

HOWARD HUMAN & CIVIL RIGHTS LAW REVIEW

VOLUME 6

•

ISSUE 1

•

2021-2022

EDITORIAL BOARD 2021-2022

MARYBETH “ADISA” OMIDO
Editor-in-Chief

ELORM K. SALLAH
Managing Editor

TREA N. HARRIS
Executive Notes & Comments Editor

REMINGTON A. DANIEL
Executive Solicitations & Submissions Editor

MAYA LOWE
Senior Articles Editor

ANGELYN A. D.H. SELDEN
Senior Articles Editor

DEVIN X. WILLIAMS
*Senior Notes & Comments
Editor*

DAESHA S. ROBERTS
*Senior Solicitations & Submissions
Editor*

HOWARD HUMAN & CIVIL RIGHTS LAW REVIEW

VOLUME 6

•

ISSUE 1

•

2021–2022

MEMBERS 2021-2022

HELEN E. AIHEVBA

EVA BRYCE GOBOURNE

OYINADE O. ADEBAYO

TRANEKE HAMRICK

PATRICIA I. ADEKUNLE

KENYA A. HOLLAND

ETHAN K. ANDERSON

OMAR A. LEWIS*

DAMANI N. ASHTON*

CHIARA D. PHILLIPS

JOHN J. CHAPMAN III*

JORDAN SPARKS

JOHN D. FORD*

BRIDGET B. WARLEA

T'YANA "TY" GLAZE

FEVEN YOHANNES

*Senior Editors**

DARIN E.W. JOHNSON

Faculty Advisor

JASBIR "JESSE" BAWA

Faculty Advisor

TUNEEN CHISOLM

Faculty Advisor

RANEEKA CLAXTON WITTY

*Business Manager and
Director of Communications*

Business Information

SUBSCRIPTIONS: The *Howard Human & Civil Rights Law Review*, ISSN 2380-3459, is published annually each academic year. Each subscription is offered at a price of \$20. The *Law Review* is accessible through Westlaw and LexisNexis.

SUBMISSIONS: The Executive Board of the *Howard Human & Civil Rights Law Review* invites submission of articles, notes, comments, book reviews, and seminar papers from professors and attorneys in all fields. All submissions must be unpublished and between 15 and 55 (double-spaced) pages. Please e-mail your submissions, along with a current resume and cover letter, to: hcrsolicitationseditor@gmail.com

The *Law Review* assumes no responsibility for the return of any materials unless requested in writing upon submission.

Howard Human & Civil Rights Law Review
Howard University School of Law
Notre Dame Hall, Rm. 419
2900 Van Ness Street, NW
Washington, DC 20008
202-806-8134
hcrsolicitationseditor@gmail.com

HOWARD HUMAN & CIVIL RIGHTS LAW REVIEW

VOLUME 6 • ISSUE 1 • 2021–2022

TABLE OF CONTENTS

LETTER FROM THE EDITOR-IN-CHIEF *MaryBeth “Adisa” Omido* vii

ARTICLES & ESSAYS

JUDICIAL COGNITION OF GENDER TRANSITION:
ONE COURT’S ATTEMPTS AT COMBATING
MISGENDERING BY JUDGES *Marcus Alan McGhee* 1

IN THE SHADOW OF *GIDEON*: NO SIXTH
AMENDMENT RIGHT TO COUNSEL AT
PAROLE REVOCATION HEARINGS *Olinda Moyd* 31

RESPECTING THE IDENTITY AND DIGNITY
OF ALL INDIGENOUS AMERICANS *Bill Piatt* 83

AGE IS NOTHING BUT A NUMBER: RAISING THE
AGE ON THE PROHIBITION OF MANDATORY
JUVENILE LIFE WITHOUT PAROL IN
LIGHT OF *MILLER V. ALABAMA* *Hayden A. Smith* 129

CRITICAL JUSTICE: TRANSFORMING MASS
INCARCERATION, MENTAL HEALTH, AND TRAUMA *Bryonn Bain* 159

STUDENT NOTES

REIMAGINING LITERACY: THE INEXTRICABLE NEXUS
BETWEEN SUBSIDIZED SCHOOL MEALS AND
BASIC MINIMUM EDUCATION *Elorm K. Sallah* 197

BULK OF THE BLAME: USING THE LEGACY OF
LYNCHING TO PROTECT TRANSGENDER PEOPLE *Remington A. Daniel* 241

THE CRUELTY IS THE POINT: WHY AMERICA’S
PRISONS SHOULD BE ABOLISHED *Maya Lowe* 275

LETTER FROM THE EDITOR-IN-CHIEF

“I have now achieved something far beyond anything my grandparents could’ve possibly ever imagined. But no one does this on their own. The path was cleared for me so that I might rise to this occasion.”

—Ketanji Brown Jackson*

Dear Reader:

We stand in a time when the world is undergoing one of the most profound shifts ever witnessed. For a while, many held onto dreams of “normal” times, but eventually, we have collectively realized that what lies ahead of us is uncharted territory: a world where we must create a new normal. The coronavirus (COVID-19) pandemic has been a massive disrupter, and the ripple effects have impacted almost every area of our human experience. Since the racial reckoning of 2020, we continue to address the systemic inequities within Black, Indigenous, and people of color (“BIPOC”) communities that the COVID-19 pandemic has only exacerbated. We are witnessing a humanitarian crisis unfolding in Afghanistan amidst shifting governmental powers. Almost every week, we receive news of thousands of migrants who risk their lives crossing the Mediterranean Sea, searching for safety and opportunity for themselves and their loved ones. We also watch in horror as the war between Russia and Ukraine takes thousands of lives.

As we embark on a multicultural transition here in America, we witness a cultural battle unlike any we have experienced before. Our fight is over our collective narrative, the story we tell ourselves and the world about who we are and where we have been. With increasing frequency, we see censorship campaigns reach our classrooms and libraries as marginalized voices continue to grow in number in their refusal to preserve false narratives about our history.

At the *Howard Human & Civil Rights Law Review*, we recognize the immense privilege we possess to elevate marginalized narratives. We realize that many of these stories are not new. Indeed, our hierarchal societal structure ceaselessly thrust these stories from the center of human and civil rights collective discourse. Even we, as marginalized individuals within this dominant structural narrative, cannot continuously combat this abhorrent erasure. However, in every volume we publish, we strive to fulfill our mission to shape conversations and encourage reflections on the most relevant causes of injustice through the law. In this Volume, we are immensely proud to offer a collection of pieces that we believe will make each reader

* Ketanji Brown Jackson, attorney, jurist, and associate justice-designate of the Supreme Court of the United States. Jackson received United States Senate confirmation on April 7, 2022. See John Wagner & Mariana Alfaro, ‘We’ve Made It,’ *Jackson Says of Being the First Black Woman Headed to the Supreme Court*, WASH. POST, <https://www.washingtonpost.com/politics/2022/04/08/joe-biden-jackson-supreme-court> (Apr. 8, 2022).

think critically about whom we say we are as a nation and the values we uphold through our legal system.

