (which cannot exclude secondary fruits) and *Massiah*'s protection of the Sixth Amendment (which theoretically can), *see generally* Eve Brensike Primus, *Disentangling* Miranda *and* Massiah*: How To Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law,* 97 Boston U. L. Rev. 1085 (2017).

34. *See, e.g.,* Hemphill v. New York, 142 S. Ct. 681, 692 (2022) ("Because the prophylactic exclusionary rule is a 'deterrent sanction' rather than a 'substantive guarantee,' the Court applied a balancing test to allow States to impeach defendants with the fruits of prior Fourth Amendment violations, even though the rule barred the admission of such fruits in the State's case-in-chief."); Kansas v. Ventris, 556 U.S. 586, 590–91 (2009) ("The Fourth Amendment . . . guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence . . . ."); Oregon v. Elstad, 470 U.S. 298, 306 (1985) ("The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits."); New Jersey v. T.L.O., 469 U.S. 325, 333 n.3 (1985) ("In holding that the search of T.L.O.'s purse did not violate the Fourth Amendment, we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities."); Williams v. United States, 401 U.S. 646, 661 (1971) (Brennan, J., concurring) ("[W]e are presented in these cases with the question whether *Chimel* should be applied to require the exclusion at trial of evidence which is the fruit of a search . . . ."); Kaiser v. New York, 394 U.S. 280, 282–83 (1969) ("Since the wiretapping in this case occurred before *Katz* was decided and was accomplished without any intrusion into a constitutionally protected area of the petitioner, its fruits were not inadmissible under the exclusionary rule . . . ."); Costello v. United States, 365 U.S. 265, 280 (1961) "([T]he 'fruit of the poisonous tree' doctrine excludes evidence obtained from or as a consequence of lawless official acts . . . .").

35. *See, e.g.,* Utah v. Strieff, 579 U.S. 232, 237 (2016) ("Under the Court's precedents, the exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and, relevant here, 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.'"); Hudson v. Michigan, 547 U.S. 586, 607 (2006) (Breyer, J., dissenting) ("*Silverthorne* thus stands for the proposition that the exclusionary rule

evidence *can* be a fruit. When Justice Frankfurter first introduced the term, he said only that once an accused "proves that a substantial portion of the case against him was a fruit of the poisonous tree," it is up "to the Government to convince the trial court that its proof had an independent origin."[36] Reference to "the case" is broad, drawing no distinction between primary and secondary evidence, thereby revealing both as classes of fruits, rendering the constitutional wrong the tree.[37] If we assume that Frankfurter's subsequent reading of his own term is instructive, two decades later he reiterated that broad sense that *all* evidence traceable to the constitutional wrong is fruit, whether the evidence is primary or secondary, direct or indirect.[38]

Even once we have reached agreement on the fruits vocabulary, the doctrine remains "complex and elusive."[39] In structuring an approach to fruits, the Court has rejected two opposing theories: first, that exclusion is justified any time the evidence would not have been discovered "but for" the wrong; second, that the implications of police wrongdoing can be neutralized after-the-fact through, for example, promptly Mirandizing the suspect, who then provides an admissible oral version of the inadmissible tangible evidence.[40] In between those two rejected theories is the Court's proximate-cause approach, which holds that but-for causation is a necessary but not sufficient condition of police responsibility for the discovery of evidence.[41] Though the causal language within fruits may be

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does not apply if the evidence in question (or the 'fruits' of that evidence) was obtained through a process unconnected with, and untainted by, the illegal search."); United States v. Patane, 542 U.S. 630, 644 (2004) ("[I]t is true that the Court requires the exclusion of the physical fruit of actually coerced statements . . ."); Segura v. United States, 468 U.S. 796, 804 (1984) ("Under this Court's holdings, the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'"); Nix v. Williams, 467 U.S. 431, 441 (1984) (*Wong Sun* "extended the exclusionary rule to evidence that was the indirect product or 'fruit' of unlawful police conduct . . . ."); Alderman v. United States, 394 U.S. 165, 201 (1969) (Fortas, J., concurring in part & dissenting in part) ("The defendant is entitled to suppression or exclusion from his trial of such illegally obtained information and its fruits.").

36. Nardone v. United States, 308 U.S. 338, 341 (1939).

37. *But cf.* Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice,* 8 DePaul L. Rev. 213, 240 n.143 (1959) (noting that "fruits" originated in a case about derivative evidence).

38. *See* Rios v. United States, 364 U.S. 233, 237 (1960) (Frankfurter, J., dissenting) ("The Court asserts that there is no longer any logic in restricting . . . *Weeks* . . . to the fruits of federal seizures, for *Wolf* recognizes that state seizures may also encroach on . . . the Federal Constitution.").

39. Harrison v. United States, 392 U.S. 219, 230 (1968) (White, J., dissenting).

40. Brown v. Illinois, 422 U.S. 590, 600–04 (1975). As late as 1966, but-for causation still had some support as a basis of exclusion. *See, e.g., Developments in the Law–Confessions: The "Fruit of the Poisonous Tree,"* 79 Harv. L. Rev. 1024, 1025 (1966).

41. *See* Hudson v. Michigan, 547 U.S. 586, 592 (2006); Powell v. Nevada, 511 U.S. 79, 89 (1994) (Thomas, J., dissenting); *see also* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 319–20 (2012); Merry C. Johnson, *Discovering Arrest Warrants During Illegal*

more metaphorical than within its torts origins,[42] the idea is the same or at least "akin":[43] of all operative variables that might have contributed to a consequence, some are less significant, less "proximate," than others.[44] Those peripheral variables are *not* the proximate cause of the injury—here, the discovery of evidence—whereas the more significant variables *are* the proximate cause of the discovery of the evidence.[45] It makes good sense that all but one of the Court's canonical fruits cases involve secondary fruits,[46] given that the causal relation of primary fruits to police wrongdoing is predictably easier to make out.[47]

## II. Evidentiary Consequences of Police Wrongdoing from Pre-Prohibition to Repeal

### A. The Pre-Prohibition Era

The Supreme Court reviewed few criminal convictions until the 1920s.[48] As early as 1821, the Court reviewed *state* convictions,[49] but until after the Civil War, "only those objected to as *ex post facto* and bills of attainder."[50] Even after the Civil War amendments, application of the Fourteenth Amendment produced little activity in the Supreme Court until 1932, when a stream of Due Process cases began to supplement

*Traffic Stops: The Lower Courts' Wrong Turn in the Exclusionary Rule Attenuation Analysis,* 85 Miss. L.J. 225, 234–35 (2016).

42. *See* Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463, 478 n.75 (2009) (The Court's "use of these metaphors apparently has led it to no different results than it would have reached if it had used more conventional causal language."); Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 Iowa L. Rev. 1741, 1743 (2008) (exclusion's emphasis on cause is "examined at length in classes on torts and substantive criminal law," yet "[f]or no apparent reason, . . . the vocabulary is different").

43. Johnson, *supra* note 12, at 115.

44. *E.g.,* Kinderavich v. Palmer, 15 A.2d 83, 86–89 (Conn. 1940) (distinguishing, *inter alia*, causes from conditions).

45. *See* Utah v. Strieff, 579 U.S. 232, 257–58 (2016) (Kagan, J., dissenting); Oregon v. Elstad, 470 U.S. 298, 333 (1985) (Brennan, J., dissenting).

46. *Hudson*, 547 U.S. at 588 (where Detroit police officers found rock cocaine in a residence that had been entered on the authority of a search warrant that had been executed with insufficient notice to the occupant).

47. *E.g.*, Payton v. New York, 445 U.S. 573, 576–77 (1980) (suppressing a shell casing found on top of stereo as primary fruit of warrantless, non-emergency, non-consensual search of Bronx apartment).

48. *But cf.* Shirley M. Hufstedler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. Pa. L. Rev. 1483, 1490 (1979) ("Until the late nineteenth century, the Supreme Court was called upon only rarely to interpret the fourth amendment.").

49. *See* Cohens v. Virginia, 19 U.S. 264, 264 (1821).

50. *See* Henry P. Weihofen, *Supreme Court Review of State Criminal Procedure*, 10 Am. J. Leg. Hist. 189, 189 (1966); Allen, *supra* note 37, at 216–17 ("Cases involving extradition and interstate rendition were numerous.").

a small number of Equal Protection cases.[51] With rare exceptions,[52] Due Process challenges before then were rejected in criminal cases, even when the Court was "vigorously applying the Due Process clause to supervise state experiments in economic and social legislation."[53] It was reform of the Court's jurisdiction in 1925, "giving it discretion under certiorari jurisdiction to control its own docket," which opened the Court to complaints about police practices,[54] but this time without the court-clogging associated with the old writ of error's review as-of-right.[55] Yet because the states were not bound by the Fourth Amendment until 1949,[56] nor by the federal exclusionary remedy until 1961,[57] the high court's state criminal docket was in the meantime quiet.

Likewise, there was no review of *federal* convictions in the Supreme Court for its first 100 years, "an omission that Congress did not remedy until 1889 . . . ."[58] Nor were there many federal crimes to enforce.[59] Because protecting persons and their property was an almost uniquely state prerogative, the daily fare of federal trial courts "had practically nothing to do with the Fourth Amendment."[60]

The late nineteenth century, however, was a "'culture of mobility,'" which necessitated federal regulatory crimes to protect local economies from interstate difficulties.[61] For example, in 1884, Congress forbade railroads and boat lines from moving diseased livestock once it was discovered that Texas cattle with contagious fever were being brought to Iowa,

51. Weihofen, *supra* note 50, at 190–91. *Compare*, for example, Ex parte Virginia, 100 U.S. 339, 340 (1880) (Equal Protection), *with* Powell v. Alabama, 287 U.S. 45, 50 (1932) (Due Process).

52. *But see* Moore v. Dempsey, 261 U.S. 86 (1923) (trial by lynch mob violates Due Process). For a deep dive into *Moore*, *see* Thomas D. Holland & Michael R. Dolski, Symposium, *"A Solemn Promise Kept": The 1919 Elaine Race Riot and the Broadening of Habeas Corpus 100 Years Later,* 57 Tulsa L. Rev. 65, 84–108 (2021).

53. Allen, *supra* note 37, at 217.59

54. Weihofen, *supra* note 50, at 192.

55. *See* Note, 23 J. Crim. L. & Criminology 841, 843 (1933).

56. Wolf v. Colorado, 338 U.S. 25 (1949).

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

58. Kansas v. Marsh, 548 U.S. 163, 183 n.1 (2006) (Scalia, J., concurring) (citation omitted).

59. *See* George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 Tex. Tech L. Rev. 199, 208 (2010) ("The Constitution gave Congress power to create federal crimes of counterfeiting, piracy, felonies on the high seas, offenses against the law of nations, and treason," to which "the first federal criminal code . . . added a few common-law crimes, like larceny and murder, if committed on a federal enclave."); Allen, *supra* note 37, at 213 n.1 (summarizing that more than half of Chicago arrests in 1912 were for crimes that had been created in the preceding 25 years).

60. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 Wm. & Mary L. Rev. 1, 117 n.396 (2006) (citation omitted).

61. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1141 (1995).

which could not guard itself against "every conceivable infection."[62] To minimize other far-flung harms, Congress enacted the Comstock Act (1873),[63] Interstate Commerce Act (1887),[64] Sherman Act (1890),[65] Federal Lottery Act (1895),[66] Mann Act (1910),[67] and Dyer Act (1919).[68] As state borders were made "increasingly porous" by planes, trains, and automobiles, Congress enlarged its federal criminal jurisdiction.[69] Despite this enlargement, federal law enforcement remained peripheral for the first two decades of the twentieth century.[70]

Limited federal law enforcement meant limited Supreme Court regulation of police. In fact, "the Supreme Court mentioned the Fourth Amendment in only about two dozen cases in the first 130 years of the Amendment's existence, and . . . interpreted the Amendment only a handful of times in that period."[71] One of those times was the October Term 1913 when the Court heard the case of Fremont Weeks,[72] whose house was "searched by local police, who turned certain evidence over to the U.S. marshal," who "later that day participated in a second warrantless search of the house," also by the local police.[73] Kept by the prosecution for use at trial were papers, letters, and envelopes found in Weeks's room.[74] Reversing Weeks's conviction for running an illegal mail lottery, the Supreme Court ordered a new trial, this time without the documentary evidence that the feds had discovered in violation of the Fourth Amendment.[75]

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62. *See id.* at 1142.

63. *See* Manual Enters., Inc. v. Day, 370 U.S. 478, 500–11 (1962) (Brennan, J., concurring) (reviewing the history of the law's ban on obscene materials, including those relating to abortion).

64. *See* Interstate Com. Comm'n v. Balt. & O.R. Co., 145 U.S. 263, 276 (1892) ("[P]rincipal objects of the interstate commerce act were to secure just and reasonable charges for transportation.").

65. *See* Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 802 n.3 (1945) (Sherman Act was enacted to meet the "dominant concern of Congress to protect consumers from business combinations").

66. *See* Champion v. Ames, 188 U.S. 321, 353–54 (1903) (ruling that Congress could "regulate" commerce by prohibiting altogether the transportation of lottery tickets from state to state).

67. *See* Caminetti v. United States, 242 U.S. 470, 488 n.1 (1917) (statute prohibiting transportation of women in interstate commerce for prostitution "or any other immoral purpose").

68. *See* United States v. Turley, 352 U.S. 407, 410 (1957) (observing that the National Motor Vehicle Theft Act criminalized knowingly transporting a stolen vehicle or aircraft in interstate commerce).

69. Brickey, *supra* note 61, at 1142.

70. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev. 476, 504 (2011).

71. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 842 (2004).

72. Weeks v. United States, 232 U.S. 383, 386 (1914).

73. 1 Wayne R. LaFave, Search & Seizure § 1.1(c) (6th ed. Dec. 2021 Update).

74. *Weeks,* 232 U.S. at 386.

75. *Id.* at 398–99. For a discussion of precursor cases that made *Weeks* "inevitable," *see* Osmond K. Frankel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 370–72 (1921), *citing*,

*Weeks* established exclusion of illegally discovered evidence in federal criminal cases;[76] what it did *not* establish was the doctrine of fruit of the poisonous tree. The reason? In *Weeks*, the connection between the warrantless searches and the documentary evidence was obvious, thus presenting no issue as to the causal scope of the exclusionary remedy, which is the office of fruits doctrine/analysis.

The first four federal cases to cite *Weeks* were all from the Second Circuit,[77] the last of those being *Flagg v. United States*,[78] which was the first to exclude evidence where causation was *non*-obvious. In *Flagg*, a haughty U.S. Post Office Inspector named Elmer Kincaid, aided by New York City police, led a warrantless raid of the Manhattan offices of Jared Flagg, a stockbroker whose short-sale, pre-Ponzi scheme, fueled by kickbacks from brokers, got him convicted on six counts of violating the federal mail-fraud statute.[79] In the September 23, 1911 raid, "all his books and papers, including securities and cash, were seized . . . and . . . carted away to the post office building, in which is the office of the United States attorney . . . ."[80] The raid was so indiscriminate in scope that while Flagg's office was being tossed, a picture of his mother "was torn from its frame and destroyed in his presence." Even his cigars were confiscated.[81]

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*inter alia*, Wise v. Mills, 220 U.S. 549 (1911) (dismissing for want of jurisdiction prosecutor's challenge to contempt citation issued by trial court for prosecutor's failure to obey order to return books and papers improperly seized in search by warrant of business owners suspected of tax evasion). For a related argument that the historical presumption against exclusion, attributed to evidence guru John Henry Wigmore, was never really all that strong, *see* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 Gonzaga L. Rev. 1, 54–65 (2010).

76. *See* Hudson v. Michigan, 547 U.S. 586, 590 (2006) ("In *Weeks*, we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment.") (citation omitted); *cf.* Morgan Cloud, Symposium, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule,* 10 Ohio St. J. Crim. L. 477, 477 (2013) ("The Supreme Court first suppressed evidence obtained in violation of the Fourth Amendment more than 125 years ago.") (citing Boyd v. United States, 116 U.S. 616 (1886)).

77. *See* United States v. Hart, 214 F. 655 (N.D.N.Y. June 16, 1914) (making no ruling on admissibility, papers voluntarily surrendered to prosecutor may be retained during trial, copies having been made for defendant's benefit); United States v. Abrams, 230 F. 313, 315 (D. Vt. Feb. 23, 1916) (Fourth and Fifth Amendments require suppression of evidence, oral or tangible, obtained by official coercion); United States v. Jones, 230 F. 262 (N.D.N.Y Mar. 2, 1916) (Congress had not vested commissioners with authority to issue search warrants to investigate federal mail fraud); Flagg v. United States, 233 F. 481, 486 (2d Cir. May 9, 1916).

78. *See generally Flagg*, 233 F. 481.

79. *See* Supreme Court of the U.S., Original Term 1914, In the Matter of the Application of Jared Flagg for a Writ of Prohibition against the U.S. Dist. Ct. for the Southern Dist. of N.Y. or in the alternative a Writ of Mandamus directed to U.S. Dist. Ct. for the Southern Dist. of N.Y., or one of the judges thereof.

80. *Flagg*, 233 F. 481 at 482.

81. In the Matter of the Application of Jared Flagg, p. 4, para. 10.

Because the Second Circuit flicked off the United States' excuse that the raid was the doing of local police,[82] *Flagg* has come to stand for the proposition that the feds cannot avoid responsibility for illegal searches and seizures by hiding behind lawless municipal agents with whom they have colluded.[83] Much rarer is the acknowledgment of *Flagg* as an early take on secondary evidence,[84] which Judge Coxe's opinion there ruled inadmissible:

> The return of the defendant's books and papers, after all the information contained therein had been obtained by the prosecuting officers, did not cure the original trespass. The wrong had then been done. The *information* illegally obtained was in the possession of the United States attorney whose agents had been working over the papers 'for three long years.' Their return at that time was an idle ceremony. The government officials possessed the 'secondary evidence' [the information] and were not concerned about the disposition of the 'primary evidence' [the physical papers].[85]

While the specific items of inadmissible secondary evidence were not delineated in *Flagg*, Judge Coxe was likely referencing either the feds' testimony about the searches or other gains from the searches, perhaps even leads, which the feds got from reading the papers. In other words, the physical papers were the primary evidence, and their content (not just as marks on paper) the secondary evidence. As a Fourth Amendment case in federal court, *Flagg* is exceptional for that fact alone, but *Flagg* is made even more exceptional as the sort of early foray into the causal scope of exclusion that would occupy the Second Circuit.

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82. *Flagg*, 233 F. 481 at 483 ("To attribute such an elaborate and carefully prepared proceeding as was planned to convict the defendant, to a few local patrolmen . . . makes too severe a demand upon the imagination.").

83. Crucial to *Flagg* is that local authorities were acting at the instigation of federal authorities. On the responsibility of one entity for the actions of agents of another, *see* Roy R. Ray, *The Law of Privilege in Texas*, 12 Tex. L. Rev. 143, 144 & n.34 (1934); J.B., Recent Case, *Evidence–Admissibility of Evidence Obtained by Illegal Search and Seizure by State Officers under National Prohibition Act*, 6 Tex. L. Rev. 390, 390 (1928); R.J.S., Comment, *Prohibition Searches by New York State Police*, 37 Yale L.J. 784, 777–88 (1928); *The Use of State-Compelled, Self-Incriminating Testimony in Federal Court*, 68 Yale L.J. 322, 327 & n.30 (1958).

84. *See, e.g.*, Donald Dripps, *Akhil Amar on Constitutional Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. Rev. 1559, 1596 n.167 (1996); Notes and Legislation, *Wiretapping and Law Enforcement*, 53 Harv. L. Rev. 863, 866–67 & n.27 (1940).

85. *Flagg*, 233 F. 481 at 486 (emphasis added). The reference to "three long years" is to the fact that the prosecutor sat on the indictments of 1911 and 1912 until 1914 before trying Flagg, a path the prosecution preferred to "interfering with the action of the Grand Jury" by post-indictment non-prosecution. *See* In re Application of Jared Flagg, Exh. E.

Repeatedly, the Second Circuit would ask in different contexts: *Which* evidence, exactly, is subject to exclusion?

Three years after *Flagg*, the Second Circuit took a position on whether secondary evidence in the form of an in-court reference to illegally seized documentary evidence could be harmless error, that is, error that did not proximately cause the conviction.[86] Specifically, at John Fitter's trial for conspiring to defraud the U.S. Navy of dairy, meat, and poultry, the prosecutor asked whether defense counsel was in possession of any delivery slips (which happened to have been illegally seized) to which a government witness had just referred.[87] Defense counsel took exception to the question, which the judge not only did not hear but doubted that any jurors heard, either.[88] The prosecutor withdrew the question, which the judge then instructed jurors to ignore.[89] Finding the prosecutor's reference to tainted evidence to have had no influence on the verdict of the "clearly guilty" Fitter, the Second Circuit identified a novel fruits issue: not just whether a Fourth Amendment violation proximately caused the discovery of evidence, but whether that violation, as a result, brought about the defendant's *conviction* as well. Remarkably, that recurring fruits issue within criminal litigation would lurk around for decades without being engaged by the Supreme Court.[90]

Over the next three decades, the Supreme Court twice "adverted to the possibility" that constitutional trial errors are never harmless.[91] The Court eventually got around to resolving the issue only by implication,[92]

86. *See* Fitter v. United States, 258 F. 567, 573–75 (2d Cir. 1919) (Rogers, Hough, & Manton, JJ.), *cited in* Recent Development, *Admission of Illegally Seized Evidence in State Prosecution Held Harmless Error Not Requiring Reversal of Conviction*, 64 Colum. L. Rev. 367, 370 & n.28 (1964).

87. *See Fitter*, 258 F. 567 at 575–76.

88. *Id.* at 576.

89. *Id.*

90. For opposing positions on the scope of the harmless-error rule within the Second Circuit, *compare* United States v. Warren, 120 F.2d 211, 212 (2d Cir. 1941) (L. Hand, Chase, & Frank, JJ.) ("Indeed, the disposition of courts to reverse judgments because of minor excesses in the exercise of the judge's authority at the trial has much abated.") *with* United States v. Liss, 137 F.2d 995, 1005 (2d Cir. 1943) (Frank, J., dissenting in part) ("My colleagues, in stating that there is a 'modern disposition to assume that an error has been harmless,' have failed to note what five circuit courts have observed: . . . that, if error is shown, there must be reversal unless it affirmatively appears from the whole record that it was not prejudicial.").

91. *See* Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2131–32 (2018), *citing* Tumey v. Ohio, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge."), *and* Kotteakos v. United States, 328 U.S. 750, 764–65 (1946) ("If . . . the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.").

92. *Cf.* 7 Wayne R. LaFave et al., Criminal Procedure § 27.6(a) (4th ed.) (Nov. 2021 Update) ("In the 1960s, with the expansion of the constitutional regulation of the criminal process, appellate courts extended harmless error analysis to constitutional violations.").

indicating on three occasions that the introduction at trial of evidence obtained in violation of the Fourth Amendment is potentially harmless.[93] By ruling in *Fitter* that reversal does not necessarily follow when evidence traceable to police wrongdoing finds its way in at trial—that some evidence, no matter how it was discovered, has no influence on a conviction based on an otherwise strong case—the Second Circuit again demonstrated what would become an enduring knack for discovering causal issues in police investigation and proof.

In sum, because of limited bases for reviewing police practices, the Supreme Court made negligible progress toward elaborating fruits doctrine in the pre-prohibition era. Whatever progress was made within fruits doctrine can be credited to the Second Circuit, which would habitually stay ahead of the curve both by identifying fruits issues not yet identified by the Supreme Court and by making rulings that were comparatively flexible, open, and unscientific.

## B. The Prohibition Era: *Silverthorne* and Its Progeny

In and out of the Second Circuit, Prohibition would shine a light on the Fourth Amendment. The origins of Prohibition go back at least to the Massachusetts Society for the Suppression of Intemperance, founded in 1813.[94] By 1835, offshoots of the American Society for the Promotion of Temperance, founded in 1826, had 20% of American adults as members. After being put on hold to eradicate a graver form of human sin[95]—slavery[96]—the war on booze would revive. President

93. *See* Chambers v. Maroney, 399 U.S. 42, 53–54 (1970); *id*. at 65 (Harlan, J., concurring in part); Bumper v. North Carolina, 391 U.S. 543, 550 (1968); *id.* at 553–54 (Harlan, J., concurring); *id.* at 557–61 (Black, J., dissenting); *id.* at 562 (White, J., dissenting). In a third case, the issue was dodged, 5-4. *See* Fahy v. Connecticut, 375 U.S. 85, 86 (1963) ("On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to . . . 'harmless error.'").

94. Jack S. Blocker, Jr., American Temperance Movements: Cycles of Reform 11–12 (1989).

95. *Cf*. Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 Brooklyn L. Rev. 739, 787 (2005) (remedy for intemperance was "banishment of ardent spirits from the list of lawful articles of commerce, by a correct and efficient public sentiment such as has turned slavery out in half our land, and will yet expel it from the world") (citation omitted).

96. *See, e.g.,* Norman H. Clark, Deliver Us From Evil: An Interpretation of American Prohibition 48–49 (1976); Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. Rev. 1437, 1455 n.70 (2000) ("This initial push for prohibition ran its course in the 1860s, which most historians attribute to the rising sectional conflict over slavery . . . ."); Kevin Wendell Swain, *Liquor by the Book in Kansas: The Ghost of Temperance Past*, 35 Washburn L.J. 322, 325 n.17 (1996) ("Significantly, 8 of the 12 temperance states from which Kansas had drawn its prohibitory strength saw their liquor control laws struck or repealed during the pre-war period, reportedly because the slavery issue diverted public attention away from temperance concerns."); Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 Suffolk U. L. Rev. 235, 237

Lincoln predicted in 1865 that after Reconstruction, suppression of legalized liquor would be the country's next major question.[97] Sure enough, the National Prohibition Party was organized in 1869, the Women's Christian Temperance Union in 1874, and the influential Anti-Saloon League in 1893.[98] The revived temperance movement, along with 1) anti-immigrant (particularly anti-German) urges,[99] 2) the passage of the Sixteenth Amendment (by which an income tax would replace liquor taxes),[100] and 3) an aim to reverse the drag that drunk male workers were placing on productivity and on their dependents,[101] all led to Prohibition.[102]

The Eighteenth Amendment's "prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors" was ratified on January 16, 1919.[103] To give it teeth, Congress passed the Volstead Prohibition Enforcement Code (Volstead Act), which became effective January 17, 1920, over President Wilson's veto.[104] Nine days later, the Supreme Court would decide *Silverthorne v. United States*,[105] which, though not a liquor case, is known as the Supreme Court's earliest articulation of what would become fruit of the poisonous tree.[106]

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(2000) ("The intervention of the slavery question, which precipitated a shift in the moral fervor of the people from temperance, ended the first crusade."). To keep agricultural productivity up and revolt down, slaves themselves were denied alcohol by law, even in some northern states post-emancipation. *See* Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law,* 51 Houston L. Rev. 781, 800–01 (2014). *But cf.* Frederick Douglass, My Bondage and My Freedom 251–55 (1855) (slaveholders, for a range of perverse motives, would purposely render their slaves drunk each December from Christmas until New Year's).

97. *See* Sidney J. Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest,* 79 Calif. L. Rev. 161, 169 (1991).

98. *Id.* at 169–70.

99. Douglas A. Berman & Alex Kreit, *Ensuring Marijuana Reform Is Effective Criminal Justice Reform*, 52 Ariz. St. L. Rev. 741, 749–50 (2020).

100. *See* Mark Norris, Note, *From Craft Brews to Craft Booze: It's Time for Home Distillation*, 64 Case W. Res. L. Rev. 1341, 1352 (2014); *cf.* Robert Miller, *Taxation – Are Bootlegger's Profits Subject to Income Tax?*, 5 Tex. L. Rev. 207, 208 (1927) ("That Congress has the power to declare gains derived from criminal sources income for the purpose of taxation is without question.").

101. *See* Edward Behr, Prohibition: Thirteen Years that Changed America 149–50 (2011) (Henry Ford warned that with male workers drunk two to three days a week, a 40-hour week would need double that for his factories to be productive); *cf.* Rathod, *supra* note 96, at 790 (apart from the negative economic effects of alcohol, the saloon was seen "as a breeding place for crime, immorality, labor unrest and corrupt politics").

102. *See* Bryce Pfalzgraf, Note, *Taking the Keg: An Analysis on the Potential Effects of Changing the Federal Excise Tax on Beer,* 2015 U. Ill. L. Rev. 2141, 2147–48 (2015).

103. Ernest H. Cherrington, The Evolution of Prohibition in the United States 374 (1969).

104. *Id.* at 381–82.

105. Silverthorne. v United States, 251 U.S. 385 (1920).

106. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 441 (1984) ("The doctrine requiring courts to suppress evidence as the tainted 'fruit' of unlawful governmental conduct had its genesis in *Silverthorne*; there, the Court held that the exclusionary rule applies not only to the illegally

After federal agents ransacked their Tonawanda Island, New York lumberyard on February 25, 1919 "without a shadow of authority,"[107] father-and-son owners Asa and Frederick Silverthorne successfully moved the district court to return their seized documents.[108] The documents were returned, or at least those not handed over to the U.S. Railroad Administration, while copies U.S. Attorneys had made were impounded by the district court clerk.[109] Based on the copies, the Silverthornes were indicted for defrauding the U.S. by billing for "grain door boards" not received by the government-controlled Lehigh Valley Railroad Company.[110] When subpoenaed for the originals for the prosecution's use at trial, Frederick's refusal resulted in his purgeable contempt citation, from which he appealed.[111] In a ruling authored by Justice Holmes, the Supreme Court granted the contemnor the relief sought, thereby extending *Weeks* (which had excluded tainted primary evidence),[112] to bar the U.S. from using the originals in "two steps instead of one" to prove the owners' fraud.[113]

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obtained evidence itself, but also to other incriminating evidence derived from the primary evidence."); Michigan v. Tucker, 417 U.S. 433, 463 (1974) (Douglas, J., dissenting) ("Mr. Justice Holmes first articulated the 'fruits' doctrine in *Silverthorne*."); Keith A. Fabi, Comment, *The Exclusionary Rule: Not the "Expressed Juice of the Wolly-Headed Thistle,"* 35 BUFF. L. REV. 937, 945 (1986) ("The general rule against using illegally obtained evidence for the purpose of gaining other evidence was first elicited in *Silverthorne* . . . .").

107. *Silverthorne*, 251 U.S. at 390.

108. It made no constitutional difference that the Silverthornes' searched premises were a business, not a house. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) (corporations are protected by the Fourth Amendment), *citing* Hale v. Henkel, 201 U.S. 43, 75–76 (1906) (same).

109. United States v. Silverthorne, 265 F. 859, 860–61 (W.D.N.Y. 1920) (*granting* motion to dismiss fraud indictment).

110. United States v. Silverthorne, 265 F. 853, 856 (W.D.N.Y. 1920) (*denying* motion to dismiss fraud indictment). Congress took World War I as an exigency that justified federal operation of private railroads. *See* Act to Provide for the Operation of the Transportation System While Under Federal Control, 40 STAT. 451 (1918). "On May 20, 1919, President Wilson announced that the railroads would be returned to their owners at the end of that year." Nathan L. Jacobs, *The Interstate Commerce Commission and Interstate Railroad Reorganizations,* 45 HARV. L. REV. 855, 862 (1932). "The date of relinquishment was subsequently extended to March 1, 1920." *Id*. at 862 n.35.

111. No account of the dispute is clear as to the corporation's contempt, which is referred to as a $250 fine. *See Silverthorne*, 251 U.S. at 390; *see also* Carroll v. United States, 267 U.S. 132, 148 (1925) (In *Silverthorne*, "a writ of error was brought to reverse a judgment of contempt . . . fining the company and imprisoning one Silverthorne, its president, until he should purge himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne."). One court has read the corporation's contempt as civil, that is, purgeable through compliance, rather than criminal, that is, punitive. *See* In re Grand Jury Proceedings, 450 F.2d 199, 211 (3d Cir. 1971). Frederick's contempt has at times been lumped in with the judgment against the corporation, both as "contempt convictions," not citations. *See* United States v. Calandra, 414 U.S. 338, 361-62 (1974) (Brennan, J., dissenting); Gelbard v. United States, 408 U.S. 41, 62–63 (1972) (Douglas, J., concurring).

112. *Silverthorne*, 251 U.S. at 391–92, *citing* Weeks v. United States, 232 U.S. 383, 398 (1914); *see* Margaret L. Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L.Q. 514, 521 (1947) (*Silverthorne* "reiterated and expanded" *Weeks*.) [hereinafter *Wire Tapping I*].

113. *Silverthorne*, 251 U.S. at 390–92.

Step one was when the feds illegally seized the papers that the trial court later ordered returned to the Silverthornes; step two was the feds using information gained from step one to draft a subpoena for the originals. *Silverthorne*'s ruling—that "knowledge gained by the Government's own wrong cannot be used"[114]—"even as a means for drafting subpoenas describing the papers sought to be produced"[115]—did place what Professor John Maguire called "a natural limitation"[116] on the scope of the exclusionary rule. After suppressing the originals from the lumberyard raid, the Court clarified, albeit in dictum:[117] "this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an *independent source* they may be proved like any others . . . ."[118] In other words, *Silverthorne* acknowledged that evidence causally independent of the wrong would be *admissible* non-fruits.

From there, the Silverthornes twice moved the district court to dismiss their fraud charges. On the second try, Judge Hazel acknowledged that 1) the agents who raided the business did not testify before the grand jury, 2) no secondary evidence was used before the grand jury, and 3) the Silverthornes made no "definite allegation" as to "clues or leads" benefitting the U.S. from the illegally seized documents.[119] Judge Hazel also nodded to "evidence showing that the basis for the indictment was procured from *independent sources*, and not from any wrongful act."[120] Nonetheless, the fact that prosecutors "worked over" the documents rendered it "manifestly impossible" for the Silverthornes to demonstrate where that work led,[121] which Hazel deduced must have been, "directly or indirectly," to the fraud indictments.[122] Quoting both the ruling above and *Flagg* (which was circuit precedent),[123] Judge Hazel granted the Silverthornes' motions to dismiss.[124]

*Silverthorne* has consistently been read to exclude not just primary evidence (the documents seized in the lumberyard raid) but

114. *Id.* at 392.
115. Rogers v. United States, 97 F.2d 691, 692 (1st Cir. 1938).
116. John M. Maguire, Evidence of Guilt § 5.07, at 219 n.7 (1959).
117. *See* Harrison v. United States, 392 U.S. 219, 230 (1968) (White, J., dissenting).
118. *Silverthorne*, 251 U.S. at 392.
119. United States v. Silverthorne, 265 F. 859, 862 (W.D.N.Y. 1920).
120. *Id.* at 863 (emphasis added) (cryptic reference to the untainted testimony of one Woodworth).
121. *Id.* at 862.
122. *Id.* at 863.
123. *See* Flagg v. United States, 233 F. 481, 483 (2d Cir. 1916).
124. *Silverthorne*, 265 F. 859 at 863.

also one item of putatively derivative/secondary evidence (the subpoenaed originals).[125] Despite the perception that *Silverthorne* posed a secondary fruits issue,[126] only the subpoenaed originals were at issue.[127] Notably, whether *Silverthorne* rendered inadmissible a real item of derivative evidence—the "improperly made copies"[128]—was not before the Court.

On that issue, there was already, apart from *Flagg*,[129] some lower-court support for suppressing the copies, not just the subpoenaed originals.[130] And a year after *Silverthorne*, Judge Learned Hand, still a district court judge,[131] ruled on the admissibility of derivative evidence in *United States v. Kraus.*[132] Though the facts are thin, Hand wrote that as

125. The following state-court rulings say as much. State v. Miles, 244 P.3d 1030, 1035 (Wash. Ct. App. 2011); People v. Williams, 756 P.2d 221, 237–38 (Cal. 1988) (en banc); State v. Griffith, 500 So.2d 240, 243 (Fla. Ct. App. 1986); In re Special Investigation No. 228, 458 A.2d 820, 832 (Md. Ct. Spec. App. 1983); People v. Fuentes, 414 N.E.2d 876, 880 (Ill. Ct. App. 1980); People v. Jones, 238 N.W.2d 813, 821–22 (Mich. Ct. App. 1975) (Bronson, J., concurring in part & dissenting in part); Carter v. State, 337 A.2d 415, 438–39 (Md. Ct. App. 1975). As do the following commentators. *See, e.g.*, James Boyd White, *Forgotten Claims in the "Exclusionary Rule" Debate*, 81 Mich. L. Rev. 1273, 1278–79 (1983) ("The rule was extended in *Silverthorne* . . . to include the derivative use of improperly seized property—in this case improperly seized papers were copied . . . .") (citation omitted); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?,* 22 Am. Crim. L. Rev. 85, 143 (1984) (Subsequent cases meant "to supplement *Silverthorne*'s argument for expanding the rule to reach 'derivative fruits.'"); J.R.H., Recent Case, *Criminal Law–Evidence Obtained as an Indirect Consequence of Unlawful Wire-Tapping*, 18 Tex. L. Rev. 504, 504–05 (1940) ("Consequently, the rule now seems settled in the federal courts that information, inadmissible in evidence because of its having been wrongfully obtained, cannot be used to secure other relevant evidence . . . , as expressed in *Silverthorne* . . . .").

126. *See, e.g.*, Kenneth Melilli, *Act-of-Production Immunity*, 52 Ohio St. L.J. 223, 229 (1991) ("If the exclusionary rule were to apply only to the 'poisonous tree' and not also to the 'fruits,' then the deterrent value of suppression would be substantially compromised."), *citing Silverthorne*, 251 U.S. at 392; *id*. at 229 n.45 ("Without the suppression of the 'fruits' (in *Silverthorne Lumber* the evidence to be produced in response to the subpoenas), a calculating police officer would still have had a significant incentive to engage in the illegal search of the office and seizure of the documents.").

127. This distinction apparently evaded Justice White. *See* Harrison v. United States, 392 U.S. 219, 230 (1968) (White, J., dissenting) ("In *Silverthorne*, . . . the 'fruits' were copies and photographs of original documents illegally seized; it would be difficult to imagine a case where the fruits hung closer to the trunk of the poison tree.").

128. State v. Keeler, 236 N.W. 561, 563 (Wis. 1931).

129. Flagg v. United States, 233 F. 481, 486 (2d Cir. 1916).

130. *See* Osmond K. Frankel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 384–85 & nn.150–51 (1921), *citing, inter alia,* United States v. Brasley, 268 F. 59, 65 (W.D. Pa. 1920) (decided 25 days before *Silverthorne*, quashing subpoena, court returned not just the seized books and papers, "but . . . every memorandum taken therefrom, every photographic or other copy made thereof . . . ."), *and* In re Tri-State Coal & Coke Co., 253 F. 605, 608 (W.D. Pa. 1918) (quashing search warrants, court returned "all books, papers, writings, and other property, . . . together with all copies, photographs, or memoranda thereof made since the same were taken . . . .").

131. President Taft appointed Judge Hand to the United States District Court for the Southern District of New York in 1909, where he sat 15 years. *See* Nadine J. Wichern, Comment, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DePaul L. Rev. 621, 634 & n.75 (1999).

132. United States v. Kraus, 270 F. 578 (S.D.N.Y. 1921) (L. Hand, J.).

he understood *Silverthorne*, an illegal forcible entry by revenue agents to search for and seize evidence of Kraus's liquor enterprise "is enough to require a return of the papers, though *not* of any copies taken or of any other information obtained from their custody."[133]

Hand characterized "this right to retain copies," in his view a matter unsettled by *Silverthorne*, as "the nub" of *Kraus*.[134] (*Silverthorne* had held only that the feds could not subpoena the primary fruits/papers returned by the trial court to the Silverthornes). Because "the Fourth Amendment does not touch the competency of proof, but the means used to get it," Hand concluded "that not only must the papers be returned, but any copies now in the possession of the [U.S.]."[135] His riff in *Kraus* on *Silverthorne*'s "natural limitation"[136]—that evidence causally independent of the wrong would be admissible non-fruits—is worth quoting at length:

> A more difficult question arises to prevent any use of the information derived from their possession, a question which must not be interjected into the trial. The officials made the first unlawful move, and any confusion resulting from it they must undertake to clear up. The order must therefore provide that no testimony or other evidence of any transaction recorded in any of the papers seized shall be offered upon the trial unless the [U.S.] can show that they got it independently of their wrongful possession. To settle this before trial some reference will be necessary to a master, who will make a record of all purchases and sales of liquor recorded in any of the papers surrendered, so that they may be identified if evidence is offered of them at the trial. No such transactions may be proved unless the [U.S.] show before the master that they have independent proof not derived from information contained in the papers. The expenses of that reference will be borne by the prosecution, through whose wrong the difficulty arose.[137]

*Kraus*, which posited the exclusion of derivative evidence and was the first to allocate the burden of proof on the exclusionary rule,[138]

133. *Id.* at 581 (emphasis added). *Kraus* involved enforcement of Prohibition, which Judge Hand personally "abhorred" yet obeyed, having given up "social drinking unless he could be assured that the libation came from a private stock purchased before passage of the act." Barbara Allen Babcock, Commentary, *"Contracted" Biographies and Other Obstacles to "Truth,"* 70 N.Y.U. L. Rev. 707, 708 & n.6 (1995); *see* George W. Pepper, *The Literary Style of Learned Hand*, 60 Harv. L. Rev. 333, 338 (1947) ("I suspect that his duty to enforce the National Prohibition Act was not a welcome responsibility.").

134. *Kraus*, 270 F. 578 at 581.

135. *Id*.

136. John M. Maguire, Evidence of Guilt § 5.07, at 219 n.7 (1959).

137. *Kraus*, 270 F. 578 at 581–82.

138. Allocating burdens of proof on the exclusionary rule became a recurring burden for the Court. *See, e.g.,* Murray v. United States, 487 U.S. 533, 540 (1988); Nix v. Williams, 467 U.S. 431, 444 & n.5 (1984); Brown v. Illinois, 422 U.S. 590, 604 & n.10 (1975); Balistieri v. United States, 394

would stay both ahead of its time and in obscurity. The Supreme Court would cite it just once, a decade later in a string cite for an unrelated proposition;[139] nor did commentators take notice,[140] perhaps because Judge Hand himself would come to abandon (or at least severely qualify) his position.[141] And when the essence of *Kraus* did become the law of the land the next Term, it was without attribution.[142]

*Kraus* was decided on February 1, 1921. On February 28, the Supreme Court excluded copies of illegally seized documents in *Gouled v. United States*,[143] which also originated in the Second Circuit, where Felix Gouled unsuccessfully moved the district court both for the return of those documents[144] and later, to quash an indictment based on the same.[145] The documents implicated Gouled in a mail fraud against the U.S. through a bribery scheme with Vaughan ("a captain in the Quartermaster's Department of the United States army")[146] and Podell (a lawyer).[147] On Gouled's appeal from his conviction at a trial that allowed in the documents in question, the Second Circuit certified six questions to the Supreme Court,[148] whose ruling is today primarily known for three propositions,[149] none of them pertinent here.

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U.S. 985, 986–87 (1969) (Fortas, J., dissenting from denial of certiorari); United States v. Wade, 388 U.S. 218, 239–40 & n.31 (1967), *quoting* Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79 n.18 (1964), *quoting* Goldstein v. United States, 316 U.S. 114, 123–24 n.1 (1942) (Murphy, J., dissenting); *cf.* Carla Rhoden, *Challenging Searches and Seizures of Computers at Home or in the Office: From a Reasonable Expectation of Privacy to Fruit of the Poisonous Tree and Beyond*, 30 Am. J. Crim. L. 107, 128–31 (2002) (analyzing lower-court interpretations of exclusionary-rule burdens as set forth in Alderman v. United States, 394 U.S. 165, 180–85 (1969)).

139. *See* Go-Bart Import. Co. v. United States, 282 U.S. 344, 355 (1931) (citing *Kraus* for the proposition that district courts have jurisdiction to rule on motions to suppress evidence/return property).

140. *But see* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 563 (2005) (identifying *Kraus* and *Silverthorne* as "antecedents" to the "modern" fruits doctrine).

141. *See* United States v. Nardone, 106 F.2d 41, 43–44 (2d Cir. 1939) (L. Hand, J.).

142. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).

143. Gouled v. United States, 255 U.S. 298, 313 (1921).

144. United States v. Gouled, 253 F. 770, 770–72 (S.D.N.Y. 1918) (Manton, J.).

145. United States v. Gouled, 253 F. 242, 243 (S.D.N.Y. 1918) (Hutcheson, J.).

146. Aubrey Vaughan pleaded guilty. *See* Gouled v. United States, 264 F. 839, 841 (2d Cir. 1920) (Ward, Rogers, Hough, JJ.).

147. Gouled v. United States, 273 F. 506, 507–08 (2d Cir. 1921) (Ward, Rogers, Hough, JJ.). David Podell was acquitted. *See Gouled*, 264 F. at 841.

148. *Gouled*, 264 F. 839 at 839.

149. First, *Gouled* "held that a warrant could not be used solely for the purpose of gaining access to a house to search for incriminating evidence unless the public or the complainant had a 'primary right' in the property seized." Charles T. Newton, Jr., Comment, *The Mere Evidence Rule: Doctrine or Dogma?*, 45 Tex. L. Rev. 526, 527 (1967). Second, because "defendant had no knowledge of the adverse possession of the evidence until its production in court," *Gouled* relaxed the requirement that motions for return of papers be made "by seasonable demand" pre-trial. Comment, *Search, Seizure, and the Fourth and Fifth Amendments*, 31 Yale L.J. 518, 521–22 (1922). Third, *Gouled* "had no difficulty concluding that the Fourth Amendment had been violated by the secret and general ransacking, notwithstanding that the initial intrusion was occasioned by a fraudulently

Common knowledge is that the government's fraud case against Gouled, who held a contract to make raincoats for soldiers in World War I,[150] was thwarted by a surreptitious search of his office at 1 Madison Avenue[151] by acquaintance Private Cohen, who was "under direction of officers of the Intelligence Department of the Army."[152] That unjustified search of Gouled's office tainted two subsequent searches there by warrant,[153] the second of which uncovered an inculpatory "written contract, signed by the defendant and one Steinthal."[154] What is not common knowledge is that the contract "was not offered in evidence but a duplicate original, obtained from Steinthal, was admitted over the objection that the possession of the seized original must have suggested the existence and the obtaining of the counterpart . . . ."[155] Citing *Silverthorne*, the Court prohibited use of the duplicate original/copy of the contract at trial.[156]

The same day, the Court made a like ruling in *Amos v. United States*,[157] an early example of its many Prohibition cases, the only in that line that addressed the admissibility of derivative evidence. In *Amos*, two federal revenue agents went to Amos's home, where they encountered his wife,[158] whom they coerced into consenting to a search of the couple's adjacent store,[159] where agents found a bottle containing a half pint of illicitly distilled "blockade whisky." Two more bottles of whiskey were found under the quilt on the bed of the Amos home.[160] After the federal district court denied Amos's motion for return of property,[161] the agents conceded at trial that they had no search or arrest warrant and that Amos showed up only after the search concluded.[162] Amos's

obtained invitation rather than by force or stealth." Lewis v. United States, 385 U.S. 206, 210 (1966). The Court would come to call this third *Gouled* proposition "extreme." *See* Olmstead v. United States, 277 U.S. 438, 463 (1928); *see also* Donald A. Dripps, Symposium, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 Ohio St. J. Crim. L. 125, 163 n.202 (2005) ("Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit.").

150. *Name Army Officers in Raincoat Scandal,* N.Y. Times, Sept. 25, 1918, at 3; *Captain Indicted in Raincoat Fraud,* N.Y. Times, July 31, 1918, at 7.

151. *Gouled*, 253 F. 770 at 771.

152. Gouled v. United States, 255 U.S. 298, 303 (1921).

153. The Steinthal contract was discovered in an envelope in Gouled's office on July 22, 1918, the first warrant having been executed on June 17, 1918. *See Gouled*, 264 F. 839 at 841.

154. *Id.*; *see also Gouled*, 255 U.S. at 306–07.

155. *Gouled*, 255 U.S. at 307.

156. *Id*.

157. Amos v. United States, 255 U.S. 313 (1921).

158. *Id.* at 315.

159. *Id.* at 315, 317.

160. *Id.* at 315.

161. *Id.* at 314–15.

162. *Id.* at 315.

conviction of selling untaxed whiskey followed his unsuccessful motion to strike the agents' testimony.[163] Again citing *Silverthorne*, the Supreme Court reversed, ruling that both the pre-trial petition for return of property (as primary fruit of the illegal search) and motion to strike the agents' testimony (as secondary fruit of the illegal search) should have been granted.[164]

1. The Supreme Court's Hiatus from Fruits

*Silverthorne*, *Gouled*, *Amos*, and the Second Circuit's ruling in *Kraus* all were decided within a year after the Volstead Act became law. For nearly two decades thereafter, however, the Supreme Court offered no guidance either on *Silverthorne*'s exclusion of derivative evidence or on its "natural limitation"[165] that allows in evidence causally independent from the wrong. This is not to say that the lack of guidance affected the outcome of suppression hearings; it is, however, to say that the lack of guidance delayed the refinement of fruits doctrine. That hiatus from delineating the scope of the exclusionary remedy is hard to trace back to anything but the demands that Prohibition placed on the Court's energies.

During that hiatus (1922–1939) the Court had three preoccupations: 1) rejecting attacks on the Eighteenth Amendment and the laws implementing it;[166] 2) resolving dual-sovereignty tensions posed by what Professor Orin Kerr calls "cross-enforcement up," that is, when local police enforce federal Prohibition law;[167] and 3) ratifying Prohibition investigations, which the "bone dry"[168] Taft Court (1921–1930) would find involved a) no search and seizure at all,[169] b) justifiable search and seizure,[170] or c) both a and b,[171] thus precluding any talk of

163. Amos v. United States, 255 U.S. 313, 315 (1921).

164. *Id.* at 315–17.