Our volume begins with a piece by Marcus Alan McGhee, an ethics attorney that focuses on attorney and professional judicial misconduct. Titled “Judicial Cognition of Gender Transition: One Court’s Attempts at Combating Misgendering by Judges,” this piece highlights the experiences members of the transgender community, particularly transgender women of color, encounter in the courtroom as they face judicial officers unwilling to accept binding precedent that ensures transgender women may change their name and gender markers to align with their identity. The following article, titled “In the Shadow of *Gideon*: No Sixth Amendment Right to Counsel at Parole Revocation Hearings,” authored by Adjunct Professor of Law and Supervising Attorney for the Reentry Clinic at Howard University School of Law, Olinda Moyd, spotlights the glaring absence of the right to counsel at parole revocation hearings. Moyd posits that the Supreme Court of the United States must examine the critical role lawyers play at every stage of the criminal system to ensure due process protections at every step of the criminal legal process. Furthermore, Professor of Law and former Dean at St. Mary’s University School of Law, Bill Piatt, authored “Respecting the Identity and Dignity of All Indigenous Americans.” This piece explores the double-barreled discrimination of Indigenous Americans whose tribal identity remains unrecognized by the United States federal government. Following Professor Piatt’s article is one authored by Pauli Murray Prize-winner Hayden A. Smith, Managing Editor of Volume V of the *Howard Human & Civil Rights Law Review*, titled “Age is Nothing but a Number: Raising the Age on the Prohibition of Mandatory Juvenile Life Without Parole in Light of *Miller v. Alabama*.” Here, Smith advances modern science, and the rationales put forth in *Miller* provide the Supreme Court of the United States the novel opportunity to either consider raising the minimum age of mandatory life without the possibility of parole sentences (“LWOP”) to twenty-five years old, or abolish mandatory LWOP in its entirety as a violation of the Eighth Amendment. Finally, our last article, authored by Professor Byronn Bain, scholar and founding director of the University of California, Los Angeles Prison Education Program, pays homage to Lani Guinier, Professor Bain’s former teacher, mentor, and friend and the first woman of color to obtain tenure at Harvard Law School, in his piece “Critical Justice, Transforming Mass Incarceration, Mental Health, and Trauma.” This conversational piece of work showcases lessons on critical race and gender and class studies from the perspective of visionary advocates and movement leaders.

In addition to our five articles discussed above, we are delighted to publish the most student notes in a single volume in our publication’s history. Our first student note, written by Volume VI’s Managing Editor, Elorm Sallah, is titled “Reimagining Literacy: The Inextricable Nexus Between Subsidized School Meals and Basic Minimum Education.” Here, Sallah argues that, in light of the holding in the United States Court of Appeals for the Sixth Circuit, *Gary B. v. Whitmer*, and results from empirical research demonstrating the positive impact universal free lunch programs on student test scores, the Supreme Court of the United States should determine whether basic minimum education within all publicly funded schools is an implied fundamental Constitutional right. Following Sallah’s note, the “Bulk of the Blame: Using the Legacy of Lynching to Protect Transgender People,” written by

our Executive Solicitations and Submissions Editor, Remington Daniel, examines the parallels of the lynchings of Black men in the late nineteenth century and early twentieth century and the present-day proliferation of intimate partner violence against transgender women of color. Daniel's comparative scholarship postulates a blueprint to abate violence against transgender individuals by the judicial relinquishment of the "trans panic defense" and codifying a federal civil rights statute that affirms and safeguards the transgender community. Finally, our third student note, authored by Maya Lowe, Senior Articles Editor, is titled "The Cruelty Is the Point: Why America's Prisons Should Be Abolished." Here, Lowe argues that in the wake of the COVID-19 pandemic, the criminal legal system, in the interest of human rights, must consider prison abolition a practical and reasonable alternative to the cruel system we currently have. Further, Lowe contrasts the American penal system with the Finnish system to offer a rubric for how the carceral system may transition from senselessly imprisoning millions of individuals under deplorable conditions.

We extend our most earnest appreciation to the Howard University School of Law faculty and our faculty advisors for this Volume: Professor Darin Johnson, Professor Jasbir (Jesse) Bawa, Professor Tuneen Chisholm, and our alumni advisor Hayden A. Smith. We would also like to thank our Law Review Manager, Ms. RaNeeka Claxton Witty, for all she has done to ensure our publication accomplishes every goal we set. We thank the Howard University School of Law community for its continued support throughout this entire year. Of course, I must personally extend my deepest gratitude to all the *Howard Human & Civil Rights Law Review* members for their hard work and dedication. This team of brilliant students produced an applaudable volume of work and hosted many events throughout the year to engage the Howard Law student body. Chief among them was this year's C. Cyldre Ferguson Symposium, *Intersectionality in the New Age: Crafting an Anti-Discrimination Agenda*, which explored how diverse, complex, and unique identities intersect. This Symposium, the highest attended in our publication's history, exemplified how *the Howard Human & Civil Rights Law Review* continues to push Howard Law to the forefront of the discourse about human and civil rights. As the academic year closes and I reflect on everything our team accomplished, I am immensely proud and grateful to have been Editor-in-Chief and serve on the editorial board for Volume VI.

To our readers, we hope that each article published within this volume will be an arrow in your quiver as we remain on the front lines of our fight for justice. We appreciate your support as we continue to endeavor to be lawyers with a conscience.

MARYBETH "ADISA" OMIDO

Editor-in-Chief

Howard Human & Civil Rights Law Review

Judicial Cognition of Gender Transition: One Court's Attempts at Combating Misgendering by Judges

MARCUS ALAN MCGHEE

Members of the transgender community—especially those that identify as transgender women of color—encounter more incivility in one day than most will in a year's time. When they enter the court system, a beacon of integrity and impartiality, they should find refuge from disenfranchisement. Instead, many transgender individuals encounter judicial officers ensconced in their intransigence and unwilling to accept binding precedent that permits them to change their name and gender markers to align with their identity. Beyond this failure to follow the law, some jurists have even purposefully rejected a litigant's requests to be identified by their preferred pronouns. Other judges have amplified the discourteousness by deliberately misgendering litigants or referring to them as "whichever" or "it." This article posits that to curtail a court's churlish behavior, such instances should be referred to judicial misconduct commissions to investigate whether the judge violated established ethical rules, and when appropriate, enter an official misconduct finding to hold that judicial officer accountable.

**Judicial Cognition of Gender Transition:
One Court’s Attempts at Combating
Misgendering by Judges**

MARCUS ALAN MCGHEE*

TABLE OF CONTENTS

INTRODUCTION	3
I. LEGAL STATUS QUO	5
A. <i>Introduction</i>	5
B. <i>The Indiana Catalyst—In re the Matter of R.E.</i>	6
C. <i>History of the Gender Change Requirements</i>	7
1. <i>In re Petition for Change of Birth Certificate</i>	7
2. <i>In re the Marriage of Davis & Summers</i>	8
D. <i>Controlling Precedent</i>	10
1. <i>Introduction</i>	10
2. <i>In re the Name Change of A.L.</i>	11
3. <i>In re the Matter of the Name Change of M.E.B.</i>	13
4. <i>In re Matter of the Name Change of K.H.</i>	16
5. <i>Conclusion</i>	17
E. <i>The Case at Issue: In re the Matter of R.E.</i>	17
1. <i>Legal Error vs. Egregious Legal Error (Misconduct)</i>	19
2. <i>Analysis</i>	20
II. SOLUTION TO THE PROBLEM	22
A. <i>Procedural Due Process</i>	22
B. <i>Potential Rule Violations</i>	23
C. <i>National Discipline Precedent</i>	24
D. <i>Advantages of Commission Referral</i>	27
E. <i>Disadvantages of Commission Referral</i>	28
F. <i>A Missed Opportunity</i>	28
CONCLUSION	29

* Ethics attorney. L.L.M., Robert H. McKinney School of Law , Indiana University; J.D., Robert H. McKinney School of Law, Indiana University; M.P.A., Northern Kentucky University; B.A., *cum laude*, Northern Kentucky University. The opinions expressed in this article are solely mine and do not represent a statement of law or policy by any entity, its staff, agencies, or organizations.

INTRODUCTION

Throwing shade—a term originating from the 1980s Black and Latino LGBTQ+¹ ballroom culture—is generally defined as a subtle or indirect way of disrespecting or ridiculing someone verbally or nonverbally.² The most notable demonstration of the phrase comes from the drag queen Dorian Corey in the 1990 documentary *Paris is Burning*.³ In the film, Corey explained, “Shade is—I don’t tell you you’re ugly. But I don’t have to tell you, because you know you’re ugly.”⁴ For the most part, this type of commentary is entertainment. Such incivility has been slowly etch-a-sketched into our scripted television series, daytime talk shows, and almost every political debate. The populace seems to enjoy the verbal assault rifle tactics of Kerri Washington’s Olivia Pope in *Scandal*;⁵ Whoopi Goldberg and Megan McCain tearing into each other on *The View*;⁶ or the vivisection that takes place during presidential campaigns. Moreover, some patrons will even pay to have their meals served to them by licentious waiters.⁷

Unfortunately, if you take the adage that *life imitates art* at face value, you must accept that incivility is a part of the zeitgeist. Whether you identify these communications as backhanded compliments, stealth comments, attempts at humor, or just simple rudeness, most people can isolate an instance when they feel derided by another per-

1. *Glossary of Terms: LGBTQ*, GLADD, <https://www.glaad.org/reference/terms> (last visited Apr. 15, 2022) (“[The] [a]cronym [LGBTQ stands] for lesbian, gay, bisexual, transgender, and queer. The ‘Q’ generally stands for queer when LGBTQ organizations, leaders, and media use the acronym. In settings offering support for youth, it can also stand for questioning. LGBT and LGBTQ+ are also used, with the ‘+’ added in recognition of all non-straight, non-cisgender identities. Both are acceptable, as are other versions of this acronym. The term ‘gay community’ should be avoided, as it does not accurately reflect the diversity of the community. Rather, LGBTQ community or LGBTQ+ community are recommended.”) (citation omitted) (internal quotations supplied).

2. *Shade*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/shade> (last visited July 17, 2021). See *Throwing Shade*, DICTIONARY, <https://www.dictionary.com/e/slang/throwing-shade> (last visited July 17, 2021).

3. *PARIS IS BURNING* (Prestige Pictures 1990).

4. *Id.*

5. *Scandal: The Fluffer* (ABC television broadcast Apr. 3, 2014).

6. *The View* (ABC television broadcast June 17, 2021).

7. Sunghyeon Kim, *Dick’s Last Resort Restaurants: A Unconventional Theme “Bad Service” Becomes Unique Experience for Guests* (2013) (B.S. thesis, University of Central Florida) (on file with the University of Florida Libraries, University of Florida) (“Dick’s Last Resort . . . is a themed restaurant chain located in [fourteen] different states in the United States. Its theme is to deliver obnoxious, outrageous, rude, yet humorous experiences to its customers. Customers [are] usually . . . given a two-foot tall paper hat complete with a humorous slogan (e.g., ‘I stuff my bra,’ ‘will take hair donations’). All in the name of humor, employees at Dick’s make fun of guests, call them names, throw napkins at them, and sometimes even use sexual jokes.”) (citations omitted).

son. This fact is especially true if you were an “essential worker”⁸ during the pendency of the coronavirus disease (COVID-19) pandemic. No one felt the coruscating bite of the public more than those employed in the food and delivery industry during 2020.⁹ Indeed, the insolence was so great that it encouraged many to seek refuge in other employment.¹⁰ While some may hold that a scolding for inadvertently adding cheese to their hamburger is inconsequential, the question becomes whether the same tolerance is practiced for criticism occurring in our courts. If television series like *Law & Order*,¹¹ *Judge Judy*,¹² and *The People’s Court*¹³ are the only interactions a person has had with the court system, then the answer might be yes. “Many have witnessed Judge Judy telling people to shut up, calling them stupid, or, if their conduct was particularly egregious, calling them a moron.”¹⁴ Such discourse can be attributed to the beguiling nature of the adversarial process or the intoxicating highs of outmaneuvering a foe. Regardless of how adroit, such remarks take on a different tenor when delivered from the bench. This understanding is especially proper if the comments focus on an individual’s characteristics (i.e., gender, race, age, religion, sex, or sexual orientation). After all, “[a]n independent, fair, and impartial judiciary is indispensable to our system of justice.”¹⁵ Accordingly, this Article posits that while the public may allow such language for entertainment purposes, it should never be allowed while seeking judicial redress as it fails to promote the public’s confidence in the integrity and impartiality required in the judiciary. More specifically, judges who participate in such churlish behavior should be disciplined before judicial misconduct boards.

Part I of this Article opens with a discussion about how lawyers have utilized misgendering as a legal strategy to distract litigants.

8. See Jen Easterly, *Advisory Memorandum on Ensuring Essential Critical Infrastructure Worker’s Ability to Work During the COVID-19 Response*, U.S. DEPT’ OF HOMELAND SEC. 1 (Aug. 10, 2021), https://www.cisa.gov/sites/default/files/publications/essential_critical_infrastructure_workforce-guidance_v4.1_508.pdf.