165. John M. Maguire, Evidence of Guilt § 5.07, at 219 n.7 (1959).

166. Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. Crim. L. & Criminology 471, 476 n.35 (1982).

167. *See* Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 Harv. L. Rev. 471, 495–506 (2018) (discussing, *inter alia*, Marsh v. United States, 29 F.2d 172 (2d Cir. 1928), Gambino v. United States, 275 U.S. 310 (1927), and Byars v. United States, 273 U.S. 28 (1927)).

168. Post, *supra* note 60, at 42.

169. *E.g.*, Olmstead v. United States, 277 U.S. 438 (1928); Hester v. United States, 265 U.S. 57 (1924).

170. *E.g.*, Marron v. United States, 275 U.S. 192 (1927); Dumbra v. United States, 268 U.S. 435 (1925); Steele v. United States, 267 U.S. 498 (1925); Carroll v. United States, 267 U.S. 132 (1925).

171. *E.g.,* United States v. Lee, 274 U.S. 559 (1927) (Coast Guard boatswain's preboarding examination with a searchlight did *not* search vessel suspected of violating revenue laws despite the descriptive name of the tool used, but subsequent boarding of vessel was justified as a search incident to lawful arrest of occupants).

exclusion of evidence except in the most obvious cases.[172] Consequently, the Court's progress in deciphering the causal reach of the exclusionary rule was impeded by a sense that the "Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure as prescribed by the Fourth Amendment."[173] Even more radically, the two amendments were at times considered reconcilable only by implicit repeal of the Fourth, strict adherence to which severely hampered Prohibition enforcement, since alcohol production, distribution, and consumption were on the sly.[174] Although the Court's "antilibertarian decisions"[175] in support of Prohibition steadily diminished as the 1933 repeal approached[176]—hastened by the Wickersham Report[177] and the Great Depression[178]—the shift did nothing to generate

172. *E.g.*, Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921).

173. United States v. Bateman, 278 F. 231, 233 (S.D. Cal. 1922). The Fourth Circuit soon after elaborated:

> The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments. The Courts are therefore under the duty of deciding what is an unreasonable search of motor cars, in light of the mandate of the Constitution that intoxicating liquors shall not be manufactured, sold, or transported for beverage purposes.

Milam v. United States, 296 F. 629, 631 (4th Cir. 1924). The very next year the Supreme Court upheld a warrantless search of a car in which sixty-nine bottles of moonshine were found in the upholstery, which federal revenue agents tore open to facilitate the discovery. *See* Carroll v. United States, 267 U.S. 132, 172–74 (1925) (McReynolds, J., dissenting); *cf.* Alice Ristroph, Book Review, *What Is Remembered*, 118 Mich. L. Rev. 1157, 1173 (2020) (positing that either sixty-eight or seventy-three bottles were found in Carroll's car, not sixty-nine).

174. *See* Frederic A. Johnson, *Some Constitutional Aspects of Prohibition Enforcement*, 97 Central L. Rev. 113, 122–23 (1924); John P. Bullington, Comment, *Constitutional Law–Searches & Seizures–A New Interpretation of the Fourth Amendment*, 3 Tex. L. Rev. 460, 471 (1925) ("A very respectable argument might be advanced that the Eighteenth Amendment qualified the Fourth Amendment in so far as necessary for the complete realization of the former."). This view that the Eighteenth Amendment repudiated the Fourth "did not go unchallenged." Tracy Maclin, *Cops and Cars: How the Automobile Drove Fourth Amendment Law,* 99 B.U. L. Rev. 2317, 2322 n.7 (2019).

175. Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. & Soc. Change 383, 426 (1986).

176. *See generally* Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. Crim. L. & Criminology 471 (1982).

177. *See, e.g.*, Franklin E. Zimring, *The Accidental Crime Commission: Its Legacies and Lessons*, 96 Marq. L. Rev. 995, 1006 (2013) (A "generous reading of Wickersham's work on Prohibition is that its extensive documentation of cost and ineffectiveness provided a foundation for many supporters of Prohibition to accept the inevitable repeal of Prohibition two years later when it came.").

178. *See, e.g.*, Robert W. Sweet, *Will Money Talk?: The Case for a Comprehensive Cost-Benefit Analysis of the War on Drugs*, 20 Stan. L. & Pol'y Rev. 229, 237 & nn.48–49 (2009) ("Of course, the Wickersham Commission report was only one among a variety of factors leading to the repeal of Prohibition, the most significant of which was the onset of the Great Depression.").

any high-court rulings that would shed light on what might count as fruit of the poisonous tree.[179]

Nonetheless, Fourth Amendment litigation was all over the lower federal courts, which were "flooded . . . with criminal defendants," many of them "wealthy enough to afford lawyers," who were engaged in challenging the admissibility of liquor seized by Prohibition agents.[180] Enforcement was handled by underpaid, corrupt appointees within a party-spoils system so far gone that H.L. Mencken predicted that "the chief victims of Prohibition . . . will . . . be the Federal judges," whose "typical job today . . . is simply to punish men who have refused or been unable to pay the bribes demanded by Prohibition enforcement officers."[181] Consigned "to perform the function of petty police courts," federal judges pushed back by subverting the Prohibition apparatus through exclusion of the evidence it uncovered.[182]

Without any help from the Supreme Court, a handful of Prohibition-era rulings from the lower federal courts did begin to flesh out the scope of *Silverthorne*, confronting causal difficulties more challenging than those posed by copies of illegally seized documents and testimony from offending state actors.[183] This is not to say the lower federal courts agreed about the scope of *Silverthorne*. In actuality, "the Eighteenth Amendment presented the lower federal courts with problems which . . . resulted in considerable diversity of opinion"[184] that until then was absent.[185] That diversity of opinion makes good sense, given that due to *Silverthorne*'s "natural limitation" on its causal scope, fruits doctrine is as susceptible to admitting as excluding evidence, and thus "can act as either sword or shield."[186]

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179. *See, e.g.,* Nathanson v. United States, 290 U.S. 41 (1933); Sgro v. United States, 287 U.S. 206 (1932); Grau v. United States, 287 U.S. 124 (1932); Taylor v. United States, 286 U.S. 1 (1932); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

180. Post, *supra* note 60, at 116–17.

181. *Id*. at 27–28, *quoting* H.L. Mencken, *Editorial*, 1 Am. Mercury 161, 161 (1924).

182. *Id.* at 28.

183. *See, e.g.*, Wiggins v. United States, 64 F.2d 950 (9th Cir.) (ruling admissible the confession of an oral surgeon, who offices were unjustifiably searched by IRS agents, who had already obtained same information voluntarily from secretary/nurse and other office staff), *cert. den*. 290 U.S. 657 (1933); Watson v. United States, 6 F.2d 870 (3d Cir. 1925) (suppression of judge's testimony about illegally seized receipt and confession); Legman v. United States, 295 F. 474 (3d Cir. 1924) (cross-enforcement between federal Prohibition agents and Newark police required suppression of federal agent's testimony about discoveries in unlawful search and seizure of kitchen/still).

184. Bullington, *supra* note 174, at 461.

185. *Id.* at 464.

186. *See* David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 Am. Crim. L. Rev. 1, 42 (2013).

## 2. The Second Circuit's Contribution to Fruits

The Second Circuit, too, was encumbered during Prohibition with cases unrelated to the exclusionary rule.[187] And on those occasions when the rule was litigated, the question of *which* evidence would be subject to exclusion rarely was at issue.[188] At issue instead was whether the rule applied *at all*, such as in deportation proceedings.[189] In those rare cases in the Second Circuit where clarifying the causal scope of exclusion was at issue, progress was at least intimated, if not always made.

For instance, in *United States v. Lydecker*,[190] District Judge Hazel (who a year before dismissed the Silverthornes' fraud charges) reasoned that it does not follow from the fact that we return illegally seized property that an extorted confession "must be returned."[191] The analogy to *Silverthorne* fails, Hazel continued, because "seizing one's books and papers and extorting a confession of crime to be used on the trial are both violations of fundamental rights, yet . . . are not controlled by the same evidentiary rule."[192] Hazel was not addressing the so-called convergence theory, which holds that the Fourth and Fifth Amendments both enjoin police from coercing divulgences.[193] Instead, Hazel was pointing to a rule of admissibility that adjudges coerced confessions on a different plane from the coerced surrender of papers; jurors can make up their own minds about the value of a confession, the argument runs, but they risk being bewitched by all other evidence, the truth-value of which seems to speak for itself.

187. For example, that 1) a federal commissioner (unlike a federal district court judge) cannot order the destruction of liquor, *see* United States v. Casino, 286 F. 976, 981 (SDNY 1923) (L. Hand, J.), 2) evidence voluntarily surrendered cannot be excluded as compelled, *see* In re E. Dier & Co., 279 F. 274, 275 (S.D.N.Y. 1922) (L. Hand, J.), and 3) consecutive sentences are improper "where the counts are for merely alternative forms of the same offense, and where a conspiracy count is added to a count for the substantive crime," *see* Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, Rogers, & Hough, JJ.).

188. *E.g.,* United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926) (L. Hand, Hough, & Manton, JJ.) (affirming order for return/suppression of papers, the seizure of which exceeded scope of Prohibition agents' warrant to search defendant's offices).

189. *Compare* Ex parte Caminita, 291 F. 913, 914 (S.D.N.Y.1922) (L. Hand, J.) (exclusionary rule applies in deportation proceedings) *with* In re Weinstein, 271 F. 5, 6 (S.D.N.Y. 1920) (L. Hand, J.) ("This court may not attempt any regulation of those proceedings while they last, unless perhaps it appears that the relator is not being restrained for purpose of deportation at all.").

190. United States v. Lydecker, 275 F. 976 (W.D.N.Y. 1921) (Hazel, J.).

191. *Id.* at 978.

192. *Id.*

193. *See* Andresen v. Maryland, 427 U.S. 463, 472 n.6 (1976); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945, 955 n.61 (1977).

Although the rule Hazel was reciting was abandoned in 1936,[194] a decade later in a related context the Second Circuit would revive the analogy that he had rejected in *Lydecker*. Relying on *Silverthorne*, *United States v. Bayer* ruled that a second confession taken from a suspect was "patently the fruit of the earlier one," which had been taken under more coercive circumstances, though never proffered by the prosecution.[195] On the government's appeal, the Supreme Court reversed, pronouncing that *Silverthorne* is inapposite in confessions cases.[196] Both before *Bayer* in *Lyons v. Oklahoma*,[197] and after in *Leyra v. Denno*,[198] the Court would analyze cases involving multiple confessions for their voluntariness in Due Process terms rather than in terms of whether, once "the cat is out of the bag,"[199] the second confession is a suppressible upshot of the prior involuntary confession.[200] Yet for reasons that remain opaque, the relation between coerced confessions and fruit of the poisonous tree remains up in the air to this day.[201]

Another prescient Prohibition-era move by the Second Circuit in defining the causal scope of the exclusionary rule came within the law of standing,[202] which has been read into American constitutional

194. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (Brown v. Mississippi, decided in 1936, "was the first case in which the Court held that the Due Process Clause prohibited the States from using the accused's coerced confession against him.") (citation omitted).

195. United States v. Bayer, 156 F.2d 964, 970 (2d Cir. 1946) (Clark, L. Hand, & A. Hand, JJ.).

196. United States v. Bayer, 331 U.S. 532, 540–41 (1947). *Bayer* featured two confessions taken six months apart under quite different conditions from Army Major Walter Radovich, who had taken $7,000 in bribes from the Bayer brothers, who were desperate to keep a son to one brother and a nephew to both out of combat in World War II. *Silverthorne* and its progeny, the Court summarized, "did not deal with confessions but with evidence of a quite different category and do not control this question." *Id*.; *cf*. Robert Hobbs, *Evidence–Confessions–Admissibility of Subsequent Confessions Where Prior Confession Inadmissible*, 26 Tex. L. Rev. 536, 536 (1948) (calling Radovich's second confession admissible "even though it was psychologically the fruit of the first"). But different how? The Court's idea that fruits analysis has no application to confession cases would become hornbook law. *See* George H. Dession, Richard C. Donnelly, Lawrence Z. Freedman & Frederick G. Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 Yale L. J. 315, 334–35 & nn.66–67 (1953) (After *Bayer*, "most state courts permit the prosecution to use evidence discovered through the involuntary confession of an accused even though the confession itself is inadmissible.").

197. Lyons v. Oklahoma, 322 U.S. 596, 603 (1944).

198. Leyra v. Denno, 347 U.S. 556, 561 (1954).

199. *Bayer*, 331 U.S. at 540–41.

200. *See* 3 Wayne R. LaFave et al., Criminal Procedure § 9.5(c) (4th ed.) (Nov. 2021 Update) (citation omitted); *see also* United States v. Ellwein, 6 U.S.C.M.A. 25, 29–31 (Ct. Mil. App. 1955) (expressing "uncertainty" over the "peremptory dismissal in *Bayer* of the applicability of . . . *Silverthorne*").

201. *Cf.* Akhil R. Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 917 n.265 (1995) (authors "aware of no U.S. Supreme Court case . . . that actually excludes physical fruits of a coerced confession").

202. For an acknowledgment of standing as a causal doctrine, *see* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 320 (2012).

law through Article III, Section 2, "for want of a better vehicle."[203] That constitutional provision extends the judicial power to "cases and controversies,"[204] not to meddling in the grievances of others.[205] As the Supreme Court's operative term of art, "standing" dates to 1939,[206] while by any other name, at least back to 1923,[207] if not earlier.[208] Based on the idea that "rights are personal,"[209] one does not get standing to challenge a search or seizure simply by being the person prosecuted; instead, one must be the person actually searched or seized.[210] Another way of saying this is that the search or seizure must cause harm to the plaintiff, not to someone else, whose rights the plaintiff may not assert vicariously. When first registering this causal limitation on suppression in 1942 (albeit in a statutory, not constitutional context), the Supreme Court acknowledged that lower federal courts were already denying the suppression remedy to third parties.[211] Among those courts is the Second Circuit.

Limited credit for the development of the standing limitation has been given to *Rouda v. United States*,[212] a Volstead-Act case where Prohibition agents entered Rouda's liquor "plant" trespassorily by an adjoining hosiery shop through which Rouda "had a right of passage."[213] Judge

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203. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U. L. Rev. 881, 882 (1983).

204. *See* Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (first opinion to link "standing" to Article III's "cases and controversies").

205. *See* Craig A. Stern, *Another Sign from* Hein*: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing To Sue?*, 12 Lewis & Clark L. Rev. 1169, 1192 (2008).

206. *See* United States v. Rock Royal Co-op, Inc., 307 U.S. 533, 560 (1939).

207. *See* Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (taxpayers lacked standing under the Tenth Amendment to challenge federal funding of health programs for mothers and children where no "direct injury suffered or threatened"), *cited in* Flast v. Cohen 392 U.S. 83, 91 (1968) ("This Court first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in a federal court in *Frothingham* . . . .") (citation omitted).

208. *See* Linda S. Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 Dick. L. Rev. 303, 309 & n.35 (1996), *citing* Fairchild v. Hughes, 258 U.S. 126, 129 (1922) ("The alleged wrongful act of the Attorney General, said to be threatening, is the enforcement, as against election officers, of the penalties to be imposed by a contemplated act of Congress which plaintiff asserts would be unconstitutional. But plaintiff is not an election officer.").

209. Simmons v. United States, 390 U.S. 377, 389 (1968).

210. Alderman v. United States, 394 U.S. 165, 171–72 (1969).

211. *See* Elwood E. Sanders, Jr., *Fourth Amendment Standing: A New Paradigm Based on Article III Rules and Right to Privacy,* 34 Cap. U. L. Rev. 669, 672 n.17 (2006), *quoting* Goldstein v. United States, 316 U.S. 114, 121 ("While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.").

212. Rouda v. United States, 10 F.2d 916 (2d Cir. 1926) (L. Hand, Hough, & Manton, JJ.).

213. Recent Case, *Constitutional Law–Searches and Seizures–Evidence Held Admissible against Roomer when Obtained at His Arrest for Crime Observed through Transom Window by Officers Who Illegally Entered Rooming House*, 61 Harv. L. Rev. 1249, 1251 (1948).

Hand's use of standing as a bar to Rouda's relief is straightforward: "If a trespass, it was not upon the premises occupied by the defendants, and they may not escape through a wrong of which they were not the victims."[214] With no interest in the hosiery shop, its unlawful entry inflicted no injury on Rouda to litigate, apart from the unactionable fact that it landed him in court.[215] In his slim tribute to Judge Hand's criminal-law rulings, Orrin Judd credits Hand for his early nod in *Rouda* to the relevance of standing.[216]

But Hand's acknowledgment of standing had come even earlier in *Ex Parte Caminita,*[217] a district-court case so obscure to have been cited by another court just once in 100 years.[218] There, after Ludovico Caminita was discovered distributing "an avowed anarchistic publication,"[219] he sought to suppress the papers in his deportation trial (which was just a pretext for J. Edgar Hoover to shake Caminita down for information about the June 2, 1919 bombings that almost killed Attorney General Palmer).[220] Judge Hand was willing to concede the illegality of the search because while Caminita was implicated, the search violated only the rights of Mazzotta, in whose "composing room" the papers were found. "The most that can be said," Hand reasoned, "is that by a wrong against Mazzotta the officials learned of the existence of competent evidence against [Caminita], which otherwise they would not have got."

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214. *Rouda*, 10 F.2d at 918.

215. In elaborating, Hand, just five years after *Kraus*, was cynical about the exclusionary rule:

> The imputed incompetency of evidence procured by an unlawful search is remedial, and no remedy can extend to wrongs done another. True, it is argued, and has indeed been held, that the remedy has in no case any relation to the wrong, taking form, as in application it does, in the victim's exoneration of a crime. But with that we have nothing to do; our only question is whether the doctrine extends to a case where the criminal has not been wronged at all. No tenable theory could support his escape, merely as punishment for the official's trespass.

*Id*.

216. *See* Orrin G. Judd, *Judge Learned Hand and the Criminal Law*, 60 Harv. L. Rev. 405, 412 & n.29 (1947) ("He has confined the protection of the Constitution to the persons who came directly within its purview, however, and held that a defendant who was not lawfully in occupation of premises could not object to the seizure of property thereon.").

217. Ex parte Caminita, 291 F. 913 (S.D.N.Y. 1922). "The first case involving an illegal search in which the limitation was applied apparently was Moy Wing Sun v. Prentis, 234 Fed. 24 (7th Cir. 1916), although the limitation had previously arisen in cases involving subpoenas duces tecum. Hale v. Henkel, 201 U.S. 43 (1906)." Comment, *Judicial Control of Illegal Search and Seizure,* 58 Yale L.J. 144, 154 n.43 (1948).

218. *See* Schenk ex rel. Chow Fook Hong v. Ward, 24 F. Supp. 776, 778 (D. Mass. 1938).

219. *La Jacquerie* was the publication's name. *Caminita*, 291 F. 913 at 914.

220. *See* Kenyon Zimmer, Immigrants against the State: Yiddish and Italian Anarchism in America 150–56 (Univ. of Ill. 2015).

But *Silverthorne*, Hand concluded, does not "invest" Caminita "with the wrongs done to another."[221]

While the Supreme Court's ruling in *Silverthorne* makes no reference to the limits of standing, Judge Hazel had stated those limits in dictum in dismissing the Silverthornes' fraud indictment *after* the Supreme Court's ruling:

> It is argued . . . that the Fourth Amendment implies a right in which all the people are concerned, and any person aggrieved may complain of the violation. But this construction is deemed fallacious . . . . The rights guaranteed by both the Fourth and Fifth Amendments are expressly for the benefit of the person or individual whose rights have been invaded, and to transfer such rights to a person who may believe himself injured by a violation of the rights of another would give such scope to the Fourth Amendment as was never contemplated.[222]

Ironically, Hazel deploys "aggrieved" in a way that would nullify the limitation that standing places on the right to sue. Such an extended sense of "aggrieved" would confer standing on anyone prosecuted (i.e., someone who *feels* aggrieved) rather than only on those unlawfully searched or seized. But that extended sense of "aggrieved" did not become law. Instead, *Caminita*, subsequent Second Circuit cases,[223] the Supreme Court,[224] and the Federal Rules of Criminal Procedure (to which Judge Hand contributed as a member of the Advisory Committee)[225] all

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221. *Caminita*, 291 F. 913 at 914.

222. United States v. Silverthorne, 265 F. 853, 857 (W.D.N.Y. 1920) (Hazel, J.).

223. In a post-Prohibition liquor prosecution, Judge Hand denied a motion to suppress on the ground that "none of the accused were *aggrieved* by the search, not being in possession of the premises." United States v. Dellaro, 99 F.2d 781, 782 (2d Cir. 1938) (L. Hand, Swan, & A. Hand, JJ.) (emphasis added).

224. *See* Alderman v. United States, 394 U.S. 165, 171–72 (1969); Jones v. United States, 362 U.S. 257, 260–61, 264–65 (1960); *cf.* Flast v. Cohen, 392 U.S. 83, 108–09 (1968) (Douglas, J., concurring) ("Congress can . . . define broad categories of 'aggrieved' persons who have standing to litigate cases and controversies. But . . . the failure of Congress to act has not barred this Court from allowing standing to sue and from providing remedies. The multitude of cases under the Fourth, as well as the Fourteenth Amendment, are witness enough.").

225. Judge Hand was absent from the Advisory Committee's first morning session where the pertinent rule was briefly discussed. That first iteration of the Federal Rules stated that "A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained . . . ." FRCP Rule 41(e), at 68–69 (N.Y.U. 1946). In four sessions over two days, the Committee steered clear of Rule 41(e), a "delicate subject" of a "controversial nature." *Id*. at 130. When Nathan April brought it up anyway by asking whether illegally seized papers and their copies would be subject to suppression, *id*. at 146–47, Judge Alexander Holtzoff, backed up by Fred Strine, insisted that their Advisory Committee was tasked with devising a system of "procedural matters," *id*. at 147, not with taking positions on "the constitutional rights of the defendant" (though Strine admitted *Silverthorne* would exclude the papers and their copies). *Id*. at 148. Judge Hand would not join the session until after lunch.

would limit standing to move to suppress evidence to parties who were actually searched or seized: no one else qualifies as aggrieved.[226]

While the Supreme Court was on hiatus from fruits, the Second Circuit was less so. Working out the relation of fruits to coerced confessions (to this day an undeveloped aspect of Supreme Court jurisprudence), not to mention the related matter of standing, the Second Circuit's preoccupation with the causal implications of *Silverthorne* was, in a word, unique. And it is not that other courts were taking different approaches to understanding the scope of the exclusionary rule; they were taking no approach at all, as though somehow the issue was not yet live.

3. The State Courts' Contribution to Fruits

As for the states' contribution to the development of fruits doctrine during Prohibition, though not yet bound by the federal exclusionary remedy,[227] a number of them nonetheless adopted the exclusionary remedy into their constitutions on their own accord.[228] In fact, a few states had done so even before *Weeks* pronounced the federal standard in 1914.[229]

"Aggrieved" was here to stay, appearing six times in the 1989 amendments to Rule 41 and appearing as well in Rule 41(e)'s successor, 41(g)-(h).

226. The first case to deploy "aggrieved" in what would become hornbook fashion is Kelley v. United States, 61 F.2d 843, 845 (8th Cir. 1932), where the Eighth Circuit ruled that as a mere employee of the still operation on the Nebraska farm, "[i]t is not understandable how Kelley was aggrieved by the seizure of someone else's property in which he had absolutely no interest. The most that can be claimed here is that Kelley as an employee had a certain physical custody and control of the illegal business and of the incriminatory evidence. That is not sufficient." *See* Comment, *Judicial Control of Illegal Search and Seizure,* 58 YALE L.J. 144, 154 n.43 (1948).

227. Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating federal exclusionary remedy).

228. *See* Bullington, *supra* note 174, at 460–61 n.1 ("approximately half the state courts"); Comment, *Judicial Control of Illegal Search and Seizure,* 58 YALE L.J. 144, 150 (1948) ("With the advent of prohibition, . . . nearly half the states adopted it."); Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 246, 250 (1961) ("[M]ost of the states that accepted the '*Weeks* Rule' did so during the period of national prohibition."); Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice,* 8 DEPAUL L. REV. 213, 240–41 (1959) ("Exclusion . . . has been rejected by two-thirds of the American states."); *cf.* Wesley M. Oliver*, America's First Wiretapping Controversy in Context and As Context*, 34 HAMLINE L. REV. 205, 209 (2011) (a majority of states adopted the exclusionary remedy before 1961); Wesley M. Oliver, *Prohibition's Anachronistic Exclusionary Rule*, 67 DEPAUL L. REV. 473, 496 (2018) ("By 1930, eighteen states had adopted a generic version of the exclusionary rule.").

229. *See, e.g.,* John E. Fennelly, *Inevitable Discovery, the Exclusionary Rule, and Military Due Process*, 131 MILITARY L. REV. 109, 111 (1991) ("In *State v. Height,* a pre-*Weeks* case, the Iowa Supreme Court fashioned an exclusionary remedy on state constitutional grounds."); Kenneth Katkin, *"Incorporation" of the Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397, 415 (2005) ("Though the holding in *Weeks* applied only to federal courts, a few states had already adopted similar rules."); Jack L. Landau, Symposium*, Should State Courts Depart from the Fourth Amendment? Seizure, State Constitutions, and the Oregon Experience*, 77 MISS. L.J. 369, 377 (2007) ("[B]efore the . . . Supreme Court decided *Weeks*, . . . courts in several states recognized

That state courts began adopting the exclusionary rule more widely in the 1920s is chalked up to "the personal reaction of judges to the prohibition law,"[230] particularly the "indiscriminate raids of the Prohibition agents and the fact that many defendants were erstwhile law-abiding citizens rather than hardened criminals . . . ."[231] Indeed, the spectacle of gonzo temperance advocate Carrie Nation "hatchetizing" Kansas saloons may be more memorable,[232] but "saloons were smashed up"[233] at the hand of Prohibition agents, too, with no more legal authority than the moralizing temperance crusaders who came before.

States have always lacked authority to prosecute federal crimes.[234] Yet the Eighteenth Amendment gave "Congress and the several States" the "concurrent power to enforce . . . by appropriate legislation" the nationwide ban on the manufacture and distribution of liquor.[235] In exercise of that power, Congress's Volstead Act empowered state judges to issue warrants for Volstead-Act violations and state prosecutors to bring nuisance actions to enjoin the same.[236] Only five states at the turn of the century had "laws prohibiting the manufacture and sale of intoxicating beverages," but by April 1917, there were twenty-six.[237] Of these, only thirteen—all in the southern and western regions—"had sought . . . the

an exclusionary rule."); Osmond K. Frankel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 368 & n.43 (1921) (citing pre-*Weeks* cases from Iowa, Maryland, and Vermont); *cf*. Elkins v. United States, 80 S. Ct. 1437, 1448–49 (1960) (detailing a half-century of states' positions on exclusion).

230. John Baker White, Note, *Search and Seizure—Wire Tapping—Judicial Method*, 27 Mich. L. Rev. 78, 81 (1928); *see* Rosenzweig, *Wire Tapping I*, *supra* note 112, at 525 (states adopting the exclusionary remedy went from nine in 1923 to eighteen in 1934).

231. Rosenzweig, *Wire Tapping I*, *supra* note 112, at 525.

232. *See* Karl S. Coplan, *Fossil Fuel Abolition: Legal and Social Issues*, 41 Colum. J. Envtl. L. 223, 289 (2016); Susan Cagnan & Rick Van Duzer, *75 Years after Prohibition*, 18 Business Law Today 45, 45 (May/June 2009) ("In the days when Carrie Nation took an axe to barrels in Kansas saloons, alcohol was blamed by the burgeoning temperance movement as the source of virtually all societal ills . . . .").

233. Wesley M. Oliver, *Prohibition's Anachronistic Exclusionary Rule*, 67 DePaul L. Rev. 473, 474 (2018).

234. *See* Martin v. Hunter's Lessee, 14 U.S. 304, 337 (1916) ("No part of the criminal jurisdiction of the United States can consistently with the constitution be delegated to state tribunals.").

235. U.S. Const. amend. XVIII, §§ 1 & 2 (repealed 1933); *see* Elizabeth Norton, Note, *The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of* Granholm v. Heald, 67 Ohio St. L.J. 1465, 1466 n.8 (2006) ("The Twenty-First Amendment, ratified in 1933, repealed the Eighteenth Amendment, and with it Prohibition, but left the states with the ability to regulate alcoholic beverages, via its Section 2 powers.").

236. Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 Harv. L. Rev. 471, 497 (2018); J.P. Chamberlain, *Enforcement of the Volstead Act through State Agencies*, 10:6 A.B.A. J. 391, 391 (1924).

237. Post, *supra* note 60, at 5–6 & n.6, *citing* James H. Timberlake, Prohibition and the Progressive Movement (1900–1920) 149–66 (1966).

drastic bone-dry legislation of the Eighteenth Amendment."[238] Even though enforcement would seem almost an impossibility without the "state enforcement authorities and the state courts,"[239] such cooperation was withheld, even though virtually every state eventually passed its own Prohibition statute.[240] For example, for fear of reputational harm "the New York Police Department wanted no part of Prohibition enforcement."[241] Regrettably, caving in soon after under pressure from the Governor to enforce the state's version of the federal booze ban "debauched the police force of this city and caused an orgy of graft, perjury, and corruption."[242]

Like the lower federal courts, state courts of last resort began to work out the scope of the exclusionary rule in the 1920s through cases involving illegal searches and seizures in enforcement of state prohibition laws, though comparatively infrequently. The primary evidence chronically at issue was stills, mash, barrels, and whiskey, whereas the secondary evidence was agents' testimony about the primary evidence.[243] For example, when nine bottles of liquid were surrendered to local police in an illegal search of the restaurant where the defendant boarded, the Florida Supreme Court found error not just in the prosecution's introduction of the bottles, but in their derivative use as well.[244] Specifically, the sheriff had vouched at trial for the intoxicating contents of the "two or three bottles" he had tasted ("It would make me drunk").[245] Likewise, on the county attorney's invitation, jurors tasted the liquid as well, the error there being none were experts, and the whole experiment might

238. *Id.* at 4–6 & 5 n.6, *citing* Charles Merz, The Dry Decade 22 (1931). The remaining dry states allowed importation and/or manufacture of alcohol for personal use, although some restricted the type of alcohol permitted and others the amount that could be imported during a given period. *See id.* at 5 n.62.

239. J.P. Chamberlain, *Enforcement of the Volstead Act through State Agencies*, 10:6 A.B.A. J. 391, 391 (1924).

240. Post, *supra* note 60, at 24–25.

241. Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 Rutgers L. Rev. 447, 496 (2010).

242. *Id.* at 497.

243. *See, e.g.*, State v. McDaniel, 231 P. 965, 967, 973 (Or. 1925) (While the "bottle of whisky was not offered or admitted in evidence," county sheriffs' testimony that "the bottle was three-fourths full of whiskey," and chemist's testimony that seized liquor "contained 34 per cent. of alcohol" ruled inadmissible); Flum v. State, 141 N.E. 353, 353, 356 (Ind. 1923) (ruling inadmissible testimony as to stills, mash, and "white mule whiskey" found by local police, sheriff, and federal agent in execution of defective search warrant); Tucker v. State, 90 So. 845, 845, 848 (Miss. 1922) (after local constables' warrantless search revealed still and whiskey, constables' testimony, not just the tangible items, excluded); State v. Andrews, 114 S.E. 257, 260 (W. Va. 1922) (ordering suppression not only of liquor seized during an illegal search, but also "any *information* acquired by the officers in making such search and seizure") (emphasis added).

244. Atz v. Andrews, 94 So. 329, 334–35 (Fla. 1922).

245. *Id.* at 334.

have violated the Volstead Act to boot.[246] Not every state-court ruling involving secondary evidence involved the enforcement of Prohibition laws,[247] but the lesson about derivative evidence was always the same: that *Silverthorne* provided for the exclusion of secondary evidence *not* stemming from a source independent from the wrong.

To recap, once the Supreme Court made exclusion a remedy for violations of the Fourth Amendment, the first judicial adventure into fruits (*Flagg*) was decided in the Second Circuit before Prohibition. Once Prohibition commenced, the Supreme Court's seminal ruling in *Silverthorne* also originated in the Second Circuit, as did *Gouled*, one of the high court's same-day decisions that constituted its first explicit rulings on secondary evidence. The Second Circuit also got there first, however, having decided *Kraus* a month before.

## III. The Influence of Wiretapping on Fruits in the Post-Prohibition Era

Development of the causal scope of the exclusionary remedy no doubt owes a debt to wiretapping. Statutes regulating the interception of telegraphic communications arose at the end of the nineteenth century to protect the telegraph companies' property and their customers' uninterrupted service.[248] But those statutes were rarely enforced until "the lawless twenties when the rise of organized crime, the difficulty of enforcing the Prohibition Law, and the perfecting of wiretapping devices brought about [its] widespread use . . . in crime detection."[249] There was no federal regulation of wiretapping until 1934[250] when Congress sought to protect telephonic communications, which "proved to be a dramatic

246. *Id.*

247. *See, e.g.*, Gorman v. State, 158 A. 903, 906 (Md. Ct. App. 1932) (excluding not only tangible evidence seized by Baltimore police sergeant who entered house without justification, but also *testimony* "as to the character of the slips, money, envelopes and books found in the home . . . ."); People v. McGurn, 173 N.E. 754 (Ill. 1930) (in purposely illegal search of suspect McGurn, concealed revolver taken off him by Chicago police, plus their testimony about its discovery, ruled inadmissible).

248. Rosenzweig, *Wire Tapping I*, *supra* note 112, at 514; Margaret L. Rosenzweig, *The Law of Wire Tapping*, 33 Cornell L.Q. 73, 73 (1947) (*Wire Tapping II*); *see* Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. Pa. L. Rev. 373, 378–79 (2014) ("Some state laws prohibiting wiretapping emerged by 1895 . . . .").

249. Rosenzweig, *Wire Tapping I*, *supra* note 112, at 514.

250. *See* Note, *Exclusion of Evidence Obtained by Wire Tapping: An Illusory Safeguard*, 61 Yale L.J. 1221, 1221 & n.2 (1952); Rosenzweig, *Wire Tapping I*, *supra* note 112, at 532. To protect the secrecy of governmental communications when the government ran the telegraph and telephone systems for a year at the end of World War I, Congress did briefly outlaw wiretapping in 1918, but the law expired the next year when control of phone services returned to private companies. *See* Rosenzweig, *Wire Tapping I*, *supra* note 112, at 527 n.111.

advance" over the telegraph.[251] Because intercepting calls was easy,[252] made even easier with local phone companies' cooperation,[253] wiretapping was rampant in the early days of the telephone,[254] of which nearly 50,000 were in use by 1880 and more than 100 times that by 1910.

Police were intercepting telephone conversations as early as 1895, but the practice stayed a secret "until 1916 when there were revelations that the Mayor of New York City had ordered the tapping of the telephones of Catholic priests."[255] Nevertheless, "no published federal criminal cases mentioned wiretapping before the Prohibition era,"[256] "about fifty years after the invention of the telephone."[257] Even during Prohibition, federal litigation over wiretapping was "sporadic," given that the Attorney General, FBI, and Treasury Department all opposed the practice.[258]

It was not until 1928 that the Supreme Court—or any federal court for that matter—picked up a wiretapping case.[259] Until then, in the

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> The federal government's decision to take control of the U.S. telephone system was part of a broader debate over the proper role of the government during times of both peace and war . . . . Were it simply a matter of reflexive support for the state during times of armed conflict, one would expect the takeover to have occurred as soon as war was declared, as was done with respect to radio. Instead, Congress waited eight months to take over the railroads and another nine months to assume control of the telephone system . . . .

Michael A. Janson & Christopher S. Yoo, *The Wires Go to War: The U.S. Experiment with Government Ownership of the Telephone System During World War I,* 91 Tex. L. Rev. 983, 1006 (2013).

251. Kerr, *supra* note 248, at 378.

252. *See id.* ("Any person with access to the physical wires carrying the call could tap into the wire and intercept the call.").

253. *See* Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act,* 56 Alabama L. Rev. 9, 12 (2004) ("Illegal surveillance was often conducted with the cooperation of local phone companies, who conspired with agents to keep surveillance secret in order to maintain public confidence in the telephone networks."). Carriers' cooperation, however, has never been all that dependable. *See* Diane C. Piette & Jesselyn Radack, Symposium, *Piercing the "Historical Mists": The People and Events Behind the Passage of FISA and the Creation of the "Wall",* 17 Stan. L. & Pol'y Rev. 437, 441–42 n.25 (2006) (Carter Administration did not oppose the passage of the Foreign Intelligence Surveillance Act in 1978 because "[e]lectronic surveillance can only be done with phone company cooperation and we weren't getting it"); Erica Goldberg, Commentary, *How* United States v. Jones *Can Restore Our Faith in the Fourth Amendment*, 110 Mich. L. Rev. First Impressions 62, 68 (2012) (In *Olmstead*, "the phone companies argued that wiretapping, even on lines outside one's home, technically trespasses upon telephone lines belonging to private phone companies and devoted to the exclusive use of the callers.").

254. Kerr, *supra* note 248, at 378.

255. Wesley MacNeil Oliver, *America's First Wiretapping Controversy in Context and As Context*, 34 Hamline L. Rev. 205, 206 (2011).

256. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 842 & n.235 (2004) (citing cases).

257. *Id*. at 884.

258. *Id.* at 843; *see* Carol S. Steiker, *Brandeis in* Olmstead*: "Our Government Is the Potent, the Omnipresent Teacher,"* 79 Miss. L.J. 149, 152–53 (2009).

259. Kerr, *supra* note 256, at 843–45.

one-third of homes that even had phones, the device was used for "business and emergency communications," not socializing, let alone crime.[260] An exception was *Olmstead v. United States*,[261] where agents tapped phone lines from a city street without entering onto any private property,[262] intercepting the calls of a young Seattle police-lieutenant-turned-bootlegger *par excellence*,[263] who thereafter moved to suppress all 775 pages of the feds' transcripts of five months of taps.[264] Focusing on the mechanics of telephone networks rather than on their users,[265] Justice Taft's opinion for a 5-4 Supreme Court ruled "that the wire tapping here . . . did not amount to a search or seizure,"[266] lawful or otherwise. The "dirty business"[267] of wiretapping therefore had no Fourth Amendment implications for "Big Boy" Olmstead because it involved no trespass and captured intangible conversations, not "persons, houses, papers, and effects" in their strict sense.[268]

Apart from *Olmstead*, the Court's rulings on wiretapping all took place *after* the Eighteenth Amendment's repeal, which, as predicted, abated "a very large portion" of federal court business.[269] Ironically, an authoritative reading of *Silverthorne* finally came in what was also a liquor investigation, albeit one commenced in 1935, two years after repeal of Prohibition. That reading was *Nardone v. United States*,[270] a wiretapping dispute that came twice to the high court and three times to Judge Hand,[271] who by then had been hearing appeals for fifteen years on the

260. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 513–14 (2011).

261. Olmstead v. United States, 277 U.S. 438 (1928).

262. Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 383 (2003).

263. *See* Steiker, *supra* note 258, at 150–53 (as Seattle's youngest police lieutenant, "Big Boy" Olmstead got sacked for smuggling booze from Canada, after which he made it big smuggling full-time, his downfall being that with local officials in his pocket, he justifiably but mistakenly counted out wiretapping by the feds).

264. *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting).

265. *See* Kerr, *supra* note 262, at 384.

266. *Olmstead*, 277 U.S. at 466.

267. *Id*. at 470 (Holmes, J., dissenting).

268. *Olmstead*, 277 U.S. at 465 (Liberalized constitutional protections "cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.").

269. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 510 & n.69 (1986) (citation omitted).

270. 308 U.S. 338 (1939) (*Nardone II*).

271. *See* United States v. Nardone, 127 F.2d 521, 521 (2d Cir. 1942) (L. Hand, Swan, & Chase, JJ.) (*Nardone III*) ("This case comes before us now for the third time. The general nature of the charge and the evidence in support of it have been so fully set out in the two opinions of the Supreme Court and in our own that we may dispense with any introduction . . . .") (citations omitted).

Second Circuit.[272] In academic circles, *Nardone* is known for a linguistic move on Justice Frankfurter's part that pushed *Silverthorne*'s notion of independent sources toward the deployment of a second doctrinal box for making admissibility calls. The real rub in *Nardone*, however, is in reconciling Judge Hand's positions in *Kraus* and *Nardone* both with each other and with the Supreme Court's position.

### A. *Nardone I*: A Statutory Basis for the Suppression of Wiretapped Conversations

In *Nardone I*, federal revenue agents' unauthorized wiretaps intercepted 500 phone calls, seventy-two of which were admitted at Frank Carmine Nardone's trial,[273] where he was convicted of smuggling untaxed alcohol by boat into the U.S.[274] The case against Nardone "was principally prepared by one Dunigan, an 'assistant supervisor of the Alcohol Tax Unit,'"[275] who had learned from informant Murray that Nardone was in a smuggling ring. After observing the group for a while, including meetings at New York's Hotel Astor, Dunigan illegally seized three telegrams that "'absolutely convinced'" him of the conspiracy.[276] On December 20, 1935, four days after intercepting the telegrams, Dunigan began three months of wiretaps.[277] On December 28, 1935, Nardone's group shipped 2400 cases of untaxed liquor from near Newfoundland, got busted around January 12, 1936 off the South Carolina coast by the Coast Guard with 1/3 of the load, and then unloaded the balance on March 17, 1936 at Pier 72 on the Hudson, bringing about more arrests, including Nardone's,[278] at New York City's Belford Restaurant on March 20.[279]

On Nardone's appeal to the Second Circuit, Judge Chase rejected Nardone's search-and-seizure claim for "attributing an enlarged and

272. *See* Gerald Gunther, *Reflections on Judicial Administration in the Second Circuit, from the Perspective of Learned Hand's Days*, 60 Brook. L. Rev. 505, 506 (1994) (Appointed by President Coolidge in 1924, "Hand served as chief judge of the Circuit from February 1939 . . . until 1951, when Hand retired 'from regular, active service.'") (citation omitted).

273. United States v. Nardone, 90 F.2d 630, 631 (2d Cir. 1937) (Chase, L. Hand, & Manton, JJ.) (*Nardone I*).

274. *Id.* at 630; *Nardone III*, 127 F.2d at 522. "Apparently Nardone was one of the ringleaders." United States v. Nardone, 106 F.2d 41, 42 (2d Cir. 1939) (L. Hand, Swan, & A. Hand, JJ.) (*Nardone II*).

275. *Nardone III*, 127 F.2d at 521. Another Dunigan, Assistant U.S. Attorney Lester C., was on the brief to the Second Circuit in both *Nardone I* and *Nardone II*.

276. *Id.*

277. *Id.* at 522.

278. *Id*.

279. *Nardone I*, 90 F.2d at 630–32. The guilty vessel was seized the same day in Bridgeport, Connecticut. *Id.* at 631.

unusual meaning to the Fourth Amendment" that was false to "the common law of evidence."[280] As for the statutory issue, the Federal Communications Act of 1934 allowed "no person" without the sender's consent to "intercept" and "divulge" "any communication" to "any person."[281] Because Congress made no mention of any remedy for violations, the Second Circuit panel unanimously affirmed the conviction, seeing no point in worrying whether wiretapping violated the statute if nothing was at stake.[282]

Deeming a federal agent a "person," wiretapping an "interception," a telephone conversation a "communication," and an agent's testimony a "divulging," the Supreme Court, through Justice Owen Roberts, reversed in what became known as *Nardone I*, which nullified the feds' divulging through exclusion of the taps on retrial.[283]

## B. *Nardone II*: A Statutory Basis for the Suppression of Derivative Evidence

On remand, Nardone was re-convicted, this time seemingly based on evidence *derived* from the taps,[284] though the intercepted conversations themselves were excluded. On Nardone's second appeal to the Second Circuit, Judge Hand's ruling eschewed looking "beyond the character of the evidence itself" and into the causal relation between the taps and the derivative testimony presented at Nardone's re-trial.[285] Key to Hand's ruling in *Nardone II* is that at the time, the Supreme Court still held the *Olmstead* view that tapping wires is not a search or seizure if executed, as it was in *Nardone*, neither by entering the aggrieved party's property by trespass nor by seizing an actual thing, not a

280. *Id.* at 632, *quoting* Olmstead v. United States, 277 U.S. 438 (1928).

281. *Id., citing* 47 U.S.C.A. § 605 (1934).

282. *Id.*

283. *See* Nardone v. United States, 302 U.S. 379, 381–82 (1937) (*Nardone I*). *Nardone I* was a controversial ruling. *See* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York Court of Appeals' Quest for Principled Decisionmaking*, 62 Brooklyn L. Rev. 1, 59 n.199 (1996); Notes and Legislation, *Wiretapping and Law Enforcement*, 53 Harv. L. Rev. 863, 865–67 (1940). *But cf.* L. Rush Atkinson, *The Fourth Amendment's National Security Exception: Its History and Limits*, 66 Vand. L. Rev. 1343, 1377 n.172 (2013) ("While executive officials condemned the *Nardone* decisions, many members of Congress embraced the evidentiary bar."). For the pros and cons of wiretapping set forth when its function was most disputed, *see* Rosenzweig, *Wire Tapping II*, *supra* note 248, at 94–97.

284. *See Nardone II*, 106 F.2d at 42 (at Nardone's retrial, "the same transactions were proved by what, generally speaking, was the same evidence, omitting the 'taps'"). In its brief to the Supreme Court, the U.S. would elaborate its independent-source argument in unsuccessfully defending Nardone's second conviction. *See* Brief for the United States, Nardone v. United States, No. 240, 308 U.S. 539 (1939) 1939 WL 48428 at *44–46 (*Nardone II*).

285. *Nardone II*, 106 F.2d at 43–44.

conversation.[286] That meant the exclusionary rule was inapplicable because *Nardone* involved no Fourth Amendment violation.

In Judge Hand's view, however, *Olmstead* was on its way out;[287] in fact, Hand was so "doubtful" about his own imminent ruling that he enlarged Nardone on bail so he could prepare his second petition for certiorari.[288] If *Olmstead* is overruled, Hand predicted, then Nardone, like Kraus before him, would be entitled to a "complete exposure" of the prosecution's case pre-trial. That, Hand regretted, would render the prosecution "hopelessly handicapped" by "a single misstep" if it is enough for exclusion that "[o]ne thing leads to another," even though evidence typically fails to "bear the ear-marks of its acquisition."[289] If, however, Nardone's right to discover "how the case against him has been prepared" must await the close of testimony, then "a mistrial will be necessary unless . . . the prosecution has not used the 'taps' at all, or so little as not to count."[290] To avoid either of these "embarrassments," Judge Hand anticipated limits on the exclusionary rule along the lines of those imposed on coerced confessions, such as by excluding only "the very transaction—the document seized, the talk overheard."[291]

The admissibility of secondary evidence derived from an illegal search and seizure, Hand posited, was an open question. "The Supreme Court has never committed itself on the point," he summarized, "for in all its decisions except *Silverthorne*, the very document or other evidence seized was offered; and in that case, although the unlawfully seized papers were not offered, the prosecution was proposing to compel their production."[292]

Judge Hand was correct in *Nardone II* that there was nothing derivative about compelling production of "the very document" the U.S. had illegally seized in *Silverthorne*,[293] but he is mistaken that the Court had "never committed itself on the point,"[294] either in *Silverthorne* itself or in the nineteen-year run-up to *Nardone II*. It had. As a reminder, the year after *Silverthorne*, *Gouled* excluded as secondary fruits

286. *See id. citing* Olmstead v. United States, 277 U.S. 438 (1928).
287. *See id.* at 43 (*Olmstead*, "so far as we can see, still stands"); *id*. at 44 ("if *Olmstead* . . . should be treated as overruled . . . ."); *id*. ("Possible *Olmstead* . . . is no longer law"). The idea was that the Federal Communications Act of 1934 had effectively overruled *Olmstead*. *See, e.g*., Lopez v. United States, 373 U.S. 427, 462 (1963) (Brennan, J., dissenting).
288. *Nardone II*, 106 F.2d at 44.
289. *Id*.
290. *Id.*
291. *Id.*
292. *Id.* (citation omitted).
293. *Id*.
294. *Id*.

"a duplicate original, obtained from Steinthal,"[295] just as the same day, *Amos* excluded as secondary fruits Prohibition agents' testimony about "blockade whiskey."[296] While the poisonous tree in both *Gouled* and *Amos* was warrantless trespassory searches, *Nardone* was still governed by *Olmstead*, under which non-trespassory wiretapping was a non-search. As such, there was no poisonous tree to bear any fruit.