9. See Julie Littman, *Why Aren’t Restaurant Workers Coming Back? Here’s What the Data Shows*, RESTAURANT DIVE (Sept. 8, 2021), <https://www.restaurantdive.com/news/why-arent-restaurant-workers-coming-back-heres-what-the-data-shows/606198>.

10. See e.g., Mary Meisenzahl, *Restaurant Workers are Quitting at Record-High Rates, and it Could Force Their Employers to Raise Wages, Experts Say*, INSIDER (June 13, 2021, 8:33 AM), <https://www.businessinsider.com/restaurant-workers-are-quitting-at-record-rates-2021-6>.

11. See *Law & Order* (NBC).

12. See *Judge Judy* (CBS Media Ventures).

13. See *The People’s Court* (Warner Bros.).

14. Marcus Alan McGhee, *Judging Judy: Revealing the Attorneys and Agencies Who Judge the Judges*, AMER. BAR ASS’N https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/niche-practice-areas/revealing-attorneys-and-agencies-who-judge-judges (last visited June 1, 2021).

15. See IND. CODE OF JUD. CONDUCT, Preamble.

Then, it shifts to postulating how judges might use misgendering to demean litigants. Next, this part reviews the controlling statutes and case law concerning name and gender marker changes within Indiana. Part I continues with a case study scrutinizing a judge's in-court demeanor during a transgender litigant's petition for a name and gender marker. The examination seeks to understand why the Indiana Court of Appeals, the state's intermediate-level appellate court, issued an order admonishing the trial court for disrespect. Finally, this part reviews the judge's failure to follow the law and maintain courtesy, and opines such behavior was not legal error but misconduct worthy of review and discipline. Part II of this Article outlines a recommendation on how to address the trial court's specific transgression. Explicitly, this section maintains that the misconduct commission's constitutional mandate to investigate and prosecute ethical misconduct make it the suitable agency to review the trial court's ethical violation. Finally, this section concludes with an assessment of the advantages and disadvantages of proceeding with an investigation and prosecution given the available and likely sanctions.

I. LEGAL STATUS QUO

A. Introduction

In their article,¹⁶ *Misgendering as Misconduct*, Chan Tov McNamarah highlights how attorneys engaging in litigation regarding the civil rights of transgender people have intentionally misgendered litigants as a strategy to intimidate and harass the transgender individuals¹⁷ in the legal system.¹⁸ They posit that the state bar associations and the Model Rules of Professional Responsibility ("MRPR") are the best mechanisms to correct this behavior.¹⁹ Likewise, this Article

16. Chan Tov McNamarah's pronouns are *they*, *them*, and *theirs*. See Chan Tov McNamarah (@chantov), TWITTER, <https://twitter.com/chantov?lang=EN> (last visited Mar. 26, 2022). See also *They*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/they> (last visited July 17, 2021).

17. See *Transgender People*, GLADD, <https://www.glaad.org/reference/transgender> (last visited Mar. 26, 2022) ("It is increasingly common for people who have a nonbinary gender identity and/or gender expression to use *they*/*them* as their pronoun. The singular *they*/*them* pronoun does not have gendered connotations.").

18. See Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISC. 40 (2020).

19. *Id.* at 44. In some jurisdictions the bar associations are charged with addressing attorney misconduct, while in other jurisdictions there are handling by a disciplinary commission or the state supreme court. See *Directory for Lawyer Disciplinary Agencies*, AMER. BAR ASS'N (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/directory_disciplinary_agencies_online.pdf.

advances that state judicial qualification commissions²⁰ and codes of judicial conduct are the appropriate tools to combat judicial misconduct surrounding purposeful misgendering of litigants.

B. The Indiana Catalyst—In re the Matter of R.E.

Indiana recently grappled with this issue of misgendering by judges in 2020 after *The Indiana Lawyer* published an article highlighting how the Indiana Court of Appeals of Indiana, the state's intermediately-level appellate court, admonished Newton Circuit Court Judge Jeryl F. Leach's disrespect toward a transgender litigant.²¹ In *Matter of R.E.*, R.E., a transgender man,²² wanted to change his name and gender marker.²³ To do so, he followed the necessary steps and filed a pro se "Verified Petition and Request" to change his name on government documents and his gender marker on his birth certificate, waive the publication requirement, and seal the court record.²⁴ R.E. also submitted the evidentiary support necessary to satisfy the requirements of good faith and without fraudulent or unlawful purpose.²⁵ As a result, this should have been a relatively routine proceeding. The Indiana Court of Appeals "made [it] clear that a transgender person may obtain a change of name on government documents and a change of the gender marker on a birth certificate based only on a showing that the person is making the request in good faith and without a fraudulent or unlawful purpose."²⁶ The court also noted that, "such petitioners are entitled to a waiver of the notice-by-publication requirement for their petitions and are likewise entitled to have their court records sealed to avoid the well-known potential for harm or harassment to which [Indiana's] transgender population has been subjected."²⁷

20. Indiana's judicial disciplinary body is called the Indiana Commission on Judicial Qualifications. Other states have similar bodies that address allegations of judicial misconduct. See *Composition of Judicial Conduct Commissions*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/_data/assets/pdf_file/0027/14877/composition.pdf (last visited Mar. 26, 2022).

21. Katie Stancombe, *Reversal: Transgender Name Change Permitted; Trial Court Admonished for Disrespect*, THE INDIANA LAWYER (Mar. 12, 2020), <https://www.theindianalawyer.com/articles/reversal-transgender-name-change-permitted-trial-court-admonished-for-disrespect>.

22. *Glossary of Terms: Transgender*, GLADD, <https://www.glaad.org/reference/trans-terms#Nonbinary%20People> (last visited Mar. 27, 2022) ("A ['transgender'] man is a] man who was assigned female at birth [and] may use the term to describe himself. He may shorten it to 'trans man.'") (internal quotations supplied).

23. *In re R.E.*, 142 N.E.3d 1045, 1045 (Ind. Ct. App. 2020).

24. *Id.* at 1046.

25. See *id.* at 1045.

26. *Id.* 1046.