That meant Nardone's relief in the Second Circuit would have to come from the statute. Stuck with the Supreme Court's ruling that the statute required exclusion of the taps, Judge Hand found "the nub" of the case, just as he had in *Kraus*, not to be the taps themselves, but testimony *derived from* the taps:

> Congress had not also made incompetent testimony which had become accessible by the use of unlawful 'taps', for to divulge that information was not to divulge an intercepted telephone talk. Indeed, the officer might lock what he had heard in his breast, and yet use it effectively enough. He would of course be taking advantage of his crime, but that would not be enough; the testimony he secured would not itself be a forbidden disclosure.[297]

Accordingly, Hand ruled that Nardone "had no right to a discovery of how the prosecution's case was prepared."[298]

When *Nardone II* reached the Supreme Court, the Justice Department's brief took Hand's contrary position in *Kraus* as "clearly dictum,"[299] even though Hand had characterized the admissibility of derivative evidence as the very "nub" of *Kraus*.[300] "Moreover," the DOJ went on, "Judge Hand, in writing the opinion in the instant case in the court below, cited the *Kraus* case without feeling bound to follow it."[301] Yet any doubt that *Gouled/Amos* would exclude derivative, not just

295. Gouled v. United States, 255 U.S. 298, 307 (1921).
296. Amos v. United States, 255 U.S. 313, 315 (1921).
297. *Nardone II*, 106 F.2d at 44.
298. *Id*.
299. Brief for the U.S., Nardone v. United States, 308 U.S. 539 (1939) (No. 240), 1939 WL 48428 at *26–27 (*Nardone II*), *quoting* United States v. Kraus, 270 F. 578, 580 (S.D.N.Y. 1921) (L. Hand, J.). The federal reporter's synopsis of *Kraus* does state that wholesale liquor dealers moved "for the return of papers claimed to have been illegally seized" by Prohibition agents. That no copies were there mentioned apparently led DOJ to conclude that Judge Hand "was acting upon a petition for the return of the very papers which had been illegally seized." *Id*.
300. United States v. Kraus, 270 F. 578, 581 (S.D.N.Y. 1921) (L. Hand, J.).
301. Brief for the U.S., Nardone v. United States, 308 U.S. 539 (1939) (No. 240), 1939 WL 48428 at *27 (*Nardone II*).

primary evidence, would soon after be removed by the high court in *Nardone II*,[302] where the Court reversed again.

Faced with a "far-reaching problem"[303] "of morality and public well-being,"[304] Justice Frankfurter's opinion for the Court predicted that bans on privacy invasions by federal agents would be "self-defeating"[305] if trial courts do not "allow the accused to examine the prosecution as to the uses to which it had put the information" owing to the wiretaps.[306] What followed was a restatement of the "natural limitation"[307] of *Silverthorne*: "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."[308] The Court went on that once an accused demonstrates that "a substantial portion of the case against him was a fruit of the poisonous tree," the prosecution may "convince the trial court that its proof had an *independent* origin."[309] Declining to perform "a finicking appraisal of the record . . . as to the existence of independent sources for the Government's proof,"[310] *Nardone II* offered no examples of what might count as attenuated, dissipated, or independent.

### C. *Nardone III*: Judge Hand's Application of the Independent-Source Doctrine

Such an appraisal would occur on remand at a hearing decided in the prosecution's favor before Nardone's third trial,[311] which ended in yet another conviction. On Nardone's appeal from that judgment, Judge Hand concluded that while the prosecution failed at the pre-trial hearing to prove that the telegrams "had not led Dunigan to begin to 'tap' the telephones four days later; or that without the 'taps' he would have pressed through his investigation to a successful conclusion,"[312] that failure didn't matter. Reviewing each item of intelligence gathered

302. *Nardone II*, 308 U.S. at 340–41, *citing Gouled*, 255 U.S. at 307 (referencing the inadmissibility of a copy of the illegally seized Steinthal contract).
303. *Id.* at 339.
304. *Id.* at 340.
305. *Id.* at 341.
306. *Id.* at 339.
307. John M. Maguire, Evidence of Guilt § 5.07, at 219 n.7 (1959).
308. *Nardone II*, 308 U.S. at 341.
309. *Id.*
310. *Id.* at 342–43.
311. *Nardone III*, 127 F.2d at 521.
312. *Id.* at 522.

on the smuggling ring prior to the intercepted telegrams, including indictments issued against members prior to the telegrams, Judge Hand ruled out that members' decisions to cooperate with authorities were prompted by illicit information.[313] The one member of the ring on whom authorities had nothing before the taps, they had nothing on afterward, either.[314] In affirming, the Second Circuit ruled that the illegal taps "did not, directly or indirectly, lead to the discovery of any of the evidence used upon the trial, or to break down the resistance of any unwilling witnesses."[315] Whether the taps somehow "spurred the authorities to press an investigation which they might otherwise have dropped" Judge Hand would not entertain, lest the law fetishize privacy in a way not prescribed by the Supreme Court in either of its reversals.[316] From there the Supreme Court refused to hear *Nardone III*.[317]

The United States was correct in arguing that Judge Hand's position in *Nardone II* and *Nardone III* had shifted in the two decades since *Kraus*.[318] While Judge Hazel had conceded in *Silverthorne* "that there was evidence showing that the basis for the [Silverthornes'] indictment was procured from independent sources, and not from any wrongful act,"[319] he found that trying to decouple the illegally seized documents from those sources was "manifestly impossible."[320] Like Judge Hazel, Judge Hand in *Kraus* saddled the prosecution with the burden of disentangling the wrong from the evidence.[321] So, Hand either changed his mind about the nature of the prosecution's task or found the evidence in *Nardone* more easily decoupled from the wrongs than he had in *Kraus*, a finding that is difficult to assess, given that *Kraus* presumed that the task was not quite humanly possible.

If Hand had changed his mind, then there was no obvious sign. In the twenty-one years between *Kraus* and *Nardone III*, Hand, sitting by designation on the court of appeals, participated in three published opinions that addressed motions to return/suppress property;[322] none

313. *Id.*
314. *Id.* at 522–23.
315. *Id.* at 523.
316. *Id.*
317. Nardone v. United States, 316 U.S. 698 (1942) (*Nardone III*).
318. Brief for the United States, Nardone v. United States, 308 U.S. 338 (1939) (No. 240) 1939 WL 48428 at *27 (*Nardone II*), *quoting* United States v. Kraus, 270 F. 578, 580 (S.D.N.Y. 1921).
319. United States v. Silverthorne, 265 F. 859, 863 (W.D.N.Y. 1920).
320. *Id.* at 862.
321. *See* United States v. Kraus, 270 F. 578, 581–82 (S.D.N.Y. 1921).
322. *See* In re Hollywood Cabaret, 5 F.2d 651, 659 (2d Cir. 1924) (Rogers, J., with L. Hand & A. Hand, JJ., both by designation) (invalidating search warrants obtained by Treasury Department agents, but limiting restoration of liquor "to one who at least claims to be the owner, or to have

are revelatory about *Silverthorne*'s "natural limitation." If *Kraus* and *Nardone III* are distinguishable, it is not clear in what way, other than by their causal complications stirring up in Hand a different sensibility. That new sensibility might have been provoked by the peculiar capacity of wiretapping to capture a large web of human entanglements, thereby producing evidence that, as Hand had said in *Nardone II*, "does not bear the ear-marks of its acquisition."[323] He had apparently come to see it as unfair to place that mystery entirely on the prosecution to resolve, as he had done in *Kraus*, which involved a liquor ring that was penetrated by an old-fashioned raid, not wiretapping.

## IV. The Second Circuit's Resistance to Doctrinal Boxes

As early as 1923, Judge Hand did betray a cynicism toward an adversarial game beset by "archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime," while giving the accused "every advantage," all just to prevent the "unreal dream" of "the innocent man convicted" from coming true.[324] Cynical or not,

had it in his possession when it was wrongfully seized"); In re No. 191 Front St., 5 F.2d 282, 286 (2d Cir. 1924) (Rogers & Manton, JJ., & L. Hand, J., by designation) (ordering return of records of liquor transactions discovered by way of defective search warrant); Linn v. United States, 251 F. 476, 479–80 (2d Cir. 1918) (Rogers & Hough, JJ., & L. Hand, J., by designation) (corporations may not resist subpoenas on grounds of compelled self-incrimination).

323. *Nardone II*, 106 F.2d at 44 ("One thing leads to another," continues Hand, "and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure.")

324. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (L. Hand, J.). Later, Hand would note that exclusion of evidence can be "extremely embarrassing" to an otherwise just judgment. United States v. White, 124 F.2d 181, 186 (2d Cir. 1941) (L. Hand, A. Hand, & Clark, JJ.). By 1958, at age 87, Hand had degraded to the point that he condemned Brown v. Board of Education as misguided judicial activism. *See* Gerald Gunther, Learned Hand: The Man and the Judge 564–66, 572–79 (Oxford 2011). Judge Posner, among others, was unimpressed. *See* Richard A. Posner, Book Review, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 Yale L.J. 511, 519 (1994) (calling Hand's position on *Brown* "eloquent twaddle"). Biographer Gerald Gunther excused Hand's condemnation of *Brown* as a "delayed surrender" to the manipulations of Justice Frankfurter, Gerald Gunther, Learned Hand: The Man and the Judge 578 (Oxford 2011), who had become quite "embittered." John Frank, Book Review, *The Great Judge*, 108 Harv. L. Rev. 931, 943 (1995). Blaming Hand's stance toward *Brown* on Frankfurter has been ruled a cop-out. *See* Michael J. Gerhardt, Review Essay, *Art of Judicial Biography*, 80 Cornell L. Rev. 1595, 1622–23 (1995); Linda Przybyszewski, *The Dilemma of Judicial Biography or Who Cares Who Is the Great Appellate Judge?*, 21 Law & Social Inquiry 135, 161–62 (1996); Edward A. Purcell, Jr., *The Historical Significance of Judge Learned Hand: What Endures and Why?*, 50 Ariz. St. L. Rev. 855, 896–97 (2018); Charles A. Wright, *A Modern Hamlet in the Judicial Pantheon*, 93 Mich. L. Rev. 1841, 1851–53 (1995). Hand's public recantation also flopped. *See* Frank, *supra*, at 944. Hand's late position on *Brown* does have its defenders, apart from Gunther. *See* McGeorge Bundy, Book Review, *The Bill of Rights*, 67 Yale L.J. 944, 948–49 (1958); Jak Allen, *Political Judging and Judicial Restraint*, 60 Am. J. Legal Hist. 169, 180 (2020).

Hand made what should be appreciated as a deep and wide mark on fruits doctrine. A historically significant illustration is *Somer v. United States*,[325] a post-prohibition dispute over untaxed alcohol. There, federal investigators from the Alcohol Tax Unit and a local police officer found an operative still in an unjustifiable search of Somer's Brooklyn apartment. When Somer's wife said that he would be home in twenty minutes, agents waited outside until he arrived as predicted, when a search of his car revealed jugs of alcohol, which agents could smell from outside the car. Relying on *Silverthorne,* the Second Circuit ruled that the car search owed to information unlawfully gotten in the home search. But the panel remanded the case because

> it does not follow that the seizure was inevitably invalid. Possibly, further inquiry will show that, quite independently of what Somer's wife told them, the officers would have gone to the street, have waited for Somer and have arrested him, exactly as they did. If they can satisfy the court of this, so that it appears that they did not need the information, the seizure may have been lawful.[326]

Characteristic of Second Circuit rulings of the era, *Somer* was free from what would become the more technical, torts-influenced, post-1963 attempts by the Supreme Court at precision in fruits cases.

From 1963 on, fruits depended on three doctrinal boxes that act as "exceptions to the exclusionary rule—the 'independent source,' 'inevitable discovery,' or 'attenuation' doctrines."[327] There is irony in that all three exceptions arose out of the Second Circuit, which itself never identified any exceptions as such. That work was all a projection on the Supreme Court's part, begun in 1963, continuing today in a perpetual state of "being and becoming."[328] In 1963, the Court projected two distinct doctrinal boxes, the first onto *Silverthorne* (admitting evidence from a source "independent" of the wrong) and the second onto *Nardone II* (admitting evidence "attenuated" from the wrong).[329] The occasion was *Wong Sun v. United States*,[330] where federal narcotics agents searched Wong Sun's San Francisco residence without justification. No narcotics were found, but Wong Sun was arrested anyway, then promptly charged, arraigned, and released. A few days later, Wong Sun voluntarily visited

325. Somer v. United States, 138 F.2d 790, 791 (2d Cir. 1943) (L. Hand, Chase, & Clark, JJ.).
326. *Id.* at 791–92.
327. United States v. Crews, 445 U.S. 463, 469–70 & n.11 (1980).
328. *See* Robert Bolton, *Plato's Distinction between Being and Becoming*, 29:1 Rev. of Metaphysics 66 (1975).
329. *See* Wong Sun v. United States, 371 U.S. 471, 487 (1963).
330. *Id.* at 471.

the Narcotics Bureau, where he confessed on his own accord, rendering the confession admissible as "attenuated" from the illegal search and seizure he had suffered.[331] Just as easily, however, could the Court have declared the confession admissible as "independent" from the illegal search and seizure.

As an interpretation of *Silverthorne*, the Court in *Nardone II* intended "no doctrinal significance at the time" in tacking attenuation/dissipation on to *Silverthorne*'s allusion to independence. The add-on was "only an idiosyncratic turn of phrase," the sort of "odd and often inexplicable" flourish to which its author, Justice Frankfurter (who actually used "palimpsest" and "gallimaufry" in opinions) was prone.[332] Commentators credit *Somer* as the basis of what four decades later would become the Court's third doctrinal box,[333] the inevitable discovery exception.[334] Those boxes, however, whatever their value, are false to the Second Circuit's way of dealing with derivative evidence.

For Judge Hand and his colleagues, application of *Silverthorne*'s "natural limitation" was a commonsense endeavor cut off from the algebraic BPL risk assessment he would later impose on tort law (and torts students alike).[335] Faced with the "concrete complexities" that Justice Frankfurter accurately predicted for fruits analysis,[336] the Second Circuit consistently ruled in a mode devoid of the mincing multi-factor balancing tests the Supreme Court would tie itself to,[337] even when the

331. *Id.* at 491.

332. *See* Brent D. Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. Crim. L. & Criminology 139, 153–55 & nn.71–74 (1984) (citation omitted).

333. *See* Wayne R. LaFave et al., Criminal Procedure § 9.3(e) (4th ed.) (Nov. 2021 Update); Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 Am. J. Crim. L. 79, 82 (1992); Stephen E. Hessler, *Establishing Inevitability without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule,* 99 Mich. L. Rev. 238, 241 n.22 (2000); Frank H. Easterbrook & David L. Shapiro, *The Supreme Court, 1983 Term,* 98 Harv. L. Rev. 118, 123 & n.47 (1984); Harold S. Novikoff, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules,* 74 Colum. L. Rev. 88, 90 (1974). *But see* Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?,* 22 Am. Crim. L. Rev. 85, 144–46 (1984) (arguing that *Somer* is *not* an inevitable-discovery case).

334. *See* Nix v. Williams, 467 U.S. 431, 444 (1984).

335. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173–74 (2d Cir. 1947); Restatement (Second) Torts § 291 (1965) ("Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the . . . act is negligent if the risk is of such magnitude as to outweigh . . . the utility of the act or of the particular manner in which it is done.").

336. *Nardone II*, 308 U.S. at 341.

337. *See* Brown v. Illinois, 422 U.S. 590, 603–04 (1975) (five-factor attenuation test); *cf.* United States v. Wade, 388 U.S. 218, 241 (1967) (six-factor independent-source test); Unger v. Young, 571 U.S. 1015 (2013) (Alito, J., dissenting from denial of certiorari) (calling out Court for passing up opportunity to apply and clarify *Wade*'s six-factor test).

fit of the facts to the factors is poor.[338] The validity,[339] application,[340] and implications[341] of the exceptions themselves and their elements have engaged the Court and commentators without end, the result being a perhaps misplaced consensus that making causal judgments is more science than art, more technique than knack, more learning than feel.

Most notable for the absence of a preoccupation with the mechanics of causation that occupies tort lawyers is the Second Circuit's ruling in *Parts Manufacturing Corporation v. Lynch*,[342] a case more factually tricky than any fruits case the Supreme Court has decided since *Nardone*. The Cliffs Notes version is that in December 1941, acting on a district judge's defective order, the FBI seized stolen Ford auto parts stashed in a NYC warehouse.[343] The Second Circuit ordered the return of the parts,[344] of which the FBI made a list for Ford's lawyers,[345] who turned the list into a replevin suit enforced by New York sheriffs, who reclaimed the parts from accused thieves who ran Parts Manufacturing, which then got its own replevin order for the parts.[346] But the FBI beat the thieves to the parts under a warrant sought by an AUSA who relied on affiants who had confirmed a year before the original invalidated search that Parts Manufacturing had ripped the parts off from Ford.[347] On appeal, in an unencumbered, perhaps too playful passage,

338. *See, e.g.,* Utah v. Strieff, 579 U.S. 232 (2016) (finding only three of the five so-called *Brown* factors applicable).

339. For example, the inevitable-discovery exception has been criticized for having "neglected to define adequately when a discovery is truly inevitable," Stephen E. Hessler, *Establishing Inevitability without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule,* 99 Mich. L. Rev. 238, 242 n.22 (2000), or "offer any precise formulation of the exception," Leading Cases, *Exclusionary Rule–Inevitable Discovery Exception,* 98 Harv. L. Rev. 118, 127 (1984). Likewise has the attenuation exception been criticized for its individual elements/factors. *See* Bryan H. Ward, *Restoring Causality to Attenuation: Establishing the Breadth of a Fourth Amendment Violation,* 124 W. Va. L. Rev. 147, 198–99 (2021) (criticizing an attenuation factor for being insufficiently causal); Dunaway v. New York, 442 U.S. 200, 220 (1979) (Stevens, J., concurring) ("The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one. Conversely, even an immediate confession may have been motivated by a prearrest event such as a visit with a minister.").

340. *See, e.g.*, Wayne R. LaFave, Search & Seizure § 11.4(f) (6th ed. Oct. 2022 Update) (calling Court's application of independent-source test in Segura v. United States, 468 U.S. 796 (1984) "unsound").

341. *See, e.g.*, Kit Kinports, *Illegal Predicate Searches and Tainted Warrants after* Heien *and* Strieff, 92 Tul. L. Rev. 837, 869–79 (2018) (mapping *Strieff* on to an unfamiliar set of facts).

342. Parts Mfg. Corp. v. Lynch, 129 F.2d 841 (2d Cir. 1942).

343. *See* Weinberg v. United States, 126 F.2d 1004, 1005–06 (2d Cir. 1942) (companion case to *Parts Manufacturing*).

344. *See id.* at 1006–09.

345. *See Parts Manufacturing*, 129 F.2d at 841–42.

346. *Id.* at 856.

347. *Id.* at 857–58.

Judge Charles Clark ended by refusing to say to the thieves that "[s]ince the first seizure was illegal, you now have a chance to spirit away the evidence . . . ."[348]

Indeed, Judge Clark's reluctance to view the relation of police wrongdoing to evidence as one of tortfeasor to plaintiff aligns well with Judge Hand's reading in *Nardone III* that the Supreme Court in *Nardone II* had "made it abundantly clear that it did not contemplate a chase after will-o'-the-wisps."[349] One will find no cites in *Parts Manufacturing* to Prosser, nor to events that are intervening, foreseeable, or causal-chain-breaking, or for that matter any other feature of tort law, to which contemporary fruits is considered sufficiently "akin"[350] to draw from. And draw from it the Court does.[351] Once in a blue moon, the Court does catch itself getting caught up in the mechanistic, wooden inquiries toward which tort law can tend, as where the Court noted that whether evidence is a fruit "cannot be decided on the basis of causation in the logical sense alone . . . ."[352] But those moments are too rare to count as representative. More typical is the Court's failure to absorb that even in torts, for an "independent" event to cut off responsibility for a prior risk-taking action, the new event need only be *independent enough*.[353]

In contrast, a virtue of the Second Circuit is that it approaches the relation of police wrongdoing to evidence as we might any other coincidence in the world. Professor Eric Johnson has argued persuasively that to call the relation of two events "independent" refers to the idea that the relation of police wrongdoing to the evidence is *coincidental*.[354] As coincidences go, some come from out of nowhere and cut off official

348. *Id.* at 843.

349. *Nardone III*, 127 F.2d at 523.

350. *See* Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U.L. Rev. 113, 115 (2008).

351. *See, e.g.,* Utah v. Strieff, 579 U.S. 232, 257-58 (2016) (Kagan, J., dissenting); Hudson v. Michigan, 547 U.S. 586, 592 (2006); Powell v. Nevada, 511 U.S. 79, 89 (1994) (Thomas, J., dissenting); New York v. Harris, 495 U.S. 14, 26 (1990) (Marshall, J., dissenting); Oregon v. Elstad, 470 U.S. 298, 333 (1985) (Brennan, J., dissenting); Segura v. United States, 468 U.S. 796, 815 (1984); Brown v. Illinois, 422 U.S. 590, 600–04 (1975).

352. United States v. Ceccolini, 435 U.S. 268, 274 (1978).

353. While it is conventional to say that "[t]he term 'independent' means the absence of any connection or relationship of cause and effect between the original and subsequent act of negligence," R.H. Macy & Co, Inc. v. Otis Elevator Co., 554 N.E.2d 1313, 1317 (Ohio 1990), such a claim is overstated. More accurate would be to say, as the Supreme Court has, that an independent (read "superseding") event occurs "where the defendant's negligence in fact *substantially contributed* to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable." Exxon Co., USA v. Sofec, Inc., 517 U.S. 830, 837 (1996) (emphasis added).

354. *See* Eric A. Johnson, *Two Kinds of Coincidence: Why Courts Distinguish Dependent from Independent Intervening Causes*, 25 Geo. Mason L. Rev. 77, 94–101 (2017).

responsibility for the outcome. In contrast, Johnson goes on, other coincidences are predictably within the scope of the prior wrongful action and, as such, keep officials on the hook for the coincidence.[355] Certainly, neither *Silverthorne* nor *Nardone* literalized the term "independent source" in a way that required that we identify new exceptions/doctrinal boxes to classify coincidental discoveries of evidence.

What those now forgotten Second Circuit cases were expressing is that ascriptions of responsibility are moral not scientific judgments, be they about the Long Island Railroad Company's responsibility to Helen Palsgraf[356] or the Narcotics Bureau's responsibility to Wong Sun,[357] two celebrated controversies that unfortunately hide this reality behind the mechanics of causation.[358] For better or worse, no basis for moral judgments can prevent borderline cases from arising. And when those borderline cases do arise, what that tells us is *not* that the rule has failed and is in need of more precision. Rather, borderline cases tell us that the rule has succeeded, or we wouldn't be able to identify borderline cases *as* borderline cases.[359] The Supreme Court's fruits docket is dedicated to sharply divided borderline cases,[360] which are disposed of in no more graceful a way today than they were when they had only a single box, a flexible notion of independence, to be applied not by "a learned lawyer," but by a "sensible" person, under rules that "are practical and discretionary," not technical and exacting.[361]

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355. *See id.*

356. *See* Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928).

357. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

358. *Wong Sun* has been cited more than Brown v. Board of Education, 347 U.S. 483 (1954), Gideon v. Wainwright, 372 U.S. 335 (1963), and Roe v. Wade, 410 U.S. 113 (1973).

359. *See* John R. Searle, Speech Acts: An Essay in The Philosophy of Language 10 (1974). Searle elegantly makes this point in his discussion of analyticity–that which makes a statement "true in virtue of its meaning or by definition." For example, "Rectangles are four-sided" is analytic, whereas "My son is now eating an apple" is not; the latter statement is not analytic because its truth must be verified. *Id.* at 4–11. Answering a critic who found where the meaning of analyticity becomes unclear, Searle writes:

> The example has its effect precisely because it is a borderline case. We do not feel completely comfortable classifying it either as analytic or non-analytic. But our recognition of it as a puzzling case, far from showing that we do not have any adequate notion of analyticity, tends to show precisely the reverse. *We could not recognize borderline cases of a concept as borderline cases if we did not grasp the concept to begin with.*

*Id.* at 8 (emphasis added).

360. *See, e.g.*, Utah v. Strieff, 579 U.S. 232 (2016) (5-3, Justice Scalia having died nine days before argument); Herring v. United States, 555 U.S. 135 (2009) (5-4); Hudson v. Michigan, 547 U.S. 586 (2006) (5-4); New York v. Harris, 495 U.S. 14 (1990) (5-4); Murray v. United States, 487 U.S. 533 (1988) (4-3); Segura v. United States, 468 U.S. 796 (1984) (5-4); Taylor v. Alabama, 457 U.S. 687 (1982) (5-4); Wong Sun v. United States, 371 U.S. 471 (1963) (5-4).

361. Gerald Gunther, Learned Hand: The Man and the Judge 123 (Oxford 2011).

## Conclusion

The two world wars are connected by a quarter-century, within which the rule of admissibility dubbed "fruit of the poisonous tree" originated. Supreme Court rulings for which that quarter-century is known, however, are themselves relatively unknown. Relegated to blurby, shorthand, stick-figure accounts, those cases would repay close study by perhaps allowing for some correction of perceptions about what those cases, now useful only for generalized propositions, did and did not rule.

Close study of the first quarter of fruits history also illuminates socio-political conditions, such as an economy that required the expansion of federal criminal law and enforcement (particularly through mail fraud and conspiracy allegations), which coincided with the expansion of Supreme Court review of criminal convictions. Chief among those socio-political conditions was the interplay between Prohibition and law enforcement, including electronic surveillance. Yet, along with Prohibition came a hiatus on the part of the Court, whose energies were diverted from the exclusionary rule to other pressing matters.

That space in the development of fruits doctrine was filled by the lower courts, particularly the lower federal courts, led by the Second Circuit, which in turn was led by Judge Learned Hand, both as trial and appellate judge. Judge Hand and his Second Circuit colleagues were the first to articulate the scope of the exclusionary rule, that is, the extent to which the rule would reach secondary/derivative evidence, even before the Supreme Court. Equally remarkable is the headway Hand and his colleagues would make not only on specific issues *within* fruits (e.g., confessions, inevitable discovery, burdens of proof) but also on matters *related to* fruits (e.g., harmless error, standing), all both ahead of their time and without acknowledgment to this day for their contributions.

Mostly, close study of the Second Circuit highlights their sensibility toward fruits that is distinct from what would come to characterize the Supreme Court. Whether a Supreme Court more faithful to the teachings of the Second Circuit would improve, impoverish, or make no difference at all to the sense, legitimacy, and predictability of fruits doctrine, this history commends to you.

# The Perceptive Brandeis: Mindfulness and the Practice of Justice

Robert Eli Rosen*

## Abstract

Our perceptions provide us with information. Properly interrogated, they inform our moral judgments. Knowledge of how justice can be embodied emerges from our perceptions and how we are present affects what we perceive.

This Article analyzes the "Perceptive Brandeis." Louis Dembitz Brandeis cultivated his perceptions. He was cool and calm. He was detached not only from his clients but from himself. And he, not alone in Victorian elite culture, practiced "renunciations" of self to understand what justice demands.

Brandeis studied Matthew Arnold, the leading theorist of cultural perception from 1860–1950. Since the 1960s, Arnold has been rightly criticized for ignoring his own cultural construction. Yet, he had strengths on which Brandeis drew. While Brandeis used his perceptions to influence the situational ordering of values, Arnold's project was through aesthetics to enable moral perception. While Brandeis overvalued individualism, Arnold too finely honed aesthetic perceptions. Importantly, for most of his life, until around the time of his nomination to the U.S. Supreme Court, Brandeis undervalued fraternité.

Today, criticisms of Brandeis and of lawyers generally focus on client disempowerment (and empowerment). Examining Brandeis's and Arnold's accounts of how to be present reveals two challenges that must be resolved when lawyers pursue justice: (1) How does one perceive

* Professor of Law, University of Miami. With thanks for the inspiration of Robert Gordon, Deborah Rhode, and Bill Simon, although this is not the article they would have written.

others, especially groups of others, and (2) how does one value justice when it is compromised?

By using Brandeis and Arnold as examples, this Article illustrates how we can become wiser about being present with our perceptions. As we seek justice or other ideals, we can recognize necessary stresses in their pursuit. Individualism and excessive refinement can stand in our way. These difficulties should not deter us. As we engage with others to critically hone our perceptions of the possible, we can imagine and work for a more ideal future, while recognizing, as Arnold wrote and Brandeis copied, "Truth sits upon the lips of dying men."[1]

This Article is for those who believe that acting for the exclusive benefit of one's client is problematic, sometimes at least. It is for those who do not believe that professional independence means ignoring non-client interests or one's own moral self. It is for those who understand that, especially when situatedness is significant, delivering justice demands responsiveness to how it is perceived. It also is for those who seek to better comprehend disciplines of the self and humanize visions of justice.

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1. This is a line from Matthew Arnold that Brandeis copied in his notebook. ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE 91 (1946).

"[A] profession . . . furnishes abundant opportunities for usefulness, if pursued in what Matthew Arnold called "the grand manner."

Louis D. Brandeis (1905)[2]

"I am a liberal tempered by experience, reflection, and renouncement."

Matthew Arnold (1882)[3]

"The narrow money-maker [is] without either *vision* or ideals . . . but there are in America today . . . McElwain and the Filenes [and] . . . many [others] with like *perception* and like spirit."

Louis D. Brandeis (1912)[4]

"[In] moral and intellectual perceptions . . . lies our richest inheritance."

Louis D. Brandeis (1916)[5]

Louis D. Brandeis's understanding of legal ethics has long been controversial. Before joining the United States Supreme Court, Brandeis practiced law for thirty-nine years.[6] His lack of legal ethics was the central charge against him in his confirmation hearings to the Supreme Court.[7] He has been lauded for displaying in his practice the ethics of a statesman[8] and the skills of a structural-functionalist.[9] Brandeis's legal

2. Louis D. Brandeis, *The Opportunity in the Law*, *reprinted in* BRANDEIS ON DEMOCRACY 52 (Philippa Strum, ed., 1995) [Hereinafter *Opportunity*].

3. MATTHEW ARNOLD, CULTURE AND ANARCHY 32 (Ian Gregor, ed., 1971) (3d ed., 1882).

4. Louis D. Brandeis, *Business–A Profession*, (Address delivered at Brown University Commencement Day, (Oct. 1912), *in* LOUIS D. BRANDEIS, BUSINESS–A PROFESSION 12 (1914) (emphasis added). Brandeis attributes financial success to those who carry such perception and spirit. *Id.* Brandeis's biographer Melvin I. Urofsky summarizes professional ability by asking "why should people come to [a lawyer] unless his [sic] knowledge *and perspective* were greater than theirs?" MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 63 (2009) (emphasis added).

5. Louis D. Brandeis, *A Call to the Educated Jew* (1915), *in* JACOB D. HASS, LOUIS D. BRANDEIS: A BIOGRAPHICAL SKETCH 194 (1929).

6. UROFSKY, *supra* note 4, at xii.

7. GEOFFREY HAZARD, ETHICS IN THE PRACTICE OF LAW 58–59 (1978). Geoffrey Hazard thought that acting as counsel to the situation was "perhaps the best service a lawyer can render to anyone." The ABA has deleted Brandeis's contribution to modern legal ethics, that of "counsel to the situation," codified in Rule 2.2 of the ABA RULES OF PROFESSIONAL CONDUCT. ABA Comm. on Ethics & Pro. Resp., Rep. Explanation of Changes (2021) (discussing the recommendation to delete Rule 2.2). On the other hand, his service as "The People's Attorney" and his use of statistics (the "Brandeis Brief") still resonate. *See, e.g.*, Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 870 (2001). William Simon uses counsel to the situation as a source for his rooting legal ethics in lawyers' ethical discretion. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1122 (1988).

8. ANTHONY T. KRONMAN, THE LOST LAWYER 23 (1995).

9. William H. Simon, *Babbitt v. Brandeis*, 37 STAN. L. REV. 565, 574 (1985).

practice has been honored to be characterized as exhibiting *verstehen*,[10] *phronesis*,[11] and a "social-engineering mentality."[12] On the other hand, the criticism in his confirmation hearings that in his practice Brandeis acted like a judge, not a lawyer,[13] has been added to the charges of arrogance and failure to engage clients.[14]

Both criticisms correctly call out that Brandeis's practice was disciplined by his vision of justice. As Professor Clyde Spillenger astutely described, Brandeis often "sought to impose a solution that made reference less to the expressed desires of the parties involved than to a *vision* nurtured by and known only to himself."[15] Described as solipsistic, Brandeis is accused of arrogance: He listens only to himself, thereby disrespecting others, including his clients.[16] The criticisms also correctly call out the importance to Brandeis of detachment.[17] They emphasize Brandeis's detachment from clients.

Brandeis's ethics also have been rejected because they do not "provide sufficient guidance."[18] This Article delivers some guidance by articulating how Brandeis understood his own practice, as well as the advice he offered other lawyers about their developing a practice responsive to the demands of justice.[19] The Article emphasizes Brandeis's detachment from self and explores his practices of self-overcoming to perceive what justice demanded.

What is missing in current criticisms of Brandeis is an account of his discipline. Understanding Brandeis's commitment to becoming

10. Hazard, *supra* note 7, at 64–65 (denoting the elaboration of lawyer as an "interpreter").

11. David Luban, Lawyers and Justice: An Ethical Study 169–74 (1988); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 Vand. L. Rev. 717, 721 (1988); *see also* Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. Legal Pro. 5, 32–33 (1995/1996).

12. Luban, *supra* note 11, at 172; *see also* David Luban, *No Rules?: Considering Values, Asking the Right Questions*, 72 Temp. L. Rev. 839, 850 (1999).

13. David W. Levy, *The Lawyer as Judge: Brandeis' View of the Legal Profession*, 22 Okla. L. Rev. 374, 383 (1969); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 Stan. L. Rev. 683, 685 (1965). For a full account of the appointment controversy, *see generally* Alden L. Todd, Justice on Trial: The Case of Louis D. Brandeis (1964).

14. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 Yale L. J. 1445, 1463 (1996).

15. *Id.* at 1509 (emphasis added). *Accord* Milner S. Ball, Called By Stories: Biblical Sagas and Their Challenge for Law 25 (2000) (Brandeis's "vision could be a good vision with good intentions and good results. It was nonetheless his own.") (emphasis added).

16. Spillenger, *supra* note 14, at 1525–27.

17. *E.g.*, Ball, *supra* note 15, at 25 ("a detached vision of his own, Brandeis was above the situation and not in it").

18. John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, U. Ill. L. Rev. 741, 769 (1992).

19. This Article's attempts are chastened by the recognition that Brandeis was not "a 'one idea man,' a term he used derogatorily for those who thought that one solution would solve all problems." Urofsky, *supra* note 4, at 141.

an embodiment of a disciplined subjectivity makes his perceptions interpretable and subject to criticism despite their origins in subjectivity. Being mindful of his perceptions, he developed a confidence now characterized as arrogance. Being mindful of how his focus can be lost, he maintained a connection to his perceptions now characterized as disrespect for how others presented themselves.

In validating the moral education of (distinctive) experiences, Brandeis is surprisingly post-modern. So, too, is his emphasis on a renunciation of self that disciplines perception and magnifies the capacity to pay attention. But Brandeis's inspiration was Victorian. To call it "mindfulness" is to use a term from the present that Brandeis would never use. But like contemporaries and ancients who practice "mindfulness," Brandeis disciplined himself to be present in the moment and cultivated his perceptive abilities. He had an answer to the question "How can one cultivate one's perception?" He understood that our perceptions influence our development of moral knowledge so that being mindful of them may motivate us to do justice.

A reconsideration of Brandeis's legal ethics is fit for the present moment for four reasons. First, some lawyers seek mindfulness to develop their perceptiveness.[20] Second, many lawyers want to bring their visions of justice to how they practice law. They may recognize the particularity of their visions of justice[21] yet want to take a stand. Third, many lawyers are attentive to how current social structures lead to both the actuality and the perception of violations of justice. Especially when situatedness is significant, delivering justice demands responsiveness to how it is perceived. Fourth, doubts about what justice entails mean that some lawyers will depend on confidence in their goodwill: Unsure if what they do will result in betterment, they take comfort from the rectitude of their motivations. Brandeis speaks to all of them. Presenting Brandeis through his own optic, this Article examines various answers to "the distinctly modern question of whether universal or impersonal value can find subjective embodiment."[22]

20. *See, e.g.*, Scott L. Rogers, The Mindful Law Student: A Mindfulness in Law Practice Guide (2022).

21. *See, e.g.*, Scott L. Cummings, *Movement Lawyering*, 2017 U. Ill. L. Rev. 1645, 1652–53 (public interest lawyers seek to empower communities, not the good for all); Jeena Shah, *Rebellious Lawyering in Big Case Clinics*, 23 Clinical L. Rev. 775, 804–05 (2017) (only represent clients who share one's vision of justice). *Cf.* Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966) (choice of client determines a lawyer's ethical responsibilities).

22. Amanda Anderson, The Powers of Distance: Cosmopolitanism and the Cultivation of Detachment 89 (2001).

What can we learn from Brandeis on how an ethical life can "be lived or given a concrete characterology?"[23]

Valorizing perceptions of justice does not mean ignoring their limitations. In this Article, I present two stressors to perceptions of justice that led to: (1) problems in seeing others and one's needs for them; and (2) problems in seeing the value of a justice that is compromised. These stressors distort perceptions. Beyond client disempowerment (and empowerment), we must be attentive to how these stresses are "solved" in the practice of justice.

Rather than imposing our perspectives on the actors involved, this Article describes the actors by their senses of meaning. In so doing, it resurrects approaches that were rejected in the 20th century in the hope that these methods can inform us today.

The first section of this Article examines the relations of perception, morality, and justice. The second section describes Brandeis's cultivation of self. The third recounts Brandeis's most sustained description of legal ethics and professionalism. The fourth describes Mathew Arnold. Arnold claims to provide a basis for trusting one's moral perceptions. The fifth describes Brandeis's response to the stresses created by his self-discipline. The sixth elaborates on that by considering Brandeis's later discussion of legal ethics and professionalism. The seventh describes the stresses in Arnold's practices. The eighth reimagines Brandeis's "counsel to the situation," Brandeis's term for lawyering that delivers justice. Linking counsel to the situation to Brandeis's perceptive practices reveals strengths and challenges in a practice that pursues justice. This Article presents a new account of Louis D. Brandeis's legal ethics and, in so doing, further articulates the challenges in practicing law influenced by a vision of justice.

## I. The Moral Content of Perceptions and Visions of Justice

> "[P]erception enables us to acquire knowledge and justification about both the physical world and normative matters, such as moral obligation."
>
> Robert Audi[24]

23. *Id.* at 108.

24. Robert Audi, Seeing, Knowing, and Doing: A Perceptualist Account 60 (2020). Gilbert Hartman uses John Rawls to demonstrate this point by emphasizing how Rawls' analysis of justice responded to Piagetian psychology and experiments in economics on distributive justice. Gilbert Harman, *Naturalism in Moral Philosophy*, 8, 9 *in* Ethical Naturalism: Current Debates (Susana Nuccetelli & Gary Seay, eds., 2012) [hereinafter Current Debates].

> "[C]ommon understanding" is a treacherous criterion . . . [Instead, we must develop] judgment by experience."
>
> Felix Frankfurter[25]

> "[Perception] can be a bridge both to a vision of justice and to the social enactment of that vision."
>
> Martha C. Nussbaum[26]

The moral value of perception is defended in a variety of philosophical positions that are grouped under the term "ethical naturalism." Perception is the "faculty by which norms are tested against concrete particularities."[27] Perceptions provide knowledge, motivate, and depict the embodiments of values. Of course, perceptions may be distorted and can distort our actions.[28] But, rejecting "mere perception" rejects too much. Perceptions are both epistemologically authoritative and defeasible.[29] Ethical naturalism emphasizes continuities rather than walls between perception and moral knowledge. Perceptions of justice, too, "have a complexity in their depiction of the relationship of ideas and forces that should not be underestimated."[30] Perceptions of justice instruct about what justice has been achieved.

Valuing perception values human agency.[31] Perception derives from not only the world viewed but also the world envisioned. People act on the basis of their perceptions, including their perceptions of themselves. Like experimental results, perceptions "have a kind of content by

25. Brief for the Defendant (Oct. 2015), Bunting v. Oregon, 243 U.S. 426 (1917) (No. 228), *reprinted in The Case for the Shorter Work Day*, National Consumers' League, Vol. 1, at xii–xiii (attributing this perspective to Brandeis).

26. Martha C. Nussbaum, Poetic Justice: The Literary Imagination and Public Life 12 (1995) (Nussbaum is writing about reading, her favored source of aesthetic perceptions).

27. Geoffrey Galt Harpham, *The Hunger of Martha Nussbaum*, 70 Representations 52, 61 (2002) (describing Nussbaum's position). As used in this article, as for Nussbaum, perception is not just "a metaphor for moral cognition." *Id.* It is phenomenal and not used to broadly refer to various aspects of epistemology. *Cf.* William F. Brewer and Bruce L. Lambert, *The Theory-Ladenness of Observation and the Theory-Ladenness of the Rest of the Scientific Process*, 68 Philosophy of Sci. 176, 177 (2001).

28. One ought not "downplay the uncertainty and outright disagreement that generally surround scientific findings." Amanda Maull, *A Deweyian Defense of Ethical Naturalism*, 50 Soc. 576, 578 (2013). And we ought not ignore "the potential misuses and abuses of scientific authority." *Id.*

29. Robert Audi, *Can Normativity be Naturalized?, in* Current Debates, 169, 172 ("In general, apart from very special circumstances, we cannot help taking to be real what we apparently perceive."). Our perceptions make claims on us to being "representational, discriminative, nondeviant [and revealing of] causal relation[s]." Audi, *supra* note 24, at 21. On the other hand, perception is fallible, but this "does not impugn all perceptual experience." *Id.* at 188.

30. Linda Mulcahy, *Sociology of Legal Images* 203, 204 *in* Research Handbook on the Sociology of Law (Jiří Přibáň, ed., 2020).

31. John Hacker-Wright, *Ethical Naturalism and the Constitution of Agency*, 46 J. Value Inquiry 13, 17 (2012).

which they guide us as agents in the physical realm."[32] "Perception is an abundant source of both knowledge and justification, and it is essential in providing premises for inferences whose content goes far beyond its deliverances."[33]

Speaking of perception is a way to speak about one's presence in the world. There are many ways of being present. How and what we perceive is revealing of us, whether or not we are mindful of our perceptions. On the other hand, there are many reasons and ways not to be present. One reason is to deny responsibility for one's perceptions: What we perceive is not owned by us; "they" mold what we see. In so doing, we deny our agency. Another reason not to be present with our perceptions is that being mindful of the internal world takes work. Being mindful of the external world takes discipline.

That there is a perception, or "sense," of injustice has long been known.[34] As Holmes opined, even a dog knows the difference between being stumbled over and kicked.[35] That perceptions, or visions, of justice inform us, even have a role in the justification of actions, rather than being subject to the withering critique of reason, is more controversial. There are multiple reasons, however, why one may attend to perceptions of justice. It is not inconsistent with reason to recognize the complexity of motivation and the impetus of visions. Nor to see perceptions as a starting place. Nor to see perceptions as information. Nor to comprehend the moral relevance of perceptions of justice. Perceptions of justice are, at the least, input into the legitimacy of the legal system. Perceptions are facts. Perceptions of justice also are manipulable.

There is an important form of naturalism that links ethics to aesthetics. There is "an enlightened European tradition . . . that sees the arts as a source of 'ethical vision' and a repository of human values in an increasingly mechanistic world."[36] Today, Martha C. Nussbaum is its most forceful advocate. Reading, her aesthetic practice of choice, Nussbaum claims, "is an essential part of both the theory and practice of citizenship."[37] Why? Readers "*perceive* . . . a beginning of social

32. Audi, *supra* note 29, at 210.

33. Audi, *supra* note 24, at 71.

34. Edmund Cahn, The Sense of Injustice (1949); Barrington Moore, Injustice: The Social Bases of Obedience and Revolt (1978); Judith Shklar, Faces of Injustice (1990).

35. Oliver Wendell Holmes, Jr., The Common Law 6 (Mark DeWolfe Howe ed., 1963).

36. Eleonora Belfiore & Oliver Bennett, The Social Impact of the Arts: An Intellectual History 10 (2008); *see also* Gertrude Himmelfarb, The Moral Imagination: From Edmond Burke to Lionel Trilling (2006).

37. Nussbaum, *supra* note 26, at 52. Like other ethical naturalists, Nussbaum knows that perceptions are defeasible. *Id.* at 12 (noting that they should not be "uncritical foundations").

justice."[38] Linking aesthetics and ethics also draws attention to "the excitations" of perceptions of art.[39] Art, especially original works of art, can motivate. Like moral ones, aesthetic judgments can be understood as non-voluntary; they have, in Habermasian terms, "no autonomy from the life-world."[40] Although the European tradition linking ethics and aesthetics was rejected by 20th-century modernism,[41] being present in front of a work of art need not yield random responses (as political artists, especially, hope). Art and music seem to demonstrate that our subjectivities are not fundamentally individual and private.[42] Visions are shared as we see and sing along with others.

Visions of justice have been attributed to judges,[43] lawyers,[44] clients,[45] collectivities,[46] and the legal system itself.[47] Today, many call on law schools to develop their students' visions of justice.[48]

38. Martha C. Nussbaum, Cultivating Humanity: A Classical Defense of Reform in Liberal Education 94 (1997); *see also* Barbara Villez, *Law and Literature: A Conjunction Revisited*, 5 L. & Humans. Literature 209, 219 (2011) ("Literature and the other arts bring visions of justice, and sometimes injustice, to the public eye.").

39. Harpham, *supra* note 27, at 54, 56.

40. *Cited in id.*, at 58.

41. The modern view is that "[t]he aesthetic point of view is voluntary." Robert Audi, *Normativity and Generality in Ethics and Aesthetics*, 18 J. Ethics 373, 385 (2014) (rejecting this view). *See also* Philippe Mach, *Ethics and Aesthetics: Reuniting the Siamese Twins*, 97 The Monist 122, 132 (2014) ("when something or someone is sensed as 'good' [either morally or aesthetically], that perception is personal, ephemeral, hard to transmit, highly dependent on individual affective circumstances"). In other words, the standard conception is that beauty is in the eye of the beholder and one may not dispute matters of taste.

42. *See, e.g.*, George Steiner, Heidegger 46, 47 (1978). ("To the majority of human beings, music brings moments of experience as complete, as penetrating as any they can register. . . . In music, being and meaning are inextricable. They deny paraphrase. But they are, and our experience of this 'essentiality' is as certain as any in human awareness.").

43. *See, e.g.*, Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 Colum. L. Rev. 2010, 2015 (1997).

44. *See* Luban, *supra* note 11, at 19, 347–48.

45. *See, e.g.,* Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & Soc. Inquiry 360, 362 (2018).

46. *See, e.g.*, Raquel Adana, *Intercultural Legal Sensibility as Transformation*, 25 S. Cal. Interdis. L. J. 1, 33 (2016).

47. *See, e.g.*, Ronald Dworkin, Law's Empire 134, 404 (1986); Gerald J. Postema, *Integrity: Justice in Workclothes*, 82 Iowa L. Rev. 821, 835 (1997).

48. *See, e.g.*, Spencer Rand, *Social Justice as a Professional Duty: Effectively Meeting Law Student Demand for Social Justice by Teaching Social Justice as a Professional Competency*, 87 U. Cin. L. Rev. 77 (2018); Adana, *supra* note 46, at 33; Heather M. Field, *Fostering Ethical Professional Responsibility in Tax: Using the Traditional Tax Classroom*, 8 Colum. J. Tax L. 215, 255 (2017); Deborah L. Rhode, Lawyers as Leaders 3–4 (2013) (discussing vision as a critical component of leadership).

What is a vision of justice? A rich account[49] of encounters with justice includes both perception and imagination.[50] A vision joins what is perceived with what is imagined. Visions of justice help answer the questions "'What shall we do together?' and 'Who shall we become as a result?'"[51] Perception of present possibilities and imagination of a future are both part of a vision of justice. A vision, and especially its imagination of justice, is tested by whether it serves "to illuminate, to help us become wiser about political things."[52] For example, does it help, even by revealing problems, in the creation of a deliberative democracy?

Lawyers whose practices are influenced by their visions of justice are criticized by both the left and the right.[53] Both claim it risks creating conflicts of interest between lawyers and clients. The root risk is that lawyers' perceptions of their clients will be limited by their visions, and lawyers will imagine what should become of their clients and act thereon. In addition, on the right, visions of justice are deemed arbitrary because all values are relative, and knowledge is positional. On the left, visions of justice are artificial and fanciful constructs that direct attention away from the real play of power and violence.

One solution to the risk of client domination is strong avoidance by limiting a lawyer to the pursuit of the interests that clients enunciate. It is best to bracket away to the extent possible any vision of justice.[54] Instead, just serve client interests.

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49. Or a "thick" account. *See* Clifford Geertz, The Interpretation of Cultures (1973). Like perception, vision is understood here as phenomenal. *Contra* Shirley V. Scott, *Inserting Visions of Justice into a Contemporary History of International Law*, 4 Asian J. Int'l L. 41, 53 (2014) (visions of justice are shorthand for a coalition of values, such as colonialism).

50. Sheldon Wolin, Politics and Vision 16–18 (1960). In response to a lawyer or judge exhibiting their vision of justice, Martha Minow imagines a conversation that includes both changed perceptions ("'We've rejected or never thought of this before'") and developed imaginations ("'This is what we've known or wanted all along, but never so articulated . . . your argument compels attention, even conviction.'"). Minow, *supra* note 43, at 2033.

51. Artika R. Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyerin*g, 10 Hastings Race & Poverty L. J. 219, 226 (2013).

52. Wolin, *supra* note 50, at 18. John Berger, drawing on Walter Benjamin, provides an account of the link between vision and politics: More than speech, vision implicates the perspective of the viewer so that "often dialogue is an attempt to verbalize this—an attempt to explain how, either metaphorically or literally, 'you see things,' and an attempt to discover how 'he sees things.'" John Berger, Ways of Seeing 9 (1973).