27. *Id.*

However, following R.E.'s filing, the trial court "demanded that R.E. publish his petition in a local newspaper; litigate the petition in open court; and submit medical evidence to show that R.E. had actually undergone a physical sex change."²⁸ Moreover, during the proceedings, the trial court "refused to use R.E.'s preferred pronoun, not only making it a point to use the incorrect pronoun 'she' but also unacceptably referring to R.E. as 'it' and 'whichever.'"²⁹ Following R.E.'s appeal, the Indiana Court of Appeals reversed and held that "the trial court obstructed the timely disposition of R.E.'s petition and placed evidentiary burdens upon R.E. that were unjustified and contrary to law. And the court failed to treat R.E. with the respect and dignity to which R.E. is entitled."³⁰

C. History of the Gender Change Requirements

1. *In re* Petition for Change of Birth Certificate

To fully understand the gravity of Judge Leach's conduct, this Article must provide a brief history of the requirements to change one's gender within Indiana.³¹ The controlling statute simply states that the Indiana State Department of Health ("ISDH") "may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence."³² Indeed, in *In re Petition for Change of Birth Certificate*, the Indiana Court of Appeals commented that the legislature was silent on any specific requirements to change one's gender.³³ Nevertheless, the court held that since the ISDH defers to the court when seeking name changes on birth certificates,³⁴ ISDH would "defer[] to the courts by requiring a court order to establish adequate documentary evidence for an amendment of gender on a birth certificate."³⁵ Therefore, the Indiana Court of Appeals ruled that "the ultimate focus should be on whether the petition is made in good faith and not

28. *Id.* at 1054.

29. *Id.*

30. *Id.* at 1055.

31. Since the name change was not the major focus of the litigation, I will focus my attention on the gender marker change request.

32. IND. CODE § 16-37-2-10(b) (2021).

33. See *In re* Change of Birth Certificate, 22 N.E.3d 707, 710 (Ind. Ct. App. 2014) ("The [Indiana] legislature is free to craft specific [gender change] requirements.").

34. See *In re* Name Change of Resnover, 979 N.E.2d 668 (Ind. Ct. App. 2012) (addresses the need for a court-ordered name change for an individual to obtain an amendment to the name on a birth certificate).

35. *In re* Change of Birth Certificate, 22 N.E.3d 707, 708-09 (Ind. Ct. App. 2014). See also *In re* Davis, 1 N.E.3d 184 (Ind. Ct. App. 2013) (observing that trial court granted petition to change gender on birth certificate).

for a fraudulent or unlawful purpose.”³⁶ The advantage of such a malleable standard is that trial courts can exercise significant discretion in addressing issues that are likely to come before them for persons requesting a modification to their founding document. Conversely, when such legislative guidance is lacking, disputes arise as to good faith and a fraudulent or unlawful purpose.

2. *In re the Marriage of Davis & Summers*

In pre-*Obergefell*³⁷ times, one trial court ruled that a marriage between a man and woman was void when the husband legally changed his name and gender to female after the parties were married.³⁸ This proposition could fit under the category of fraudulent or improper purpose for changing one’s gender, so it is worth exploring.

In *In re Marriage of Davis & Summers*, the parties solemnized their marriage in Brown County, Indiana, on October 30, 1999, as David Paul Summers and Angela Summers.³⁹ In 2005, after the couple had a daughter, David Paul Summers transitioned⁴⁰ and began living authentically as Melanie Davis, a transgender woman,⁴¹ and Davis legally changed her name and gender marker on all government documents.⁴² In 2008, the couple separated, and in 2012, Davis filed for divorce.⁴³ In late 2012, the trial court approved a custody arrangement, giving Davis physical custody and joint legal custody.⁴⁴ Then, the trial court issued an order—without a hearing or briefing—holding that the marriage between Davis and Summers was void because it violated state law, which prohibited marriage between same-sex

36. *In re Change of Birth Certificate*, 22 N.E.3d 707, 710 (Ind. Ct. App. 2014). *See also id.* n.4 (“The Social Security Administration (the ‘SSA’) recently began a new policy for individuals seeking to change their gender designation in their Social Security records. Previously, the SSA required documentation of sex reassignment surgery. This is no longer required. Under the new policy, individuals can submit, among other things, an amended birth certificate with the new sex, a court order directing legal recognition of the change of sex, or a physician’s verified statement that “the individual has had appropriate clinical treatment for gender transition.”) (citations omitted) (internal quotations supplied).

37. *See Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the fundamental right to marry is guaranteed by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).

38. *In re Marriage of Davis & Summers*, 1 N.E.3d 184, 185 (Ind. Ct. App. 2013).

39. *Id.* at 185.

40. *Glossary of Terms: Transgender*, *supra* note 23 (“Transition is the process a person undertakes to bring their gender expression and/or their body into alignment with their gender identity.”).

41. *Id.* (“A [‘transgender woman’ is a] woman who was assigned male at birth [and] may use this term to describe herself. She may shorten it to ‘trans woman.’”) (internal quotation marks supplied).’

42. *In re Marriage of Davis & Summers*, 1 N.E.3d at 186.

43. *Id.*

44. *Id.*

couples.⁴⁵ The trial court reasoned that when the court amended Davis' gender, the marriage was between two women and was void under state law.⁴⁶

If Davis, who initiated the divorce proceedings, was motivated to change genders for a fraudulent or unlawful purpose, doing so after starting and creating a life with someone might be the perfect time to do so. First, if Davis had a void marriage, she might be able to stave off child support and child custody obligations because the child would have been born out of wedlock, and paternity would need to be established.⁴⁷ Second, the property division would likely be easier since there would be no marital property and only individual property.⁴⁸ Finally, the parties would legally be able to say they were never married before. This remedy may help remove the stigma associated with divorce and avoid any religious repercussions.

Nevertheless, if Davis wanted to remain in her child's life, she would have to go through the extra steps of establishing paternity. Additionally, she would likely be unable to collect alimony or spousal maintenance.⁴⁹ Finally, all the tax benefits once provided to the marriage would no longer be applicable.

In *Davis*, the Indiana Court of Appeals reversed, holding that, "[t]he trial court's reasoning in the present case has the effect of [improperly] adding the type of marriage at issue, a marriage between a male and female solemnized pursuant to Indiana law, to that Section 1 marriages that are void *ab initio*, along with polygamous, polyandrous, cousins' and incompetents' marriages."⁵⁰ The court held that the statute outlined particular instances in which a marriage was void, noting that this case was not considered and to add it would be an action, "beyond the purview of [their] constitutional authority to interpret

45. See IND. CODE § 31-11-1-1 (2022), (stating "[o]nly a male may marry a female" and "a marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it was solemnized"), held unconstitutional by *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

46. *In re Marriage of Davis & Summers*, 1 N.E.3d at 186.

47. See *id.* at 189 n.3 ("It is important to emphasize that there is nothing in the record to suggest that Davis actually wishes to abandon her child. To the contrary, Davis claims that the trial court's ruling could have the undesired effect of terminating her parental rights. And the ruling could indeed have that effect."). Moreover, Indiana "favors the public policy of establishing paternity . . . of a child born out of wedlock." IND. CODE § 31-14-1-1.

48. *O'Connell v. O'Connell*, 889 N.E.2d 1, 10-11 (Ind. Ct. App. 2008) ("The division of marital property in Indiana is a two-step process. First, the trial court determines what property must be included in the marital estate. Second, the trial court must then divide the marital property under the statutory presumption that an equal division of marital property is just and reasonable. The trial court, however, may deviate from this presumption.") (internal citations omitted).