53. *See, e.g.*, Luban, *supra* note 11, at 347–48 (1988); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 Cornell L. Rev. 1377, 1392 (2008); Eric S. Fish, *Against Adversary Prosecution*, 103 Iowa L. Rev. 1419, 1451–52 (2018); Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 Sw. U. L. Rev. 265, 338 (1996).

54. *Cf.* Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. Cal. L. Rev. 551, 557 (treating visions of justice as distortions of self-interest).

An alternative is to engage clients' visions of justice to better serve them. Clients may benefit from their lawyers generating mutual learning processes, problem-solving activities, and critical reflection about how clients envision justice.[55] The danger of lawyer domination reappears if client interests change as a result. Despite fulsome client engagement, when client interests change, the possibility of lawyer influence can't be eliminated.[56]

Some lawyers become prophets, known by their visions of justice.[57] Prophetic organizations also exist. Like prophets, organizations work best when they tell stories because "ours is an age that makes personal testimony often the only form in which to speak with honesty about the public good."[58] To have their story told by a prophet of justice, some clients will choose to make themselves vulnerable to their lawyer.

Yet other lawyers will be committed to doing justice but not have clients who informedly consent to become part of such a practice. Especially when visions of justice are seen as individualized, such lawyers risk being accused of the "imposition of . . . personal views" on their clients.[59] Worse, because visions are partially shared and are not merely personal, they may be accused of imposing their class, race, or other backgrounds on their clients.

Certainly, lawyers who pursue justice in their practices must make themselves accountable to their clients. Part of this includes the development of their clients' senses of justice so that both visions may become vulnerable to each other.[60] Differences between client and

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55. Although praising learning with clients, Nancy Ehrenreich, for example, recognizes that:

> [M]embers of subordinated groups [do not] possess an alternative 'truth' that should necessarily and inevitably win the day. Marginalized groups themselves are not monolithic or homogeneous. Sexuality, gender, race, class, and other intersecting vectors of identity and experience crosscut and fundamentally affect the views and realities of members of those groups. Moreover, membership in outsider groups does not guarantee immunity to hegemonic ideologies, nor is the question of which groups constitute "outsiders" uncontroversial.

Nancy Ehrenreich, *Conceptualizing Substantive Justice*, 13 J. Gender Race & Just. 533, 565 (2010). Nonetheless, lawyers must be wary of "socializing their clients." Rebecca Roiphe, *The Decline of Professionalism*, 29 Geo. J. Legal Ethics 649, 658 (2016) (criticizing Brandeis).

56. *Contra* Ehrenreich, *supra* note 55, at 563 (properly conducted client engagement "either will elicit agreement or not").

57. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 Cornell L. Rev. 1331, 1353 (1995).

58. Minow, *supra* note 43, at 2032 (considering criticisms of both Judge Weinstein and the lawyer Brandeis).

59. *Id.*

60. Gerald Lopez speaks of a "double commitment" between lawyers and groups. Gerald Lopez, Rebellious Lawyering: One Chicano's Lawyer Vision of Progressive Law Practice 77 (1992); *see also* Tyner, *supra* note 51, at 257.

lawyer visions of justice should be embraced. To be accountable, lawyers and clients must engage the particularities of their visions of justice.[61]

Another way in which lawyers who practice by their visions of justice can become accountable to their clients is by lawyers sharing the practices by which they cultivate perceptions. Clients can admire not only what lawyers stand for but also how they strive to be present. Lawyers can interrogate their perceptive practices with their clients. Clients may choose to become vulnerable to lawyers because they have confidence in their lawyers' perceptive abilities and practices.

Furthermore, clients may value not just who they are, with their current interests, but who they are becoming.[62] They, too, may strive to see deeper and feel more—to be more fully present—and be more responsive to what justice requires of them. Lawyers can inspire them.

Lawyers inspiring clients is not part of regnant lawyering. Even if some exceptional lawyers, prophets, are inspirational, the rules of legal practice, both formal and informal, require even them to serve clients' interests, not inspire them to be better.

Brandeis inspired at least some of his clients.[63] He believed that clients chose him because of his perceptive abilities, and they sought him to be influenced by his vision of justice.[64] In *The Opportunity in the Law*, Brandeis sought to inspire other lawyers about how to practice. The next section describes Brandeis's cultivation of his perception.

## II. The Disciplined Brandeis: The Cultivation of His Perception

To his biographer, Melvin I. Urofsky, Brandeis has "seeming contradictions in his life": "How could someone who felt so passionately about so many things appear to so many people as cold, austere, and indifferent?"[65] An account of his perceptive discipline explains the link between his detachment and his passion for justice. Brandeis cultivated a renouncement of himself in order to perceive what justice demands.

Brandeis "many saw as a hard—indeed heartless—personality."[66] He "seemed two-dimensional and unfeeling to his contemporaries."[67] He

61. *Cf.* Ehrenreich, *supra* note 55, at 563 (discussing presenting "[T]he details of the vision itself, including the assumptions upon which it is premised and the concrete results it seeks to produce").
62. *See* discussion *infra* note 78.
63. *See, e.g.*, discussion of Edward Filene *infra* note 112, and WEIU *infra* note 337.
64. *But see* discussion of Lennox *infra* notes 344, 342.
65. Urofsky, *supra* note 4, at xii.
66. *Id.* at 17.
67. *Id.* at xii.

was perceived as "being cold, haughty, and disdainful."[68] The client also literally experienced the cold when in Brandeis's presence: "[I]n winter, . . . Brandeis deliberately kept the temperature low in his office so that people would not be tempted to chat. [After being] subjected to a grilling on who had the right [in the situation] . . . the client . . . teeth chattering, would go out in the winter's warmth."[69]

Brandeis practiced a discipline to create a "cast of mind"[70] that made him "appear two dimensional" and "aloof."[71] He told his daughter Susan that he spent more than forty years cultivating a "general calm attitude toward every situation."[72] "Felix Frankfurter noted that Brandeis did not enjoy 'the windfall of inspiration.' Rather, 'thought for him was the product of brooding. He believed in taking pains, and the corollary of taking pains is taking time.'"[73]

Taking pains, one hopes not literally, Brandeis came to moral judgments. As he wrote in one letter, "A very wise man said to me many years ago; 'Take all the time necessary for deliberation, but when you have decided, act thereon for life without doubting.' [This is] an eternal truth."[74] For Brandeis, perception and experience can enable an individual to have moral certainty.[75] At least, a certainty sufficient on which to act. This certainty derives not from an abstracted morality. Individuals striving for morality or justice must stake their claims on "observation

68. *Id.* at 171.

69. *Id.* at 72 (2009). Phillipa Strum argues that "his punctuality and brevity [were not] signs of coldness and disinterest." Philippa Strum, Louis D. Brandeis: Justice for the People 38 (1984).

70. For a discussion of the importance to Brandeis that an ethical lawyer has the right "cast of mind," *see* Luban, *supra* note 11, at 725. "Cast of mind" is generally important in discussions of legal ethics: a lawyer acts professionally only by "thinking like a lawyer." *See* Robert E. Rosen, Christine E. Parker, & Vibeke L. Nielsen, *The Framing Effects of Professionalism: Is There a Lawyer Cast of Mind? Lessons from Compliance Programs*, 60 Fordham Urb. L.J. 297, 297–98 (finding and detailing a less than normatively desirable "cast of mind" in lawyers). Brandeis prefers "habits of mind," *see infra* text accompanying note 188. He does not mean social mores, "habits of the heart." *See* Robert N. Bellah, et. al., Habits of the Heart: Individualism and Commitment in American Life (1985). Unlike mores, Brandeis was referring to a more individualized accomplishment.

71. Urofsky, *supra* note 4, at 338; Allon Gal, Brandeis of Boston 42 (1980).

72. Urofsky, *supra* note 4, at xii.

73. *Id.* at 23. Matthew Arnold also "condemn[ed] any rushed, unpremeditated action," seeing it as making people "blind," in the sense of non-perceptive. Geoffrey A. Baker, The Aesthetics of Clarity and Confusion: Literature and Engagement since Nietzsche and the Naturalists 109 (2016). Arnold wrote: "[W]e ourselves must put up with our friends' impatience . . . [so that we might develop] a condition of mind out of which really fruitful and solid operations may spring." Matthew Arnold, Culture and Anarchy 225 (New Haven: Yale University Press 1994) (1869). *Compare* "when you are excited you are not peaceful." Thích Nhất Hạnh, The Art of Power (2009); Thích Nhất Hạnh, The Miracle of Mindfulness: An Introduction to the Practice of Meditation 60 (Mobi Ho, trans. 1975) (mindfulness "is a serene encounter with reality").

74. Letter from Louis D. Brandeis to Susan Brandeis (Oct. 23, 1925), *in* The Family Letters of Louis D. Brandeis 411–12 (Melvin I. Urofsky & David W. Levy, eds., 2002).

75. Urofsky, *supra* note 4, at lx ("established values" exist). *Id.* at 72 (Brandeis's "moral certitude").

and induction."[76] Perceptive individuals also see "the drama of life"[77] and thus respond to a more fulsome present. Brandeis put it pithily in an undated memorandum *What the Practice of Law Includes*: "Reason; use imagination."[78]

Brandeis did not doubt that his moral judgments were neither the product of egoism nor displays of arrogance. Brandeis wrote, "I could not recall ever having been proud."[79] As Dean Acheson, one of his clerks, noted, "Brandeis expected good work, and when he got it, . . . he 'was not given to praise in any form.'"[80] What could appear to be "self-righteousness"[81] was Brandeis having confidence that he had done good work, as was his duty.

To understand Brandeis, one must remember that "Mid-Victorian moralists took the idea of impersonality very personally. Among the ethical affections that were most encouraged [were] . . . disinterestedness, detachment, [and] selflessness. . . . [They argued for an] almost obsessive antipathy to selfishness."[82] Democracy was thought to depend on a moral calculus in which self-satisfaction was excluded.[83] Brandeis, for example, contrasted "the man of public spirit and him who is steeped in sordid selfishness.'"[84]

Brandeis was not simply a Mugwump denouncing vice[85] but was part of a tradition in which renunciations of one's self were understood to ground perception and enable moral clarity. In America, Brandeis was preceded by Thoreau, who famously retired to the woods to live

76. Richard P. Adelstein, *"Islands of Conscious Power": Louis D. Brandeis and the Modern Corporation*, 63 Bus. Hist. Rev. 614, 650 (1989) (quoting Brandeis).

77. Louis D. Brandeis, *The Harvard Law School*, I Green Bag 18–21 (1889), *quoted in* Urofsky, *supra* note 4, at 28. *Compare* "I always found so much of romance and of adventure in securing a new client and in their confidences that the ordinarily essays of the imagination presented by all but the best novels or stories seemed pretty poor in comparison" in Letter from Louis D. Brandeis to Susan Brandeis (Jan. 17, 1925), *in* Family Letters, *supra* note 74, at 399.

78. Memorandum from Louis D. Brandeis, *What the Practice of Law Includes*, n.d., *quoted in* Urofsky, *supra* note 4, at 63. To the contrary, Oliver Wendell Holmes thought that "Great art . . . is the antithesis of Law . . . because it . . . expresses creative freedom and imagination." Coustas Douzinas & Lynda Nead, Introduction, *in* Law and the Image: The Authority of Art and the Aesthetics of Law 1 (Costas Douzinas & Lynda Nead, eds., 1999) (emphasis added).

79. Letter from Louis D. Brandeis to Alice Goldmark Brandeis (Nov. 1890), *in* 1 Letters of Louis D. Brandeis 94 (Melvin I. Urofsky & David W. Levy, eds., 1971). Urofsky notes "In examining the Brandeis letters covering more than six decades, one finds very few expressing satisfaction and almost none expressing pride." Urofsky, *supra* note 4, at 110.

80. Gal, *supra* note 71, at 80.

81. *Id.* at xii.

82. James Walter Caufield, Overcoming Matthew Arnold: Ethics in Culture and Criticism 169 (2012).

83. Belfiore & Bennett, *supra* note 36, at 135 (quoting Arnold).

84. Urofsky, *supra* note 4, at 400.

85. On Brandeis as a Mugwump, *see* Spillenger *supra* note 14, at 1452. Gal, *supra* note 71, at 91.

deliberately, and Emerson, who speaks not of renunciation but of "abandonment," in which we "forget ourselves" in order to "align" with reality.[86]

Generally, they are part of a tradition that emphasizes "the self-realization of the individual"[87] by "alienation from the present self, the letting go of immediate desires and egotistic interests in order to allow for an immersion into the world."[88]

In the second half of the 19th century in the United States, the success of abolition ignited "a culture that was increasingly obsessed with the moral authority of the individual conscience."[89] Slavery demonstrated that individual conscience is no shield against evil. Emancipation led to emphasis on the question of "how could individuals become more moral?"

The end of the nineteenth century was a turbulent time of increasing inequality.[90] "[T]he secular concept of sin was selfishness."[91] What was needed was a discipline to overcome selfishness.

Brandeis placed an enormous burden on the responsibility to transform himself. Brandeis "arrived [in Boston] as the exotic young man from the country"[92] possessing "courage and perspicacity."[93] Needless to say, he also had ambition.[94] For him to have a place in

86. Jennifer Gurley, *Devotional Emerson*, 22 J. Hist. of Modern Theology 23, 29 (2015); *see also* Sharon Cameron, *The Way of Life by Abandonment: Emerson's Impersonal* 3 *in* The Other Emerson (Branka Arsic & Cary Wolfe, eds., 2010). Emerson mingled "intensity and detachment" and equated "disengaged" with "thinking." Louis Menand, The Metaphysical Club 18 (2001). He displayed an "aloofness." *Id.* at 83. On Brandeis's respect for Emerson, *see* Urofsky, *supra* note 4, at 34.

87. Belfiore & Bennett, *supra* note 36, at 116. "It would be misleading, however, to see [this] . . . as a completely inward-looking mechanism; on the contrary, [it] is seen as an integral part of the individual's contribution to the enrichment and maintenance of his or her civilization." *Id.* at 119.

88. Claudia Schumann, *Aversive Education: Emersonian Variations on 'Bildung,'* 51 Educ. Phil. & Theory 488, 490 (2019) (citing Gademer).

89. Menand, *supra* note 86, at 14.

90. Consider just one year, 1889, during which: agriculture in the Midwest was devastated by a drought, there were more strikes than in any single year in the nineteenth century, anti-Chinese riots broke out in Seattle, anarchists and police collided in Chicago's Haymarket Square riot, and Geronimo's capture in Arizona marked the end of the last major Indian war. In that same year, however, technology rolled on: important discoveries in metallurgy made it possible to extract aluminum from ore, and George Westinghouse introduced the alternating current for commercial applications; meanwhile the Statue of Liberty was dedicated on October 28 in New York Harbor. Although the 'Gilded Age' was a time of political malaise, materialism, and commercialism, it was also a time of technological advancement and economic growth, through which the United States began to move toward center stage in the world theatre. A symbol of the complexities in American society might be found in the American city, balancing newly raised skyscrapers against burgeoning slums. Eric Carl Link, The Vast and Terrible Drama: American Literary Naturalism in the Late Nineteenth Century 2 (2004).

91. Urofsky, *supra* note 4, at 342 (describing President Wilson's philosophy).

92. *Id.* at 367.

93. *Id.* at 25.

94. "There is also ambition to be satisfied." Letter from Louis D. Brandeis to Frederika Brandeis (July 12, 1879), quoted *in* Urofsky, *supra* note 4, at 45.

Boston society, he needed to engage in self-transcendence to develop "the fiber of character through which is wrought the life worthwhile."[95] To become "more brahmin than the brahmins,"[96] "every activity in life . . . every person" had to be analyzed and remembered.[97] In 1898, he wrote to his sister that he was consumed by "the sense of being always under the necessity of preparedness to justify [himself]."[98]

Brandeis's discipline can be viewed as "severe self-limitations."[99] "Limitations," he wrote, "are essential to the wise conduct of life."[100] For Brandeis, life demanded a "continuous sacrifice by the individual."[101] Brandeis wrote that he responded to "the pressure from within."[102] He demanded that one be a "*self-respecting man*,"[103] which he understood as being motivated by "the higher aims."[104] Brandeis was describing himself when he praised a candidate for Mayor of Boston in 1905, who acted "without any self-seeking, without any posing, in a simple and modest fashion.'"[105] Brandeis "was controlled in his emotions."[106] When told, "'when feelings run high, men too often forget themselves.' . . .

95. Letter from Louis D. Brandeis to Susan Brandeis (Feb. 24, 1919), *in* Family Letters, *supra* note 74, at 328; Letter from Louis D. Brandeis to Alice Goldmark Brandeis (Oct. 27, 1890), *in* 1 Letters of Louis D. Brandeis, *supra* note 79, at 93 ("character only is to be 'admired'"); *cf.* Thích Thích Nhất Hạnh, Understanding Our Mind: Fifty Verses on Buddhist Psychology 46 (2002) ("My actions are my only true belongings").

96. Urofsky, *supra* note 4, at 3 (quoting Samuel D. Warren, Jr. describing Brandeis); *see also* Irving Katz, *Henry Lee Higginson v. Louis Dembitz Brandeis: A Collision between Tradition and Reform*, 61 N. Eng. Q. 67, 72 (1968).

97. Letter from Louis D. Brandeis to Jacob Meyer Rudy (Apr. 14, 1913), *in* 3 Letters of Louis D. Brandeis 62–63 (Melvin I. Urofsky & David W. Levy, eds., 1973). Brandeis was praised for not having class-bound perceptions: "[H]e liked to draw out others, dip into their interests, store up new information, even if he got it from a boy on the street." Alfred Leif, Brandeis: The Personal History of an American Ideal 30 (1936).

98. Gal, *supra* note 71, at 80.

99. Urofsky, *supra* note 4, at 472. As he wrote to his future wife, "'it appeared as if the only joy in life lay in the performance of duties.'" *Id.* at 108. In 1915, Brandeis wrote, "Duty must be accepted as the dominant conception in life." *A Call to the Educated Jew*, *in* Brandeis on Democracy, *supra* note 2, at 169.

100. Louis D. Brandeis, *The Living Law*, 10 Ill. L. Rev. 461, 469 (1916) [hereinafter *The Living Law*].

101. Letter from Louis D. Brandeis to Robert W. Bruere (Feb. 25, 1922), *in* 5 Letters of Louis D. Brandeis 45, 46 (Melvin I. Urofsky & David W. Levy, eds., 1978).

102. Letter from Louis D. Brandeis to Alice Goldmark Brandeis (Nov. 1890), *in* 1 Letters of Louis D. Brandeis, *supra* note 79.

103. Urofsky, *supra* note 4, at 264. *Compare* "he always let private individual who hired him—even for a public service—pay something. This he said, often allowed them to maintain their self-respect more easily than if he had served them for nothing." *Id.* at 91.

104. Gal, *supra* note 71, at 161 (quoting from a Dec. 1912 speech by Brandeis).

105. Letter from Louis D. Brandeis to Henry Sweetser Dewey (Nov. 13, 1905), *in* 1 Letters of Louis D. Brandeis, *supra* note 79, at 372 quoted *in* Gal, *supra* note 71, at 91 (describing this as a Mugwump position).

106. *Id.* at ix (also describing Brandeis as "taciturn"); *cf.* Urofsky, *supra* note 4, at 25 ("austere"). *But see* Strum, *supra* note 69, at xii (Brandeis was "warm, thoughtful, humorous, and unaffected").

Brandeis could not think of a proper response,"[107] because he viewed forgetting oneself as how feelings were disciplined.

Brandeis felt this pressure in even the smallest of choices. He once wrote, "complacency is the Seven Deadly Sins rolled into one."[108] He was relentless because if one did not sacrifice oneself in mundane decisions, one would not be able to properly perceive what was demanded in more consequential ones.[109] It often was noted that Brandeis "could not tolerate dishonesty" in even the smallest matters.[110] He feared "constant compromise."[111] On the other hand, Brandeis saw "the wisdom of conciliation."[112] "The high idealism he cherished all his life would allow concessions to achieve a solution fair to all parties."[113] On one hand, "he could be uncompromisingly rigid."[114] On the other, Brandeis "admired the Greek notion of balance, of finding a mean between extremes."[115] It was his constant discipline that enabled him to distinguish between compromise and conciliation.

Sometimes, Brandeis emphasized the importance of play and of "unconscious thinking."[116] One expression of this seeming oxymoron is presented by Schopenhauer:

> [A person] should entirely forget himself and the relations in which he stands, . . . genius is the faculty of continuing in the state of pure perception, of losing oneself in perception . . . leaving one's own interests, wishes, and aims entirely out of sight, thus of entirely renouncing one's own personality for a time, so as to . . . [attain a] clear vision of the world.[117]

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107. Urofsky, *supra* note 4, at 493.

108. Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 22, 1928), *in* 5 Letters of Louis D. Brandeis, *supra* note 101, at 324.

109. Urofsky, *supra* note 4, at 273 (denying that this made Brandeis "a prig"); *see also* The Pocket Thích Nhất Hạnh 7 (compiled and edited by Melvin McLeod, 2017) ("You have to drink the tea with 100 percent of your being. The true pleasure is experienced in the concentration"); *cf.* Thích Nhất Hạnh, Peace Is Every Step: The Path of Mindfulness in Everyday Life (1992) ("Every thought you produce, anything you say, any action you do, it bears your signature").

110. Urofsky, *supra* note 4, at 274.

111. *Id.* at 472.

112. *Id.* at 60.

113. *Id.* at 274.

114. *Id.* at 235.

115. *Id.* at 235.

116. Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 Letters Of Louis D. Brandeis, *supra* note 79, at 109.

117. Lionel Trilling, Matthew Arnold 25 (1939, 1979) (explaining Matthew Arnold by quoting Schopenhauer).

And thereby ground impersonal values in a subjective embodiment. Cultivating perception was understood to enable "the voice of the universal moral order expressing itself in us."[118]

There are many practices of renunciation and of becoming present. No single one "can be held up as uniformly or exclusively progressive. . . [it] is always an ongoing, partial project."[119] The goal always is "to observe facts . . . not by the impulse of prejudice or caprice."[120] But the path to this goal is bordered by danger. There always is the "irreducible possibility of self-deception."[121] The hard work of the practice needs to be combined with critical self-reflection and social interrogations.[122] Only thereby can practices of self be joined to "the aspirations of deliberative democracy and internationalist politics."[123] Then, as Brandeis put it, one can see the "distorting effects" of perception.[124] Although renunciation does not justify perceptions,[125] such practices can create confidence in oneself and promote disclosures in mutual learning processes by "detaching" oneself from one's proposals.

Critical reflection on Brandeis's practices leads to his concept of freedom: "I don't want money or property most. I want to be free."[126] He understood freedom as "personal independence."[127] As he wrote in one letter, "you should keep yourself free; that is, *at all times* be able to take such course as you think proper."[128] Too many Americans, he wrote, are only "consumers . . . servile, self-indulgent, indolent, ignorant."

"[T]he only remedy," Brandeis continued, "is via the individual: To make him care to be a free man & willing to pay the price."[129] Brandeis

118. Caufield, *supra* note 82, at 316.

119. Anderson, *supra* note 22, at 180.

120. Caufield, *supra* note 82, at 148 (2012) (quoting Arnold). This explains why Brandeis can be accused of disrespecting clients by not adopting their presentations of themselves. In response, Brandeis might offer Thích Nhất Hạnh's wisdom: "If you see a person and don't also see his society, education, ancestors, culture, and environment, you have not really seen that person. Instead, you have been taken in by the sign of that person . . . When you see that person deeply, you . . . will not be fooled by appearances." Thích Nhất Hạnh, The Pocket, *supra* note 109, at 70.

121. Kevin McLaughlin, *Culture and Messianism: Disinterestedness in Arnold*, 50 Victorian Stud. 615, 636, n.4 (2008).

122. Anderson, *supra* note 22, at 180.

123. *Id.* at 179 (citing Bruce Robbins, Feeling Global: Internationalism in Distress (1999); Cosmopolitics: Thinking and Feeling Beyond the Nation (Pheng Cheah and Bruce Robbins, eds., 1998); and Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Politics (1992)).

124. *The Living Law*, *supra* note 100, at 470. He also spoke of "distortion of judgment." *Id.*

125. Alasdair MacIntyre, After Virtue 18 (1981).

126. Urofsky, *supra* note 4, at 154. *See also id.* at 190.

127. *Id.* at 120.

128. Letter from Louis D. Brandeis to Clarence R. S. Martin (Nov. 5, 1912), in 2 Letters of Louis D. Brandeis, 709 (Melvin I. Urofsky & David W. Levy, eds., 1972) (emphasis added).

129. Adelstein, *supra* note 76, at 645.

appreciated the price that he paid for his discipline, its self-limitations, relentless scrutiny, and aloofness from others.

Throughout much of his life, Brandeis was "unaffected" by others.[130] As he told his future wife, "'I have stood alone, rarely asking, still less frequently caring for the advice of others. I have walked my way all these years but little influenced by any other individual.'"[131] This distancing accords with his discounting of professional courtesy: "If one lawyer asks for an adjournment, for whatever reason, professional courtesy dictated that the opposing lawyer agree, on the understanding that at some point in the future the tables might be reversed. Brandeis, according to [his 'good friend' Charles C.] Burlingham, 'never gave any favors to anybody.'"[132] He was "self-sufficient."[133]

This idealization of a lack of connection was reiterated in one of Justice Brandeis's most famous dissents: "[T]he most comprehensive of rights, and the right most valued by civilized man is 'the right to be left alone."[134] This peculiar ordering of values would satisfy a misanthrope, which Brandeis was not. Rather, it gives effect to his conception of freedom, which in *The Right to Privacy*, Brandeis and Warren described as the right to an "inviolate personality."[135]

Brandeis's vision of the self as autonomous, disinterested, and disengaged underplays a vision of self as relational and only thereby identity-forming.[136] For Brandeis, "[t]he training of the practicing lawyer . . . breeds a certain virile, compelling quality."[137] One peculiar feature of late nineteenth-century practices, and of Brandeis's, is a fear of "excessive emotionality," seen as dangerous "effeminacy."[138] The

130. Strum, *supra* note 69, at xii.

131. Urofsky, *supra* note 4, at 109. This distance did not mean that he did not learn from "moral teachers." Gal, *supra* note 71, at 7.

132. Urofsky, *supra* note 4, at 451.

133. Gal, *supra* note 71, at 42.

134. Olmstead v. United States, 277 U.S. 438, 471, 478 (1928) (Brandeis, J., dissenting) (This right was essential to "enable spiritual, emotional and non-material interests to flourish").

135. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 205 (1890).

136. Since Carol Gilligan, this contrast has been one of feminism's essential insights. Carol Gilligan, in a Different Voice: Psychological Theory and Women's Development (1982). As applied to Brandeis, *see* Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 Cardozo Studies in Law and Literature 139, 139 (1996).

137. *The Living Law*, *supra* note 100, at 469.

138. Caufield, *supra* note 82, at 174 ("Notions like disinterested love and impersonal desire are apt to strike modern readers as oddly oxymoronic." ). There is a fear of being "sneered" at as "unmanly." *Id.* at 162.

"ascetic discipline" of the practices, and their unrelenting demands, affirmed their masculine identity.[139]

For most of Brandeis's life, it can be said that he understood that the "only zone of liberty resides in the self's action upon the self."[140] This can appear to be arrogance but derives from a perspective that in social action "the only relation is between the singular subject and those forces and conditions (both extrinsic and intrinsic) that must be controlled, balanced or heroically faced."[141]Brandeis advised other lawyers to develop "that confidence in [their] own powers which begets confidence in others."[142] As we have seen, Brandeis's confidence in his being able to properly respond to the forces and conditions that he and his clients faced derived from disciplining his perception, including renouncing his self and his dependence on others. Brandeis protected his agency. As he understood it, he was free. But it cost him and those affected by him.

Brandeis came to recognize these weaknesses.[143] But for most of his time in practice, he was committed to being influential rather than collaborative. Client definitions of the situation were relevant data, as were the client's extant statement (both expressed and implied) of their objectives. Brandeis, however, sought to be able to "impress [his] personality upon others."[144] He strived to be someone whose advice was sought.[145] For him to have clients is to have people who would listen to him.[146] His influence led to his clients' "dependence" on him.[147] Rather than understanding the lawyer-client relationship as a complex social process in which powers are ceded, shared, and withheld, Brandeis

139. *Id.* at 161. Brandeis, of course, was not alone in this perspective. Oliver Wendell Holmes's "heroic disinterestedness," Menand, *supra* note 86, at 66, was even more bleak: "Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and despair trusted to your own unshaken will—then only will you have achieved," Oliver Wendell Holmes, *The Profession of Law* (Feb. 17, 1886), *in* Collected Legal Papers, 29, 32 (1920).

140. Anderson, *supra* note 22, at 117; *see also* McLaughlin, *supra* note 121, at 636 (discussing Arnold and the dilemmas of Foucault's "aesthetics of existence").

141. Anderson, *supra* note 22, at 117–18.

142. Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), *in* 1 Letters of Louis D. Brandeis, *supra* note 79.

143. *See* Sections V and VI, *infra*.

144. Letter from Louis D. Brandeis to William Harrison Dunbar (Aug. 19, 1896) *in* 1 Letters of Louis D. Brandeis, *supra* note 79, at 125. Brandeis wrote to Holmes on his becoming Chief Justice in Massachusetts: "The opportunity to impress yourself on the law has been greatly increased." *Id.* at 137.

145. "Advise" is said to derive from the Vulgar Latin *mi est visum*, "in my view."

146. Urofsky, *supra* note 4, at 74.

147. *Id.* at 109.

concentrated on his input and influence. Clients, he wrote, left "to me the decision as to what should be done."[148]

In affirming the powers that come from detachment from clients and himself, Brandeis "goes against the grain of much recent work in literary and cultural studies:"[149] Detachment from others risks debasing them; ideas of detachment ignore that claims to truth are claims to power; seeking impersonality can be a charlatan obscuring displays of self-interest; we all are situated.

On the other hand, practices of self-detachment can improve perceptions, especially of the present moment; being here, now. There is value in the "suppression of the personal, idiosyncratic, or local."[150] For most, detachment is not "all or nothing" but is "a temporary vantage, unstable achievement, or regulative ideal."[151] One can choose to be self-conscious and aware that one is choosing how to adapt to a better future, how to join with the marginalized and vulnerable, how to be aware that what one values may not be that valuable, and how to link motivation to ambition. The disciplines of detachment can open doors of perception. One can meditate on that thought and return strengthened when connecting with others.

In influencing others, Brandeis was involved in ordering ends. Not all desires can be fulfilled. He sought influence to shape economic and social structures to influence which and how values were realized, trusting in his own perceptions and imagination, his vision, of what could best be done. An indifferent doctor can serve a "patient who correctly and fully describes his ailments," but legal clients lack "full knowledge" and Brandeis chose the remedy for their situation because his experience gave him "deep knowledge of human necessities."[152]

Others have thought that Brandeis's actions were based on a belief in scientific objectivity.[153] Certainly, Brandeis was committed to science in practice. He admired Wilbur Wright, Bell, and Edison.[154] I suggest

148. Letter from Louis D. Brandeis to Edward Francis McClennen (Feb. 19, 1916), *in* 4 LETTERS OF LOUIS D. BRANDEIS 77 (Melvin I. Urofsky & David W. Levy, eds., 1975).

149. ANDERSON, *supra* note 22, at 5.

150. *Id.* at 11.

151. *Id.* at 32.

152. Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), *in* 1 LETTERS OF LOUIS D. BRANDEIS, *supra* note 79, at 107. "Brandeis did acknowledge the desirability of personal charm, although he apparently lacked it." UROFSKY, *supra* note 4, at 63.

153. *See, e.g.*, Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1356 (2006) (citations omitted); Spillenger, *supra* note 14, at 1468.

154. In *Business–A Profession*, *supra* note 4, at 7. Brandeis uses them as ideals of ethical business people.

that rather than objectivity, Brandeis valued the processes of scientific observation. Because the "scientific attitude" (or cast of mind) is one of "impartiality and detachment,"[155] it has some similarities to the disciplines of perception described in this Article. Much has been written about "the twentieth century's passion for objectivity."[156] Brandeis, however, was an ethical naturalist who did not believe "that one should separate facts from values."[157] He did not set himself up as "a scientific arbiter."[158] Brandeis knew it was his perceptions that were being applied and analyzed.

Brandeis hoped to develop "a human notion of how it really is."[159] Certainly, he paid attention to science. But Brandeis also knew the importance of imagination. What the account of the "scientific Brandeis" misses is that not only was he a realist, but Brandeis also was a romantic.[160] The "Perceptive Brandeis" pursued a humane, not just scientifically accurate, vision of justice.

As a lawyer, Brandeis "occupied a different social position than other reformers:" He was a "freelancer," not tied to institutions.[161] Thus, he could be "didactic" and "argumentative."[162] He didn't need to compromise

155. Israel Scheffler, Science and Subjectivity, 2 (1967).

156. *See id.*; *see also* Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession (1988); Lorraine Daston & Peter Galison, Objectivity (2007). The importance of a commitment to objectivity in the American legal profession at the turn of the twentieth century and its political consequences has been emphasized by some. The giant here is Morton J. Horwitz. *See, e.g.*, Morton J. Horwitz, The Transformation of American Law, 1780–1860, 257 (1977). But others have suggested that the rhetoric of science was not predominant and that its political implications were more complicated than shielding law from democratic and redistributive possibilities. *See, e.g.*, Kunal M. Parker, Common Law, History, and Democracy in America: 1790–1900: Legal Thought Before Modernism (2011); Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 L. & Hist. Rev. 577 (2002).

157. This is Schudson's definition of objectivity. Michael Steven Schudson, Origins of the Ideal of Objectivity in the Professions: Studies in the History of the American Journalism and American Law, 1830–1940, 3 (1976).

158. David Riesman, *Law and Sociology: Recruitment, Training and Colleagueship*, 9 Stan. L. Rev. 643, 654 n.19 (1957) ("Professor Paul A. Freund of Harvard Law School [who clerked for Brandeis] has pointed out to me that the Brandeis brief was originally designed to show than an impressive body of opinion could be mustered to support the judgment of a legislature against constitutional attack; its aim was to resist the play-it-by-ear tendency of cavalier judgments, but not to set itself up as a scientific arbiter beyond that").

159. Adam J. Hirsch, *Book Review: Searching Inside Justice Holmes*, 82 Va. L. Rev. 385, 404 n. 113 (1996). The quoted language in the text is Holmes quoting Brandeis.

160. This combination was the theme of late nineteenth-century American and European urban middle-class and elite life. *See* Link, *supra* note 90, at 41; Samuel J. M. M. Alberti, *Conversaziones and the Experience of Science in Victorian England*, 8 J. Victorian Culture, 208, 218 (2003). John Dewey understood that perception (of art) enabled "a mode of prediction not found in charts and statistics, and it insinuates possibilities of human relations not to be found in rule and precept, admonition and administration." John Dewey, Artas Experience 349 (1934, 2005).

161. Paul Stob, *Louis Brandeis and the Rhetoric of Transactional Morality*, 14 Rhetoric & Public Affairs 261, 262 (2011).

162. *Id.* at 263.

his integrity "[W]hen the claims of justice are clear to all members of the community, then integrity no longer has a mission."[163] Brandeis did not believe he lived in such a time. He did not seek coherent law but coherence in his moral life. That coherence depended on his discipline. He relied not on past principles to reveal what justice demanded but on the clarity that derived from his practices of cultivating perceptions. They gave him both confidence in his judgments and rich content.

We lack information about Brandeis's particular practices of self-reflexivity because, consistent with his self-renunciation, he failed to speak of himself.[164] His biographer Urofsky found that among the "tens of thousands of letters in his lifetime, . . . very few cast any light on his inner man."[165] As Brandeis occluded himself, he was "a very private person as an adult."[166] We know of Brandeis's practices from their results as Brandeis understood them, from others of his time, and from advice that he gave to others.[167] In the next section, some of that advice is considered.

## III. Brandeis's *The Opportunity in the Law's* Advice on How to Practice

On May 4, 1905,[168] in response to an invitation from the Harvard Ethical Society to speak about "The Ethics of the Legal Profession," Louis Brandeis delivered a talk entitled *The Opportunity in the Law*.[169] He begins

163. Postema, *supra* note 47, at 835 (discussing integrity in law finding).

164. Urofsky concludes that Brandeis lacked self-reflexivity: Being "introspective . . . [was] an unusual sentiment for him." Urofsky, *supra* note 4, at 553. Brandeis's discipline portrayed here is a form of introspection. *Compare* Urofsky's conclusion about introspection to his conclusions regarding the charge that Brandeis was "austere:" "Louis did not select sacrifice or self-denial as a lifestyle; rather, he established priorities of what mattered most to him." *Id.* at 33. Urofsky attributes agency to Brandeis in regards to austerity, but denies it in regards to introspection. Brandeis established priorities that focused his introspection on the renunciation of self.

165. *Id.* at xiii. For example, in 1883, Sam Warren married the daughter of a U.S. senator, and Brandeis was not invited to the wedding. "[W]e have no mention by Brandeis of how he felt at the slight of not receiving an invitation to his best friend's wedding." *Id.* at 97. After the marriage, "Warren's wife . . . did not look favorably upon the friendship . . . and tried to discourage it by omitting [Brandeis] from her guest list whenever she could. Gal, *supra* note 71, at 36. Nonetheless, apparently without wounded pride, "in 1889, Brandeis moved his law office to . . .the same building that housed the corporate offices of S.D. Warren & Company . . . in order to be closer to his friend." *Id.* at 55.

166. *Id.* at 12.

167. The limitations of this data are acknowledged. An interpretation of Brandeis is offered from what I perceive in the data.

168. Urofsky, *supra* note 4, at 22.

169. *Opportunity*, *supra* note 2. Brandeis undoubtedly knew that Oliver Wendell Holmes delivered a lecture to Harvard undergraduates on "The Profession of Law" in February 1886, almost twenty years before Brandeis. Holmes answered the question, how may one "live greatly in the law"? Holmes, *supra* note 139, at 30. His answer was that it depended on one's interests. Some

the talk by opining that "opportunities for usefulness" arise in whatever occupation one is engaged in if one practices "in what Matthew Arnold called 'the grand manner.'"[170] Although others have noted Brandeis's invocation of Matthew Arnold, none have analyzed it in depth.[171]

Today, *The Opportunity in the Law* is normally understood as a Jeremiad describing the falling away of the legal profession from the pursuit of the common good.[172] The results of litigation were skewed against "the interests of the people" because "people's lawyer[s]" were not amassed against corporate ones.[173] Outside of litigation, especially when designing legislation, lawyers failed to play a constructive role in solving public problems. Instead, they advanced corporate interests.[174] Brandeis exhorted his audience to advocate for workers and the underrepresented and to positively influence progress.[175] This critique and unfulfilled agenda still ring true. In 1905, Brandeis perceived that "the ideals of American society" were "threatened" and needed those to "defend" them.[176] And that, too, still rings true.

Brandeis exhorted his audience to move beyond representing interests to being influential. What is most distinctive about the essay

had "the barbaric thirst for conquest" and should seek specialties in which that desire could be satisfied. *Id.* at 31. Others, had other ambitions and should seek that "which life offers for your appointed task." *Id.* He proposed no single answer to his question, noting, "If a man has the soul of Sancho Panza, the world to him will be Sancho Panza's world; but if he has the soul of an idealist, he will make—I do not say find—his world ideal." *Id.* at 29. The Opportunity's argument that one can become better than one has been by perceiving in the grand manner can be seen as a response to Holmes.

170. *Opportunity*, *supra* note 2, at 52. Brandeis's audience would have known of Arnold. "'For half-a-century,' says R.A. Scott-James, 'Arnold's position [in England] was comparable to that of [Aristotle] in respect of the wide influence he exercised.'" Trilling, *supra* note 117, at 190–91. On Arnold's influence in America, and especially in Boston, at the turn of the century, *see id.* at 392–405. The extent of Brandeis's knowledge of Arnold, as is so much of his personal life, is unknown, but it is revealing that for his summer reading in 1891, he took two books on art and "two volumes Matthew Arnold." Family Letters, *supra* note 74, at 73.

171. *See* Judith A. McMorrow, *An Interdisciplinary Retrospective Moving from a Brandeis Brief to a Brandeis Law Firm: Challenges and Opportunities for Holistic Legal Services in the United States*, 33 Touro L. Rev. 259, 270 (2017); Rob Atkinson, *The Foundations of Neo-Classical Professionalism in Law and Business*, 10 Geo. J.L. & Pub. Pol'y 429, 435 (2012).

172. Robert Gordon says the talk is now remembered as a summons to public interest lawyering. Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 Stan. L. Rev. 1731, 1736 (2017).

173. *Opportunity*, *supra* note 2, at 57. This castigation of lawyers allying themselves with corporate interests has a long history. *See, e.g.*, Oliver Wendell Holmes, *The Bar as a Profession* (1896) *in* Collected Legal Papers 158 (1920). More recently, the castigation has been accompanied by moral uplift. *See, e.g.*, Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 589 (1985) (citing Brandeis); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 Md. L. Rev. 255 (1990).

174. *Opportunity*, *supra* note 2, at 58.

175. *Id.* at 59.

176. Louis D. Brandeis, *What Loyalty Demands* (Nov. 28, 1905) (transcript available in the Louis D. Brandeis School of Law Library) [hereinafter *What Loyalty Demands*], quoted in Gal, *supra* note 71, at 145–46.

is where Brandeis describes lawyers exercising influence: Corporate lawyers, Brandeis argued, were tasked with "matters of state": "The relations between rival railroad systems are like the relations between neighboring kingdoms."[177] The growth of large corporations divested great powers to those business lawyers who were trusted for their "judgment."[178] Some of these lawyers were placed in leading management positions, but many others remained in the "private"[179] practice of law. They all were tasked with "the proper handling" of "questions of statesmanship."[180] Lawyers were "aiding businesses in their attempts to *peer into the future* and predict which courses would prove most financially profitable and least legally contentious."[181] To Brandeis, corporate lawyers were not necessarily stooges but could be perceptive and thereby be agents on "a moral proving ground."[182]

To explain how lawyers developed the "habits of mind"[183] that enabled them to become business visionaries, Brandeis emphasized that law practice develops not only a lawyer's reason but also "his field of observation."[184] He "sees men of all kinds" and "sees them in situations which 'try men's souls.'"[185] Seeing all this means that a lawyer "is apt to become a good judge of men."[186] After all the evidence is heard "very often" a lawyer perceives "that both he and his opponent were in the wrong."[187] A lawyer does not perceive a situation "abstractly:" Seeing can "ripen his judgment," leading to a "habit of mind" which is both "judicial in attitude and extremely tolerant."[188]

177. *Opportunity*, *supra* note 2, at 56.
178. *Id.* at 53.
179. Brandeis is describing that law practice has public aspects irrespective of its position to the market. Robert Gordon characterizes Brandeis as evincing a "managerialist ideology:" Managers have a "public interest-seeing role" in discharging their organizational duties. Gordon, *supra* note 172, at 1736 (emphasis added). Consequently, "private" is in quotation marks.
180. *Opportunity*, *supra* note 2, at 56. For the predominance of the counseling role, over advocacy, in the corporate bar at the turn of the twentieth century, *see* Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm*, 1870–1915, *in* The New High Priests: Lawyers in Post Civil War America 21 (Gerard Gewalt, ed., 1984).
181. *Opportunity*, *supra* note 2, at 53 (emphasis added); *cf.* William J. Brennan, *The Responsibilities of the Legal Profession*, *in* The Path of the Law 121 (A. Sutherland ed., 1968) ("[The lawyer can] take a broader long-term view of his client's needs—whether the client be a private corporation, an individual or a government agency—than can the client himself.").
182. Urofsky, *supra* note 4, at x (discussing this role in Brandeis's thought).
183. *Opportunity*, *supra* note 2, at 55.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

Brandeis paints how a lawyer "sees," what "habits of mind" a lawyer develops, "and what constitutes "judgment" with broad brush strokes.[189] It is not difficult to understand why his approach has been perceived so differently by modern authors. Is he repeating Aristotle's *phronesis*?[190] Or is it Weber's *verstehen*?[191] Or is it Parsons' structural-functionalism?[192]

All these accounts fail to explain why most lawyers don't take up the opportunities for usefulness in the law. If the practice of law develops *phronesis*, why then is practical reason not deployed against "the excesses of capital"?[193] If the practice of law develops *verstehen*, why then don't lawyers understand "the aspirations of the people"?[194] If lawyers are structural-functionalists, why then aren't they mediators between public and private interests, advancing the "common weal?"[195]

*The Opportunity in the Law* is both a Jeremiad against lawyers and a laudatory description of lawyers. The hinge between them is given in the introductory sentences of the talk. Brandeis tells us that "*how* men pursue their occupation" is "far more important" "than *what* the occupation is which they select."[196] Lawyers will be useful if, in their practice, they pursue "what Matthew Arnold called 'the grand manner.'"[197] The Jeremiad reveals that most lawyers, particularly corporate lawyers, who could approach their work in an Arnoldian fashion, don't. Without Arnoldian discipline, they are not mindful and don't see, and consequently advance corporate "selfish interests."[198] They view themselves as "adjuncts" to client masters and don't see

189. *Id.*
190. *See generally* Luban, *supra* note 11.
191. *See generally* Hazard, *supra* note 7.
192. *See generally* Simon, *supra* note 9.
193. *Opportunity*, *supra* note 2, at 57. Holmes wrote, "I fear that the bar has done its full share to exalt that most hateful of American words and ideals, 'smartness,' as against dignity of moral feeling and profundity of knowledge." Oliver Wendell Holmes, *The Use of Law Schools* (1886) *in* Collected Legal Papers 39 (1920).
194. *Opportunity*, *supra* note 2, at 57.
195. *Id.*
196. *Id.* at 52.
197. *Id.* Oliver Wendell Holmes discusses the importance of the "grand manner" not to lawyers, but to law professors, because their service is "the shaping of men's interests and [their] aims . . . [are] moral, not intellectual." Holmes, *supra* note 193, at 36. He explains that "The aim of a law school should be . . . not to take men smart, but to make them wise in their calling." *Id.* at 39–40. Brandeis would have agreed that the "grand manner" shapes moral judgments and makes one wiser. He thinks it should be adopted by lawyers, not just law professors. It is unclear if Holmes was referring to Arnold's "grand manner." *But see* the general influence of Arnold in America in Trilling, *supra* note 117, at 392–405.
198. *Opportunity*, *supra* note 2, at 57.

themselves as occupying a "position of independence."[199] Without the "grand manner," they are not free.[200]

Brandeis assumed that his audience understood what Matthew Arnold sometimes called "the grand manner," but more often called "the grand style." The popularity of Arnold in the U.S. at the turn of the twentieth century[201] is perhaps best indicated by the fact that another future Supreme Court Justice, Benjamin Cardozo, wrote his undergraduate essay on "The Moral Element in Matthew Arnold."[202] He ended it with this quote from Arnold, which Brandeis could well have chosen to describe those lawyers who practice in "The Grand Manner": "Docile Echoes of the eternal voice, pliant organs of infinite will, such men are working along with the essential movement of the world and this is their strength and their happy and divine fortune.[203]

Surely a worthy pursuit, as Cardozo claims. To become the subjective embodiment of eternal and immediate truths is inspiring. But how can one accomplish it? The next section unpacks what Arnold saw, and what Cardozo and Brandeis were referring to: the proper cultivation of perception.

## IV. Matthew Arnold's "The Grand Manner:" Renouncement of Self and Perception of the Ideal

Arnold may likely be remembered for his advocacy of educating the masses in the "best" of culture. He understood that engaging with, and especially criticizing, culture can be "an inward spiritual activity" through which comes "increased sweetness, increased light, increased life, increased sympathy."[204] To Arnold, the grand manner enabled seeing both what exists and what ought to exist.

The grand manner is what we would call "mindfulness." It is a technique to hone perception. Arnold pithily said, early in CULTURE AND ANARCHY, that he engaged in practices of renunciation, engagement with

199. *Id.* at 56–57.

200. On the importance of freedom to Brandeis, *see supra* text accompanying notes 126–135.

201. *See* TRILLING, *supra* note 117, at 392–405.

202. Benjamin Cardozo, *The Moral Element in Mathew Arnold in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 61 (Margaret E. Hall & Edwin W. Patterson, eds., 1947).

203. ARNOLD, quoted in *id.* at 76.

204. ARNOLD, *supra* note 3, at 43–44. Arnold's characterization of what is "best" deserves questioning, not for its being elitist, but by other conceptions of the "best." JOHN MICHAEL, ANXIOUS INTELLECTS 56 (2000). Critics questioned who would determine what constituted the "best" in culture and whether Arnold's vision risked perpetuating a narrow, Eurocentric perspective. For Brandeis discussing "best novels," *see supra* note 77. For Brandeis speaking of "best good," *see* GAL, *supra* note 71, at 91.

his perceptions, and patient reflection on them under the illumination of the ideal.[205] He practiced renunciation to eliminate noise. [206] This enabled him to magnify his capacity to pay attention to "*see as it really is*" [which] was the essence of Arnold's teaching," according to Lionel Trilling.[207] He sees again, sharpening his perception. He takes all the time necessary to perceive what is valuable. The grand manner describes an "*inward* condition of the mind and spirit,"[208] and requires a "'discipline of conduct.'"[209] Its honing of perception opens "the eye of the imagination."[210] That requires "disentangling" the self.[211] And like Brandeis, Arnold was seen as cold.[212] Brandeis happily found on the flyleaf of his future wife's diary these lines of Arnold: "Life is not a having and a getting; but a being and a becoming."[213] This approach to life demands the constant vigilance that we know Brandeis tried to embody. Like Brandeis,[214] "Arnold eschewed theoretical abstractions in favor of the concrete facts of practical experience. . . 'the great safeguard is never to let oneself become abstract.'"[215] The goal is to be present.

Those who perceive in the "grand manner" may realize a particular type of ambition.[216] The grand manner demands constant "pretensions to the highest."[217] Brandeis might have recognized himself had he read Arnold's view that the grand manner would appeal to those who seek "something to animate and ennoble them—not merely to add zest to their melancholy or grace to their dreams."[218] The grand manner synthesizes perception with not only evaluative but also cathectic norms.

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205. *See* Arnold, *supra* note 3, at 28–29.

206. Foucault ascribes renunciation of the personal as characteristic of all 19th century philosophy. Michel Foucault, The Hermeneutics of the Subject: Lectures at the Collège de France, 1981–1982, 28 (Frédéric Gros, ed., 2005).

207. Trilling, *supra* note 117, at Introduction (not paginated); *Cf.* Thích Nhất Hạnh, The Miracle of Mindfulness: An Introduction to the Practice of Meditation, *supra* note 73, at 76 ("The problem is to see reality as it is").

208. Lionel Trilling, The Portable Mathew Arnold 478 (1949).

209. Caufield, *supra* note 82, at 187 (quoting Arnold).

210. Arnold, *supra* note 3, at 199; *see also supra* text accompanying notes 76, 188.

211. Arnold, *supra* note 3, at 89.

212. J. Hillis Miller, The Disappearance of God: Five Nineteenth-Century Writers 242 (1963).

213. Letter from Louis D. Brandeis to Alice Goldmark Brandeis (Oct. 18, 1890), *in* 1 Letters of Louis D. Brandeis, *supra* note 79.

214. *See supra* text accompanying notes 76, 188.

215. Caufield, *supra* note 82, at 189.

216. Atkinson, *supra* note 189 (explaining "the grand manner" in terms of ambition; making possible the "fullest imaginable flourishing, personal and professional . . . [and] focus their individual efforts on the social goals").

217. Arnold, *supra* note 3, at 47.

218. Trilling *supra* note 117, at 141.

The grand manner explains what some contemporaries thought strange about Brandeis. A contemporary remarked, "that Brandeis, having changed his mind about an issue, had a luminous look, as if he came from wrestling with the devil."[219] During the confirmation hearings, Sherman Whipple, a Boston lawyer, criticized Brandeis because he "*was in love*, so to speak, with this idea of looking after everybody concerned and guiding the situation."[220] "One of his former law partners considered 'the prime source' of Brandeis's power to be his 'intense belief in the truth of what he was saying.'"[221] Although frequently emphasized is Brandeis's advice that lawyers gain knowledge of the facts, less often cited is his language that lawyers "must feel 'in his bones' the facts, . . . must know intimately" the facts.[222] Arnold writes that not only "openness to ideas" but also "ardour for them" is demanded by the grand manner.[223] Brandeis spoke of the need for the "ardor for seeing things whole."[224] The grand manner thus not only affords a vision but also a passion for that vision. It is this passion that these contemporaries of Brandeis were noting. At the same time, the grand manner requires a renunciation of self, so this passion requires being cool and indifferent, creating the seeming contradictions in his life noted by Urofsky.

The idea that there is a higher and better, and not just opinions about superiority, is foundational to the grand manner. In fact, it has been said that one is adopting the grand manner when one "sees life under the aspect of [this] distinct and illuminating idea."[225] Or, as Nicholas Murray put it, the grand manner speaks to one's "best self" and it requires that people "are mainly led, not by their class spirit, but by a genuine humane spirit, by the love of human perfection."[226] Brandeis embraced such an attitude: "In my opinion the only thing of real value in life is the ideal."[227] The task is to perceive the ideal.

Tying Brandeis to Arnold may seem strange because Brandeis did not engage in art criticism. Yet, Brandeis understood that culture

219. Martin Green, The Mount Vernon Street Warrens: A Boston Story, 1860–1910, 64 (1989).

220. Todd, *supra* note 13, at 118 (emphasis added).

221. Philippa Strum, Brandeis: Beyond Progressivism 62 (1993).

222. Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), *in* 1 Letters of Louis D. Brandeis, *supra* note 79, at 107.

223. Trilling, *supra* note 208, at 447.

224. Mason, *supra* note 1, at 3.

225. *Id.* at 178.

226. Nicholas Murray, A Life of Matthew Arnold 245 (1996) (quoting Arnold).

227. Letter from Louis D. Brandeis to Jacob Billikopf (Jan. 5, 1915), *in* 3 Letters of Louis D. Brandeis, *supra* note 97, at 412.

developed individuals.[228] In *The Right to Privacy*, Warren and Brandeis speak of "the refining influence of culture."[229] His perceptions were tied to his perceptions of art.[230] And, it has been claimed, that his policy positions were in fact aesthetic judgments: Thomas K. McGraw argues that Brandeis's moral railings against "The Curse of Bigness" was motivated by his "aesthetic preference for small size."[231]

Tying Brandeis to Arnold also may be seen as tying him to a whipped horse. "Arnold established a cultural agenda which remained dominant in debate from the 1860s until the 1950s."[232] But since the 1960s, "Arnold, or a convenient parody of what he is supposed to have stood for, has been the target of some unusually violent criticism."[233] This criticism has been about Arnold's exercises of power over education, but not the grand manner, except in so far as it requires orienting oneself to higher and better experiences. As such, the criticisms accurately capture that Arnold was an opponent of relativism.

Arnold, however, made a claim to quality without a claim to universality. For Arnold, criticism did not "establish" what is "absolutely true," only "true by comparison with that which it displaces."[234] The grand manner "appealed to the 'possible Socrates' within us all, to 'that power of a *disinterested* play of consciousness upon [our] stock notions and habits.'"[235] Arnold did not propound principles but developed a method that questioned them. To Arnold, being mindful is not so much

228. *See supra* text accompanying note 187. *See also* Urofsky, *supra* note 4, at 722. Brandeis and his wife came from families which "assumed that books, art, and music constituted an essential part of one's life." *Id.* at 106. Instead of a U.S. college, Brandeis went to a *gymnasium* in Dresden. At graduation, Brandeis chose "a book on Greek art by A. W. Becker, Charakterbilder aus der Kunstgeschichte." *Id.* at 22. Later, he frequented gatherings of artists and art collectors. *Id.* at 36, 53. He was an avid vulture of culture, even serving as Secretary of the Boston Art Club. Lief, *supra* note 97, at 29. In Arnoldian language, Brandeis wrote that "a Department of Fine Arts and Music [at the University of Louisville] . . . purpose [is] to provide that development which is comprised in the term culture." Letter from Louis D. Brandeis to Alfred Brandeis (Feb. 18, 1925), *in* 5 Letters of Louis D. Brandeis, *supra* note 101, at 163.

229. Warren & Brandeis, *supra* note 135, at 196.

230. Once, having seen racehorses, Brandeis wrote, "They are the most beautiful living creatures I have ever seen. The only fit comparison seems to me the marbles of Praxiteles; and for the wonderful Greek marbles I know no fitter comparison than these horses." Urofsky, *supra* note 4, at 358. In another letter, he wrote: 'The day is bright and clear and the coloring would do honor to Monet.'" *Id.* at 362.

231. Thomas K. McGraw, *Louis D. Brandis Reappraised*, 54 Am. Scholar 525, 527 (1985).

232. Belfiore & Bennett, *supra* note 36, at 27.

233. Stefan Collini, Matthew Arnold: A Critical Portrait 3 (1988).

234. Matthew Arnold, *The Function of Criticism in the Present Time*, *in* Trilling, *supra* note 208, at 234, 238.

235. Donald D. Stone, Communications with the Future: Matthew Arnold in Dialogue 12 (1997) (emphasis added).

a principle as it is an anti-principle.[236] The grand manner is a "tonic—'a source of intellectual invigoration and moral stimulus.'"[237]

The grand manner is not a guarantee. Arnold admits that those acting in the grand manner "may not be capable of intelligently leading the masses of a people to the highest pitch of welfare for them."[238] Arnold also acknowledges that those who act in the grand manner may not successfully disentangle their "own notions of justice."[239]

Yet, Arnold commends the grand manner to those who, like him, were living in times of "great changes." When facts are developing, deciding on the best course of action is very difficult. During "a period of transformation," Arnold tells us "[o]penness and flexibility of mind are . . . the first of virtues," and those who can "adapt themselves honestly and rationally" to the situation can exhibit what "is perhaps the nearest approach to perfection" in such times.[240] The grand manner, to Arnold, is the best offense during periods of historical change.

Adopting the grand manner is faith that one is doing the best that can be done in the situation despite knowing that there are no guarantees. Arnold recognized "necessary doubt."[241] Arnold sought to propagate "a free play of mind on all subjects which it touches."[242] Strangely, Arnold's commitment to contingency led Edward Said to castigate the "grandly unthinking Arnoldian way."[243]

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236. CAUFIELD *supra* note 82, at 67. *See also* James Walter Caufield, *'Most Free from Personality': Arnold's Touchstones of Ethics*, 38 CAMBRIDGE Q. 307, 323 (2009). As an anti-principle, the grand manner entails a vagueness that is only concretized by that to which it is opposed. In this vagueness, its advocates may take comfort from the literature about clinical legal education. In a comprehensive review of this literature, and based on a lifetime of clinical teaching, Mark Aaronson summarizes it as telling students interested in the public interest to have "good sense." Mark Aaronson, *Judgment-Based Lawyering: Working in Coal*, 27 J. AFFORDABLE HOUS. 549, 594 (2019) (quoting Hannah Arendt). That good sense is developed not so much by dictums, as by examples of law practice in which good sense is displayed (or not). Students learn good sense by seeing legal practice under the ideal of perfection. They are asked to imagine "What should have been done?" At its best, clinical literature and teaching are inspirational. Like the grand manner, they appeal to those who seek "something to animate and ennoble them," *see supra* text accompanying note 218, and "are mainly led, not by their class spirit, but by a genuine humane spirit, by the love of human perfection." *See supra* text accompanying note 226.

237. Archibald MacMechan, *Introduction*, lxi *in* THOMAS CARLYLE, SARTOR RESARTUS (Archibald MacMechan, ed., 1925) (citation omitted).

238. TRILLING, *supra* note 208, at 441.

239. *Id.* at 448.

240. *Id.* at 468. "Ambivalence and uncertainty" marked nineteenth-century thinkers on the powers of distance. ANDERSON, *supra* note 22, at 3. On the other hand, Arnold ascribed the grand manner to Ulysses S. Grant, whom Arnold claims "sees things straight and sees them clear." STONE, *supra* note 239, at 31.

241. TRILLING, *supra* note 117, at Introduction (not paginated).

242. MATTHEW ARNOLD, ESSAYS IN CRITICISM 18 (1883). Arnold's "attention to . . . the role of ambivalence and doubt put Arnold closer to his late-twentieth-century critics than has been generally acknowledged." STONE, *supra* note 235, at 118.

243. EDWARD W. SAID, HUMANISM AND DEMOCRATIC CRITICISM 45 (2004).

A profound recognition of one's own tragedy motivates the grand manner rather than arrogance or belief in one's own superiority. Arnold's poem *Sohrab* and *Rustum* is about mistaken identity that leads a father to kill in battle an opponent whom he later learns, tragically, to have been his son. Brandeis, in 1877, copied these lines from the poem:

> For we are all like swimmers in the sea,
> Poised on the top of a huge wave of Fate,
> Which hangs uncertain to which side to fall.
>
> …
>
> We know not, and no search will make us know;
> Only the event will teach us in its hour.
> Truth sits upon the lips of dying men.[244]

The grand manner is not for everyone. One can be "good and sound," and not act in the grand manner.[245] "It is no disrespect" to say that one does not act in the grand manner.[246] Failing to adopt the grand manner, however, one's actions are not governed by the unity of the ideal. Those who do not perceive in the grand manner demonstrate "an inward and spiritual diversity": They may be "vigorous" and "spirited," but their movement is "what the French call *saccadé*, . . . jerky."[247] This is an apt description of not being mindful.

Arnold thought the grand manner can emerge "in whole classes of [people] . . . by the possession of power, by the importance and responsibility of high station, by habitual dealing with great things."[248] Brandeis thought the responsibilities assigned to corporate counsel might afford them the judgment necessary for ethical action.[249] Arnold, too, praised "the enlargement of mind which the habit of dealing with great affairs tends to produce."[250] He thought "*the grand style*" was "the chief virtue of a healthy and uncorrupted aristocracy."[251] But, like Brandeis, Arnold wrote Jeremiads against the fallen state of those who could have been so much more. Arnold concluded that "[t]he time has arrived . . . when it is becoming impossible for the aristocracy of England" to govern.[252]

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244. MASON, *supra* note 1, at 40 (quoting from Brandeis's notebooks).
245. TRILLING, *supra* note 208, at 64.
246. *Id.* at 56.
247. *Id.*
248. TRILLING, *supra* note 208, at 439.
249. *See supra* text accompanying notes 177–182.
250. TRILLING, *supra* note 208, at 465.
251. *Id.*
252. *Id.* at 440.

Brandeis and Arnold had a more expansive understanding of individual discipline by attending to the cultivation of perception. They attended to the work of being here now. Brandeis relied on Arnold's concept of the grand manner to explain how an ethical professional should act.[253]

## V. Stresses in Brandeis's Practice: Valuing Fraternité

> "There is no place for what President Roosevelt has called hyphenated Americans. There is room here for men of any race, of any creed, of any condition in life, but not for Protestant-Americans, or Catholic-Americans, or Jewish-Americans, not for German-Americans, Irish-Americans, or Russian-Americans."
>
> Brandeis, 1905[254]

> "Multiple loyalties are objectionable only if they are inconsistent. . . . A man is a better citizen of the United States . . . for being loyal to his family, and to his profession or trade; for being loyal to his college or lodge. . . . Every Irish-American who contributed to advancing home rule was a better man and a better American for the sacrifices he made."
>
> Brandeis, 1915[255]

Before Brandeis joined the U.S. Supreme Court, he came to understand the limits of his practice. He shifted, as these quotes suggest, from a melting pot to a cultural pluralist understanding of citizenship.[256] Instead of just standing alone,[257] reconciling liberty and equality by his

253. *See supra* text accompanying note 196.

254. Urofsky, *supra* note 4, at 400. This is from *What Loyalty Demands*, *supra* note 177, delivered on Nov. 28, 1905, a few months after delivering *The Opportunity in the Law*, on May 4, 1905. 1 Letters of Louis D. Brandeis, *supra* note 79, at 321 n.1. Contrast Brandeis's view in 1905 with that of Robert Woods, "the renowned social worker of the South End House." Woods, in October 1905, in a paper read in the same venue where Brandeis presented *The Opportunity in the Law*, urged the "building-up of a natural federation among all our different racial groups, which will in a reasonable degree preserve all that is valuable in the heredity and traditions of each type, but will link all types together into a universal yet coherent and distinctively American nationality." Gal, *supra* note 71, at 147–48. Brandeis chose his middle name after his relative Louis Dembitz who did not want American Jewry to be a hyphenated group and "waged a constant and bitter war against the use of Yiddish." *Id.* at 69.

255. Urofsky, *supra* note 4, at 412 (internal quotations omitted).

256. Gal links Brandeis to Horace M. Kallen who was "the first to expound a comprehensive theory of cultural pluralism." Gal, *supra* note 71, at 150. Philippa Strum sees the 1905 position as a condemnation of "ethnic separatism." Strum *supra* note 69, at 230. Alon Gal explains the 1905 speech as a condemnation of the Irish, who had not assimilated. Gal, *supra* note 71, at 72, 92–93. These interpretations highlight the contrast between the positions in the quotes from 1905 and 1915.

257. *See supra* text accompanying notes 130–35.

perceptions of possibilities, Brandeis became committed to fraternité.[258] For example, he wrote that the "right of development on the part of the group is essential to the full enjoyment of rights by the individual. For the individual is dependent for his development (and his happiness) in large part upon the development of the group of which he forms a part."[259] Solidarity emerged for him as a value that was an important part of getting the just result.[260]

Brandeis came to support what he called "inclusive brotherhood."[261] He came to perceive a United States in which democracy "has deepened."[262] In 1904, Brandeis wrote of the "excesses of the French Revolution."[263] But in 1916, he praised the French Revolution as

258. Of course, fraternité is the third of the triad motto of the French Revolution and French Republic, equal to liberty and equality. Fraternité is an important aspect of human rights. In the Universal Declaration of Human Rights, Article 1, fraternité appears in English as the "spirit of brotherhood." Universal Declaration of Human Rights, United Nations, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Sept. 5, 2023). It unfortunately is sexist. This was noted in 1791 by Olympe de Gouges, who wrote the pamphlet: the Declaration of the Rights of Woman and of the Female Citizen (Déclaration des droits de la femme et de la citoyenne). Olympe de Gouges, Declaration of the Rights of Woman and of the Female Citizen, in Tolerance: The Beacon Of The Enlightenment 49–51 (Caroline Warman ed., trans., 2016); *see also* Jonathan Day, Liberté, Égalité, Fraternité: The Meaning and History of France's National Motto, Liberties (May 18, 2021), https://www.liberties.eu/en/stories/liberte-egalite-fraternite/43532. It has practical importance in the fight for human rights. *See* Charles D. Gonthier, *Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy*, 45 McGill L. J. 567 (2000) (a Justice of the Supreme Court of Canada finding fraternity concretized in Canadian law). Of course, like the other members of the triad, fraternité has various interpretations. For the purposes of this article, John Rawls's summary is relevant: "In comparison with liberty and equality, the idea of fraternity has had a lesser place in democratic theory. It is thought to be less specifically a political concept, not in itself defining any of the democratic rights but conveying instead certain attitudes of mind and forms of conduct without which we would lose sight of the values expressed by these rights." John Rawls, A Theory of Justice 90 (1999). *But see* Rawls' difference principle as a precise definition of fraternity. *Id.* at 90-91. A history of the concept can be found in Eric J. Hobsbawn, *Fraternity*, 27 New Society 471(1975). For radically different understandings *see* Gerald A. Cohen, Why Not Socialism? 38–45 (2009) and Wilson C. McWilliams, The Idea of Fraternity in America (1974). The text elaborates fraternité as the recognition that groups are normatively significant in themselves. This minimal claim is sufficient to explain the change in Brandeis's practices.

259. Louis D. Brandeis, *The Jewish Problem: How to Solve It* (1915) *in* Brandeis On Democracy, *supra* note 2, at 155, 157.

260. For example, in 1912, Brandeis wrote, "We must have industrial liberty as well as good wages." *Quoted in* Mason, *supra* note 1, at 429.

261. Louis D. Brandeis, *True Americanism* (Oration Delivered art Fanueuil Hall Boston, July 4, 1915), *in* Louis D. Brandeis, Brandeis on Zionism: A Collection of Addresses and Statements 3, 8 (1942).

262. *The Living Law*, *supra* note 100, at 461.

263. Louis D. Brandeis, *The Emp. and Trades Unions* (Apr. 21, 1904), *in* Brandies on Democracy, *supra* note 2, at 82, 84.

beginning a progressive "period of rapid transformation."[264] Later, on the Court, Brandeis was a proponent of "active citizenship."[265]

Brandeis did not reject Arnoldian perfectionism.[266] But he came to value processes in which he was not the only voice being heard. Only after practicing law for over thirty years did Brandeis acknowledge the weaknesses of his moral practice, committing himself to not only the practical but also the normative need to work with others.[267] In so doing, he affirmed the rights of others.[268]

Brandeis always understood the facts of political power and the political role of money.[269] However, in 1905, he thought cultivated perception would lead the way. First, the community had to "liberate itself from the reign of fear or favor"; second, "educational work" was needed; and third, the citizen "must seek to distinguish between the good and the bad—between the genuine and the sham—between the demagogue and the statesman."[270] Making these distinctions required educational work, which included having citizens see "that which is higher and that which is better."[271]

Brandeis's views changed. He did not become a relativist, but added commitments to the "communal process of collision and interaction among individuals and groups."[272] In 1913, he wrote that labor "dis-content is due perhaps less to dissatisfaction with the material conditions, as to the denial of participation in management." [273] As he

264. *The Living Law*, *supra* note 100, at 462.

265. Stephen Macedo, Liberal Virtues: Citizenship, Virtue, and community in Liberal Constitutionalism 100 (1990).

266. For example, he wrote in 1922 that "always and everywhere the intellectual, moral and spiritual development of those concerned will remain an essential—and the main factor—in real betterment," *quoted in* Adelstein, *supra* note 76, at 621.

267. "'I trusted only expert opinion,' he recalled in 1913; but 'experience in life' had made him look again at democracy." Stephen W. Baskerville, Of Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis 174 (1994). In particular, Brandeis examined labor democracy. He asserted in 1915 that "The employees must have the opportunity of participating in the decisions . . . [and] the right to assist in making the decision [includes] the right of making their own mistakes [which] . . . is a privilege which should not be denied to labor." Strum, *supra* note 69, at 182.

268. *Id.*

269. Gal, *supra* note 71, at 111, 128.

270. *Id.* at 93, 106.

271. Mason, *supra* note 1 at 91.

272. Spillenger, *supra* note 14, at 1466 (denying that Brandeis ever had such commitments).

273. Louis D. Brandeis letter to Dix W. Smith (Nov. 5, 1913), *in* 3 Letters of Louis D. Brandeis, *supra* note 97, at 210. Earlier, "His agenda was not to increase workers' participation in corporate decisions, but to give workers a better minimum standard of living." Nikolas Bowie, *Corp. Personhood v. Corp. Statehood*, 132 Harv. L. Rev. 2009, 2036 (2019) (reviewing Adam Winkler's *We The Corps.: How Am. Bus. Won Their Civil Rights* (2018)). Earlier, Brandeis understood the conflict between labor and capital simply as a "sign of man's failure to regulate their affairs rationally." Todd, *supra* note 13, at 45.

wrote, "[w]e must give the working man that development of his powers which comes only from freedom and sharing in the responsibilities of the business."[274] Only after about 1912 did "struggle" join "reason" as a core belief.[275]

One explanation for his changed views is that they were the result of what he saw in the labor strikes where self-identifying ethnic individuals and groups were mobilized. He saw Irish, Italians and Jews, speaking in their own dialects, mobilizing their ethnic compatriots.[276] "During the [1910 New York] garment strike he was plunged into a world. . . he had barely known existed. It was a world of 'poor' Jews. . . . For the first time, with tears in his eyes, he realized how necessary it had been for this family to preserve their customs and traditions. . . . He changed his mind. The Jewish, Irish and German communities should not lose their own special characteristics in becoming Americans."[277] His understanding of solidarity deepened: "Common race is only one of the elements which determine nationality. Conscious community of sentiments, common experiences, common qualities are equally, perhaps more, important."[278]

Another explanation for Brandeis coming to value fraternité is his becoming a Zionist. He writes that the "right of development on the part of the group is essential to the full enjoyment of rights by the individual" in "his most important Zionist address."[279] Brandeis was "a

274. Letter from Louis D. Brandeis to Winthrop Talbot (Apr. 16, 1912), *in* 2 Letters of Louis D. Brandeis, *supra* note 128, at 587.

275. "We cannot hope to get on without struggle." Brandeis in "How Far Have We Come on the Road to Industrial Democracy?—An Interview," 1913 *in* Brandeis on Democracy, *supra* note 2, at 94, 96. *See also The Living Law*, *supra* note 100, at 467. *Cf.* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J. dissenting) ("the right of industrial combatants to push their struggle to the limits"); Gilbert v. Minnesota, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting) ("national life is a resultant of the struggle between contending forces ") (explaining the right of association). *Cf.* Lobel, *supra* note 57, at 1331 (collecting proponents (not including Brandeis) of justice as struggle).

276. To understand the role of ethnicity in the labor movement in the early twentieth century, see the New York City Immigrant Labor History Project collection at the Tamiment Library and Robert F. Wagner Archives at the New York University. *See* Tamiment Libr. & Wagner Lab. Archives, https://specialcollections.library.nyu.edu/search/tamiment (last visited Sept. 7, 2023).

277. Iris Noble, Firebrand for Justice: A Biography of Louis Dembitz Brandeis 115–16 (1969).

278. Brandeis, *supra* note 259, at 161. "[E]ach race or people, like each individual, has a right and duty to develop and that only through such differentiated development will . . . liberty be fully attained, and minorities be secure." *Id.* at 160.

279. *Id.* at 157. The characterization of this address is by the editor, Philippa Strum, at 155. Brandeis's views did not derive from the fact that he was addressing a Jewish audience. His 1905 melting pot argument, *supra* text accompanying note 254, was delivered "before the New Century Club on the occasion of the 250th anniversary of the first settlement of Jews in the United States." Strum, *supra* note 69, at 229–30. The New Century Club is described as "a Jewish group" by Gal, *supra* note 71, at 92.

thoroughly assimilated Jew."[280] "In 1914 Brandeis's life took a completely unexpected turn.[281] He, a "secular humanist,"[282] who "from his first year as a lawyer in Boston (1879) . . . assumed no. . . responsibility in the Jewish community,"[283] "suddenly and intensely"[284] became a leader of the American Zionist movement. Sometimes, his Zionism and his newfound commitment to democratic solidarity are both explained in terms of his becoming committed to (idealizing) the Greek polis.[285] The Greek ideal that inspired Brandeis was the one that we now associate with Hannah Arendt, active political life in a small community, as was described in Alfred Zimmern's THE GREEK COMMONWEALTH (1911) "a book that '[Brandeis] quoted throughout his life and made certain that all the members of his extended family read.'"[286]

What links these explanations is Brandeis's increasing value of fraternité. Brandeis's democratic transformation is spurred by his perceptions of "brotherhoods" of workers. He worked to create solidarity through the American Zionist Movement. And it is the Athenian community, not its philosophy, that is normatively significant. All of them led Brandeis to perceive the normative significance of being with others in groups. Fraternité is not a passive virtue but connotes "people seeing themselves as being together in struggle, united by their beliefs and nationality."[287] Brandeis came to perceive "that whole peoples have individuality no less marked than that of the single person."[288] He attributed "the desire for full development" and the desire "for self-expression" to both individuals and groups.[289] "Whatever economic arrangement are made," and making them was

280. STRUM, *supra* note 69, at xi.

281. *Id.* at 224. Gal sees Brandeis's Zionism emerging in 1910. GAL, *supra* note 71, at 135.

282. STRUM, *supra* note 69, at 230.

283. GAL, *supra* note 71, at 72. In his speech accepting leadership of the American Zionism movement, Brandeis said, "'Throughout long years which represent my own life, I have been to a great extent separated from Jews.'" *Id.* at 206. In contrast, Brandeis's Jewish clients were involved with and often leaders of the Jewish community. *Id.* at 44.

284. STRUM, *supra* note 69, at xi.

285. It has been said that for Brandeis "the idea of the Greek city-state matched the possibilities of Palestine." STRUM, *supra* note 69, at 237. *See also* UROFSKY, *supra* note 4, at 430. Although Brandeis also said, "Zionism is the Pilgrim inspiration and impulse over again." Louis D. Brandeis, *A Call to the Educated Jew* (Jan. 1915), *quoted in* UROFSKY, *supra* note 4, at 411; *see also* GAL, *supra* note 71, at 181.

286. BASKERVILLE, *supra* note 267, at 208. "It is not certain exactly when [Brandeis] first picked up" this book that "would greatly affect [his] views on the ideal society." UROFSKY, *supra* note 4, at 359, 297.

287. Jonathan Day, *Liberté, Égalité, Fraternité: The Meaning and History of France's National Motto*, LIBERTIES (May 18, 2021), https://www.liberties.eu/en/stories/liberte-egalite-fraternite/43532#.

288. Louis D. Brandeis, An Essential of Lasting Peace (Feb. 8, 1915) *in* BRANDEIS ON DEMOCRACY, *supra* note 2, at 171, 172.

289. *Id.* at 173.

what his practice entailed, Brandeis now saw that if both of these desires are not met, there will be "injustice."[290]

Despite his changes, Brandeis did not come to denigrate being influential. Brandeis was a prophet.[291] And, he also came to understand the practical and normative significance of group influence.

## VI. Brandeis's *The Living Law* and the Deepening of Democracy

Just three weeks before President Wilson submitted the nomination of Brandeis to the U.S. Supreme Court, Brandeis delivered a talk before the Chicago Bar Association titled *The Living Law*.[292] "Not since his 1905 talk 'The Opportunity in the Law' had [Brandeis] spoken so comprehensively about law and the legal profession."[293] The contrast between the two is a profound one that reinforces this analysis of the strengths and weaknesses of Brandeis's disciplined perception.

Once again, Brandeis drew on Matthew Arnold. He cited Arnold not for the "grand manner," but for the importance of observation: "'Lack of recent information,' says Matthew Arnold, 'is responsible for more mistakes of judgment than erroneous reasoning.'"[294] Instead of using Arnold to teach how a lawyer should train themselves, Brandeis here used him to raise doubt about the value of past perceptions. Courts "continued to ignore" changing conditions and "lag behind the facts of life," relying on "abstract conception[s]," "deaf and blind" to current conditions, imposing "18th century conceptions" on a vastly different present.[295] Brandeis urged lawyers: Be here, now!

In *The Living Law*, Brandeis claimed that there has been "a shifting of our longing from legal justice to social justice . . . Now it is, 'Democracy and social justice."[296] And there has been a shifting away from the importance of "the lawyer's influence"[297] to "the will of the people.[298] As he put it, "our democracy has deepened."[299]

290. *Id.* at 173.
291. *See, e.g.*, Jeffrey Rosen, Louis D. Brandeis: American Prophet (2016).
292. Letter from Louis D. Brandeis to George Rublee (Dec. 28, 1915), *in* 3 Letters of Louis D. Brandeis, *supra* note 97, at 682.
293. Urofsky, *supra* note 4, at 430.
294. *The Living Law*, *supra* note 100, at 470.
295. *Id.* at 464–65.
296. *Id.* at 461.
297. *Id.*
298. *Id.* at 471.
299. *Id.* at 461.

*The Living Law* also is distinguished from the earlier talk because of its emphasis on "struggle." "We are engaged in a continuing struggle."[300] He praised those who "took some part in political life."[301]

In addition to the importance of knowledge of economics and sociology in *The Opportunity in the Law*, Brandeis in 1916 speaks of knowledge "of politics."[302] Instead of emphasizing discontinuity, rather than relationships, and an ascetic masculinity, Brandeis now quotes approvingly a description of law as "human, buxom and jolly, and not a formula, pinched [and] stiff."[303] He speaks of the "lawyers' intimate relation to contemporary life."[304] There certainly are many continuities with *The Opportunity in the Law*, discussing the importance of facts and the problems of specialization, for example. But instead of a lawyer as the carrier of the grand manner, he ends the talk praising a jurist, Bogigish, who "literally made his home with the people."[305] For two years, Bogigish lived with the people for whom he was drafting laws, interacting with them, learning "their customs, their practices, their needs, their beliefs, their points of view."[306]

In *The Living Law*, Brandeis argues that integrating ends, which he had done alone, requires the normative contribution of others. Bogigish, "instead of utilizing his great knowledge," subjected himself to "the people."[307] The jurist, "a deep student of the law" whose "fame" was well known,[308] did not influence them. His genius was to "embody" them in the law.[309] Brandeis praises Bogigish for understanding not only the needs of individuals, but also what was necessary for group development.

Brandeis did not doubt the genius of his practice. He came to recognize that he should not lead alone. He had responsibilities and an omnipresent sense of duty, but others and groups were entitled to full development and self-expression. Before he joined the U.S. Supreme Court, Brandeis came to understand the practice of democracy as missing in his renunciation of self.

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300. *Id.* at 467.
301. *Id.* at 469.
302. *Id.* at 470.
303. *Id.* at 469 (quoting a description of Alexander Hamilton). *But see* his praising being "virile" because it is "proof" against dishonesty. *Id.*
304. *Id.* at 470.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.* at 470.
309. *Id.* at 471.

## VII. Stresses in Arnold's Practice: Dissecting and Sharpening Perception

Arnold opines that the grand manner is "a bent . . . for the pursuit, in a word, of perfection."[310] This bent is liberating but also is situated.[311] Cornel West praises Arnold for encouraging others, especially "intellectuals . . . to shed their parochialism, provincialism and class-bound identities," but also criticizes Arnold's Eurocentric parochialism, especially as it excludes and degrades others, especially "women and people of color.") Arnold's normative choices reveal both his history and his place in history.

The judgments of those who embrace the grand manner, of course, can be criticized.[312] Perceiving great works of art, even pursuing perfection, is no guarantee of moral judgments.[313] Arnold correctly emphasized the contingency of his judgments.[314] Pursuing moral clarity by honing perception "commends the intellectual virtue of epistemic humility, fosters an appreciation of reality's immense complexity, and is disposed to distrust any one-size-fits-all ideology."[315] Epistemic humility is a necessary virtue of acting in the grand manner, but not one that Arnold consistently practiced.

Edward Said wrote that Arnold's "doctrines must be criticized for what they leave out, denigrate, demonize, and dehumanize on presumably humanistic grounds."[316] Said also is correct that the benevolent ambitions of the Victorians do not protect them from their failures to perceive the victims of their helping hands. Especially when we act for others, we need to be self-critical and engage those whom we seek to help not as objects but as strong subjects. Arnold's embrace of contingency does not guard his judgments from those who feel their effects.

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310. Trilling, *supra* note 117, at 537.

311. Cornel West, The Cornel West Reader 119, 122–23 (1999).

312. *See* Raymond Williams, Culture and Society: 1780–1950, at 108, 110–29 (1958). Arnold, for example, while a critic of the depredations of British capitalist development also was the product of British imperial hegemony, enunciating racial theories to justify Irish dependency. *See also* T. J. Boynton, *"Things That Are Outside of Ourselves": Ethnology, Colonialism, and the Ontological Critique of Capitalism in Mathew Arnold's Criticism*, 80 ELH 149 (2013).

313. *See* Williams, *supra* note 312, at 120, 128. Goose-stepping Nazis, educated in the works of Heine and Goethe, raised to the music of Mahler, must at least give pause to relying on a canon alone to train morality.

314. *Id.* at 120–21.

315. *Id.*; *cf.* Urofsky, *supra* note 4, at 141 (reporting that Brandeis used the term "a one idea man" to disparage those who didn't ground themselves in the concrete. According to Urofsky, he did not agree with "those who thought that one solution would solve all problems").

316. *Id.* at 47–48.

What the criticisms fail to point out is Arnold's practice in the grand manner. They focus, rightly so, on what Arnold said and wrote. They don't interrogate his disciplining of perception. Some problems with the grand manner have already been discussed in relation to Brandeis. Like Brandeis, there are problems with Arnold's individuation. Arnold values only certain cultural products. Touting Athens, he leaves out its slaves. He denigrates many (most) cultural products and others' cultures. All that is excluded—especially by those who believe that they are among "the best and the brightest"—needs to be seen and heard, as others have ably demonstrated. Furthermore, a discipline attentive to one's perception, continually returning to the self's sensation, can downplay the normative significance of others and of groups.

Arnold's practices of criticism reveal another problem that emerges in the cultivation of perception. Arnold sought perfection by dissecting cultural works. His criticism whittled down culture to gain access to the ideal. Seeking perfection, he sliced culture to find the greats. He then diced them to reveal perfection in their works. Wordsworth wrote, "We murder to dissect."[317] By this, he did not only mean the frog. He did mean that one can be present and not hear the music. To be focused has costs. There is "wisdom" in the unheard music.[318] And Wordsworth also questioned the "toil and trouble" of cultivating perception, which "Misshapes the beauteous forms of things."[319]

In other words, Arnold also can be criticized for failing to stop the cutting. He never settles. He seeks an uncompromised ideal. In pursuit of the ideal, for Arnold, any clouding of the illumination of perfection is to be excised, not embraced. Seeking the ideal, however, one may not see that to which it needs to be connected.[320] In dissection, the integuments that support the ideal may be cut. The ideal may be better perceived but may have become more unstable.

The ideal can be the enemy of the good. Seeking perfection can make conciliation seem like compromise. If the only justice that can be delivered is a compromised one, the grand manner may not see it. Worse, it can deny that it has any value. Why waste time on a little more

317. William Wordsworth, *The Tables Turned*, Poetry Foundation, https://www.poetryfoundation.org/poems/45557/the-tables-turned.

318. *Id.* at line 12.

319. *Id.* at lines 4, 27.

320. "If you think you can think about a thing that is hitched to other things without thinking about the things that it is hitched to, then you have learned to think like a lawyer." Peter R. Teachout, *Uneasy Burden: What it Really Means to Learn to Think Like a Lawyer*, 47 Mercer L. Rev. 543, 543 n.1 (1996). Arnold's pursuit appears to reflect this legalism. *Id.*

justice when there is so much more to be achieved? The pursuit of an ideal can hinder embracing partial victories.

Arnold's confidence in his judgments is his confidence in his ability to reveal perfection so clearly that it can be recognized by all those who heed him. In pursuit of that end, he put on high-beam headlights. With Arnold, we might be able to see far down the road, but not what's near. As a result, Arnold's "diagnoses of the ills of society were as a rule acute and accurate, but his cures were mostly vague and indefinite."[321] The more refined may be the less practical. The perception of perfection does not answer the question of what should be done now.

The stresses in Arnold's pursuit are revealing of stresses in many attempts to be guided by an ideal. How much justice is enough? How moral can I be? How open can I be? These are dangerous questions if they lead to finer and finer perceptions of the ideal. The pursuit of "true" justice can lead to unreasonable demands: Only a revolution will suffice. The pursuit of being a "truly" moral person may lead to unreasonable renunciations: We all need to be monks. The pursuit of "true" openness may lead away from worthwhile but partial connections: Only perfect love will do.

How refined ought the ideal be? Arnold reveals that this question must be faced by all those who pursue an ideal. For example, to be guided by justice requires refining one's perceptions so that justice can be recognized. On one hand, the less refined, the less it will challenge the status quo, the more its realization may be compromised, but the more stable its institutionalization will be. On the other hand, the more refined is one's vision of justice, the more it will challenge existing victories over injustice, the less it will accept workable compromises, but the more motivating will it make the pursuit of justice.

The problems with Arnold's practices do not deny the value of pursuing ideals. Rather, they reveal stresses that must be resolved in the pursuit. Vision is not to be disregarded. But if it is piercingly illuminating, it will have no practical relevance. If it is cloudy, the ideal will only be partially achieved, and how can that be justified? How refined is one's vision is a problem for all who practice by paying it attention. 20/20 is perfect eyesight. Moral ideals have no comparable baseline. We must choose them.

321. Wolf Lepenies, Between Literature and Science: The Rise of Sociology 159 (1988).

## VIII. Re-Imagining Brandeis's "Counsel to the Situation"

Brandeis explained his acting as counsel to the situation by saying, "My position was that of being on neither side, but as holding . . . the position of advisor."[322] His service was "dispensing justice."[323] There are at least five cases of his acting as counsel to the situation: The McElwain Shoe Company, Women's Educational and Industrial Union (WEIU), The Lennox Family Bankruptcy, The Filene Department Store, and the Warren Family Trust cases. Seeing the "perceptive Brandeis" at work in them enables understanding his practice of justice.

In one display of Brandeis acting as counsel to the situation, McElwaine, the owner of a non-public shoe manufacturing company that was beset by labor problems, called on Brandeis for assistance. The client wanted to cut employee wages. We do not know if this would have been a breach of any legal duties that he owed to the employees. The client argued that his excuse if needed, was that in lean times, he could no longer afford to pay the rate to which he had previously agreed. Presumably, he also was arguing for his good faith in lowering wages.

In this case, we are told that Brandeis discovered that the workers were subject to long layoff periods so that although their hourly rates were high, their annual wages were low. After studying the economics of the shoe industry, Brandeis proposed that the client revamp his operations, accepting orders long before the proposed delivery and then rescheduling operations to eliminate the layoff periods. Both the client and the employees, with their seemingly opposed interests, were reconciled.[324] Brandeis was able to dispense a form of justice by working as counsel to the situation.

Counsel to the situation has been described as "one of the most unfortunate phrases [Brandeis] ever casually uttered."[325] This description reflects how the concept is divergent from modern legal ethics. The modern conception enshrines principles of both neutrality and partisanship. As neutral, the lawyer is detached from the client's interests. As a partisan, the lawyer works aggressively to advance these interests.

Modern legal ethics is rooted in protecting clients by minimizing agency costs and disempowering lawyers. Informed consent both

322. Letter from Louis D. Brandeis to Cornelia Lyman Warren (Feb. 17, 1916), *in* 4 LETTERS OF LOUIS D. BRANDEIS *supra* note 148, at 72.

323. Letter from Louis D. Brandeis to Edward Francis McClennen (Feb. 19, 1916), *in* 4 LETTERS OF LOUIS D. BRANDEIS, *supra* note 148, at 77, 78.

324. UROFSKY, *supra* note 4, at 65 (The McElwain Case).

325. Frank, *supra* note 13, at 702.

authorizes and limits lawyer actions. The modern conception enables a narrow loyalty between lawyer and client.[326] Client vulnerability requires lawyers to segregate their feelings and their moral selves because they will intrude on the representation.[327]

Counsel to the situation recognizes client vulnerability and embraces it. Clients hired Brandeis to be influential.[328] He refused to be one of the "collaborators in their clients' short-sightedness."[329] A counsel to the situation revises the client's ends and strives to realize that vision.

Brandeis saw the possibilities for both power and responsibility in the lawyer's role. Brandeis refused clients who demanded "the best way to reach [their] ends." He required that clients allow him to answer for them the question of what they should do.[330]

In the McElwain case, the immediate problem was solved to all sides' satisfaction, so it is easy to ignore that he did not act as a partisan. Ignoring Brandeis's exercise of power, his actions could be justified under modern legal ethics as "relational lawyering."[331] Understanding Brandeis as having made a scientific discovery about the shoe industry (high wages/inconstant employment) also downplays his exercise of power.

But if we admit that Brandeis was conscious of his power, the question shifts to how it is made responsible. Informed consent works very poorly in counsel to the situation cases. John Dzienkowski presciently argued, "The label 'lawyer for the situation' is too nebulous to *adequately communicate to the potential clients the manner in which the lawyer is going to represent* their interests. Without a more concrete explanation of what it means to represent a situation, the potential clients cannot extend an informed consent to the representation."[332]

In the modern conception, Brandeis's power masks client domination. Where is there accountability? Where are the limits on his control? Where is respect for his clients? Where is client empowerment?

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326. Hazard, *supra* note 7, at 64.

327. *See* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy In Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103-04 (1992).

328. *See* Urofsky, *supra* note 4, at 70.

329. *Id.* at 61.

330. *Id.*

331. Eli Wald and Russell Pearce describe a relational understanding of a client's interests: "[A] relational perspective recognizes that all actors . . . , are intrinsically inter-connected and cannot maximize their own good in isolation …. maximizing the good of the individual or business requires consideration of the good of the neighbor, the employee or customer, and of the public." Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 Geo. J. Legal Ethics 601 (2016).

332. Dzienkowski, *supra* note 18, at 784 (emphasis added).

Where is the building of a collective project of reflection, learning, and problem-solving? Where is there collaboration? He is a leader, but does he develop leadership in others? Are others mobilized? He engaged in legislative advocacy, but did he engage communities to do so as well? How could Brandeis be so irresponsible?

We know that Brandeis came to understand that making leaders, mobilizing communities, and allowing others to be present were essential. But Brandeis always believed in the usefulness of his influence. How could that be made accountable?

This Article presents Brandeis's answer. He gave up partisanship and committed himself to renunciation of self, so much so that he appeared to be cold. He gave up neutrality, confident that his subjectification gave worth to his moral judgments. His discipline, he believed, gave him something similar to what Karl Llewelyn would later call "situation sense."[333] Today, we might say that Dzienkowski's challenge ignores the powers of being mindful. He asks what is "the manner in which the lawyer is going to represent their interests?" Brandeis might reply, "the grand manner."

Because the pie grew larger, there were no complaints in the McElwain case about not serving client interests. Brandeis serving as counsel to the situation case is harder to reconcile with current legal ethics in the WEIU case. A delegation of women from WEIU went to Brandeis seeking his help to raise wages for women working in stores and factories. Brandeis recognized that the delegation was composed of "middle-class and elite matrons" and "trenchantly suggested that they first get, literally, their own houses in order."[334] Seeing the larger picture, Brandeis "recognized something they often did not: their homes were paid workplaces and bore examination as such."[335] Brandeis also recognized "the servant problem:" domestic servants were becoming scarce as employment outside the home increased.[336] Brandeis's reaction

333. For an analysis of Llewellyn's use of "situation sense," *see* William Twining, Karl Llewellyn and the Realist Movement 217–29 (1973). Like the grand manner, "'[s]ituation sense' appears to involve 'true understanding' of the facts and 'right evaluation' of them." *Id.* at 217. Unlike the grand manner in which understanding emerges from perception, situation sense emerges from a faculty of the mind. *Id.* at 210. Like Arnold, Llewellyn writes about "the grand style." *Id.* at 370, Like the practices of Brandeis and Arnold, Llewellyn's "grand style" functions "to reconcile the values of 'vision' and 'imagination.'" *Id.* But instead of flowing from honed perception, for Llewelyn what is needed are the "austere values of intellectual discipline." *Id.*

334. Sarah Deutsch, Women and the City: Gender, Space, and Power in Boston, 1870–1940, 56 (2000). This case, the only one in which women appear, is strangely absent from the legal literature on Brandeis.

335. *Id.*

336. *Id.* at 55.

did not respond to the problem posed by the clients. Nonetheless, WEIU responded by collecting statistics on domestic employment, opening a training school for domestic servants, and forming an employment bureau.[337]

"Before I help you, get your own house in order" is not how modern lawyers normally speak. When these employers of maids came seeking to raise the wages in businesses that now employed many of their former servants, Brandeis, who zealously guarded his independence and "grilled" clients, decided that they were trying to deceive him and may be deceiving themselves. Brandeis saw that their stated goal would decrease others' demands for their servants because it would increase the numbers of other workers competing for the now better-paying jobs. It would lessen "the servant problem." Unlike in the McElwain case, it is hard to attribute this perception to the application of scientific principles. Brandeis's practices mobilized him to perceive deception.[338]

A remarkable feature of this case is that WEIU became motivated to do better. They got their houses in order. They may have discovered their self-interest in establishing a training school and employment bureau because they could thereby increase the pool of labor available to them.[339] But the case suggests that Brandeis reimagined their benevolent spirit. They came, they said, wanting to help. Brandeis offered to them other ways to express benevolence to those whom they employed and those whom they might employ. And they embraced Brandeis's vision.

A feature of the grand manner is to treat people as better than they are,[340] with the hope they will become better. In acting as counsel to the situation in this case, Brandeis was pursuing the grand manner. He inspired his clients.

In the Lennox case, Brandeis informed a family, whose breadwinner had become bankrupt, that he would not help them resolve the ensuing

337. *Id.* at 56.

338. In his undated memo, What the Practice of Law Includes, Brandeis wrote: "Don't believe client witnesses." UROFSKY, *supra* note 4, at 63.

339. If so, they were mistaken. "Despite all their efforts, however, they found that if at all possible working women would choose any occupation before they would choose domestic service." DEUTSCH, *supra* note 334.

340. Arnold stressed the pragmatic function of a commitment to "the best:" "To treat men as if they were better than they are is the surest way to *make* them better than they are." TRILLING, *supra* note 208, at 466. Arnold praised Homer because he "does not rise and sink with his subject; on the contrary, his manner invests his subject, whatever his subject be, with nobleness." *Id.* at 38. Arnold would tell us that Brandeis was seeing the nobility in his clients when Brandeis refused to simply take their orders.

financial difficulties until they promised to pay the creditors first.[341] Brandeis refused to be their partisan. When there were complaints, Brandeis answered that they had consented: "Lennox was untrue to the terms and conditions" of our engagement. My involvement in this matter "expressly, and even more by implication, [required] honest cooperation on his part and of course the assumption on my part of honesty."[342] Urofsky explains this case as a matter of "poor communication."[343] That might explain why Brandeis thought that Lennox was being dishonest. It less well explains why Lennox thought that the matter revealed Brandeis's bad character.[344] Lennox didn't say that he didn't consent to Brandeis being counsel to the situation. He thought Brandeis abused his delegated powers, revealing his bad character in how he acted. Brandeis would have agreed with Lennox that his practice revealed his character but, of course, disagreed with the valence Lennox assigned.

Urofsky argues that the difficulty with "counsel to the situation" is that it requires that "all parties had to act in good faith."[345] Undoubtedly correct. Good faith is a requirement in the performance of all contracts. But it was Brandeis's perceptions of what good faith demanded that was problematic to Lennox. Brandeis did not see partial renunciation of the Lennox family's interests as problematic. In serving as counsel to the situation, he appears to have imposed his own ideals on Lennox.

There is no indication that Lennox and Brandeis spoke about the cultivation of perception. Discussion of practices of renunciation would have been on point. Brandeis was certain that clients came to him because he was "Brandeis." Explaining the grand manner and its role for him would help ensure that he was correct. Clarity about the processes of the representation is especially important when its goals are subject to revision.

Lennox sought out Brandeis because of his "reputation."[346] If the testimony at the Confirmation Hearings is believed, the "leaders" of the Boston Bar thought that Brandeis did not understand his reputation, at least in some elite business circles.[347] In asserting what was impliedly

341. Urofsky, *supra* note 4, at 66–67.

342. Letter from Louis D. Brandeis to Edward Francis McClennen (Mar. 9, 1916), *in* 4 Letters of Louis D. Brandeis, *supra* note 148, at 111.

343. Urofsky, *supra* note 4, at 68.

344. Todd, *supra* note 13, at 117–18.

345. Urofsky, *supra* note 4, at 65.

346. *Id.* at 66.