49. See IND. CODE § 31-11-10 (2014).

50. *In re Marriage of Davis & Summers*, 1 N.E.3d 184, 189 (Ind. Ct. App. 2013).

statutes.”⁵¹ Moreover, the court found that such an action would have negative implications on the child, such as leaving, “the parties’ child without the protection afforded by Indiana’s dissolution statutes with regard to parenting time and child support” an action, they assert, was not the legislature’s intent.⁵² Most importantly, the court explicitly acknowledged that “[t]he question of whether the trial court properly amended Davis’s birth certificate to show a change of gender [was] not before [them].”⁵³ Nevertheless, this case suggests a person could not legally enter into a pre-*Obergefell*⁵⁴ marriage (a marriage between a man and a woman) and then change his or her gender to invalidate that marriage.

D. Controlling Precedent

1. Introduction

The Indiana courts have unequivocally determined that there are no specific statutory requirements to change one’s gender, and a person seeking to do so need only prove that their request is in good faith and not for a fraudulent or unlawful purpose.⁵⁵ The case law also demonstrates that when the legislature is silent on procedures for effectuating a gender marker change, trial courts typically rely on the procedures found in name change proceedings.⁵⁶ To proceed with a name change, one must publish their desire to change their name in a newspaper for three weeks in the county where their petition was filed.⁵⁷ There is one exception to the publication requirement, found in Rule 1 of the Indiana Rules on Access to Court Records, which “governs public access to, and confidentiality of[] [c]ourt [r]ecords.”⁵⁸ The exception states documents that might otherwise be available to the public may be shielded if the moving party demonstrates that “[a]ccess or dissemination of the Court Record will create a significant risk of substantial harm to the requestor.”⁵⁹ Proponents of access to court records assert that unrestricted access is the only way to guarantee transparency and accountability in government.⁶⁰ Opponents of such a blanket rule argue that there are some instances in which “pub-

51. *Id.*

52. *Id.*

53. *Id.*

54. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

55. *In re Change of Birth Certificate*, 22 N.E.3d 707, 710 (Ind. Ct. App. 2014).

56. *Id.*

57. IND. CODE § 34-28-2-3(a).

58. IND. R. ACCESS CT. REC. R. 1.

59. IND. R. ACCESS CT. REC. R. 6(A)(2).

60. IND. R. ACCESS CT. REC. R. 1.

lic policy interests [] are not always fully compatible with unrestricted access.”⁶¹ As a result, Rule 1 “attempts to balance competing interests and recognizes that unrestricted access to certain information in Court Records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses.”⁶²

2. *In re the Name Change of A.L.*

The first case to apply this legal framework was a consolidated appeal of two transgender men (A.L. and L.S.), who filed petitions to change their legal gender marker, and one of the men sought to change his name and waive the publication requirement.⁶³

A.L. filed a pro se petition for a name change, published his intent to change his name in a newspaper and, the trial court granted the petition.⁶⁴ Simultaneously, A.L. requested to have his gender marker changed on his birth certificate.⁶⁵ The trial court directed A.L. to publish his intent to change his gender marker with a newspaper and set the matter for another hearing.⁶⁶ A.L. subsequently obtained counsel who “filed a motion to correct [the] error, asserting that the trial court’s requirement that A.L. publish [a] notice of his intent to change his gender marker was contrary to Indiana law.”⁶⁷ Although the trial court found A.L. requested the gender change in good faith and without any fraudulent intent, the court denied the petition because A.L. had not published his intent to change his gender marker with a newspaper.⁶⁸ A.L. again challenged the court’s finding, to no avail, and the court ordered A.L. to provide proof of publication before it would issue an order changing his gender marker.⁶⁹

L.S. filed a petition for change of name and gender, a request for waiver of publication, a request for sealing of the record, a notice of exclusion of confidential information, and a memorandum supporting these requests.⁷⁰ The trial court held a hearing and denied L.S.’s motion to proceed without publication and ordered L.S. to publish his intent to change his name and gender marker in a newspaper.⁷¹ Regarding L.S.’s request to waive publication of his intent to change his

61. IND. R. ACCESS CT. REC. R. 1 cmt.

62. *Id.*

63. *In re A.L.*, 81 N.E.3d 283, 284-85 (Ind. Ct. App. 2017).

64. *Id.* at 285.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 286.

70. *Id.*

71. *Id.*

gender marker, the trial court reaffirmed its stance in A.L.’s case and reiterated that L.S. was acting in good faith without an intent to defraud.⁷² In his name change argument, L.S. specifically linked his name change request to the fact that he was transgender.⁷³ L.S. also provided evidence of the potential violence he could face if it were to be public knowledge that he was transgender.⁷⁴

First, he testified about how an employer terminated his internship after finding out he was a transgender man.⁷⁵ Then, L.S. recounted a time when he witnessed a close friend being physically assaulted by a man once he found out the woman he was with was a transgender woman.⁷⁶ Next, he detailed the research he had done in Indiana and nationally that discussed how LGBTQ+ people were more likely to experience hate crimes and how trans people were disproportionately subjected to violence and homicide.⁷⁷ Specifically, he highlighted an Indiana survey that revealed that 74% of respondents experienced harassment or mistreatment on the job; 73% reported harassment in their elementary, middle, and high schools; and 27% reported physical assault.⁷⁸ Moreover, he cited to statistics that proved that in 2016, twenty-six transgender people were killed in the United States because they were trans.⁷⁹ Finally, with that data, L.S. confided in the court that he feared he would face the same discrimination, harassment, and violence if the public were to be privy to his petition to change his name and gender marker.⁸⁰

While the trial court acknowledged the harm to the transgender community, it noted that L.S. did not establish that he had been subject to “specific threats or violence; that publishing his petition would subject him to an increased risk of violence or harassment that exceeds what he already faces as a member of the transgender community; or that the public filing of such court cases has resulted in targeted violence against transgender individuals.”⁸¹ The Court of Appeals reversed the trial court, holding instead that:

[A]s an out member of the transgender community, he would face a significantly higher risk of violence, harassment, and homicide. He has personally witnessed a transgender friend being violently as-

72. *Id.*

73. *Id.*

74. *Id.* at 290.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

saulted because of her gender identity. He has personally experienced discrimination in the workplace after a discrepancy between the way he looked and the way he was identified by Social Security outed him as a transgender individual. Publication of his birth name and [his] new name would enable members of the general public to seek him out, placing him at a significant risk of harm. And in today's day and age, information that is published in a newspaper is likely to be published on the Internet, where it will remain in perpetuity, leaving L.S. at risk for the rest of his life.⁸²

With this reasoning, the Court set two precedents. First, transgender individuals are entitled to change their gender markers without first publishing notice of their intent to change their gender markers.⁸³ Second, court records should be sealed when the transgender litigant adequately demonstrates that the publication requirement creates a significant risk of substantial harm—even if the harm is not specific—by demonstrating the potential harm to the trans community.⁸⁴

3. *In re the Matter of the Name Change of M.E.B.*

Similarly, M.E.B., a transgender woman, sought to change her name and gender marker.⁸⁵ In the process, she filed a request to waive publication and seal the record.⁸⁶ To bolster her argument, M.E.B. testified that she was “aware of the high rates of violence, discrimination, and invasion of privacy against transgender people in Indiana and nationwide.”⁸⁷ She explicitly indicated that if the public knew she was transgender, she would be subjected to that same violence, discrimination, and invasion of privacy.⁸⁸

She also included data about the high rates of violence, discrimination, invasion of privacy, and harassment nationwide and within Indiana.⁸⁹ Most importantly, she noted she feared for her well-being “because of [her] personal experience with violence and discrimination in [her] community.” She recounted a story about a “man in Orange County who ha[d] outspoken anti-trans views and . . . said that if he [found] out about a trans person, he w[ould] kill them.”⁹⁰ The trial court denied M.E.B.’s motion and, in doing so, said,

82. *Id.* at 290–91.

83. *See id.* at 291.

84. *See id.*

85. *In re M.E.B.*, 126 N.E.3d 932, 933 (Ind. Ct. App. 2019).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 933–34.

90. *Id.* at 934.

[M.E.B.] testified that he/she [sic] suffers from “gender identity disorder”. [M.E.B.] stated his/her [sic] name and gender marker are not correct. [M.E.B.] “perceives” himself/herself [sic] as a female however he/she [sic] was “assigned male hardware[.]” This has created problems with how he/she [sic] perceives himself/herself [sic]. [M.E.B.] came to [c]ourt wearing women’s clothing and hairstyle. [M.E.B.] had makeup on and spoke in a feminine voice. He [sic] requested that [c]ourt refer to her as [M.E.B.]⁹¹

Additionally, “the trial court found that M.E.B. did not provide sufficient evidence to support her claim that maintaining public access to her case records (including the requirement of notice publication) would create a significant risk of substantial harm to her.”⁹²

In a scathing rebuke, the Court of Appeals reversed, holding that they had already concluded in *A.L.* that it was not a requirement for a person requesting a gender marker change to seek publication or prove that they experienced violence to qualify for the exemption under the rules for access to court records.⁹³ Specifically, the court held that the exemption to the publication requirement “is proactive; it seeks to *prevent* harm.”⁹⁴ Moreover, to force M.E.B. to wait until they have already experienced that harm would vitiate the purpose of the rule.⁹⁵ The court highlighted that the trial court should spent less time on what M.E.B did not provide and instead focus on what they did provide.⁹⁶

Specifically, the Court believed the trial court should have spent more time focusing on the surveys of transgender people in Indiana provided by M.E.B. which found that in Indiana: 73% of respondents reported “harassment in their K-12 school,” 74% reported harassment or mistreatment on the job; and 27% reported being physically assaulted because of their trans identity.⁹⁷ The court thought it was important to heed M.E.B.’s testimony that between 2013 and 2015, hate crimes against transgender people increased 239%, with “LGBT people more likely than any other minority group to experience hate crimes in the United States.”⁹⁸ The Court of Appeals wanted the focus to be on the fact that M.E.B. knew that in 2016 an Indiana trans-

91. *Id.* (footnote omitted).

92. *Id.* at 935–36.

93. *Id.* at 936.

94. *Id.* (emphasis supplied).

95. *Id.*

96. *Id.*

97. *Id.* at 936–37 (internal citations omitted).

98. *Id.* at 936 (citing Haeyoun Park & Iaryna Mykhyalysyn, *L.G.B.T. People are More Likely to Be Targets of Hate Crimes than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html>).

gender woman was shot in the face while her attacker yelled anti-transgender sentiments.⁹⁹ Finally, the Court held the trial court should have been more mindful of M.E.B.'s assertion that the systemic violence transgender people experience neither begins nor ends with hate crimes, physical assault, or homicide.¹⁰⁰ Instead, these attacks extend to other parts of their lives like family relations, education, employment, housing, public accommodations, obtaining accurate identification documents, and accessing adequate and appropriate medical treatment.¹⁰¹

The Court of Appeals also took issue with some of the trial court's statements. First, they noted that:

Throughout its order, the trial court fails or refuses to use M.[E.]B.'s preferred pronoun. The order is also permeated with derision for M.[E.]B. We would hope that the trial courts of this state would show far greater respect (as well as objectivity and impartiality) to all litigants appearing before them.¹⁰²

To highlight their disdain for the trial court's intransigence, the Indiana Court of Appeals placed the editorial "sic" behind each misuse of M.E.B.'s preferred pronouns.¹⁰³ In their concluding statement, the Court criticized the trial court's reasoning that M.E.B. would not face the harm of being outed as a transgender person because, "[t]he Petitioners [sic] actions, dress, and demeanor profess to all that he/she [sic] is trans-gender [sic]. It is not a secret or private diagnosis. It is readily apparent and obvious to the public."¹⁰⁴ The Court of Appeals determined that the trial court's subjective assessment was not an element of the Access to Court Records Rule 9 petition, nor should it be.¹⁰⁵ They ruled that "[a]pppearance is in the eye of the beholder, and

99. *In re M.E.B.*, 126 N.E.3d at 937.

100. *Id.* at 936.

101. *Id.* at 936-37.

102. *Id.* at 934 n.1.

103. *Sic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sic> (last visited Mar. 26, 2022) ("The adverb *sic*, usually enclosed in brackets, is a word editors use in the reproduction of someone else's speech or writing to indicate that an unexpected form exactly reproduces the original and is not a copier's mistake. *Sic* comes from Latin, in which it means "so" or "thus." Though it's a useful tool, some usage commentators feel it is bad manners to use a *sic* to needlessly call attention to someone's error or to deride the language of a less-educated person.").

104. *In re Matter of M.E.B.*, 126 N.E.3d at 935.