347. For example, testimony regarding "what is the general reputation of Mr. Brandeis?" was that Brandeis "is ruthless in the attainment of his objects, not scrupulous in the methods he

agreed to by Lennox, Brandeis was relying on the fact that his reputation (as he understood it) constituted some of the (implied) terms of the engagement. What Brandeis valued in his reputation would have been a good place to begin dialogue with Lennox. Mutual engagement between lawyer and client about their own "character" is necessary when situations are subject to change. Such conversations may not be easy ones.

In 1901, Edward Filene approached Brandeis because of labor issues at his department store. Brandeis advised Filene to establish a Cooperative Association between management and workers. This Association helped reduce labor problems.[348]

As we have seen, Brandeis, at this stage in his life, did not understand the necessity of industrial democracy and believed that labor and management could reason together.[349] In fact, the Cooperative acted as another tool for management power. One can blame the workers who "did not reach out to grasp power but rather shrank from responsibility."[350] But, as we have seen, Brandeis's vision was a limited one, and it also may be blamed. Edward Filene wrote to Brandeis, "you taught me the wisdom of conciliation."[351] The Cooperative Association was a conciliation that functioned to cool labor without giving them power.[352] Brandeis, as we have seen, came to recognize that this avoidance of worker rights to self-expression and development stemmed from problems in his practices of renunciation.

In his last will and testament, Samuel D. Warren, Sr. provided that his children were to participate "equally" in the estate.[353] To avoid creating a fire sale, the will provided that the executors of the estate could run the business for 18 months following the death and then decide whether to continue or sell it. Samuel D. Warren, Jr. (Sam) was an executor of the estate. On the advice of Brandeis, the executors asked

adopts, and not to be trusted." MASON, *supra* note 1, at 480. One can imagine Lennox, in financial difficulty, seeking such a lawyer to turn his fortunes around.

348. *Id.* at 146.

349. This was even explicitly stated in his 1904 address that labor and capital should meet in the "spirit" of "[c]ome let us reason together." Louis D. Brandeis, *The Emp. and Trades Unions* (Apr. 21, 1904), *in* BRANDIES ON DEMOCRACY, *supra* note 2, at 86.

350. Saul Engelbourg, *Edward A. Filene: Merchant, Civic Leader, and Jew*, 66 AM. JEWISH HIST. Q. 106, 112 (1975).

351. UROFSKY, *supra* note 4, at 60.

352. "In 1930 a Russell Sage Foundation study [of the Filene Co-operative Association] concluded that the plan had been unworkable because the idea of worker-management had been instituted from above." STRUM, *supra* note 221, at 39.

353. Filed 4 June 1888, dated 10 May 1882. Paragraph Fourteenth (on file with author). *Accord* Richard W. Painter, *Contracting Around Conflicts in a Family Representation: Louis Brandeis and the Warren Trust*, 8 UNIV. CHI. ROUNDTABLE 353, 361 (2001).

the heirs to convey their interests in the business properties to a trust that would exist for thirty-three years.[354] The trust, of which Sam was a trustee, then leased the properties to Brandeis for a term of thirty-three years. Brandeis then sublet the properties to a business, of which Sam was one of three managers.

The trust and lease had three important consequences. First, the fruit of Senior's estate would not be divided equally between the heirs; Sam, the son, would have more so long as the business remained profitable. Sam would take both under the will and from the profits of the business. Second, the managers were running a business, not a trust (because of the intermediation of Brandeis's lease), so they did not owe strong fiduciary obligations to the heirs. And third, the heirs had no say for up to thirty-three years regarding their properties.[355]

As Sam was Brandeis's friend, classmate, co-author, and law firm partner, the advantages he accrued over those of his siblings are too easy to explain.[356] Such a conclusion, however, conflicts with Urofsky's finding that Brandeis and "Sam both had a highly developed, some would say overdeveloped, senses of morality, and neither would have done anything to jeopardize the interests of the other heirs."[357]

In Brandeis's confirmation hearings, the lawyer who sued the trust blamed Brandeis: "Sam had to be persuaded by Brandeis to put this plan into effect: 'Mr. Brandeis had convinced [Sam] that the plan, or the scheme, as [Sam] called it, was a proper one.'"[358] Brandeis imagined the situation, and Sam came to see it, as did Brandeis. Both may have come to see that Sam was entitled to be better compensated not only for his

354. *Id.* at 360.

355. *Id.* at 363. In running the business, Sam may have felt that he was fulfilling his filial duties as his father long wished that Sam leave the law and join him in the business. GREEN, *supra* note 219, at 101–02. Nonetheless, his father also wished that his children share equally in the estate.

356. Sam and Brandies co-authored *The Right to Privacy.* Warren & Brandeis, *supra* note 135.

357. UROFSKY, *supra* note 4, at 70. Brandeis said of Sam: "He was of all people whom I ever knew who had to do with business affairs, the most indifferent to money; and no man have I ever known who sought more eagerly to do justice, and who erred, if he erred at all, in deciding against his own financial interest, when decisions had to be made." Letter from Louis D. Brandeis to Cornelia Warren (Sam's sister) (Feb. 17, 1916), *quoted in* MASON, *supra* note 1, at 447. In a letter to the widow after Sam's death, Matthew Prichard, once Sam's secretary and then Secretary to the Museum of Fine Arts-Boston, wrote: "If you turn to the teachings of Buddha you will find an extraordinary correspondence between the conditions of the Path and the practices of Sam Warren." GREEN, *supra* note 219, at 205.

358. Painter, *supra* note 353, at 379, n. 81. Ned's lawyer suggested that Brandeis's involvement in drawing up the trust put Sam's "brain and conscience to sleep . . . producing a sort of chloroform in the form of a legal opinion." MASON, *supra* note 1, at 476. In Sam's own will, however, which created a trust with Brandeis as one of the trustees, there was an explicit waiver of conflicts of interest between the trustees and the beneficiaries. GREEN, *supra* note 219, at 193.

work to maintain a successful business but also for Sam's responsibility to maintain and increase the Warren family's status in Boston, an expensive venture.

Sam was sued by one of his brothers (Edward Perry Warren, universally known as "Ned") for breach of fiduciary duties. After a day of giving testimony, Sam went to his country estate in Dedham and committed suicide.[359] Brandeis said that his service "with the Warrens [was] dispensing justice among them."[360] If so, this was a spectacular failure.

Brandeis did not represent Sam in this suit because he "could not take Ned [the plaintiff] seriously."[361] After the suit, Brandeis lamented the plaintiff's character and even his sanity.[362] Yet, Brandeis was so unfamiliar with the plaintiff that he messed up his name.[363] Brandeis also failed to understand that the plaintiff was a business person, a leader in the antiquities trade.[364] Instead, Brandeis perceived that Ned needed money simply to indulge himself.[365]

As he judged the motivation of WEIU, Brandeis judged Ned's motivation. In Brandeis's eyes, Ned was the selfish one. Brandeis perhaps hoped that Ned would become a better person. Brandeis, however, did not perceive that Ned was already committed to an ideal.[366] Not seeing the ideal in Ned's life and not properly perceiving Ned, Brandeis failed as counsel to the situation. Ned was an "other" to Brandeis. As moderns, we cannot help but suspect that Ned's sexual orientation may not have been irrelevant.[367] Regardless, in this case,

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359. Urofsky, *supra* note 4, at 69.

360. Letter from Louis D. Brandeis to Edward Francis McClennen (Feb. 19, 1916), *in* 4 Letters of Louis D. Brandeis, *supra* note 148, at 77, 78.

361. Green, *supra* note 219, at 192.

362. *Id.* at 207, 210.

363. Letter from Louis D. Brandeis to Cornelia Lyman Warren (Feb. 17, 1916), in 4 Letters of Louis D. Brandeis, *supra* note 148, at 72 (calling Ned, "Ed").

364. In 1900, at a dinner for Ned, who was visiting Boston, hosted by Sam, Charles Eliot Norton said: 'There is not and never has been in America or in Europe a man with such capacities, will and circumstances for collecting, and the Museum must be entirely dependent upon him; if Mr. [Ned] Warren's life were shortened, the hopes of this Museum would die with him.'" 1 Walter Muir Whitehill, Museum of Fine Arts Boston: A Centennial History 157 (1970). This was no after-dinner extravagance. Oxford's John Beazley said that Ned and his partner, John Marshall, had "complete control of the market in classical antiquities. Almost everything that was good, whether a new find or an old, came to [them] for the first refusal. Competition had all but ceased." David Sox, Bachelors of Art: Edward Perry Warren & the Lewes House Brotherhood 97 (1991).

365. Urofsky so describes Ned. Urofsky, *supra* note 4, at 69. Brandeis disparages many Americans as indulgent in *supra* text accompanying note 129.

366. John Potvin, Bachelors of a Different Sort: Queer Aesthetics, Material Culture and the Modern Interior in Britain 150 (2014).

367. For a discussion of how Ned's sexual orientation may have influenced *The Right to Privacy*, *see* Charles E. Colman, *About Ned*, 129 Harv. L. Rev. F. 128 (2016). Had Brandeis understood

Brandeis's perceptiveness let him down, and he failed spectacularly. "Counsel to the Situation" depends on the insights of a disciplined perception and fails when that perception is distorted. Like Arnold, Brandeis's normative choices reveal both his history and his place in history.

Robert Cochran used the Warren Trust case to argue that lawyers have a professional obligation to present ADR as an alternative to clients.[368] He is not alone in reducing counsel to the situation to a critique of adversarialism.[369]

Others see counsel to the situation as an early articulation of collaborative law. To Urofsky, being counsel to the situation means the ability to find "reasonable" and "workable" solutions.[370] Collaborative law, on the one hand, talks about "creative problem solving,"[371] and on the other hand, about "the client's real, long-term human needs" and the "true client" marked by "enlightened self-interest."[372]

ADR, relational lawyering, collaborative lawyering, or simply being reasonable all purport to describe the process of lawyering. But they less describe the how of lawyering than define situations in which the consideration of non-client ends is justifiable. Brandeis did not need to justify the consideration of non-client ends. Employing the grand manner was how he practiced, and it enabled him, sometimes, to become unbound from extant social forces and clearly perceive how justice required a lawyer to act. Brandeis was duty-bound by his perceptions and didn't need other justifications. Pointing to the structures supporting regnant lawyering, Brandeis might tell us that if we think there is a need to respond to non-client interests, there probably is something that we see and that deserves inspection.

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Ned's business, buying antiquities and then hoping to sell them to museums, Brandeis would have understood that Ned would always need advances from the Trust to keep him afloat and would have understood that the Trust he designed would not work for Ned. As Ned was buying the Greek antiquities that Arnold, and Brandeis, so prized, Brandeis's failure is ironic at best.

368. Robert F. Cochran, Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Under Other Professional Responsibility Standards*, Fordham Urb. L. J. 895–914 (2001).

369. *See, e.g.*, Hazard, *supra* note 7, at 74. Urofsky quotes a letter from Filene to Brandeis: "I recall especially of how mystified I was at first at a great lawyer's efforts to keep his clients out of court." Urofsky, *supra* note 4, at 60. Unfortunately, this does not distinguish Brandeis from Elihu Root, who led the charge against Brandeis in the confirmation hearings, who similarly said "A lawyer's chief business is to keep his clients out of litigation." *Id.*

370. Urofsky, *supra* note 4, at 15.

371. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 Ariz. L. Rev. 289, 295 (2008).

372. *Id.* at 299.

The problem for a lawyer partly unmoored from client interests is to decide how to act. Meditating on an ideal, such as "Pursue Justice, Justly," works for some. For others, including Brandeis, cultivating perceptive abilities reveals what must be done. It is his discipline of self that gave Brandeis confidence in his decisions. He had an answer to the question of how to become a partial subjective embodiment of universal principles. He had perceptions and visions of justice (and injustice).

Ethical naturalism argues that perception properly interrogated produces moral knowledge. To that end, Brandeis embraced the grand manner and recommended it to other lawyers. Problems with the employment of the grand manner describe the weaknesses of Brandeis being counsel to the situation. In the Filene and Warren matters, Brandeis didn't see. What Brandeis saw led to the strengths of his service in the McElwain and WEIU cases. And Brandeis's ignorance of how he was present in certain Boston business circles led to the chasm revealed in the Lennox case and the Confirmation Hearings. Brandeis would not have concluded that he was an "honest broker to all sides and parties to an issue."[373] This makes him into a jobber and trader, not the carrier of the grand manner. It denies his revisioning client ends and his pursuit of justice. It effaces Brandeis's vision of justice.[374] It ignores Brandeis's practices that lead to his confidence in himself. As Hazard notes, counsel to the situation is only possible if the lawyer "trusts himself."[375] Counsels to the situation can impose agency costs on their clients. To do so responsibly, lawyers must have legitimate confidence in their perceptions of the situation. Although putting Brandeis in the tradition of ADR or collaborative law helps make him more compatible with modern legal ethics, it is not how he viewed himself. He said that his service was "dispensing justice."[376]

The "Perceptive Brandeis" provides an avenue for re-imagining counsel to the situation. In the McElwain case, even though the pie grew larger, why was Brandeis confident in his exercise of power? The grand manner answers that as well as explains why he ennobled his clients in

373. Urofsky, *supra* note 4, at 36.

374. *Cf.* William F. Simon, The Practice of Justice: A Theory of Lawyers' Ethics 27–35 (1998) (describing the normalization of Brandeis's vision).

375. Hazard, *supra* note 7, at 66.

376. Letter from Louis D. Brandeis to Edward Francis McClennen (Feb. 19, 1916), *in* 4 Letters of Louis D. Brandeis, *supra* note, 148 at 77, 78. As a member of the Court, "Go and do justice" was his guiding norm. Quoted without citation in Michael Herz, *"Do Justice!": Variations on a Thrice-Told Tale*, 82 Va. L. Rev. 111, 157 (1996). Justice Holmes is said to have replied, "No, Louie . . . We are here to enforce the laws, not to do justice." *Id.*

the WEIU case. Renunciation, however, does not protect a lawyer who does not see. Self-expression may go unseen (Filene), and others may even be degraded (Warren). When lawyers who practice in the grand manner are hired, discussion of vision and practices of perception can prevent miscommunication and regret (Lennox).

On the Court, Brandeis acted as if he "had sufficient access to what was important about the relevant historical story."[377] This is a good description of practicing as counsel to the situation. He had confidence in his abilities to be counsel to the situation because of practices that magnified his abilities to pay attention and perceive the drama in which he has been retained to act. The grand manner often allowed him to sufficiently know what was relevant. But not always. Critical reflection on processes of perception is the challenge posed by Brandeis's service as counsel to the situation.

## IX. Conclusion

Our perceptions and the stories we tell about them matter. Justice and injustice can be perceived. When such perceptions are touched by imagination, visions of greater justice and lesser injustice may emerge. A humane view is possible. Developing these abilities is what Brandeis urged.[378]

Discipline and cultivation characterize Brandeis's perceptive practices. Both science and art figure in his moral education. In my reading, Brandeis is as much a transcendentalist as he is a progressive. Becoming the subjective embodiment of a universal is the task he set for himself. He was committed to both perception and the ideal.

The grand manner Brandeis understood gave one perspective. It also enabled perception. The grand manner supported being present, and it supported evaluation. It distinguished what people believe is valuable from what really is of value. To see things as they are requires seeing both what is and what can become.

Brandeis's understanding, as I have suggested, is Arnoldian. Tearing it from this framework makes him, and his counsel to the situation, appear to be solipsistic and arrogant. As I have attempted to demonstrate, the "perceptive Brandeis" can be interpreted and criticized. Brandeis and Arnold engaged in and recommended to others

377. Richard Primus, The Functions of Ethical Originalism 79, 87 (2010).

378. *See, e.g.*, Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 Letters Of Louis D. Brandeis, *supra* note 79, at 94, 106.

practices to clarify perception. They present accounts of how to be present. Like ethical naturalists, they understood that perception has a place in moral education.

Practicing by one's vision does not place one above criticism. Visions can be distorted. Visions may have absences. Matthew Arnold's visions have been relentlessly criticized since the 1960s. In three of the cases in which he acted as counsel to the situation, Brandeis can be faulted. More importantly, for most of his time working as a lawyer, Brandeis suffered from what we may see as a gendered limitation: Meditating on oneself, seeking freedom from attachments to be able to do what is right, and mobilizing strength to manage all forces impinging on the moment, can support a vision that represses emotions and cuts one off from being truly vulnerable to others and groups.

Brandeis came to recognize these limitations in his practice. But he never retreated from believing that cultivation, seeking ideals, and characterizing certain ways of being as better than others were fundamental. Discipline and cultivation allowed him often to know what was necessary to know about a case. He understood that he would be judged by the consequences of his actions, but he implored judging individuals by their character and by how they perceived.[379]

"How should one cultivate one's perceptions?" Brandeis and Arnold had answers to this question. For both, there is the ineluctable tragedy that one can only do the best that one can. They both take stands despite knowing indeterminacy and believing that they were living in periods of historic change. Epistemic humility is a necessary virtue. But, as the ethical naturalists argue, rejecting perception because it is defeasible is rejecting too much.[380] Perceptions may be evanescent. Perceptions may be distorted. However, there are many practices that can clarify perceptions. Because our perceptions influence our development of moral knowledge, attending to them may prevent distorted moral judgments.

Arnold engaged a community of critics and others to consider answers to what it means to discipline and cultivate aesthetic perceptions. Arnold often publicly spoke of the moral and political judgments that his perceptive abilities created. There was no comparable engagement with others by the "perceptive Brandeis." Although, as we have seen, Brandeis

379. Letter from Louis D. Brandeis to Alice Goldmark (Oct. 1890), in 1 LETTERS OF LOUIS D. BRANDEIS, *supra* note 79, at 93. "Of course results are not to be despised. They are evidence of what produces them . . . character alone is to be 'admired' . . . in the Latin sense [of being wondered at]. . . It is the effort—the attempt—that tells"). *Id.*

380. *See supra* notes 25–27.

urged others to discipline and cultivate their perceptions, it cannot be said that he subjected these ideas to interpersonal interrogation and mutual learning processes. But such processes can start today.

Arnold's and Brandeis's exercises of power, which were rooted in their perceptions, are largely in the past. Today, we can consider their methods for infusing value into work without being constrained by the sharp limits of their social construction. They were of their time and place. We discipline and cultivate perception in our time. There are many methods to be present. There are many schools of ethical naturalism. How to see and how to evaluate perceptions are the questions that Arnold and Brandeis leave us.

In particular, Brandeis turns our attention to the perceptions of justice and injustice. Attentive to his perceptions, Brandeis often was not content with what justice has been achieved. His perceptions of justice and injustice and his vision of justice challenged existing structures. As a lawyer, Brandeis was a change agent.

When Brandeis came to understand the normative significance of groups, he came to understand that perceptions of justice are situated. Brandeis saw that morally significant situatedness may be created by common "race," "experiences" and "qualities."[381] But moral significance also attaches to a "[c]onscious community of sentiments."[382] When situatedness is significant, perceptions of justice and injustice may be social facts. In the beginning of the 20th century, a community of sentiments fueled immigrant groups joining together in solidarity to demand worker empowerment as a condition of justice. What Brandeis called "the deepening of democracy"[383] requires attentiveness to how justice is not only lived but also is perceived.

Is the pursuit of a vision or of an ideal itself wrong? Emerson wrote that "We judge of a man's wisdom by his hope."[384] Not hoping can be damaging. Even in Brandeis's time, the psychological harms of neutrality and partisanship, regnant lawyering's restrictions on lawyers' practicing by their hopes for justice, were apparent.[385] Brandeis's and Arnold's hopes have been discussed. Of course, what one hopes for and what one realizes may differ. Arnold said his hope was for "the dignity of labour,

381. *See supra* text accompanying note 259.
382. *Id.*
383. *See supra* text accompanying note 276.
384. Quoted by Arnold in Mathew Arnold, Discourses in America 193–94 (1924). Arnold says of Emerson, "never had man such a sense of the inexhaustibleness of nature, and such hope." *Id.* at 194.
385. *See, e.g.,* Jerold Auerbach, *Book Review of Lawyer's Lawyer: The Life of John W. Davis by William H. Harbaugh*, 87 Harv. L. Rev. 1100, 1111 (1974).

the necessity of righteousness, the love of veracity, the hatred of shams."[386] It should be of little surprise if these hopes were not realized.

In his famous *Olmstead* dissent, Brandeis wrote: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[387]

Today, we blunt any thrust toward shared vision by accepting that "personal motives, fallibility, cognitive biases, and heuristics influence our perceptions of reality and what we 'see.'"[388] Ironically, this acceptance enthuses us with zeal and arrogance as "people tend to exhibit excessive confidence with respect to their views and positions."[389] Brandeis's and Arnold's arrogance is of a different sort. They engage in practices to renounce "personal motives." Their zeal is not for their personal perceptions but for the opening of the doors of perception that the "grand manner" enabled.

Striving to find moral knowledge through cultivating perception can appeal to those who have deconstructed theoretical knowledge. Attempts to link aesthetic and moral judgment can appeal to those who have sought moral foundations elsewhere without success. Seeing perception as morally significant can appeal to those who experience their situatedness. When an argument is indecisive, individual experiences are morally distinctive, or there are non-mediatable moral or political divisions, then perceptions, or even visions, of justice may be a saving remnant.

Ethical naturalism teaches that one cannot escape drawing on perception in making moral judgments.[390] As the phenomenologists understood, the same processes that construct the world as a view, individuals are constructed as subjects.[391] Brandeis's and Arnold's subjectivities reflect a world that may not be our own. Their examples, however, show ways in which a zeal for justice can go forward, as well as astray. The dangers affecting their practices may appear in our own. Confronting the strengths and challenges of disciplining and cultivating perception can help us develop and maintain a practice of justice.

386. Arnold, *supra* note 389, at 199.
387. Olmstead v. United States, 277 U.S. 438, 479 (1928).
388. Barak Orbach, *On Hubris, Civility, and Incivility*, 54 Ariz. L. Rev. 443, 446 (2012).
389. *Id.* at 453. Like Nietzsche, we "alternate between despair at there being nothing but power in the world, and intoxication at our own possession of power." Richard Rorty, *Overcoming the Tradition: Heidegger and Dewey*, 30 The Review of Metaphysics 280, 294 (1976).
390. *See* notes 36–38, *supra*.
391. Martin Heidegger, *The Age of the World View*, 4 Boundary 340, 352 (1976) (Marjorie Green, trans.) ("The world becomes a view is one and the same process with that by which man, within the existent becomes a subjectum").

# Whose Child Are You? Protecting Black Children and Families Predisposed to the Harms of the Family Regulation System.[1]

Breanna Madison*

## Introduction

"Children have their sorrows as well as men and women; and it would be well to remember this in our dealings with them. [Black] children are children and prove no exceptions to the general rule."
-Frederick Douglass[2]

Preserving the "traditional" structure of the nuclear family has long been embraced by the Supreme Court because familial constructions reflect values that positively contribute to American society. Marriage and familial relationships that emerge from procreation are implied fundamental rights protected by the Constitution. More specifically, the Court has asserted, "the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges has long been recognized at common law as essential to the orderly pursuit of happiness by free men."[3] The relationship between a parent and child is such an intimate one that many aspects of parenting are protected under the right to privacy principle under the Fourteenth Amendment. Although parents

1. Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, The Imprint (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 (Scholar Dorothy Roberts uses the term "family regulation system" in lieu of child welfare system to describe its carceral use of surveillance that aims to regulate the structure of Black families rather than address societal inequities).

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2. Frederick Douglass, My Bondage and My Freedom 39 (New York & Auburn: Miller, Orton, & Mulligan eds. 1855).

3. Meyers v. Nebraska, 262 U.S. 390, 399 (1923).

have the broad ability to raise their children as they see fit, their rights are not infinite. The Court places certain limitations on parental rights in the best interest of the child by asserting parental rights are not absolute and "the family itself is not beyond regulation in the public interest."[4] Although these limitations are set in place to ensure children are adequately taken care of under parental supervision, the United States child welfare system places a racialized caveat on the general recognition of parental rights by heightening surveillance of low-income Black communities, which in turn results in the forced separation of those families.

In 1980, Abby Gail Lassiter, a Black mother of five, had her eight-month-old infant, William, taken away from her by social services after a social worker determined that her infant's malnourished state was a result of Lassiter's neglectful parenting.[5] Lassiter was unable to appear at her parental termination hearing because she was incarcerated.[6] As a result, she was unable to obtain effective counsel, and the trial court proceeded to terminate her parental rights of her infant son, asserting she "willfully failed to maintain concern or responsibility for the welfare of the minor."[7] When Lassiter appealed the decision, arguing her indigent status required the trial court to appoint her effective counsel, the Court determined that Lassiter's inability to appear at her hearings (due to what the Court perceived as indifference on Lassiter's part) was not a sufficient reason for appointed counsel.[8] The Court also suggested that trial courts rely on the three-factor test developed in *Mathews v. Eldridge*, which would allow judges to determine on a case-by-case basis whether an indigent parent should be appointed counsel.[9] When the plaintiff in *Mathews* had his social security benefits taken away, he argued administrative procedures concerning disability benefits required an evidentiary hearing.[10] The Court in *Mathews* created a three-factor test to determine whether an administrative procedure adhered to the constitutional guarantee of due process: "(1) the private interests at stake, (2) the government's interest in the matter, and (3) the risk that the procedures used will lead to an erroneous decision."[11]

4. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

5. Brooke D. Coleman, *Lassiter v. Department of Social Services: Why Is It Such a Lousy Case?,* 12 Nev. L. J. 591, 592 (2012).

6. *Id.* at 593.

7. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981) (Since the Supreme Court's 1981 decision, this case has had much negative treatment regarding indigent parents' right to counsel during parental termination rights hearings, specifically regarding state law).

8. *Id.* at 33–34.

9. *Id.* at 37.

10. Mathews v. Eldridge, 424 U.S. 319, 324–25 (1976).

11. *Id.* at 335.

The Court in *Lassiter* applied the *Mathews* test to conclude that Lassiter's private interest did not outweigh the State's interest in the safety of her child and overall interest in efficiency within the adjudicative process in trial court hearings.[12] The holding of *Lassiter*, which asserts indigent parents are not constitutionally entitled to counsel in termination of parental rights hearings, raises serious conflicts with the implied fundamental right to have a family by placing legal obstacles in the way of poor parents of color.[13] The *Lassiter* opinion "completely reject[ed] the idea that the loss of parental rights might be equal to or greater than the loss of one's personal liberty in the criminal context."[14]

The right to counsel is generally afforded in criminal proceedings but not civil ones. In fact, the right to counsel in civil cases varies by state and depends on the type of civil case. The logic is that, unlike civil proceedings, criminal proceedings can potentially result in a serious deprivation of life and liberty in the form of carceral and/or capital punishment. However, forty-five states and D.C. recognize parents' statutory right to counsel in parental termination hearings and require appointment at termination rights hearings.[15] Family separation resulting from terminated parental rights is arguably as serious as criminal proceedings. Separating children from their parents through termination of parental rights deprives parents and their children of their liberty as (1) parents' implied fundamental right to family is revoked and (2) children placed under the direct supervision of child services through group homes or foster care are subjected to scrutiny that mirrors carceral punishment, so much so that they are more than two and a half more times likely to be entrapped in the criminal legal system.[16]

*Lassiter* also illustrates a need to investigate protecting the implied fundamental right by centering the role of the child in the family unit. If there is an implied fundamental right to parent one's own child, reciprocally, children should have the implied fundamental right to be parented by their parents. Children's rights are often considered in tandem with the adults in their lives. American jurisprudence must allow for some form of children's rights separate from their parents and

12. *Lassiter*, 452 U.S. at 27–28.
13. *Id.* at 33–34.
14. *See* Coleman *supra* note 5, at 595.
15. Vivek Sankaran & John Pollock, *A National Survey on a Parent's Right to Counsel in State-initiated Dependence and Termination of Parental Rights Cases*, http://civilrighttocounsel.org/uploaded_files/219/Table_of_parents__RTC_in_dependency_and_TPR_cases_FINAL.pdf (last updated Oct. 27, 2016).
16. *What is the Foster care to Prison Pipeline* System, Juv. L. Ctr. (May 26, 2018), https://jlc.org/news/what-foster-care-prison-pipeline.

provide more robust protection for children, especially those children disproportionately subjected to the harms of the child welfare system. *Lassiter's* ruling deprives children of their constitutional rights by disregarding their implied fundamental right to be parented, and as a result, Black children predisposed to the family regulation system face novel consequences. Considering the child welfare system's discriminatory targeting of low-income Black families, Black children at risk of being separated from their parents due to termination of parental rights face invidious discrimination in a variety of forms, including targeted punishment by teachers and other school personnel, heightened surveillance, and encounters with law enforcement. As a result, childhood[17] must be considered a suspect class to provide Black children a safeguard against the harms of family separation by the State.

Part I of this note presents a historical background to provide relevant explanations of the racial and class disparities found within child welfare that disproportionately separate low-income Black families. Part II examines the implied fundamental right to parent under the Fourteenth Amendment and the Court's imbalanced evaluation of those rights based on the race of parents making procedural due process claims. Part III critiques the United States' lack of recognition of children's rights and autonomy by raising questions as to what sort of rights children have in relation to their parents as well as separate from them. It also provides solutions to correct the errors of *Lassiter* and overall issues with the United States' handling of child neglect cases in two ways: (1) asserting that there is an implied fundamental right to be parented to heighten the level of scrutiny in parental rights cases and (2) recognizing children as a suspect classification to address the invidious discrimination that occurs in child neglect procedures.

## Part I. Historical Background on the American Family Structure and the Child Welfare System's Regulation of Intimate Family Ordering

### A. Chattel Slavery's Shaping of Black Parenthood and Childhood

The "ideal" American family structure is centered on the hierarchical constraints of race, gender, and class. Chattel slavery shaped the

17. For the purpose of this paper, the term "children" refers to people under the age of eighteen. *See* 42 U.S.C. § 5101 (1)(A) ("[T]he term 'child' means a person who has not attained the lesser of . . . the age of 18.").

familial dynamics of both Black and white families, with Black mothers at the center of both. The paternalist concept of white slave masters and overseers knowing what is best for the Black people they owned has direct connections to the State's approach to intervening in child welfare matters, especially those concerning Black families. Black women who worked in the fields often strapped their babies to their backs, sometimes resulting in "infants not properly secured [and] f[alling] . . . while others tied too tightly sustained injuries from the "compression" of pressing against their mothers' backs."[18] Slave masters determined enslaved children's physical safety and health to be compromised under the supervision of their mothers and thus instituted plantation nurseries to ensure Black children survived and grew strong enough to eventually become "able-bodied workers with high fiscal value."[19] Slave masters maintained nurseries on their plantations where Black children were kept under the supervision of white overseers or older enslaved Black women while the children's parents worked in the fields.[20] These nurseries cultivated a physical and psychological separation between Black children and their parents while simultaneously "institut[ing] white paternal authority [as] [d]aily decision making about the care and nurture of [Black] children became the purview of masters."[21] Within these nurseries, slave masters and overseers took an perverse paternal role in Black child rearing, "bec[oming] the guardians of enslaved children's welfare . . . delegat[ing] key parental roles like feeding and washing, and determined how they were to be performed."[22] This left Black mothers as practical surrogates for their own children.

Enslaved women's lack of reproductive and parental autonomy marked a devastating disruption of Black familial development while simultaneously propelling the economic development of the United States. Slave breeding farms forced Black women to birth as many Black children as possible, resulting in an exhaustive physical and emotional strain on Black mothers and also providing a lucrative source of income for their slave owners.[23] Slave breeding ravaged the Black familial structure on two fronts: (1) the dehumanizing process of forcing enslaved Black people to procreate and subsequently sell off their children left

18. Sasha Turner, Contested Bodies: Pregnancy, Childrearing, and Slavery in Jamaica 192 (2017).
19. *Id.* at 198.
20. *Id.* at 195-96.
21. *Id.* at 196.
22. *Id.* at 198.
23. *See generally* Ned Sublette & Constance Sublette, The American Slave Coast: A History of the Slave-Breeding Industry 24 (2016).

little to no opportunity for Black families to develop a unit "of social cohesion and resistance to slavery" and (2) "destroying family webs systematically in every generation was the best way to guarantee the perpetual existence of an abject underclass whose labor and upkeep would remain cheap as possible."[24] If a Black woman's child(ren) were not sold and sent off to another plantation, she was still forced to neglect her children due to excruciating laborious expectations of enslavement.[25] For instance, Black women were obstructed from mothering their own children in order to mother their masters as Black mothers were required to wet nurse when their mistresses demanded and to dress and entertain whatever other needs of white children.[26] Enslaved mothers' inability to fully parent their children in turn impacted societal views of Black children and their role in the Black familial unit.[27] Just as their mothers' ability to reproduce translated into profitability, the existence of enslaved children guaranteed lucrative opportunities for their masters. Once they reached an age where they could work, enslaved children faced the same grueling conditions as their parents.[28] Enslaved children could be sold at a whim if their masters faced financial troubles and were even given away as gifts to newlywed white couples or white children celebrating their birthdays.[29]

The separation and exploitation found in slavery greatly shaped the experiences and perceptions of modern-day Black motherhood and childhood. Prominent sociologist and law professor Dorothy Roberts uses three stereotypes of "Black Maternal Unfitness" to explain the discriminatory treatment Black mothers and their children face within the child welfare system: (1) the Mammy, (2) the Unwed Matriarch, and (3) the Welfare Queen.[30] The "Mammy" stereotype describes a nurturing Black maternal figure who tends to the needs of anyone except

24. *Id*.

25. MC Miller, *Destroyed by Slavery? Slavery and African American Family Formation Following Emancipation*, 55 Demography 1587, 1590 (2018).

26. Emily West & R.J. Knight, *Mothers' Milk: Slavery, Wetnursing, and Black and White Women in the Antebellum South*, 83 J. of S. Hist. 37, 46 (2017) ("[W]hite slaveholders manipulated and commodified enslaved women's motherhood by placing the needs of others . . . above those of [Black] mothers themselves.").

27. *See generally* Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 61 (2001).

28. Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 Minn. J.L. & Ineq. 187, 203–04 ("As soon as the child was able, usually around five or six, the child would be put to work.").

29. Shonda Buchanan, *The Practice of "Gifting" Black Children as Slaves*, PushBlack (Mar. 10, 2021), https://www.pushblack.us/news/practice-gifting-black-children-slaves.

30. Roberts, *supra* note 27, at 61.

her own children.[31] The "Unwed Matriarch" stereotype describes single Black mothers abandoned by their Black male counterparts forced to raise children on their own.[32] Lastly, the "Welfare Queen" stereotype describes Black mothers who refuse to work and instead have children for the sole purpose of receiving government assistance to use for their personal benefit.[33] The Black children of these stereotypical Black mothers were given the label of being illegitimate, ill-mannered, disruptive children in need of discipline and structure.[34] And the solution to correcting these careless mothers and misbehaved children was the implementation of the child welfare system.

## B. Origins and Functions of the Child Welfare System

There are four major forms of child maltreatment recognized by a majority of states, including: (1) neglect, (2) physical abuse, (3) sexual abuse, and (4) emotional abuse or neglect.[35] The definition of child neglect varies from state to state. However, it is generally known as "the failure of a parent or other person with responsibility for the child to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child's health, safety, and well-being are threatened with harm."[36] The development of the child welfare system arose in the early 20th century in an effort to redress the exploitation of children in the labor force and orphanages.[37] Through federal reform, the government developed agencies to exclusively protect children from exploitative harm committed by their families.[38] The functions of the modern-day child welfare system as we know it can be traced to the publication of pediatrician Henry Kempe's 1962 scholarly article entitled "The Battered Child-Syndrome."[39] This term was created to describe "the clinical

31. *Id.*; *see also* Burnham, *supra* note 28, at 204 ("Although the system discouraged parents from forming strong bonds, the slave mother was nevertheless constantly accused of neglecting her children [and] . . . slaves were cursed as both immoral and incompetent parents.").

32. Roberts, *supra* note 27, at 63.

33. *Id.* at 64.

34. *Substantial racial stereotyping toward young children of color found among white adults who work with them*, Harv. T.H. Chan Sch. Pub. Health, (Sept. 12, 2018), https://www.hsph.harvard.edu/news/press-releases/substantial-racial-stereotyping-toward-young-children-of-color-found-among-white-adults-who-work-with-them/.

35. *Definitions of Child Abuse & Neglect*, Child Welfare Info. Gateway (2022), https://www.childwelfare.gov/topics/can/defining/.

36. *Id.*

37. Steven Minz, *Children, Families and the State: American Family Law in Historical Perspective*, 69 Den. L. Rev. 635, 646 (1992).

38. *Id.* ("Perhaps the most striking development in early nineteenth century family law was the development of a host of public and private institutions designed to rectify family failures.").

39. John E.B. Meyers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449, 455 (2008).

condition of severely abused, neglected, or maltreated children which could result in death."[40] Kempe's detailed accounts of treating severely beaten children put child abuse in the national spotlight, compelling the federal government to take a more active role in social services.[41] The federal government created more robust child protection agencies through the implementation of law enforcement and investigative techniques to better track and ideally prevent the abuse and neglect of children by their parents. However, these tactics result in disproportionate targeting and surveilling of Black families. Black parents are more likely to be investigated and/or reported for maltreatment of their children, and this targeted reporting can be traced to the racially biased assumptions of Black people having an affinity for violence.

Scholar Charlotte Baughman uses the term "surveillance tentacles" to describe how different areas such as medical facilities, educational spaces, and law enforcement agencies act as extensions of the family regulation system that hyper-monitors poor Black families.[42] These "tentacles" stretching to common spaces central to family life, making surveillance almost inescapable. A 2021 study conducted by University of New Hampshire Professor Vernon Brooks Carter found that white children were "more likely to be inadequately supervised by their parents—left at home alone, for instance, while mom runs to the store. But Black children under similar circumstances were more than three times as likely to be removed from their parent's care."[43] Kempe's seminal article laid the foundation for doctors and other medical professionals to become mandated reporters, ultimately transforming medical services into a surveillance tentacle that often targets Black patients.[44]

The medical field as a surveillance tentacle can be illustrated through the story of Gloria, a Black mother of two who entered the hospital to give birth to her second child but left the facility separated

40. G. Inguanta & Catharine Sciolla, *Time Doesn't Heal All Wounds: A Call to End Mandated Reporting Laws*, 19 Colum. Soc. Work Rev. 118, 119 (2021).

41. *Id.* at 120.

42. Charlotte Baughman, et al., *The Surveillance Tentacles of the Child Welfare System*, 11 Colum. J. of Race & L. 501, 509 (2021).

43. *Id.*

44. Inguanta & Sciolla, *supra* note 40; *see also What is a Mandated Reporter?*, Nat'l Ass'n of Mandated Reps. (2021), https://namr.org/news/what-is-a-mandated-reporter ("Mandated reporters have an individual duty to report known or suspected abuse or neglect relating to children . . . [t]he professionals most commonly mandated to report across the States include the following: social workers, teachers, principals, and other school personnel, physicians, nurses, and other healthcare workers, counselor, therapists, and other mental health professionals, child care providers . . . .").

from her newborn.[45] After undergoing a cesarean surgery to deliver her second child, Gloria was subjected to non-consensual drug testing without notice.[46] When traces of marijuana were found in her system, Gloria was required to participate in an hour-long interview, giving her no time to rest after undergoing an intrusive surgical procedure.[47] During the interview, Gloria admitted to smoking marijuana recreationally, and once the interview concluded, she was told she could not take her newborn home with her.[48] Overwhelmed by this news, Gloria became upset with the caseworker, who in turn reported Gloria to be "rude, angry, and uncooperative."[49] This outburst resulted in Gloria's other child (who was three years old at the time) being temporarily taken away from her.[50] Gloria was then subjected to a week-long hearing determining whether she should retain custody of her children, all while simultaneously recovering from cesarean surgery.[51]

Racial bias from medical professionals comes in a variety of forms. Studies have shown that doctors and nurses are less likely to believe their Black patients' complaints of pain due to prejudiced assumptions that Black people have higher pain tolerances or the belief that they may be lying to obtain drugs.[52] In Gloria's case, her doctors had less than reasonable suspicion that she smoked marijuana and urged her to take a drug test immediately following her cesarean surgery.[53] The reverence of medical professionals in our society causes their reports of child maltreatment to be taken especially seriously. However, something as minute as missing a doctor's appointment or concern about a parent waiting too long to get treatment for their child is enough for a doctor to submit a maltreatment report that can result in a child being taken away from their parent.[54] The biased assumption that Black parental supervision is inadequate may prevent a doctor from considering

45. *Our Systems Meant to Help, Hurt Black Families*, Nat'l Inst. For Child.'s Health Quality, https://www.nichq.org/insight/our-systems-meant-help-are-hurting-black-families (last visited Feb. 24, 2023).

46. *Id.*

47. *Id.*; *see also* Baughman, *supra* note 42, at 512 ("Hospital staff also regularly report mothers who test positive for illicit drugs, even when the mother is already engaged in a substance abuse program or the substance is marijuana, which has not been linked to any detrimental effects or risk for the child.").

48. *See* Nat'l Inst. For Child.'s Health Quality *supra* note 45.

49. *Id.*

50. *Id.*

51. *Id.*

52. Janice A. Sabin, *How We Fail Black Patients in Pain*, Ass'n of Am. Med. Colls. (Jan. 6, 2020), https://www.aamc.org/news-insights/how-we-fail-black-patients-pain.

53. *See* Nat'l Inst. For Child.'s Health Quality *supra* note 45.

54. Baughman, *supra* note 42, at 512.

that a Black child missed a doctor's appointment because their parent could not get off of work in time or that their parent waited too long to seek treatment due to the high expenses that accompany a doctor's visit.

The social worker is another type of "surveillance tentacle" that has a more intimate view of the families they monitor. The Fourth Amendment case law lauds the household as "first among equals"[55] due to the intimate activities often done in the privacy of the home. Yet, social workers are able to visit homes with no notice or warrants.[56] When Angeline Montauban reached out to a domestic abuse hotline, attempting to seek help getting out of an abusive relationship, a caseworker arrived at her doorstep because Angeline's phone call revealed her three-year-old was in the same house where domestic abuse occurred.[57] The caseworker tasked to monitor Angeline made monthly unannounced visits to Angeline's household, inspecting her son's body and searching for any sign of child maltreatment.[58] When Angeline refused the court's suggestion of obtaining an order of protection for her son against his father (Angeline's abuser), the Administration for Children's Services (ACS) took her son away on claims of child neglect.[59] Angeline's parental rights were threatened to be terminated, and her son was held within the foster care system for five years before they finally reunited.[60]

The accounts of these two Black mothers encapsulate the predatory actions that arise out of the child welfare system employing surveillance and law enforcement mechanisms as an attempt at preventative care of children. Angeline's desperate attempt to seek help turns into the removal of her child, and the non-consensual drug testing done on Gloria immediately following the delivery of her child illustrates how the biased perceptions of Black mothers exacerbate harm against Black children and, more broadly, the Black family unit. Why was Angeline's disclosure of experiencing domestic violence met with an interrogation of her parenting skills rather than an opportunity for her social worker to help her and her child to safety? What made the medical staff tending to Gloria decide to test her for drugs immediately after she went through an invasive, often deadly medical procedure when she showed no actual signs of inebriation? Racism has crafted a narrative of Black motherhood

55. *See* Florida v. Jardines, 569 U.S. 1, 6 (2013).
56. Wyman v. James, 400 U.S. 309, 326 (1971).
57. Dorothy Roberts, *How the Child Welfare System is Silently Disrupting Black Families*, In These Times (May 24, 2022), https://inthesetimes.com/article/systemic-inequalities-in-the-child-welfare-system-target-black-families.
58. *Id.*
59. *Id.*
60. *Id.*

that deems Black mothers (especially poor Black mothers) as hostile, irresponsible people, and these biases, in turn, follow their children.

The purpose of the child welfare system is to protect children from harm that may be inflicted on them by parents and/or other family members, but in reality, it is the system that inflicts racialized harm on children. Statistics show that Black children are generally viewed as older and physically bigger than they actually are.[61] This prejudiced view is known as "adultification" and imposes the belief that Black children are in lesser need of protection due to society's assumption that they are more mature and less innocent.[62] The adultification of Black children can be seen in how the child welfare system treats Black children who are taken away from their parents. Over 50% of Black children will have been through a child welfare investigation before the age of eighteen (and this percentage is double the rate of white children).[63] Black children are disproportionately represented in the foster care system, making up only 14% of the child population in the United States and yet making up 23% of the American foster care population.[64]

A 2020 study discovered that "over 70% of all children, and 63% of Black children, removed into the U.S. foster system were taken from their families for reasons related to "neglect."[65] Children in foster care are more likely to suffer from depression, struggle with addiction, face homelessness, and have a higher chance of being entrapped within the

61. Anissa Durham, *Black children are more likely to be treated like adults in U.S. elementary schools*, Ctr. For Health Journalism (Feb. 20, 2023), https://centerforhealthjournalism.org/2022/10/12/new-data-reporting-project-looks-adultification-and-sexualization-black-children.

62. Alison N. Cook & Amy G. Halberstadt, *Adultification, anger bias, and adults' different perceptions of Black and White children*, 35 Cognition & Emotion 1416, 1417 (2021) ("Adultification is the perception that a child is older and more mature than their age or current developmental stage would indicate"); *see also Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds*, Am. Psych. Ass'n. (2014), https://www.apa.org/news/press/releases/2014/03/black-boys-older ("Children in most societies are considered to be in a distinct group with characteristics such as innocence and the need for protection. Our research found that black boys can be seen as responsible for their actions at an age when white boys still benefit from the assumption that children are essentially innocent.").

63. Shereen A. White & Stephanie Persson, *Racial Discrimination in Child Welfare Is a Human Rights Violation—Let's Talk About It That Way*, Am. Bar Ass'n (Oct. 13, 2022), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2022/fall2022-racial-discrimination-in-child-welfare-is-a-human-rights-violation/#:~:text=In%202020%20over%2070%20percent,up%20in%20homes%20experiencing%20poverty; *see generally Racism at the Front End of Child Welfare*, Child.' Rts. (Jan. 2023), https://www.childrensrights.org/wp-content/uploads/2023/04/CR-Racism-at-the-Front-End-of-Child-Welfare-2023-Fact-Sheet.pdf.

64. *Black Children Are Overrepresented in Foster Care. Here's How We Can Address This Disparity*, KVC Kansas (Feb. 7, 2022), https://kansas.kvc.org/2022/02/07/black-children-are-overrepresented-in-foster-care-heres-how-we-can-address-this-disparity/.

65. White & Persson, *supra* note 63.

criminal legal system. [66] The stigma of being viewed as unwanted or abandoned by their biological parents has detrimental effects on Black children's physical and psychological health but also impacts how they are treated by the adults they encounter within the system. Teachers, foster parents, and youth group home staff are quick to misconstrue Black children exhibiting normal adolescent behavior as hostile action requiring intervention by law enforcement.[67] The absence of their biological parents, paired with the presence of professional adults who often villainize them, leaves Black children with no real advocates who recognize their vulnerability as both kids and racial minorities. The unenumerated fundamental right to family can safeguard Black children from the harms of familial separation as this right recognizes the importance of child-rearing within one's own community. However, chattel slavery's destruction of Black familial relationships challenges how this implied fundamental right must be viewed in order to entirely fulfill its protective functions.

## Part II. The Right to Family Under the Fourteenth Amendment

### A. The Right to Child Rearing and the Role of the Child

When the Supreme Court evaluates whether an asserted Constitutional right that is not enumerated can be impliedly fundamental, it often looks at whether that asserted right is "deeply rooted in our Nation's history and tradition."[68] Through implied fundamental rights, the Court has recognized parental rights under the "penumbra" of privacy rights protected by the Fourteenth Amendment.[69] *Meyers v. Nebraska* is one of the earliest Supreme Court cases to recognize parental control as a form of liberty.[70] Prior to *Meyers*, liberty interests primarily revolved around bodily autonomy; however, when a Nebraska state statute prohibited schools from teaching students foreign languages, the Court recognized that liberty in the context of the Due Process Clause extended beyond physical intrusions of liberty on one's person.[71] Liberty interests touch

66. Rachel Anspach, *The Foster Care to Prison Pipeline: What It Is and How It Works*, Teen Vogue (May 25, 2018), https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works.
67. *Id.*
68. Washington v. Glucksberg, 521 U.S. 702, 703 (1997).
69. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
70. *See generally Meyers*, 262 U.S. at 390.
71. *Id.* at 399–400.

on all aspects of life, but especially ones regarding intimate relationships such as marriage and family.[72] The Court in *Lassiter* even recognized the clear liberty interests for parents to provide "[T]he companionship, care, custody, and management of his or her children . . . that undeniably warrants deference and, absence of countervailing interest, protection."[73] *Troxel v. Granville* further protects parents' liberty interests by limiting the visiting rights of non-parents that threatened the parental right to raise one's child.[74] The Court asserted, "[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[75]

In 1978, John and Annie Santosky (two white parents) had their son and daughter removed from their home after the Department of Social Services determined the Santoskys's parental supervision would pose "imminent danger to [their children's] life or health."[76] The Santoskys appealed the lower court's ruling to terminate their parental rights on the grounds that New York's preponderance of evidence standard in making parental termination rights determinations was unconstitutional under the Fourteenth Amendment.[77] Interestingly, the Court in *Santosky v. Kramer* references the *Lassiter* opinion, noting that *Lassiter* raised an important question regarding "whether process is constitutionally due a natural parent at a State's parental rights termination proceeding."[78] Ultimately, the Court determined New York's preponderance of evidence standard violated the Santoskys's due process rights because of its low burden of proof.[79] The *Santosky* opinion recognized the magnitude of the right to family and preserving parental rights by explaining:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention

72. *Id.* at 399.
73. *Lassiter*, 452 U.S. at 27.
74. *See generally* Troxel v. Granville, 530 U.S. 57, 60 (2000).
75. *Id.* at 65.
76. Santosky v. Kramer, 455 U.S. 745, 751 (1982).
77. *Id.* at 752.
78. *Id.* at 753.
79. *Id*.

> into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedure.[80]

Although *Lassiter* and *Santosky* dealt with differing issues under the Fourteenth Amendment's Due Process Clause, the Court chose to honor the importance of preserving natural parent rights in one case but not the other, and race played an integral factor in the contrary outcomes in these two cases.[81] Looking at the *Lassiter* opinion, the Court questions Abby Gail Lassiter's (a Black mother) parenting skills and is in full agreement with the lower court's original determination.[82] However, in *Santosky*, despite the lower court concluding "the Santoskys were incapable, even with public assistance, of planning for the future of their children," the Court merely noted the Santoskys were not "model parents" and restored their parental rights through acknowledgment of their right to parent their children under the Fourteenth Amendment.[83] The grace the Court extended towards John and Annie Santosky was not given to Abby Gail Lassiter, despite the two parties having similar facts in their respective cases. Viewing the Court's jurisprudence regarding the implied fundamental right to family, it is clear that it favors the parents' interest in raising their children how they see fit; however, through the case comparison of *Lassiter* versus *Santosky*, one can see that in practice, the Court's deference to upholding the privacy rights of the family is not afforded to poor Black parents, especially mothers.

## B. The Racialization of the Right to Family and Childrearing

Understanding slavery's volatile suppression of Black parents' ability to raise their children helps to explain child welfare services' disproportionate targeted surveillance of Black families. How can Black parents assert the implied fundamental rights to family and to parent their children, when historically, Black people had limited agency in the creation and sustaining of their family units? The Court's treatment of Abby Gail Lassiter illustrates how racial bias impacts a State's determination of where a Black child gets placed in the system. Judges, teachers, and "caseworkers [alike often] evaluate African American parenting

80. *Id.* at 753–54.
81. *See Santosky*, 455 U.S. at 753; *see also Lassiter*, 452 U.S. at 24.
82. *Lassiter*, 452 U.S. at 33–34.
83. *Santosky*, 455 U.S. at 752–53.

based on their own parenting beliefs [and] . . . they often judge parents as angry, dangerous, and ill-equipped to competently raise their children."[84]

In addition to racial bias that harms Black children in connection to their parent's ability to parent, the hierarchical dynamic between parent and child that is recognized by American jurisprudence upholds the concept of ownership that also contributes to an imbalanced power dynamic. Parents are assumed to be in complete control of their children by virtue of their relationship with them. With children practically being viewed as the property of their parents, the child's interest in the relationship to their family is completely ignored.[85] Black children are in a novel and ultimately disadvantaged position when considering the intersection of racism and the power dynamic between adults and children. Historically, Black children were not considered the children of their parents, let alone children at all, so societal perceptions that determine how they should be treated have led to particularly egregious consequences, many of which are found in the family regulation system.[86] The intersection of Blackness and childhood causes societal structures to dismiss Black children's perspectives in two distinct ways: (1) their youth undermines their ability to exercise agency in a society that upholds adults as people who hold more power than them, and (2) their race villainizes them in a way that deprives them of grace and innocence assumed to be given to children. To better address the unfair denial of parental rights based on race, the experience of Black children must be centered, and this can be done by using a constitutional analysis of implied fundamental rights and suspect classification.

## Part III. Resolutions: Acknowledging the Rights of Children Through Implied Fundamental Rights and Suspect Classification

### A. Exploring the Implied Fundamental Right to be Parented Through the Societal and Cultural Roles of the Family Unit

The common theme throughout the seminal Supreme Court cases discussed in Part II is the narrow focus of parents' liberty interests and subsequent undermining of the child's perspective and overall role in the family unit.[87] In this focus, the implied fundamental right to family

84. Effrosyni D. Kokaliari et al., *African American Perspective on Racial Disparities in Child Removals*, 90 Child Abuse & Neglect 139, 140-41 (2019).

85. Minz, *supra* note 37, at 640.

86. *See generally* Buchanan, *supra* note 29.

87. Lee E. Teitelbaum, *The Legal History of Family*, 85 Mich. L. Rev. 1052, 1061 (1987) ("[T]he impact of judicial patriarchy . . . was the creation of a language for thinking about the

is viewed solely from the perspective of the parent, despite children playing a crucial part in the creation of family. This disregard for children's presence in the family unit showcases a greater issue of American jurisprudence sustaining the societal belief that children's value is attached to the relationship they have with the adults in their lives rather than being viewed as autonomous individuals. American jurisprudence assigns a subservient role to the child, as Justice Douglas decried in the dissenting opinion in *Wisconsin v. Yoder*, arguing that children have "constitutionally protectible interests" outside those of their parents and, consequently, that their parents should not "seek[] to vindicate . . . [liberty interest] claims" on their children's behalf.[88]

Children are rendered vulnerable by social, cultural, and legal parameters that dictate where they are to be, what they must learn, and with whom they can live and interact. Although children lack maturity and responsibilities obtained in adulthood, the very fact that they are people should be sufficient to acknowledge that they, too, possess a form of autonomy that is distinct from their relationship with their parents or guardians. Although certain groups of children (specifically infants and toddlers) rely entirely on the decisions of the adults in their lives, ultimately, the state of childhood as personage must be recognized and respected as an integral part of the American familial structure. This can be achieved through the recognition of the implied fundamental right to be parented.

Recognizing children have a right to be parented by their biological parents will better address the balancing of private interests prong in the *Mathews* test referenced in *Lassiter*. The Court in *Lassiter* applied the private interests prong in a way that primarily considered the interest of the parents and their reasoning for retaining their parental rights.[89] Having the implied fundamental right to be parented by one's natural parents would compel courts deciding child neglect cases to take children's personal interests into more thoughtful consideration. Courts would have to seriously consider whether a child's sense of identity, familial pride, and cultural competency needs to be compromised. In addition, courts would also have to grapple with the psychological effects of potentially being removed from a place of familiarity and placed in a system that is not always the safest or healthiest option

family . . . The tendency was to define the family as a collection of distinct legal personalities with potentially antagonistic relations: husband versus wife, parent versus child, state versus father.").

88. Wisconsin v. Yoder, 406 U.S. 205, 241, 243 (1972) (Douglas, J., dissenting).

89. *Lassiter*, 452 U.S. at 27–28.

for the child. Some may say this is the very reason for the creation of guardians *ad litem* and best interest attorneys. However, these appointed positions still leave children dependent on adults to make final determinations on their behalf. In addition, many child advocates harbor biases that can harm Black children.[90]

The "best interest of the child" standard attempts to evaluate "a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern."[91] Approximately twenty-two states employ the best interest standard, considering factors such as "[t]he emotional ties and relationships between the child and his or her parents, siblings, family, and household members, or other caregivers[,] [t]he capacity of the parents to provide a safe home and adequate food, clothing, and medical care[, and] [t]he mental and physical health needs of the child."[92] Although these essential aspects of familial life are important to take into consideration, the subjectiveness of the best interest standard leaves the judiciary with too much discretion.[93] Despite the court's positioning of neutrality, personal experience, and biases can impact a judge's determination of the fitness of a parent, and this is especially skewed when dealing with parents of a particular race and class.[94] Guardians *ad litem* act as advocates for the children they represent but also work in tandem with the courts, providing recommendations based on their observations.[95] Best interest attorneys do not represent the actual wishes of the child, but instead, they make the determination of what would be in the best interest of their child client.[96] The roles of guardians *ad litem* and best interest attorneys as child advocates ultimately fall flat because they exercise a level of paternal control over children that "[fails to] address children's interests as persons in their own right."[97] To better address the needs and wishes

90. Michael Dsida & Leon Smith, *Baker Proposal for Guardians Ad Litems Will Only Worsen Child Welfare System*, Common Wealth Mag. (Apr. 29, 2022), https://commonwealthmagazine.org/courts/baker-proposal-for-guardians-ad-litem-will-only-worsen-child-welfare-system/ ("But GALs often do not reflect the racial and socioeconomic diversity of the families in care and protection proceedings and are likely to evaluate homes based on white middle-class norms.").

91. *Determining the Best Interests of the Child*, Child Welfare Info. Gateway: State Statute Series (2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

92. *Id.*

93. Carl Funderburk, *Best Interest of the Child Should Not Be an Ambiguous Term*, 33 Child. Legal Rts. J. 229, 237–38 (2013).

94. *Id.* at 229.

95. Douglas NeJaime, Family Law in a Changing America 908 (2021).

96. *Id.*

97. Ana C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 Yale L. J. 1448, 1470 (2018).

of children predisposed to the child welfare system, their important role within the family unit must be adequately recognized. One must begin by looking at why society values the creation and sustaining of family.

People have children for a variety of reasons. They want to make positive contributions to society, advance generational aspirations, and provide and receive unconditional love. In *Smith v. Organization of Foster Families for Equality and Reform*, the Court asserted:

> [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought . . . in intrinsic human rights, as they have been understood in this Nation's history and tradition . . . [t]hus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life through the instruction of children.[98]

The Court has long recognized child-rearing as a societal norm that improves and adds value to the parents' lives. These emotional and cultural reasons for having children are embedded in our nation's historical understanding of family, and therefore there must be an implied fundamental right to be parented.[99]

Passing on familial tradition, cultural knowledge, and personal values to succeeding generations is usually done through the child-rearing of those who are usually related.[100] The familial household is the foundation of learned behaviors that influence how individuals interact with others and move through society.[101] "Families set the parameters of community standards within the home environment [and] such boundaries affect [can affect a child's] outlook on the larger social order."[102] The family unit "provide[s] emotional support and affection and contribute[s] to the socialization of children."[103] Family rituals[104]

98. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844-45 (1977) (internal quotations omitted).

99. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("[T]he right of the family to remain together without the coercive interference of the awesome power of the state . . . encompasses the reciprocal rights of both parent and child . . . children have the constitutional right to avoid dislocat[ion] from the emotional attachments that derive from the intimacy of daily association with the parent.").

100. *See generally* Kacey Shipman, *Embracing Family Traditions*, Youth First Blog (Nov. 21, 2018), https://youthfirstinc.org/embracing-family-traditions/.

101. Sharon A. Denham, *Relationships Between Family Rituals, Family Routines, and Health*, 9 J. of Family Nursing 305, 308 (2003).

102. Michael K. Herndon & Joan B. Hirt, *Black Students and Their Families: What Leads to Success in College*, 39 J. of Black Stud. 489, 491 (2004).

103. Minz, *supra* note 37, at 645.

104. *See id*. ("Family rituals often serve as a unifying factor for family identity and values offer a way to determine degrees of family organization.").

developed within one's home and community foster familial unity and create routine that provides stability and security. Children are essentially the center of community, as their upbringings and learned experiences determine longevity of cultural customs.

The Black family unit is an interdependent system that relies on kinship to preserve and pass on culture and tradition.[105] As explained in Part One, chattel slavery had a detrimental impact on Black familial structures. However, enslaved people maintained and created customs through kinship, which acted as "an adaptive response to an alien, hostile, life threatening environment . . . [and provided] affection, companionship, love, and empathy for their suffering."[106] In fact, "[c]hild rearing was one of many important functions carried out through [Black] kinship . . . [and] child care became a community responsibility" in order to combat slave masters' attempts at separating Black children from their parents.[107] Black kinship is foundational to Black children developing their identity, self-esteem, and sense of self. In addition to cultural customs, Black kinship serves a preparatory role for Black children who are forced to navigate discriminatory systems. Most notably, Black parents are tasked with teaching their children how their Blackness is perceived by others.[108] The array of cultural and social practices that are innate to Black kinship can be lost because of the separation of children from their parents.

### B. Finding Opportunities for Children to Exercise Their Autonomy

In addition to recognizing children as integral parts of the family units rather than subsidiaries, children must also be viewed as individuals outside of their relationship with their parents to better incorporate their perspective in the family unit. American jurisprudence considers the interest of the child standard in relation to the fitness of their parents with no regard to the interests of children concerning themselves. Scholars Anna C. Dailey and Laura B. Rosenbury provide five categories of "broader interests"

105. Sheila M. Littlejohn-Blake & Carol Anderson Darling, *Understanding the Strengths of African-American Families*, 23 J. of Black Stud. 460, 460 (1993).

106. Ciyrtal S. Mills et al., *Kinship in the African American Community*, 13 Mich. Socio. Rev. 28, 32 (1999).

107. *Id.* at 32–33.

108. Gustavo Solis, *For Black parents, 'the talk' binds generations and reflects changes in America*, USC News (Mar. 10, 2021), https://news.usc.edu/183102/the-talk-usc-black-parents-children-racism-america/ (explaining that Black parents give their children 'the talk' which consists of teaching them how to interact with law enforcement in the event their children get stopped or pulled over).

of children, which can help recognize children as autonomous individuals.[109] These "broader interests" include "(1) parental and nonparental relationships; (2) exposure to new ideas; (3) expressions of identity; (4) personal integrity and privacy; and (5) participation in civic life."[110] The United Nations Convention on the Rights of the Child[111] also incorporates autonomous language in Article 12, which asserts, "Every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times."[112] Giving children the opportunity to express their agency can assist courts in making more considerate determinations in parental termination hearings, even though some children (due to age and/or ability) are unable to comprehend certain matters or communicate their expressions.

Drawing parallels to the surveillance and scrutiny their parents face due to race, Black children also experience racialized targeting within the child welfare system. Black children separated from their parents and placed into the foster care system are more likely to develop serious mental health issues and have heightened encounters with law enforcement.[113] For example:

> Foster children . . . face an increased risk of arrest in school because they may not have a parent to pick them up or advocate on their behalf . . . [T]eachers and school staff may not know the particular system that [Black children are] involved with, but they know there's a lot of different people coming for [those children] that are not [their] biological family. So[,] for foster youth, a lot of times[,] it's easiest for the school to call the police to come in.[114]

Black children who encounter the child welfare system are subjected to criminalization, and as a result, the discriminatory treatment

109. Dailey & Rosenbury, *supra* note 97, at 1484.

110. *Id.*

111. Ton Liefaard & Julia Sloth-Nielsen, The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead (Brill & Nijhoff eds. 2017) (explaining that the United States has signed onto the United Nations Convention on the Rights of the Child but is the only participating country that has not ratified it).

112. *A Summary of the UN Convention on the Rights of the Child*, *United Nations Convention on Child Rts.*, https://www.unicef.org.uk/wp-content/uploads/2019/10/UNCRC_summary-1_1.pdf (last visited Sept. 17, 2023).

113. Anspach, *supra* note 66 ("I just feel like since I'm just a Black kid in foster care [the justice system] doesn't want to see us given opportunities or help us grow.").

114. *Id.*

of these children calls for a constitutional safeguard in the form of suspect classification.

### C. Categorizing Childhood as a Suspect Classification

Suspect classification is used to analyze government action that facially discriminates against classes labeled as suspect.[115] These classes include race, religion, national origin, and alienage.[116] Laws that facially discriminate against a suspect class must be reviewed under strict scrutiny.[117] Strict scrutiny is a judicial standard of review that is applied when assessing government action that deals with a suspect classification or fundamental right.[118] Strict scrutiny is an important safeguard for suspect classes because it compels courts to presume government action to be unconstitutional and places a high burden of proof on the government to provide a compelling interest for their discriminatory practices.[119] This standard of review is especially helpful in discrimination cases. The intent standard in *Lyng v. Castillo* defines a suspect class by asserting, "As a historical matter, [suspect classes] have been subjected to discrimination; they . . . exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are [] a minority or politically powerless."[120] Children are clearly a discrete and insular minority because (1) their growth development exhibits immutable characteristics, (2) they are politically disenfranchised as they are not able to participate in democratic processes, and (3) they are a minority numbers-wise as there are fewer children than adults in the United States.[121]

Immutable characteristics refer to physical traits or characteristics that are unchangeable.[122] However, a more "socialized concept[] of immutability [describes] a low social status that persists throughout

115. *Suspect Classification*, Legal Info. Inst., https://www.law.cornell.edu/wex/suspect_classification (last visited Apr. 26, 2023).

116. *Id.*

117. *Strict Scrutiny*, Legal Info. Inst., https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=Strict%20scrutiny%20is%20a%20form,sues%20the%20government%20for%20discrimination (last visited Apr. 26, 2023).

118. *Id.*

119. *Id.*

120. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

121. *Total population by child and adult populations in the United States*, Kids Count Data Center https://datacenter.kidscount.org/data/tables/99-total-population-by-child-and-adult-populations#detailed/1/any/false/2048,574,1729,37,871,870,573,869,36,868/39,40,41/416,417. (last updated July 2023).

122. *Id.* at 278.

various and political domains."[123] Although children range in size depending on their age and stage of growth development, there are specific physical features and cognitive and motor skills that are specifically associated with people ranging from infancy to eighteen-years old that distinguish them from adults.[124] These immutable characteristics directly relate to the treatment of children in our society. Children's physical statures and stage of brain development prevent them from participating in society in ways that adults can, which gives their "[p]arents . . . full and unfettered access to and control over children's bodies from birth" and exerting this authority over their children "permits parental behavior that would otherwise violate the bodily integrity of adults."[125] One must be eighteen to vote, and although the age of candidacy laws vary from state to state, the minimum age a person must be to run for office at a state level is eighteen.[126] This age requirement, in conjunction with political enfranchisement, suggests that people under eighteen do not have the capacity to fully appreciate the gravity of political processes. However, being barred from political processes renders children vulnerable as they do not have a direct say in the educational, health, and welfare systems that dictate their lives.

Broadly identifying children as a suspect class can help show that the procedures in the child welfare system are forms of invidious discrimination towards Black children due to the system's disproportionate harmful impact on Black children's lives. Invidious discrimination describes the "act of treating a class of persons unequally in a manner that is malicious, hostile, or damaging. It refers to discrimination that is motivated by animus or ill will towards a particular group."[127] Viewing the child welfare system as surveillance tentacles illustrates how Black children who encounter these systems are criminalized and subjected to racialized violence. Disparate impact describes a law that appears

123. Nicholas Serafin, *In Defense of Immutability*, 2020 B.Y.U. L. Rev. 275, 277-278 (2020).

124. Dailey & Rosenbury, *supra* note 97, at 1500–01 ("Children's bodies often represent milestones and otherwise mark time and development in ways that adult bodies do not . . . most preadolescent children are physically smaller and weaker than most adults and their brains do not fully mature until around the age of twenty-five.").

125. *Id.* at 1501.

126. *Voting Age for Primary Elections*, Nat'l Conf. of State Legs., https://www.ncsl.org/elections-and-campaigns/voting-age-for-primary-elections (last updated Jan. 20, 2023); *see also Age of Candidacy*, Nat'l Youth Rts. Ass'n, https://www.youthrights.org/issues/voting-age/age-of-candidacy/ (last visited Sept. 17, 2023).

127. *Invidious Discrimination*, Legal Info. Inst., https://www.law.cornell.edu/wex/invidious_discrimination (last visited Apr. 26, 2023).

to be facially neutral but has a discriminatory impact on a protected class.[128] However, due to the *Washington v. Davis* intent standard, disparate impact can no longer be utilized to show purposeful discrimination within the child welfare system.[129] The *Washington v. Davis* opinion determined the disparate impact standard was not sufficient to show discriminatory intent because "[the Court's] cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact."[130] However, *Village of Arlington Heights v. Metropolitan Housing Development Corporation* provides some assistance in the difficulty of demonstrating invidious intent within racial disproportionate impact.[131] To determine whether a facially neutral policy that disparately impacts a suspect class has invidious intent, the Court in *Village of Arlington Heights* developed a non-exhaustive list of circumstantial and direct evidence that can be evaluated to determine whether a discriminatory purpose existed in State action.[132]

Legal scholar Professor Charles Lawrence, who studied the psychological effects of racial harm, argues, "racial motive [is] most often reflected in unconscious conduct bearing a disparate racial impact . . . [M]essages communicated by facially neutral governmental actions were the best indicator of racist motive, and . . . therefore, [there must be] greater judicial attention to the cultural or racial meaning of policy choices and initiatives."[133] Mandated reporters, judges, and guardians *ad litem* may harbor "unconscious" racial bias that impacts their views and interactions with Black children in the child welfare system; however, it is very unlikely that they would outwardly express racial animus dictated the discriminatory determinations they make that impact Black children's lives. Employing the *Village of Arlington Heights* test can help highlight the more covert aspects of racism and demonstrate that the disparate treatment of Black children in the child welfare system is invidious in nature.[134]

128. *Disparate impact*, Legal Info. Inst., https://www.law.cornell.edu/wex/disparate_impact#:~:text=Disparate%20impact%20(also%20%E2%80%9Cadverse%20impact,refers%20to%20intentional%20discriminatory%20practice (last visited Apr. 26, 2023).

129. *See generally* Washington v. Davis, 426 U.S. 229, 239 (1976).

130. *Id.* at 239.

131. *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

132. *Id.* at 267–68.

133. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 809 (2006).

134. *Vill. of Arlington Heights*, 429 U.S. at 267-268 (explaining how *Village of Arlington Heights* test has a non-exhaustive list of factors including: "(1) the historical background predating

Suspect classification for children can assist advocates in ameliorating the racial disparities within the child welfare system. Using *Lassiter* as an illustration, recognizing baby William's infancy as a suspect would require the Court to scrutinize the State's process of investigating his mother, Abby Gail Lassiter, and the lower court's harsh treatment of her. Lassiter had three other children at the time and, due to her socioeconomic status, struggled to provide for her family.[135] As a result, baby William was malnourished, and doctors tending to him reported his mother on suspicion of child neglect.[136] The trial court judge failed to give Lassiter adequate time to obtain counsel and permitted a social worker who only met Lassiter once to testify about Lassiter's parenting, even though records reflected that the social worker had no personal knowledge of Lassiter's parenting.[137] During testimony, Lassiter recounted seeing baby William with his foster mother at the grocery store and described him "g[etting] out of [the shopping] cart because he saw his mother and his siblings and he didn't want to go with [his foster mother]."[138] At his tender age, baby William clearly recognized his biological mother and siblings and further demonstrated his autonomous desire to remain with family members. Suspect classification would move the Court to seriously consider baby William's response to positively recognizing his mother and question the trial judge's deference to the social worker's testimony despite only meeting baby William and his mother once.[139] This encapsulates the need for classifying children as suspect to carefully consider whether being placed with child protective services is actually in their best interest.

## Part IV. Conclusion

Although *Lassiter* has had much negative treatment[140] since 1981, the Supreme Court's assertion and reasoning for indigent parents not having a constitutional right to counsel for parental termination hearing has created a legacy of bad precedent for the treatment of

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the decision; (2) the specific sequence of events leading up to the challenged classification; (3) departures by the state actor from normal procedures; (4) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly point to a decision contrary to the one reached; and (5) the legislative or administrative history surrounding the adoption of the legislative classification.").

135. Coleman, *supra* note 5, at 592.
136. *Id.*
137. *Id.* at 593-94.
138. *Id.* at 597 (internal quotations omitted).
139. *Id.* at 593-94, 597.
140. *See generally Lassiter*, 452 U.S. at 18.

indigent, Black parents and children who have encountered the child welfare system. By minimizing the impact of the fundamental rights lost with the termination of parental rights, *Lassiter* implicitly suggests Black parents and children are less deserving of substantial consideration of their familial rights. Since the exploitative construction of the United States, the government has played a direct role in the forceful separation of Black families. Chattel slavery blockaded Black parents from raising their own children and thus placed the lives of Black children at their master's will. The objectification of enslaved Black mothers and their children subsequently led to the creation of prejudiced caricatures of Black motherhood and childhood, which the State has utilized as a litmus test to determine what is considered unfit parenting. The historical context of slavery demonstrates how Black people are systemically denied the right to family—arguably one of the most essential implied fundamental rights—and this can be seen through the hypersurveillance of Black families via the child welfare system.[141]

This racial inequity can be redressed by using constitutional law as a venue to carefully focus on the rights of Black children through the assertion of an implied fundamental right to be parented by one's biological parents and distinguishing childhood as a suspect classification. These two resolutions can prevent Black children from entering the child welfare system by alleviating racial biases found in the surveillance tentacles[142] of the State and overall adjudicative processes. During the trial court judge's questioning of whether her infant child should stay under her parental supervision, Abby Gail Lassiter poignantly stated, "[c]hildren know they family . . . . They know they people, they know they family and that child knows us anywhere."[143] Children are thoughtful, curious, growing human beings who are well aware of their surroundings and relation to the people in their lives. Amplifying their voices through an implied fundamental right to be parented and the use of suspect classification have the ability to prioritize the needs of Black children predisposed to the family regulation system and, more importantly, ensure that Black children are safe and empowered.

141. *See generally* Baughman, *supra* note 42.
142. *Id.*
143. Coleman, *supra* note 5, at 597.

# Discriminatory Taints Leave Indelible Stains: Another Look at Felony Disenfranchisement Laws

## I. Introduction*

Terun Moore, a forty-year-old Black Mississippian, co-founded the People's Advocacy Institute, a grassroots organization within Mississippi.[1] His work within this organization to "interrupt violence" in his community has been successful and is acknowledged in other cities across America.[2] Moore turned his life around to attain this recognition after completing his sentence for a murder he committed at the age of seventeen.[3]

Roy Harness, a sixty-four-year-old Black Mississippian and a Vietnam veteran, was previously convicted of forgery.[4] He committed this crime as he was desperately fueling his drug addiction.[5] After completing his sentence, he beat his addiction and earned his degree in social work from Jackson State University, graduating with honors.[6] His hard work further paid off in the form of a scholarship for his master's degree.[7] He aspires to be a social worker with the Veterans' Administration, the same entity that helped him overcome his addiction.[8]

Kamal Karriem, a Black Mississippian, is another accomplished citizen. He completed his sentence after being convicted of embezzlement.[9]

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* Caylin Bennett, *Howard Law Journal* and Class of 2024. Special thanks to Professor Cedric Powell and his input and guidance with writing this note.

1. Will Tucker, *Fight to Vote: Community Activist in Miss. Banned from Voting for Life, Along with Some 200,000 Fellow Citizens*, S. Poverty L. Ctr. (Sept. 2, 2020), https://www.splcenter.org/news/2020/09/02/fight-vote-community-activist-miss-banned-voting-life-along-some-200000-fellow-citizens.

2. *Id.*

3. *Id.*; *Terun Moore on Prison as a Teen and Getting a Second Chance,* PBS, https://www.pbs.org/newshour/brief/296427/terun-moore (last visited Apr. 22, 2023).

4. *Roy Harness Redemption*, Miss. Ctr. for Just. (Apr. 13, 2020), https://mscenterforjustice.org/roy-harness/.

5. *Id.*

6. *Id.*; Harness v. Watson, 47 F.4th 296, 319 (5th Cir. 2022), *petition for cert. filed*, (Nov. 2, 2022) (No. 22-412) (Graves, J. dissenting).

7. *Harness*, 47 F.4th at 319.

8. Miss. Ctr. for Just., *supra* note 4.

9. *Harness*, 47 F.4th at 319.

Prior to his sentence, Karriem was a former city council member, and he is currently a pastor, an owner of his family's restaurant, and an author.[10]

While all three Black men have transformed their lives by becoming model, upstanding citizens, none of them can vote because the state of Mississippi is concerned with only one thing their previous convictions. Like other states across America, Mississippi has a provision in its state constitution that deprives citizens of their right to vote following a conviction.[11]

One would naturally assume that once an individual completes their sentence, they would no longer be penalized for that crime. However, in most states, when individuals are convicted of a crime, their punishment does not end when their sentence does.[12] After, as an additional punishment (without the additional due process procedures), individuals are stripped of many privileges and rights.[13] One of the most repugnant of these deprivations is the deprivation of the right to vote.[14] Formally, this is called felony disenfranchisement.[15]

Felony disenfranchisement refers to the practice of rescinding one's right to vote because of a criminal conviction.[16] This practice has existed since America's inception.[17] The most prominent justification states that "individuals who committed a crime [were] in violation of the social contract [and] . . . cannot be trusted to exercise their right to vote responsibly."[18] However, this justification does not sufficiently explain why these individuals should continue to be punished since the completion of their sentences symbolizes that their debt to society has been paid.[19] It is also an insufficient justification when it affects voting—a right that has been deemed fundamental.[20]

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10. *Id.*; *Kamal Karriem Jr.: Civil Rights Author & Pan African Author*, Speakerpedia, https://speakerpedia.com/speakers/kamal-karriem-jr (last visited Apr. 22, 2023).

11. Miss. Const. art. 12, § 241 (West, Westlaw through Nov. 1972 amendments).

12. Bruce E. Cain & Brett Parker, *The Uncertain Future of Felon Disenfranchisement*, 84 Mo. L. Rev. 935, 936–37 (2019).

13. *Id.*

14. *Id.*

15. *Id.*

16. Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, The Sentencing Project 1, 1 (July 2021), https://www.sentencingproject.org/app/uploads/2022/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf.

17. Hadar Aviram, Allyson Bragg & Chelsea Lewis, *Felon Disenfranchisement*, 13 Ann. Rev. L. Soc. Sci. 295, 298 (2017).

18. *Id.*; Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 Fed. Sent'g Rep. 248, 248 (2000).

19. Mauer, *supra* note 18, at 250.

20. Harper v. Virginia Bd. Of Elections, 383 U.S. 663, 670 (1966) (stating "the right to vote is too precious, too fundamental to be so burdened or conditioned.").

As will be discussed in the next section, felony disenfranchisement laws exist in many forms throughout America. However, this note is focused on one type that exists in Mississippi, i.e., those initially enacted with a discriminatory purpose.[21] Moore, Karriem, and Watson cannot vote because of Section 241, a provision in Mississippi's constitution that states the following:

> Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector.[22]

This provision is unique because of why it was enacted. Section 241 was implemented in 1890 as one of the efforts to exclude Black people from the electorate.[23] One of the attendees stated that "'Mississippi's constitutional convention of 1890 was held for no other purpose than to eliminate the nigger from politics.'"[24] If this language is unconvincing that this provision was implemented because of race, the crimes included provide further proof. When enacted, Section 241 also included the crime "burglary," but it did not include "murder" or "rape."[25] It seems odd that serious crimes did not disenfranchise citizens. However, murder and rape were excluded because the petty crimes listed were thought to be disproportionately committed by Black people.[26] While deplorable, this provision stands out.

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21. While Mississippi is the example here, it is not the only example of a provision of this kind. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (striking down Alabama's felony disenfranchisement constitutional provision that was also enacted for a discriminatory reason).

22. Miss. Const. art. 12, § 241.

23. Neil R. McMillen, Dark Journey: Black Mississippians in the Age of Jim Crow 43 (1989).

24. *Id.*

25. Harness v. Watson, 47 F.4th 296, 319 (5th Cir. 2022), petition for cert. filed, (Nov. 2, 2022) (No. 22-412) (Graves, J. dissenting).

26. *Id.* at 302.

This provision is also the subject of a case decided by the Fifth Circuit in 2022, *Harness v. Watson*.[27] In this case, the plaintiffs, Harness and Karriem, argue that Section 241 is unconstitutional because it was enacted with discriminatory intent.[28] In essence, they argued that the provision was tainted upon enactment, and regardless of any subsequent amendments, it is insufficient to remove this racist taint.[29] It questions the validity of felony disenfranchisement statutes in a nuanced way, which could cause officials to question similar provisions and felony disenfranchisement laws as a whole.[30]

Although Section 241 is unique in how it was enacted, its impact mirrors other felony disenfranchisement laws.[31] Even though blanket felony disenfranchisement statutes are cloaked in neutrality because they do not target specific crimes, they still discriminate based on citizens' race.[32] On one end of the spectrum, there are felony disenfranchisement laws that were enacted for the explicit reason of excluding Black people from the electorate.[33] For example, Mississippi's initial provision included "Black crimes."[34] In 1968, the legislature added the crimes murder and rape to Section 241 because these "more serious" crimes made the provision neutral.[35] However, this does not negate the fact that the crimes included since the provision's enactment had and continue to have a disproportionate impact on Black Mississippians.[36] Today, Section 241 excludes sixteen percent of Black Mississippians from the electorate.[37]

On the other end, however, there are felony disenfranchisement laws that apply evenhandedly to all citizens who commit a felony.[38] Virginia has a blanket felony disenfranchisement law, which is seemingly

27. *See generally id.* at 300.
28. *Id.* at 302.
29. *Id.*
30. Holly Barker, *Courts Weigh What it Takes to Scrub Old Laws of Racist Intent*, Bloomberg Law (Aug. 30, 2022), https://news.bloomberglaw.com/litigation/courts-weigh-what-it-takes-to-scrub-old-laws-of-racist-intent.
31. Chung, *supra* note 16.
32. *Id.* at 2.
33. Harness v. Watson, 47 F.4th 296, 301 (5th Cir. 2022), petition for cert. filed, (Nov. 2, 2022) (No. 22-412) (Graves, J. dissenting).
34. *Id.* at 300.
35. *Id.*
36. Caroline Sullivan, *'An Opportunity to Right a 130-year-old Wrong:' How the 5th Circuit Failed Mississippians*, Democracy Docket (Aug. 31, 2022), https://www.democracydocket.com/analysis/an-opportunity-to-right-a-130-year-old-wrong-how-the-5th-circuit-failed-mississippians/.
37. *Id.*
38. *Voting Rights Restoration Efforts in Virginia*, Brennan Ctr. (Apr. 20, 2018), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia#:~:text=Disenfranchisement%20in%20Virginia,to%20have%20their%20rights%20restored (last updated Apr. 3, 2023).

neutral because it applies to all felonies.[39] However, upon closer examination, these laws also disproportionately affect Black people.[40] Black people only make up twenty percent of Virginia's population, but one in five Black people in Virginia cannot vote.[41] As a result, no matter how hidden the racist intent, all these statutes function the same way by overwhelmingly excluding Black people from the electorate. Here, the "neutral" felony disenfranchisement law has a more negative impact on Black citizens than the explicitly racist provision.[42] Thus, exposing the clear unconstitutionality of discriminatory felony disenfranchisement laws could provide an avenue for eradicating all types of felony disenfranchisement laws because none of them are truly neutral.

This note challenges felony disenfranchisement laws from a different perspective. In *Harness v. Watson*, the Fifth Circuit upheld Section 241, holding that the subsequent amendments cleansed the racial taint of the statute from when it was initially implemented.[43] Other circuits have upheld felony disenfranchisement laws and provisions but under slightly different circumstances.[44] The Fifth Circuit is unique in holding that felony disenfranchisement laws enacted with a discriminatory purpose are cleansed of their racism through later amendments.[45] While scrutinizing such laws, the Fifth Circuit used the test established in *Hunter v. Underwood*.[46] This test consists of two steps. In step one, courts determine whether discrimination was the motivating factor in enacting the legislation. To make this determination, courts apply the motivating factor test set out in *Arlington Heights*.[47] If "racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind the enactment of the law, the burden shifts," and the state has to show that

39. *Id.*

40. Phuong Tran, *The Racist Roots of Felony Disenfranchisement in Virginia,* ACLU Va. (Feb. 28, 2020), https://www.acluva.org/en/news/racist-roots-felony-disenfranchisement-virginia.

41. *Id.*

42. *Compare* Sullivan, *supra* note 36 *with* Tran, *supra* note 40.

43. Harness v. Watson, 47 F.4th 296, 311 (5th Cir. 2022), petition for cert. filed, (Nov. 2, 2022) (No. 22-412) (Graves, J. dissenting).

44. *See* Hayden v. Paterson, 594 F.3d 150, 169 (2d Cir. 2010) (upholding New York's felony disenfranchisement laws because they were not enacted with discriminatory intent); *see also* Johnson v. Governor of State of Fla., 405 F.3d 1214, 1224 (11th Cir. 2005) (upholding Florida's disenfranchisement provision because there was no evidence that racism motivate the enactment of the provision).

45. *See* Cotton v. Fordice, 157 F.3d 388, 392 (5th Cir. 1998) (upholding Mississippi's constitutional provision because later amendments to the provision cleansed the provision of its discriminatory intent); *Harness*, 47 F.4th at 309–10 (upholding Mississippi's constitutional provision, again stating that later amendments cleansed the provision of its racism).

46. *Harness*, 47 F.4th at 304; *see also Hunter*, 471 U.S at 227–28.

47. *Hunter*, 471 U.S at 227.

it could have enacted the law in a non-discriminatory manner.[48] If the answer is yes, then courts uphold the statute, but if the answer is no, the statute is struck down.[49]

However, *Hunter* left the question of "whether later reenactments [of felony disenfranchisement laws] would have rendered the [challenged] provision valid."[50] Subsequently, the lower courts were burdened with answering that question. Their response was that later reenactments, which they interpreted included amendments, made the provision valid.[51] Under *Hunter*'s second step, courts have upheld discriminatory statutes because they claim that later amendments "neutralized" the provision, cleansing it of its racist taint.[52] However, this note argues that the question posed by *Hunter* was erroneously answered by the lower courts for two reasons. First, subsequent amendments are not the same as reenactments. Thus, the lower courts have incorrectly approached this question. Second, regardless of reenactments or amendments, changes to a racist statute cannot cure the initial provision's racist taint. Holding the opposite has allowed these challenged racist provisions to remain, affecting Black people disproportionately.[53] These decisions conflict with the purpose of *Arlington Heights*, thus violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution.[54]

Part II of this note will further elaborate on the importance of voting, voting rights for Black Americans, felony disenfranchisement, the history of Mississippi, the line of precedent on this topic, and *Harness v. Watson*. Part III will show why the precedent established was erroneous, particularly in how it applies to *Harness*. Part IV will show potential resolutions from either the Supreme Court or Congress.[55] Finally, Part V will conclude this note with a brief overview of the topic.

48. *Id.* at 228.
49. *Id.* at 233.
50. *Id.*
51. The Fifth Circuit has held that subsequent "reenactments can cure the discriminatory taint." *See Cotton*, 157 F.3d at 390; *Harness*, 47 F.4th at 303.
52. *See Cotton*, 157 F.3d at 390; *Harness*, 47 F.4th at 309–10.
53. Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History,* Brennan Ctr. (May 9, 2017), https://www.brennancenter.org/our-work/research-reports/racism-felony-disenfranchisement-intertwined-history.
54. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (stating that proof of discriminatory motives is sufficient to find a violation of the Equal Protection Clause under the Fourteenth Amendment).
55. Given the Court's current jurisprudence of looking to the history and tradition of this nation to determine whether rights should be upheld, it is doubtful that they would find felony disenfranchisement, disproportionately affecting the ability of Black citizens, unconstitutional.

## II. Background

### A. *Harness v. Watson*

*Harness v. Watson* is the most recent effort to overturn Mississippi's felony disenfranchisement constitutional provision, Section 241.[56] Plaintiffs Kamal Karriem and Roy Harness were disenfranchised after being convicted of crimes enumerated in Section 241.[57] The crimes, forgery, and embezzlement were two of the eight crimes that have been in Section 241 since its enactment in 1890.[58] The provision was amended twice in 1950 and 1968 to modify residency requirements, eliminate the poll tax, remove "burglary," and add "murder" and "rape" to the list of crimes.[59] However, eight of the original crimes remained.[60]

Karriem and Harness brought suit, alleging that Section 241 violated the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment because it was enacted with a discriminatory purpose.[61] The plaintiffs had two arguments.[62] First, they argued that Mississippi's constitutional amendment process "did not give voters an opportunity to consider eliminating either in their entirety or individually the bulk of the crimes tainted by racial animus."[63] Second, they argued that the amendments were also enacted with a discriminatory purpose because Mississippi was notoriously intolerant towards civil rights during the 1950s and 1960s.[64]

The district court, relying on a case that determined the constitutionality of Section 241, *Cotton v. Fordice*, upheld the provision because it was cleansed of any prior discriminatory taint.[65] Harness and Karriem appealed.[66]

The Fifth Circuit upheld Section 241, holding that the later amendments constituted a reenactment of Section 241, which automatically cleansed it of its racist taint.[67] The court rejected plaintiffs' first argument

56. *See generally* Harness v. Watson, 47 F.4th 296 (5th Cir. 2022), petition for cert. filed, (Nov. 2, 2022) (No. 22-412) (Graves, J. dissenting).
57. *Id.* at 302.
58. *Id.*
59. *Id*. at 300–01.
60. *Id.*
61. *Id.* at 302.
62. *Id.* at 307–08.
63. *Id.* at 307.
64. *Id.* at 307–08.
65. *Id.* at 302–03.
66. *Id.* at 303.
67. *Id.* at 307.

because the amendment procedures were sufficient enough to constitute a reenactment, and further, Mississippi state law provides that constitutional amendments repeal prior versions of the statutes.[68] Thus, the amendments are a reenactment or an automatic racism remover. Even though eight crimes remained in Section 241 since 1890, the court cannot look at the legislators' intent in 1890.[69] Instead, the court could only examine the legislators' motives when the provision was last amended in 1968.[70]

In moving to the new starting point for the Court's analysis, in 1968, the Fifth Circuit rejected plaintiffs' second argument.[71] The Court stated that the racist environment in Mississippi in the 1950s and 1960s was insufficient to show that racism was a motivating factor behind the amendments.[72] The Fifth Circuit pointed to the "multi-racial Election Law Reform Task Force" to show that the motivation behind the amendment process was non-discriminatory.[73] Thus, plaintiffs failed at step one of the *Hunter v. Underwood* test because discrimination was not a motivating factor when the statute was enacted in 1968.[74]

In reaching this decision, the Court informally addressed step two of *Hunter* in holding that, under state law, later constitutional amendments constitute reenactments.[75] These later reenactments reset the provision, wiping them clean of any discriminatory taint from earlier versions.[76] Under this decision, even though legislators included forgery and embezzlement in their initial provision to exclude Black people from the electorate if any part of the provision is amended, that racist intent dissipates. Even if the legislators in 1968 kept these crimes for the same reason, absent the same explicitly racist legislative history, the court would uphold the provision.[77]

It is remarkable that the court went to these lengths to uphold a racist felony disenfranchisement provision. However, given how powerful voting is, it is not shocking that the Fifth Circuit would go this far to keep this power from Black citizens.

68. *Id.* at 309.
69. *Id.* at 307.
70. *Id.*
71. *Id.* at 309.
72. *Id.*
73. *Id.* at 302, 310.
74. *Id.* at 310.
75. *Id.* at 309.
76. *Id.*
77. *Id.* at 307.

## B. The Fundamental Right to Vote

The right to vote is vital in a democracy; it represents "the language of American democracy."[78] Voting is how citizens communicate what they wish to see in their community to their elected officials.[79] Scholar Michael Cholbi, a philosophy professor, understands that while voting can be seen as a "political right," it simultaneously signifies a right "that resides at the heart of the justification of the state within the liberal democratic tradition."[80] Essentially, in a democracy, voting justifies and legitimizes government action.[81] Cholbi further notes that the right to vote can thus be understood as "the right of self-determination[,]" as it allows citizens to mold the society that they desire.[82] As a result, being deprived of this right is profoundly debilitating.

Other theoretical works further illustrate the importance of voting. American philosopher John Rawls' "principle of equal liberty," encompassed the liberal perspective.[83] This theory sees the right to vote as an integral part of promoting liberal's objective of being tolerant of the wide range of views that exist in a democracy because citizens are not a monolith.[84] Here, voting matters because "it gives [a citizen] a means of protecting or promoting her interests in the electoral arena, and (or) because she values highly the opportunity which it affords her to join with other citizens in a participatory venture which affirms her sense of civic friendship."[85] Essentially, voting arms citizens with the tools to advocate their interests, and it instills a sense of belonging alongside others with shared interests.[86] Thus, an individual disenfranchised is defenseless as she does not have the tools to effectively advocate for herself, and she is also ostracized from civic friendship.

The Republican perspective championed by American philosopher Dworkin illustrates the aforementioned self-determination idea.[87] Under

78. *Voting Rights*, The Leadership Conf. on Civ. & Hum. Rts., https://civilrights.org/value/voting-rights/ (last visited Dec. 12, 2022).

79. *Id.*

80. Michael J. Cholbi, *A Felon's Right to Vote*, 21 L. & Phil. 543, 549 (2002); *see also* Michael J. Cholbi, *Home*, Michael Cholbi, https://michael.cholbi.com/ (last visited Apr. 22, 2023).

81. Michael J. Cholbi, *A Felon's Right to Vote*, 21 L. & Phil. 543, 549 (2002).

82. *Id.*

83. Heather Lardy, *Citizenship and the Right to Vote*, 17 Oxford J. Legal Stud. 75, 84 (1997); *see also* Leif Wenar, *John Rawls*, Stan. Encyclopedia of Phil. (Mar. 25, 2008), https://plato.stanford.edu/entries/rawls/ (last updated Apr. 12, 2021) (giving additional information on Rawls).

84. Lardy, *supra* note 83, at 85.

85. *Id.* at 86.

86. *Id.*

87. *Id.* at 88; *see also* Godfrey Hodgson, *Ronald Dworkin Obituary*, The Guardian (Feb. 14, 2013), https://www.theguardian.com/law/2013/feb/14/ronald-dworkin (giving additional information of Dworkin).

Dworkin's perspective, voting helps produce the "common good."[88] Voting does so by "yield[ing] . . . agreement among all (or nearly all) political participants that a certain conception of the good should prevail."[89] Dworkin, perhaps unintentionally, implies that those who cannot participate cannot contribute to creating the image of the common good, and, thus, they must live in someone else's creation of the common good.[90] Thus, those affected by felony disenfranchisement are subjected to a society created by others who may not share their interests or vision of the common good.

The Supreme Court also views voting as important, holding that it is a "fundamental right."[91] In doing so, it instructed the states that they could not grant the right to vote in a discriminatory manner.[92] However, the states ignored this instruction as it pertained to their Black citizens.

## C. Voting Rights for African Americans

Voting rights for African Americans has been an ongoing battle. Since 1920, all Black citizens have had the right to vote.[93] In 1870, the Fifteenth Amendment was ratified following the Civil War, granting all men the right to vote.[94] The purpose of this Amendment was to give Black men recently freed from enslavement the right to vote.[95] In 1920, the Nineteenth Amendment was ratified, and it granted all women the right to vote.[96] Other Amendments maximized the power of voting.[97] The Seventeenth Amendment gave citizens the power to directly vote for United States Senators; the Twenty-Third Amendment extended the right to vote to D.C. citizens; the Twenty-Fourth Amendment banned poll taxes; and the Twenty-Sixth Amendment lowered the voting age requirement to eighteen.[98] However, for Black people, the right to vote was only on paper, not in practice.

88. Lardy, *supra* note 83, at 89.
89. *Id.*
90. *Id.*
91. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1996).
92. *Id.* at 666 (stating that states cannot impose poll taxes because it infringes on the fundamental right of voting by discriminating on the basis of wealth).
93. *See* U.S. Const. amend. XV (granting all men the right to vote, regardless of race); U.S. Const. amend. XIX (granting all women the right to vote).
94. *See* U.S. Const. amend. XV.
95. Travis Crum, *The Superfluous Fifteenth Amendment*, 114 NW. U.L. Rev. 1549, 1551 (2020).
96. U.S. Const. amend. XIX.
97. John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 Md. L. Rev. 451, 483 (1978).
98. *Id.*

While Black men had early successes as they began to exercise their right to vote following the passage of the Fifteenth Amendment, this success was only short-lived.[99] White people, particularly in the South, quickly developed strategies to rescind this right.[100] Their strategies included terror, intimidation tactics, and other procedural obstacles, including felony disenfranchisement.[101]

Following the adoption of the Reconstruction Amendments, many states convened to devise methods to exclude recently enfranchised Black Americans from the polls while remaining in compliance with the Fifteenth Amendment.[102] A delegate in attendance at the Virginia Constitutional Convention of 1906 explicitly stated that "'this Convention . . . was elected . . . with a view to [eliminate] every negro voter.'"[103] This Convention was modeled after Mississippi's Constitutional Convention and its adoption of constitutional provision Section 241.[104]

Some of these obstacles were removed with the passage of the Voting Rights Act of 1965 ("VRA").[105] The VRA aimed to protect Black people and other minorities from the reach of racist policies that abridged their right to vote.[106] The VRA did not extend to felony disenfranchisement laws, so they remained a viable method to exclude Black people from the electorate.[107] Unfortunately, under the Supreme Court's recent jurisprudence, states can use additional subtle methods with impacts similar to felony disenfranchisement laws.

The Supreme Court has made multiple attempts over recent years to gut the VRA, making it functionally ineffective.[108] In *Shelby County*, the Court made Section 4 of the VRA inoperative because it believed that racism in the Twenty-First Century was not as bad as it was in 1965 when the VRA was enacted.[109] Because of this improvement, the Court

99. DeeDee Baldwin, *The First Black Legislators in Mississippi*, Miss. Hist. Now (July 2022), https://mshistorynow.mdah.ms.gov/issue/first-black-legislators-mississippi.

100. Andrew L. Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 537 (1993).

101. *Id.*

102. *Id.* at 537–41.

103. *Id* at 537 (quoting 2 Report Of The Proceedings And Debates Of The Constitutional Convention, State Of Virginia 3076 (1906)).

104. *Id.* at 540–41 (stating that "South Carolina (1895), Louisiana (1898), Alabama (1901), and Virginia (1901-02)" all followed Mississippi's lead in targeting "Black" crimes).

105. *See generally* 52 U.S.C. § 10101.

106. Shapiro, *supra* note 100, at 549.

107. *50th Anniversary of Voting Rights Act and Felony Disenfranchisement*, Equal Just. Initiative (Aug. 5, 2015), https://eji.org/news/50-years-voting-rights-act-and-felony-disenfranchisement/.

108. *See generally* Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013); Allen v. Milligan, Oyez https://www.oyez.org/cases/2022/21-1086 (last visited Dec. 13, 2022).

109. *Shelby Cnty.*, 570 U.S. at 556–57.

held, the need for the coverage formula in Section 4 was no longer necessary.[110]

Literature noted that conservatives framed the issue in *Shelby County* as one of states' rights, reminiscent of the southern states' argument leading up to the Civil War.[111] Conservatives contend that certain states are "unequally targeted" in Section 4's coverage formula because of their racist practices when the VRA was promulgated.[112] However, such practices would only be unequal if the aggrieved states had not found new, covert ways to exercise their racism.[113] Notably, "[i]n states specifically covered by the VRA, the [B]lack-to-white ratio of incarceration is greater than three to one."[114] These states also have felony disenfranchisement laws, showing that racism never left. It was just reinvented.[115]

Further, not missing a beat, states covered under Section 4 promulgated legislation restricting voting rights hours after *Shelby County* was decided.[116] These restrictions included the following:

> [S]crapp[ing] sameday registration and out-of-precinct voting, reduc[ing] the period of early voting from seventeen to ten days, expan[ding] allowable poll observers and voter challenges, eliminating the discretion of county boards of election to keep the polls open an additional hour in extraordinary circumstances, and eliminat[ing] "preregistration" of sixteen- and seventeen-year-olds who would not be eighteen by the next general election[, and] . . . mandat[ing] a . . . more burdensome voter ID provision.[117]

110. *Id.* at 529, 556–57 (stating that the coverage formula "defin[es] the 'covered jurisdictions' as States or political subdivisions that maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s. In those covered jurisdictions, § 5 of the Act provides that no change in voting procedures can take effect until approved by specified federal authorities in Washington, D.C.. Such approval is known as 'preclearance.'") (quoting 52 U.S.C. § 10303(b)).

111. Bridgette Baldwin, *Backsliding: The United States Supreme Court, Shelby County v. Holder and the Dismantling of Voting Rights Act of 1965*, 16 Berkley J. Afr. Am. L. & Pol'y 251, 253 (2015); *see also Causes of the Civil War*, PBS, https://www.pbs.org/opb/historydetectives/feature/causes-of-the-civil-war/#:~:text=A%20key%20issue%20was%20states,Another%20factor%20was%20territorial%20expansion (last visited Apr. 22, 2023) (discussing the states' right argument leading up to the Civil War).

112. Baldwin, *supra* note 111.

113. *Id.* at 254.

114. *Id.* at 258.

115. *Id.*

116. Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 Wm. & Mary L. Rev. 1961, 1962 (2018).

117. *Id.* at 1973 (providing an example of what North Carolina did immediately following the Court's decision in *Shelby County*).

This further shows that racism never vanished from the states covered by Section 4 of the VRA, the states simply developed strategic ways to discriminate. Unfortunately, these states have not stopped here.

In the 2022 Supreme Court term, another voting rights case, *Allen v. Milligan*, concerns Section 2 of the VRA.[118] Plaintiffs alleged that Alabama's redistricting plan that concentrated Black people in one district and then distributed other Black populations across other districts violated Section 2 of the VRA.[119] Scholars have noted that this is "a continuation of conservative efforts to gut the VRA."[120] They have also stated that if the Court strikes down Section 2, "[i]t all but guarantees that minority voters will be subject to at least one election under an illegal map."[121] Thus, the purpose of the VRA in protecting minorities from voter suppression will no longer be served.[122] Given the rationale in *Shelby County*, it was very likely that the Court would strike down Section 2, effectively killing the VRA.[123] In a surprising move, the Supreme Court sided with the Black citizens, striking down Alabama's redistricting plan.[124] This decision alongside the decision reached in *Moore v. Harper*, which struck down the independent legislature theory, are atypical from the Supreme Court's voting rights' jurisprudence.[125] However, both decisions indicate a scintilla of hope for voting rights.

These cases reveal a pattern of efforts to eliminate Black citizens from the electorate. *Milligan* and *Harper* are outliers that may indicate that the Supreme Court is not willing to go to extremes to disenfranchise Black citizens.[126] The force driving these efforts is that white Americans fear losing control of democracy.[127] Literature suggests that

118. Oyez, *supra* note 108.

119. *Id.*

120. Erwin Chemerinsky, *Making it Harder to Challenge Election Districting*, 1 Fordham L. Voting Rts. & Democracy F. 13, 16 (2022).

121. Carolyn Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court*, 83 Oh. State L.J. Online 111, 119 (2022) https://kb.osu.edu/bitstream/handle/1811/101812/1/OSLJ_Online_V83_111.pdf.

122. *Id.* at 119-120.

123. Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 557 (2013).

124. Amy Davidson Sorkin, *The Supreme Court's Surprise Defense of the Voting Rights Act*, The New Yorker (June 9, 2023), https://www.newyorker.com/news/daily-comment/the-supreme-courts-surprise-defense-of-the-voting-rights-act.

125. Hansi Lo Wang, *What the Supreme Court's Rejection of a Controversial Theory Means for Elections*, NPR (June 30, 2023), https://www.npr.org/2023/06/28/1184631859/what-the-supreme-courts-rejection-of-a-controversial-theory-means-for-elections.

126. Sorkin, *supra* note 124 (stating that the rationale behind the decision lied in the fact that the independent state legislature theory in this case was on the more extreme end; this extremeness somewhat obligated the Supreme Court to strike it down).

127. Terry Smith, Whitelash: Unmasking White Grievance at the Ballot Box 8 (Cambridge Univ. Press, 2020).

recent efforts to restrict voting originate from a desire to prevent certain groups from becoming more politically powerful.[128] This also prompted early disenfranchisement efforts after the ratification of the Reconstruction Amendments, and it resurged to limit the expansion of immigration rights in 1992 when Democrats gained control of the legislative and executive branches.[129] Additionally, while conservatives claim Obama becoming president signaled the end of racism, ironically, it likely sparked recent efforts to disenfranchise Black voters.[130] Disenfranchising efforts that resurfaced in Georgia after Biden beat Trump in the 2020 election further show white people's fear of becoming the political minority.[131] This fear is insufficient to justify such actions. However, the success of widespread felony disenfranchisement, along with the courts' complicity, has permitted public officials to believe that this is justifiable.[132]

## D. Felony Disenfranchisement

### 1. Background

Currently, "5.2 million Americans remain disenfranchised, 2.3 percent of the voting age population."[133] Within this number, minority populations are overrepresented; it is estimated that "[o]ver 6.2 percent of the adult African American population is disenfranchised compared to 1.7 percent of the non-African American population."[134] Additionally, "[a]pproximately 1.2 million women are disenfranchised."[135]

State felony disenfranchisement policies differ.[136] In two states, Kentucky and Virginia, individuals with a felony conviction are

128. Desmond S. King & Rogers M. Smith, *The Last Stand? Shelby County v. Holder, White Political Power, and America's Racial Policy Alliances*, 13 Du Bois Rev.: Soc. Sci. Rsch. On Race 25, 29 (2016).

129. *Id.* at 36; Henry Louis Gates, *Freedom to Fear: A Terrifying and Deadly Backlash*, Equal Just. Initiative, https://eji.org/report/reconstruction-in-america/journey-to-freedom/ (last visited Apr. 26, 2023).

130. Steven R. Morrison, *The Post-Shelby County Game,* 16 Berkley J. Afr. Am. L. & Pol'y 236, 241 (2015).

131. Sam Levine, *'Death by a Thousand Cuts': Georgia's New Voting Restrictions Threaten Midterm Election*, The Guardian (Oct. 5, 2022), https://www.theguardian.com/us-news/2022/oct/05/georgia-voter-suppression-registration-challenges.

132. *See infra* Section II.D. *Felony Disenfranchisement*.

133. Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, Sentencing Project (Oct. 30, 2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/.

134. *Id.*

135. *Id.*

136. *Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map (last visited Sept. 23, 2022).

permanently disenfranchised.[137] In ten states, citizens convicted of crimes enumerated in the applicable statute or provision are disenfranchised.[138] In fifteen states, citizens convicted of a crime are enfranchised after their sentence ends.[139] In two states, citizens incarcerated and on parole are disenfranchised.[140] In twenty-three states, only those incarcerated are disenfranchised.[141] Only in Maine, Vermont, and D.C. are citizens permitted to vote regardless of any prior or current convictions.[142] Some states with felony disenfranchisement laws also provide a method to regain the right to vote, but it is more symbolic than a sincere effort.

There are methods in many jurisdictions that purport to provide an avenue for "re-enfranchisement," but they are complex and do not guarantee that one's right to vote will be reinstated.[143] For example, in Mississippi, those convicted of a disenfranchising crime can regain their right to vote, but only by obtaining an executive order from the governor or by getting a bill introduced into the state legislature that receives sixty percent of the vote from the legislature and the governor's approval.[144] The process is even more complex with federal crimes because some states do not permit individuals to use state procedures to become re-enfranchised; a presidential pardon is the only option.[145] While this is a convoluted system that lacks uniformity, it is constitutional.

States have the power to impose restrictions on voter qualifications under Article I, Section 2 of the Constitution.[146] These restrictions can range from residency, age, and previous criminal record, but

137. *Id.* The seven states include Alabama, Arizona, Florida, Iowa, Mississippi, Tennessee, and Wyoming. *See* Miss. Const. art. 12, § 241 (providing an example of a provision stating that only certain crimes will lead to disenfranchisement).

138. *Id.* The ten states include Alabama, Arizona, Connecticut, Delaware, Florida, Iowa, Mississippi, Tennessee, Virginia, and Wyoming. *See* Miss. Const. art. 12, § 241 (providing an example of a provision stating that only certain crimes will lead to disenfranchisement).

139. *Felony Disenfranchisement Laws (Map)*, *supra* note 136.

140. *Id.*

141. *Id.*

142. *Felony Disenfranchisement Laws (Map)*, *supra* note 136; Chung, *supra* note 16, at 1; Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here's Why Few Do.*, The Marshall Project (June 11, 2019), https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do (stating that the possible reason why Maine and Vermont extend the right to vote to everyone regardless of their prior or present conviction(s) is because it is "less controversial"; "incarcerated people can only vote by absentee ballot in the place where they last lived[;] [t]hey are not counted as residents of the town that houses a prison . . . [a]nd . . . the majority of prisoners in Maine and Vermont are white, which defuses the racial dimensions of felony disenfranchisement laws.").

143. Mauer, *supra* note 18.

144. *Id.*

145. *Id.*

146. George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 Fordham Urb. L.J. 101, 103 (2005).

they cannot create suspect classifications or infringe on fundamental rights.[147] However, if voting is a fundamental right, how is this reconciled with the existence of felony disenfranchisement laws?

Felony disenfranchisement laws have persisted throughout America's history.[148] They originated from practices in ancient Greece that Britain adopted.[149] Being convicted of a crime subjected individuals to "civil death," which resulted in a loss of their rights, including the right to vote.[150] The neutral reason continually proffered was the social contract theory.[151] This theory simply states that those convicted of a crime broke their social contract with their government, and this breach of contract makes it permissible to rescind some rights.[152] However, this reason, among the other proffered reasons, including reducing election fraud and keeping the ballot "pure," are merely pretexts. These laws are simply another tool in the state's arsenal to disenfranchise Black people.[153] What is there to gain, however, by continuing to keep this system in place?

Many states have considered this recently, and, as a result, felony disenfranchisement laws have changed, reinstating some citizens' right to vote.[154] While this seems to show improvement, this progress is ephemeral.[155] For example, Florida repealed its "permanent felon disenfranchisement law."[156] However, six months later, Florida's legislature passed a bill "delay[ing] the restoration of voting rights until an ex-felon's outstanding financial obligations are resolved."[157] Scholars Bruce Cain and Brett Parker attribute this to the changing landscape of American politics, which is "more professionalized, polarized, and closely contested."[158]

147. *Id.*; *see also* Dunn v. Blumstein, 405 U.S. 330, 352–54 (holding that residency requirements for voting was unconstitutional because the state created a classification that infringed on the fundamental right to travel, and the state failed to show how this requirement was the less restrictive means).

148. Aviram et al., *supra* note 17.

149. *Id.* at 305.

150. Antoinette Solomon, *Democracy Unchained: Judicial Review of Felon Disenfranchisement Laws in America and an International Comparison*, 771 L. Sch. Student Scholarship 1, 3 (2016), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1757&context=student_scholarship.

151. Aviram et al., *supra* note 17.

152. Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement*, 1 Wash. U. Juris. Rev. 193, 203 (2009).

153. Brooks, *supra* note 146, at 104.

154. Caroline Sullivan, *Nearly 70 Bills Introduced To Restore Voting Rights After Felony Conviction*, Democracy Docket (Feb. 23, 2023), https://www.democracydocket.com/analysis/nearly-70-bills-introduced-to-restore-voting-rights-after-felony-conviction/.

155. Cain & Parker, *supra* note 12, at 938.

156. *Id.*

157. *Id.*

158. *Id.* at 939. "Professionalization" speaks to "the rising importance of paid, full-time political consultants."

In essence, the hesitancy to enfranchise citizens with prior convictions is more political than moral.[159] This again emphasizes that the source of disenfranchising measures is white people's fear of being the political minority.[160] Alongside the states, the courts have also contributed to the persistence of these laws.

2. Precedent

After the ratification of the Reconstruction Amendments, the Supreme Court limited how far the Amendments could extend in protecting citizens.[161] In response to this constriction of the Amendments, the states took advantage where they could and passed felony disenfranchisement laws that targeted Black voters.[162] When individuals challenged these provisions, the Supreme Court provided the overall framework for determining the constitutionality of these laws, and the lower courts filled in the gaps.[163]

The foundation for felony disenfranchisement case law is the infamous case of *Richardson v. Ramirez*.[164] In *Richardson*, Californians challenged California's felony disenfranchisement law under the Equal Protection Clause of the Fourteenth Amendment.[165] Respondents completed their sentences but were still barred from voting because of their felony convictions.[166] The Supreme Court upheld this provision, finding that "the exclusion of felons from the vote has an affirmative sanction in [Section] 2 of the Fourteenth Amendment."[167] They held that this "affirmative sanction" made it permissible for states to exclude felons from the electorate while not running afoul of the Equal Protection Clause.[168] However, even though states could exclude felons from the electorate, was this absolute?

In *Hunter v. Underwood*, the Supreme Court held that felony disenfranchisement laws are unconstitutional when enacted with discriminatory intent.[169] In this case, plaintiffs, a Black woman, and a white man brought suit because they were prohibited from voting after "be[ing]

159. *Id.* at 940.
160. *See* discussion *supra* Section C.
161. Brooks, *supra* note 146, at 107.
162. *Id.* at 108.
163. *Cotton*, 157 F.3d at 392; *Harness*, 47 F.4th at 310.
164. *See generally* Richardson v. Ramirez, 418 U.S. 24 (1974).
165. *Id.* at 26–27.
166. *Id.* at 31–32.
167. *Id.* at 54.
168. *Id.* at 54–56.
169. *See generally* Hunter v. Underwood, 471 U.S. 222, 233 (1985).

convicted of presenting a worthless check."[170] They asserted that Alabama's constitutional provision that barred them from voting, Section 182, was unconstitutional under the Equal Protection Clause because of its "discriminatory impact."[171] They provided evidence showing that the initial constitutional provision, adopted in 1901, was enacted to target Black citizens of Alabama.[172]

Here, the Supreme Court found this provision to be unconstitutional under the Equal Protection Clause because the provision was enacted with discriminatory intent.[173] Because of this discriminatory intent, the felony disenfranchisement law did not fall under the purview of Section 2 of the Fourteenth Amendment.[174] This was because "§ 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 [the Equal Protection Clause] of the Fourteenth Amendment."[175] While this resolved one lingering question from *Richardson*, it posed another question. This question concerned whether a provision enacted with discriminatory intent "would be valid if enacted . . . without any impermissible motivation."[176] The Court has not answered this question since it was raised in 1985, but the lower courts have taken a stab at it.

The Fifth Circuit was the first to address this question in 1998 in *Cotton v. Fordice*.[177] Keith Brown challenged Mississippi's constitutional provision, Section 241.[178] He argued that he should not be disenfranchised because the crime he was convicted of was not enumerated in Section 241.[179] He also argued that Section 241 was unconstitutional because it was enacted with discriminatory intent.[180] The Fifth Circuit held that Section 241 was constitutional because although the initial provision was enacted with discriminatory intent, the act was amended in such a way that it "superseded" the original provision.[181] As a result, this cured Section 241 of any "discriminatory taint," and, thus, it was constitutional.[182]

170. *Id.* at 223–24.
171. *Id.* at 225, 227.
172. *Id.* at 226, 231–32.
173. *Id.* at 230–32 (finding such intent examining the legislative history of the provision which led to the conclusion that the crimes enumerated were selected because the legislature believed that they were "more commonly committed by [B]lack[] people . . .").
174. *Id.* at 233.
175. *Id.*
176. *Id.*
177. *See* Cotton v. Fordice, 157 F.3d 388, 392 (5th Cir. 1998).
178. *Id.* at 390.
179. *Id.*
180. *Id.* at 391.
181. *Id.*
182. *Id.* at 391–92.

The crime that encompassed Brown's conviction was one of the eight crimes that had been a part of Section 241 since it was enacted in 1890.[183] This did not matter to the court as it held that subsequent amendments or reenactments made the provision valid.[184] In doing so, the Fifth Circuit looked at the intent of the legislators *at the time of the amendments* rather than when the provision was implemented.[185] Here, since the plaintiff did not show proof of the legislature's discriminatory intent when the provision was amended in 1950 and 1968, the court upheld the provision.[186]

The Eleventh Circuit addressed this question in 2005 in *Johnson v. Governor of State of Florida*.[187] Here, the plaintiffs were individuals who could no longer vote because they were convicted of a felony, and Florida's felony disenfranchisement law at the time extended to anyone convicted of a felony.[188] Here, and unlike *Hunter* and *Cotton,* the Eleventh Circuit was unable to find discriminatory intent behind the promulgation of the provision.[189] Additionally, unlike *Cotton*, Florida's felony disenfranchisement law underwent a significant change from its initial enactment to the "reenacted" version.[190] This change also included a blanket felony disenfranchisement law rather than a law only targeting specific crimes.[191] The court, relying on the analysis in *Hunter*, held that the provision was constitutional because of these changes and the lack of a finding of discriminatory intent.[192]

The next case in this line of precedent is where this note picks up, *Harness v. Watson*. However, before addressing the defects in *Harness*, it is necessary to understand why Section 2 of the Fourteenth Amendment is insufficient to justify felony disenfranchisement.

3. Section 2 of the Fourteenth Amendment

"Disenfranchisement for participation in crime, like durational residency requirements, was common at the time of the adoption of the Fourteenth Amendment. But 'constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian

183. *Id.* at 390–391.
184. *Id.* at 391.
185. *Id.* at 392.
186. Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of Cotton v. Fordice*, 157 F.3d 388, 432-33 (5th Cir. 1998), 71 U. Cin. L. Rev. 421 (2003) [hereinafter Chin, *Rehabilitating*].
187. *See generally* Johnson v. Governor of State of Florida, 405 F.3d 1214 (2005).
188. *Id.* at 1216–17, 1221.
189. *Id.* at 1218–19.
190. *Id.* at 1220–22.
191. *Id.* at 1221.
192. *Id.* at 1224.

amber.'"[193] This is a portion of Justice Thurgood Marshall's dissent in *Richardson v. Ramirez,* the case that upheld felony disenfranchisement under Section 2 of the Fourteenth Amendment.[194] Marshall stated that Section 2 was an ultimatum offered by the Republicans in Congress to Southern Democrats.[195] The Democrats could either allow Black men to vote or lose their representation in Congress.[196] Thus, as Marshall asserted, this had nothing to do with providing states a *carte blanche* to promulgate felony disenfranchisement laws.[197] This was not the end of the discussion on Section 2 of the Fourteenth Amendment, however, as scholars debated on what the Section meant and how it was to apply to the states.[198]

One scholar asserts that the Fifteenth Amendment was proposed only because Section 2 of the Fourteenth Amendment was a failure.[199] Section 2 was promulgated to provide former slave states a political advantage if they granted Black citizens the right to vote.[200] While directed at southern states, it applied to all states.[201] Senator Howard, specifically concerned with the allocation of congressional representation, provided that excluding Black people from the electorate on any grounds would result in a political disadvantage to the state.[202] Thus, Section 2 was primarily concerned with congressional apportionment to resolve the imbalance created by the repeal of the three-fifths compromise.[203] It had virtually nothing to do with felony disenfranchisement.

All male citizens had the right to vote in federal elections prior to the Fifteenth Amendment under the Equal Protection Clause of the Fourteenth Amendment.[204] This was later confirmed when the Supreme Court held that voting is a fundamental right, and thus, under the Equal Protection Clause of the Fourteenth Amendment, it cannot be granted in a discriminatory manner.[205] However, because the states

193. Richardson v. Ramirez, 418 U.S. 24, 76 (1974) (Marshall, J. dissenting).
194. *Id.* at 54.
195. *Id.* at 73–74.
196. *Id.*
197. *Id.*
198. *See generally* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment*, 92 GEO. L.J. 259 (2004) [hereinafter Chin, *Reconstruction*]; *see generally* George D. Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 103–04 (1961).
199. Chin, *Reconstruction*, *supra* note 198, at 260–61.
200. Zuckerman, *supra* note 198.
201. *Id*. at 103–04.
202. *Id.* at 96, 104.
203. *Id.* at 104.
204. Chin, *Reconstruction*, *supra* note 198, at 308–09.
205. *Id.*

still excluded certain citizens from the electorate, Congress passed the Fifteenth Amendment, explicitly granting all men the right to vote.[206] Felony disenfranchisement subsequently undermines both the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment.[207] Further, the Supreme Court's reliance on Section 2 has allowed felony disenfranchisement to survive not just scrutiny under the Fourteenth and Fifteenth Amendments but also the VRA.[208] This was and still is, erroneous because Section 2 was repealed by the Fifteenth Amendment.[209]

Yet, in attempts to validate felony disenfranchisement under Section 2 of the Fourteenth Amendment, courts note that these laws are non-discriminatory.[210] They contend that such laws disproportionately affect Black people regardless of whether the law applies to all crimes or to specified crimes.[211] However, does this contradict the notion that these laws apply neutrally?

Under the Supreme Court's interpretation, Section 2 of the Fourteenth Amendment also grants states the power to disenfranchise those involved in rebellion.[212] However, rebellions do not have the same disenfranchising consequences as crimes.[213] One recent example highlights this dissonance.

On January 6, 2021, about 10,000 Trump supporters, who believed Trump's fallacious conspiracy theory that the 2020 election results were fraudulent, were involved in an insurrection.[214] This was a rebellion, so those involved should be disenfranchised under Section 2 of the Fourteenth Amendment.[215]

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206. *Id.* at 315.
207. *Id.*
208. *Id.* at 315–16.
209. *Id.* at 316.
210. Harness v. Watson, 47 F.4th 296, 312 (5th Cir. 2022) (Ho, J., concurring in part).
211. *Id.*
212. The Constitution states:

> [b]ut when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion . . . .

U.S. Const. amend. XIV, § 2.

213. Aaron Morrison, *Race Double Standard Clear in Rioters' Capitol Insurrection*, AP News (Jan. 7, 2021), https://apnews.com/article/congress-storming-black-lives-matter-22983dc91d16bf949efbb60cdda4495d.

214. Olivia Rubin, Alexander Mallin & Will Steakin, *7 Hours, 700 Arrests, 1 Year Later: The Jan. 6 Capitol Attack, by the Numbers*, ABC 7 (Jan. 6, 2022), https://abc7.com/jan-6-insurrection-us-capitol-riot/11428976/.

215. U.S. Const. amend. XIV, § 2.

However, only about seven hundred of the 10,000 people involved were charged.[216] Secondly, excluding Maine and Vermont, those charged are not, per se, disenfranchised unless it is explicitly stated under their respective state laws.[217] Thus, those convicted of misdemeanors and not felonies are still enfranchised in some states.[218] Further, in states like Mississippi, which only disenfranchise those convicted of certain crimes, such citizens are still permitted to vote.[219] This is absurd, and it shows the discriminatory double standard implicit in felony disenfranchisement laws.[220] While the link between committing a crime and voting is tenuous, the link between a rebellion and participation in elections is strongly linked; however, both are not punished equally.[221]

Despite the logic of disenfranchising such individuals, the logic is deafened by the fact that such people were predominantly white and, thus, not the intended targets of Section 2.[222] This is not only apparent from the insurrection but also from the history of states like Mississippi.

## E. Mississippi and its Hostile Racial History

Historically, Mississippi has consistently displayed hostility toward Black people. Before racism was firmly rooted in other states' statutes, "white Mississippians . . . carefully defined the [B]lack place in what they invariably called a 'white man's country.'"[223] As one could imagine, this defined place was crafted to limit Black Mississippians' power.

After the passage of the Fifteenth Amendment, Black Mississippians outnumbered white Mississippians in the electorate.[224] Subsequently, white people employed "force and fraud" to successfully drive Black people from the polls.[225]

Section 241 was enacted as part of what was referred to as "the Second Mississippi Plan."[226] The *Raymond Gazette* "reported . . . 'the purpose [of the convention was to] devis[e] means by which the negro

216. Nate Hanson, Mauricio Chamberlin & Brandon Lewis, *Yes, Some Felons from the Jan. 6 Insurrection can Vote but it Depends on Where they Live*, VERIFY (Dec. 7, 2021), https://www.verifythis.com/article/news/verify/national-verify/felons-voting-rights-january-6-insurrection/536-34779097-3df2-4ff9-a8e4-e9d0fcaeac9e; Rubin et al., *supra* note 214.
217. Hanson et al., *supra* note 216.
218. *Felony Disenfranchisement Laws (Map)*, *supra* note 136.
219. MISS. CONST. art. 12, § 241.
220. Morrison, *supra* note 213.
221. *Id.*; MISS. CONST. art. 12, § 241.
222. Kelley, *supra* note 53.
223. MCMILLEN, *supra* note 23, at 4–5.
224. *Id.* at 35–36.
225. *Id.* at 36.
226. *Id.* at 39.

can be constitutionally eliminated from politics.'"[227] Significantly, not one word in the promulgated provisions mentioned race.[228] However, no one could deny that the provisions under the Second Mississippi Plan were crafted to target Black people.[229] This was evident from the "understanding clause," which permitted illiterate white Mississippians to circumvent the literacy test requirement.[230] It was also further evident from Section 241 itself. The crimes included were "tailored . . . to bar [B]lacks, a 'patient, docile people . . . [likely to commit] furtive offenses than to the robust crimes of the whites.'"[231] It was understood that these measures were meant to disproportionately affect Black Mississippians, so it did not need to be said in the statute.[232]

The decrease in Black Mississippians registered to vote following the passage of Section 241, alongside other disenfranchising tactics, was substantial.[233] In 1868, 96.7% of Black people eligible to vote were registered to vote; in 1892, two years after Section 241 was enacted, only 5.9% of Black people eligible to vote were registered.[234] The percentage did not reach over 10% until 1968.[235]

Congress and the Supreme Court, in the 1950's and 1960's, helped eradicate some of the methods that disenfranchised Black voters.[236] Many of Mississippi's measures to exclude Black people from the electorate were preempted or held unconstitutional.[237] However, the felony disenfranchisement provision remained, so it had to be protected.[238]

Mississippi removed the crime "burglary" in 1950.[239] In 1960, Mississippi attempted to add a clause that required "good moral character," but based on the Supreme Court's critique of this same clause in South Carolina's law, Mississippi repealed the provision in 1965.[240] The last change to the provision was the addition of "murder" and "rape" in 1968.[241]

227. *Id.* at 40.
228. *Id.* at 41–42.
229. *Id.* at 42–43.
230. *Id.* at 42.
231. *Id.* at 43.
232. *Id.* at 41–43.
233. *Id.* at 36.
234. *Id.*
235. *Id.* at 36.; *see also* David C. Colby, *The Voting Rights Act and Black Registration in Mississippi*, 16 Publius: The J. of Federalism 123, 130 (1986).
236. Chin, *Rehabilitating*, *supra* note 186, at 422.
237. *Id.*
238. *Id.* at 422–23.
239. *Id.* at 432.
240. *Id.* at 430.
241. *Id.* at 432.

This form of Section 241 was upheld in *Cotton v. Fordice* and again in *Harness v. Watson*.[242]

While the Mississippi state legislature was making these changes, racial hostilities within the state were high.[243] In fact, within a few counties in 1961, zero percent of Black Mississippians were registered to vote.[244] Furthermore, many Black Mississippians were terrorized while trying to register to vote or help others register.[245]

In 1963, Mitchell Grim, a Black Mississippian registered to vote, accompanied his friends, two other Black Mississippians, who also wanted to register to vote.[246] Grim refused to listen to the sheriff's order, asking him to leave, so the sheriff beat Grim and his two friends.[247] There was nothing wrong with Grim's presence, but the sheriff wanted to use Grim as an example to deter other Black Mississippians from registering to vote.[248]

The federal government did not turn a blind eye to these struggles. In the early 1960s, the Department of Justice filed twenty-two cases against Mississippi's counties and the state itself under the Civil Rights Acts of 1960 and 1964 on the grounds of Mississippi's "discriminatory application of voting requirements."[249] However, Mississippi was not cooperative in these cases, and given the magnitude of the violations, Congress determined that the only way to remedy the wrongs was to enact another piece of legislation, the VRA.[250] So, while the Fifth Circuit in *Harness* stated that the racist atmosphere of Mississippi during the 1950s and 1960s was insufficient to show a discriminatory motive at the time of the last amendment in 1968, Congress felt the climate in Mississippi was so bad that the only way to fix it was with the VRA.[251] There seems to be dissonance between the court's perception of history and the history itself. In addition to this historical dissonance, there is also another dissonance between how America operates felony disenfranchisement laws versus how other democracies choose to operate such laws. Looking at other democracies further shows how America's usage is questionable at best.

242. *Id.* at 432–33; Harness v. Watson, 47 F.4th 296, 310–11 (5th Cir. 2022).
243. *See generally The Struggle for Voting Rights in Mississippi—The Early Years*, Civ. Rts. Movement Hist., https://www.crmvet.org/info/voter_ms.pdf (last visited Apr. 26, 2023).
244. *Id.* at 4.
245. Colby, *supra* note 235, at 126.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at 128–29.
250. *Id.* at 129.
251. *Id.* at 129; *see also* Harness v. Watson, 47 F.4th 296, 310 (5th Cir. 2022).

## F. International Perspectives

The United States is unique in utilizing "the most restrictive disenfranchisement laws of any democratic nation."[252] Considering that the United States has the highest incarceration rate, its usage of such laws is even more severe in comparison to other democracies.[253] In the minority of countries that implement felony disenfranchisement, once one has completed their sentence, felony disenfranchisement is temporary; it is granted by a judge and imposed only if that individual is convicted of a crime related to voting, i.e., "electoral fraud or corruption."[254] The majority of democratic nations, however, are not as restrictive and even allow those currently incarcerated to vote.[255]

Germany is an example of a democracy with less restrictive felony disenfranchisement laws.[256] Prior to the 1960s, Germany's felony disenfranchisement laws were similar to the United States' laws.[257] Both the rationale, i.e., those convicted of felonies should lose other rights, and the applicability, i.e., such laws applied to many crimes, were the same. However, even prior to the 1960s, Germany's laws applied only temporarily.[258] By the 1960s, Germany started to rethink its felony disenfranchisement laws.[259] It removed harsher penalties for a category of crimes referred to as "*Zuchthaus*," which was a conviction that led to "an aggravated form of prison."[260] This was done because the cost of negatively affecting those individuals from successfully reintegrating into society outweighed any perceived benefits.[261]

Disenfranchisement was still permitted in Germany, but it was an option so as not to disrupt about "150 federal and state laws" that spoke to disenfranchisement.[262] As a result of such changes, there is a negligible amount of convictions that disenfranchise individuals annually.[263] This is because this penalty is narrowly tailored to crimes that "will or

252. Mauer, *supra* note 18, at 248.
253. Solomon, *supra* note 150, at 12.
254. Mauer, *supra* note 18, at 248.
255. *Id.*
256. *See generally* Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753 (2000).
257. *Id.* at 756–58.
258. *Id.* At most, disenfranchisement lasted 10 years.
259. *Id.* at 757–59.
260. *Id.*
261. *Id.* at 759.
262. *Id.*
263. *Id.*

[are] likely to undermine the foundation of the state."[264] Further, the right to vote can be restored either through a pardon or through the sentencing court.[265] The sentencing court, among other things, considers "rehabilitative concerns."[266] These rehabilitative concerns also drive courts to not disenfranchise young adults, regardless of the offense.[267] Thus, America is an anomaly by being the only democracy that insists on using felony disenfranchisement laws with severe, permanent consequences. However, as will be shown in the next section, upholding these laws takes more interpretative magic than logic.

## III. Core Analysis

The analysis will show that the lower courts answered the question posed in *Hunter* incorrectly because there is no way to remove the discriminatory taint from a systemically racist law. It will point out the logical gaps in the Fifth Circuit's reasoning in *Harness v. Watson* and present evidence showing the lingering effects such laws have had on Mississippi. In addressing the weaknesses of the Fifth Circuit's opinion, the distinction between reenactment and amendment must first be addressed.

### A. Reenactment Versus Amendment

The first issue raised is whether the Supreme Court's question about future reenactments also applied to future amendments of a statute.[268] A reenactment of a provision is different from an amendment. When the term "reenactment" is used, it usually refers to the process of repealing an earlier statute and then, in the future, enacting the law again in a different form.[269] However, even when the old law is repealed and a new one enacted, unless the language is markedly different, the substance of the law remains the same.[270] While it will not be discussed in depth because it is inapplicable here, it is questionable whether the

264. *Id.* at 761 (stating that "[s]uch offenses include: perpetration of a war aggression, treason, use of insignia of a prohibited political organization, sabotage, espionage, election fraud, bribery of voters, and similar crimes.").
265. *Id.*
266. *Id.*
267. *Id.* at 761–62.
268. Harness v. Watson, 47 F.4th at 296, 304 (5th Cir. 2022).
269. *Reenact*, Merriam-Webster, https://www.merriam-webster.com/dictionary/reenact#:~:text=%3A%20to%20enact%20(something%2C%20such,an%20earlier%20event%20or%20incident) (last visited Apr. 26, 2023); *see also* Minn. Stat. § 645.37.
270. Minn. Stat. § 645.37.

Supreme Court suggested that a reenactment could cure a statute of its racist taint, given that states can reenact a statute procedurally while keeping the substance the same.

The term "amendment," however, means to "make a change by adding, subtracting, or substituting."[271] This leaves the original provision still intact, and the legislature adds clauses, eliminates clauses, or substitutes an obligation in the statute for another.[272]

To start, it is important to determine whether Section 241 was reenacted or amended. This determination dictates whether the Fifth Circuit should have even addressed *Hunter*'s unanswered question. Below is Section 241; the italics show the changes, and strikethroughs show the deletions that occurred between 1890 and 1968 when the provision was last amended:

> Every male inhabitant of this state, except idiots *and* insane persons and Indians not taxed, who is a citizen of the United States of America*, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote,* and who is duly registered as provided in this article, and who has never been convicted of *murder, rape,* bribery, ~~burglary~~, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, ~~and who has paid, on or before the first day of February in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes~~, is declared to be a qualified elector*, except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector*; ~~but any minister of the gospel in charge of an organized church shall be entitled to vote after six months residence in the election district, of otherwise qualified~~.[273]

In both *Cotton* and *Harness*, the Fifth Circuit held that these changes constituted a reenactment.[274] The Fifth Circuit deserves a gold medal for the mental gymnastics it used to uphold an obviously racist

271. *Amend*, Cornell L. Sch. Legal Info. Inst., https://www.law.cornell.edu/wex/amend (last visited Apr. 26, 2023).

272. *Id.*

273. *Compare* Miss. Const. art. XII, § 241 (1890) with Miss. Const. art. XII, § 241.

274. Cotton v. Fordice, 157 F.3d 388, 391–92 (5th Cir. 1998); Harness v. Watson, 47 F.4th at 296, 310.

provision. The court relied on Mississippi state law that provides that constitutional amendments repeal prior versions of the statutes as interpreted in another case, *State ex rel. Moore v. Molpus*.[275] This was erroneous for two reasons. For one, *Molpus* stands for the proposition that the court will not overrule *precedent* interpreting an earlier version of a statute because the subsequent amendment overruled that *precedent*.[276] This is analogous to Congress overruling a Supreme Court case by amending a statute because it did not like the Court's interpretation.[277] Second, that same case held that the prior interpretation becomes history, so it is still relevant to the court's analysis.[278] Thus, even if the 1890 provision was overruled, the Fifth Circuit still had to consider the racist history that tainted Section 241.[279]

In sum, Section 241 was not reenacted. The Fifth Circuit intentionally misinterpreted lower court precedent to find that the 1968 amendment overruled any prior version of Section 241.[280] Regardless of how the Fifth Circuit framed it, Section 241 underwent nothing more than an amendment. The legislature added some clauses, subtracted others, and substituted some obligations for others. These changes were minor, leaving the primary purpose of Section 241 intact because amendments cannot cure provisions of their racism.

### B. Discriminatory Taints Leave Indelible Stains

Taints from a provision enacted with a discriminatory intent cannot be cleansed with subsequent amendments because such changes cannot erase the systemic racism from the statute. Many changes, like those done to Section 241, barely eliminate the systematic racism in such statutes. Subsequently, it cannot eliminate the systemic racism that underlies these statutes.

Systemic racism cannot be cured by only fixing pieces of that racism. The Supreme Court has even acknowledged this.[281] In *Green v. County School Board*, the Court stated that school boards had a duty to rid the school system of racial discrimination "root and branch."[282]

275. State ex rel. Moore v. Molpus, 578 So. 2d 624, 639 (Miss. 1991); *Harness*, 47 F.4th at 309.
276. *Molpus*, 578 So. 2d at 639; *Harness* 47 F.4th at 307.
277. Rachel M. Cohen & Marcia Brown, *Congress Has the Power to Override Supreme Court Rulings. Here's How*, The Intercept (Nov. 24, 2020, 5:00 AM), https://theintercept.com/2020/11/24/congress-override-supreme-court/.
278. *Molpus*, 578 So. 2d at 639.
279. *Id.*
280. *See generally Harness*, 47 F.4th at 296.
281. *See generally* Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968).
282. *Id.* at 437–38.

It was insufficient to only address the outgrowth of racial problems, and here, allowing subsequent amendments or reenactments to cleanse discriminatory taint would only address the outgrowth or the "branch" of the problem.[283] Instead, the source of discrimination needs to be addressed, so here, that means repealing Section 241 in its entirety.

Further, the lower courts' approach to analyzing these provisions frustrates the purpose of *Arlington Heights*.[284] The test in *Arlington Heights* was developed to determine whether "invidious discriminatory purpose" was a motivating factor in enacting the provision at issue.[285] Upon finding that discrimination was the motivating factor, the Supreme Court did not indicate that there should be another determination as to whether amendments could cure the statute of its discrimination.[286]

Once discrimination was found, the statute was subject to the strict scrutiny standard of review.[287] This standard asks whether the legislature can provide a compelling interest for the statute and whether the law is narrowly tailored to that compelling interest.[288] If this standard of review cannot be satisfied, the statute is held unconstitutional, and this gives the respective legislature the opportunity to promulgate a new statute absent discrimination.[289] Subsequent amendments do not fit anywhere within this framework, and thus, lower courts should have never used them as an avenue to uphold otherwise invalid laws.

The counter to the discriminatory effect of felony disenfranchisement law might incorporate the discretionary nature of the criminal justice system.[290] This is similar to the Supreme Court's reasoning in *McCleskey v. Kemp,* where the Court upheld Georgia's death penalty.[291] In *McCleskey*, petitioner's claim, brought under the Equal Protection Clause, challenged the disproportionate imposition of capital punishment on Black and white defendants.[292] The Court stated that "[b]ecause discretion is essential to the criminal justice process, [it] would demand exceptionally clear proof before [it] would infer that the

283. *Id.*
284. *See generally* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
285. *Id.* at 265–68.
286. *Id.* at 266–68 (stating that the only relevant factors include disproportionate impact, historical background, departures from normal procedures, and legislative history).
287. Hunt v. Cromartie, 526 U.S. 541, 546 (1999).
288. Miller v. Johnson, 515 U.S. 900, 920 (1995).
289. *Id.* at 922, 927–28.
290. *See generally* McCleskey v. Kemp, 481 U.S. 279 (1987).
291. *Id.*
292. *Id.*

discretion has been abused."[293] This is because, in the Court's opinion, the multiple discretionary layers make it difficult to determine if racial animus was the motivation at each stage.[294] Because of the discretion involved in the conviction of the affected individuals, the opponents could extend this discretionary argument to felony disenfranchisement. However, this argument would be insufficient because the effect of these laws is felt independent of the discretion exercised in the criminal justice system. These effects are not only felt by the individuals who are powerless in their community, but they are also seen in the political landscape.

### C. Mississippi and Black Voters in the Twenty-first Century

It is clear that Section 241 was enacted with discriminatory intent, and it is the effects of this provision that make the intent clear.

In many respects, particularly in terms of politics, Mississippi is still considered the "old South."[295] The political landscape is dominated by white conservatives, although Mississippi has the highest number of Black eligible voters.[296] Currently, under Section 241, about one in seven otherwise eligible Black Mississippians cannot register to vote.[297] If not already bleak enough, Mississippi is also notorious for making it more complex for people to become re-enfranchised.[298]

Under this provision, Moore was prohibited from voting in the 2018 Mississippi United States Senator special elections that took place after his release.[299] Similarly, Harness and Karriem were unable to vote in the 2016 United States general elections as they were convicted of a crime under the same provision.[300]

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293. *Id.* at 297.

294. *Id.* at 313.

295. Renuka Rayasam, *The Southern State Where Black Voters are Gaining in Numbers, but not Power*, Politico (Jan. 2, 2021, 7:00 AM), https://www.politico.com/news/2021/01/02/mississippi-black-voters-452213.

296. *Id.*

297. John Frtize, *'Racist Taint.' Will the Supreme Court Review a Jim Crow-era Voting Ban Targeted at Black Mississippians?*, USA Today (Mar. 27, 2023, 12:56 PM), https://www.usatoday.com/story/news/politics/2023/03/27/supreme-court-jim-crow-mississippi-felons-voting/11509427002/.

298. *Id.*

299. Tucker, *supra* note 1; Miss. Const. art. XII, § 241.

300. Harness v. Watson, 47 F.4th at 296, 302 (5th Cir. 2022) (stating that Harness' crime of forgery and Karriem's crime of embezzlement are disenfranchising crimes); Miss. Const. art. XII, § 241.

Mississippi has the highest percentage of Black people at about 37.9 percent.[301] However, this is not reflected in its elected officials.[302] In the 2016 general elections in Mississippi, the margin of votes in the presidential race between Hillary Clinton and Donald Trump was approximately 216,000.[303] The number of individuals disenfranchised under Section 241, including Harness and Karriem, was roughly 218,000.[304] This does not imply that each disenfranchised individual would have both voted and cast their vote for Clinton, but it shows that the outcome of the race could have been closer.

Additionally, in the 2018 special elections for the United States Senate in Mississippi, there was a race between a Black Democrat, Mike Espy, and a Republican, Cindy Hyde-Smith.[305] A couple of weeks before the election, Hyde-Smith stated, "[i]f [I were invited to a public hanging, I'd be in the front row]."[306] Hyde-Smith still won the election but with a margin of only about 3,000 votes.[307] This was the election that Moore, alongside at least 218,000 others, could not participate in because of their convictions.[308] This is even more painful for Moore because his right to vote was predicated on an act he committed while he was a minor—not even old enough to vote.[309] While it is nearly impossible to state that re-enfranchising everyone affected by Section 241 would have produced a different winner, the smaller margin in this race and the Republican candidate jeopardizing her own campaign suggest this outcome would have been different.[310] This shows that Mississippi

301. Adriana Rezal, *Black Members of Congress: A History*, U.S. News (Feb. 28, 2022), https://www.usnews.com/news/best-states/articles/2022-02-28/states-with-the-most-african-american-members-of-congress#:~:text=Meanwhile%2014.2%25%20of%20the%20country's,according%20to%20the%202020%20Census.&text=The%20states%20with%20the%20highest,are%20Mississippi%2C%20Louisiana%20and%20Georgia (noting the discrepancy in representation of Black congressional members in states including Mississippi with a high percentage of Black people, but only four of its congressional representatives are Black).

302. John A. Tures, *No African American has Won Statewide Office in Mississippi in 129 Years—Here's Why*, The Conversation (June 17, 2019, 7:21 AM), https://theconversation.com/no-african-american-has-won-statewide-office-in-mississippi-in-129-years-heres-why-118319.

303. *2016 Mississippi Presidential Election Results*, Politico (Dec. 13, 2016, 1:57 PM), https://www.politico.com/2016-election/results/map/president/mississippi/.

304. One Voice, et. al., *Felony Disenfranchisement in Mississippi*, (Feb. 2018), https://www.sentencingproject.org/app/uploads/2022/08/Felony-Disenfranchisement-in-Mississippi.pdf.

305. Tucker, *supra* note 1.

306. Michael Brice-Saddler & Deanna Paul, *A Senator Refuses to Apologize for Joking About 'Public Hanging' in a State Known for Lynchings*, The Wash. Post (Nov. 12, 2018, 6:53 PM), https://www.washingtonpost.com/politics/2018/11/11/senator-mississippi-joked-about-public-hanging-her-black-opponent-called-it-reprehensible/.

307. *Mississippi Election Results 2018*, Politico, https://www.politico.com/election-results/2018/mississippi/ (last updated Sept. 9, 2023, 12:10 PM).

308. Tucker, *supra* note 1; One Voice, et. al., *supra* note 304.

309. Tucker, *supra* note 1.

310. Brice-Saddler & Paul, *supra* note 306; *Mississippi Election Results 2018*, *supra* note 307.

uses felony disenfranchisement as a political tool, and it also shows that it has been effective. However, while these observations are important, how can this situation be resolved?

## IV. Resolution

The resolution of this matter, in theory, could be simple, but given the current political climate, that may not be the case. The easiest solution would be for the Supreme Court to speak and hold what should be clear: subsequent amendments to felony disenfranchisement statutes enacted with a discriminatory purpose are unconstitutional.

The easiest avenue to deliver this message would be granting certiorari to the case of *Harness v. Watson*.[311] However, even if the Court declines to do so in this case, it could still do so in a later case with a similar provision involved.

In speaking to this matter, the Court will need to address that it was wrong to bring up the possibility that a statute enacted with discriminatory intent could be cured through later reenactments.[312]

However, while seemingly a simple answer, the current jurisprudence of this Court may not provide the appropriate guidance.[313] While the Court is best equipped to address its own precedent, the current makeup of the Court and its tendency to analyze matters by referring to this country's history and tradition may not be instructive.[314] Further, because the Court tends not to view voting rights for Black people favorably, it may decide in favor of a provision that disproportionately affects them.[315]

While all may seem bleak, there is another possible resolution to this problem, Congress. Congress has the power to enact legislation regarding voting.[316] With this power, Congress could either pass a bill eliminating felony disenfranchisement explicitly, or it could pass an amendment that would *expressly* overturn Section 2 of the Fourteenth Amendment, which would have the same effect. This would preempt all the state

311. Ashton Pittman, *Mississippi 'Purged Any Taint' From Jim Crow Law by 1968, AG Fitch Tells Supreme Court*, Miss. Free Press (Jan. 11, 2023), https://www.mississippifreepress.org/30289/mississippi-purged-any-taint-from-jim-crow-law-by-1968-ag-fitch-tells-supreme-court.

312. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

313. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022) (overturning Roe v. Wade, 410 U.S. 113 (1973), holding that abortion was not a fundamental right because "a right to abortion is not deeply rooted in the [United States'] history and traditions.").

314. *Id.* at 2246.

315. *See generally Shelby Cnty.*, 570 U.S. 529.

316. U.S. Const. amend. XV.

constitutional provisions regarding felony disenfranchisement.[317] This approach is an ambitious endeavor, however, and potential political backlash could prevent such a law from being enacted.

Another possible option would be for Congress to pass legislation that would order states that have felony disenfranchisement laws enacted prior to 1900 that have only been amended to create entirely new laws with proof that its effect would be neutral. If a state refuses, Congress, under the Spending Clause, could withhold a portion of the state's block grant until it complies.[318]

Further, while not desirable, Congress could also enact a felony disenfranchisement law that only applied to those crimes that had some connection to voting or elections. Any of the potential solutions would be better than the current felony disenfranchisement laws, and they could provide more uniformity.

## V. Conclusion

In conclusion, it is evident that the lower courts answered the question left by *Hunter* erroneously. It is also evident that amending a statute is insufficient to remove the discriminatory taint from the statute or provision involved. By permitting such provisions to stand, the discriminatory effects will continue to have a lingering effect. Further, ignoring these effects is harmful to those affected, who are currently powerless by being deprived of this fundamental right.

317. *Preemption*, Cornell L. Sch. Legal Info. Inst., https://www.law.cornell.edu/wex/preemption (last visited Sept. 17, 2023).

318. *See* U.S. Const. art. I, § 8, cl. 1; *see also* South Dakota v. Dole, 483 U.S. 203, 206–210 (1987) (providing guidance on Congress authority under the Spending Clause).