105. *Id.* at 938. Indiana Access to Court Records Rule 9(G) was repealed and replaced by Rule 5. *See* IND. ACCESS CT. REC. R. 5. cmt. ("A court has only two ways to exclude otherwise accessible records from Public Access: sealing the records pursuant to Indiana Access to Public Records Act; or entering an Order Excluding Court Records from Public Access pursuant to the specific requirements in Rule 6.".) *See also* IND. ACCESS CT. REC. R. 6(A)(2) ("In extraordinary circumstances, a [c]ourt [r]ecord that otherwise would be publicly accessible may be excluded from [p]ublic [a]ccess by a [c]ourt having jurisdiction over the record. A verified written request to prohibit [p]ublic [a]ccess to a [c]ourt [r]ecord may be made by any person affected by the

regardless of the trial court's own opinions about how men and women 'should' look, M.[E.]B. has the right to appear as she desires while maintaining public confidentiality about her gender identity."¹⁰⁶

4. *In re Matter of the Name Change of K.H.*

The last case that bookends the gender marker precedent comes from K.H.—a transgender woman—who sought to change her name, her gender marker and requested to waive publication and seal the court record.¹⁰⁷ Following her filing, the trial court temporarily sealed the record and set the matter for a hearing.¹⁰⁸ The court also ordered K.H. to publish notice of her name change, which did not have to include her name but had to include a note that "[t]he Petitioner desires to change the Petitioner's own name from a name commonly used by males to a name more commonly used by females and to include the cause number and date and time of the hearing so that objectors could be present."¹⁰⁹ Then the trial court, "ordered her to give notice of the hearing to the Indiana Attorney General."¹¹⁰

K.H. asked the trial court to reconsider its order, but the court denied the request.¹¹¹ The trial court ruled that the public should be given a general idea as to why the petitioner is seeking to exclude the records from public access and that the Attorney General should be able to determine whether to ask to intervene.¹¹² Unrelentingly, K.H. filed a supplemental request stating that the court's order requiring publication not only put her life at risk but also endangered the lives of the family that supported her.¹¹³ K.H. argued that publishing notice and alerting the Indiana Attorney General would serve as an invitation to the public to offer their opposition on how she identifies.¹¹⁴ While K.H. fervently held that the court is entitled to a substantive hearing on the matter, she believes the public has earned no such deference, having forfeited the lectern through discrimination and violence.¹¹⁵

release of the [c]ourt [r]ecord. The request shall demonstrate that . . . [a]ccess or dissemination of the [c]ourt [r]ecord will create a significant risk of substantial harm to the requester.").

106. *In re M.E.B.*, 126 N.E.3d at 938.

107. *In re K.H.*, 127 N.E.3d 257, 258-59 (Ind. Ct. App. 2019).

108. *Id.* at 259.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.* 262.

In its opinion reversing the trial court, the Indiana Court of Appeals held that K.H. “sufficiently establish[ed] that immediate and irreparable injury, loss, or damage [would] result to K.H. if she [was] forced to provide the notice demanded by the trial court.”¹¹⁶ Echoingly, the court invoked *A.L.* and noted that the statistics are present both in Indiana and nationwide to sufficiently establish “the risk of harassment, violence, and homicide to the transgender population.”¹¹⁷

5. Conclusion

With *A.L.*, *M.E.B.*, and *K.H.*, the Indiana Court of Appeals outlined its standard for gender marker change petitions and requests to seal court records. Additionally, the court articulated that the rule permitting sealing of the record is preventative and that the statistical data regarding the harm to the transgender community is sufficient to warrant the safeguard. Even beyond the case law, there is other evidence to support the conclusion that the trans community is under siege.¹¹⁸ There is the July 10, 2016, shooting of Crystal Raquel Cash in Evansville, Indiana.¹¹⁹ Moreover, there is the October 12, 2020, deadly shooting of Sara Blackwood while she was walking around her Indiana neighborhood.¹²⁰ Further, the Human Rights Campaign reported that “2021 . . . s[aw] at least 30 transgender or gender non-conforming people fatally shot or killed by other violent means.”¹²¹

E. The Case at Issue: In re the Matter of R.E.

With the Indiana Lawyer article, the question becomes whether Newton Circuit Court judge, Judge Jeryl F. Leach, failed to comply with clear precedent. From the record, we know that the trial court

116. *Id.*

117. *Id.* at 263.

118. See Kristin Wright & Andrea Swalec, *Transgender Woman, Deeniquia Dodds, Dies After Being Shot in D.C.*, NBC WASH. (July 16, 2016, 10:42 PM), <https://www.nbcwashington.com/news/local/transgender-woman-shot-in-northeast-dc-dies/59622/>; see also Hristina Byrnes et al., *Supreme Court Decision Aside, Some States are Better—And Some are Worse—For LGBTQ Community*, USA TODAY (June 19, 2020, 7:00 AM), <https://www.usatoday.com/story/money/2020/06/19/the-best-and-worst-states-for-lgbtq-people/111968524>.

119. Richard Gootee, *Evansville Shooting Suspect Identified with Alleged Hate Group*, COURIER & PRESS (July 12, 2016), <https://archive.courierpress.com/news/crime/evansville-shooting-suspect-identifies-with-alleged-hate-group-376f773c-362f-68d7-e053-0100007fe86a-386475291.html>.

120. Katiera Winfrey, *Transgender Community Mourns Death of Woman Shot Walking Home from Work*, WISHTV, <https://www.wishtv.com/news/multicultural-news/transgender-community-mourns-death-of-woman-shot-walking-home-from-work> (last updated Oct. 19, 2020, 6:09 PM).

121. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> (last visited July 20, 2021).

“demanded that R.E. publish his petition in a local newspaper; litigate the petition in open court; and submit medical evidence to show that R.E. had actually undergone a physical sex change.”¹²² Moreover, during the proceedings, the trial court “refused to use R.E.’s preferred pronoun[s], not only making it a point to use the incorrect pronoun ‘she,’ but also unacceptably referring to R.E. as ‘it’ and ‘whichever.’”¹²³ During a hearing on the matter, R.E. testified that he had been transitioning for over two years, but that he had presented as male for at least three years.¹²⁴ Nevertheless, R.E. requested to waive publication because his unique name would make him easily identifiable and a direct target of harassment and discrimination.¹²⁵ He reasoned it would allow others to find out where he worked and that put him in fear for his life.¹²⁶

During the hearing, the court inquired as to whether R.E. had experienced any violence directly.¹²⁷ R.E. responded in the negative but attempted to submit information about the harm faced by transgender individuals generally.¹²⁸ The trial court rejected R.E.’s submission and ordered him to publish notice of his petition.¹²⁹ At a subsequent hearing, the trial court revealed that R.E.’s medical doctor attempted to send medical records directly to the court, but the judge rejected those as well.¹³⁰ Persistent in his objective, R.E. filed a verified petition and included the medical information from his doctor, which stated, “R.E. ‘has had the appropriate clinical treatment for gender transition to the new gender, male,’ and the physician’s affirmation to the Indiana Bureau of Motor Vehicles of R.E.’s gender change.”¹³¹ The judge rejected the offering, asserting a failure to comply with the Indiana Rules of Evidence.¹³² Ultimately, the judge inquired how the court could determine whether R.E. requested to change his gender in good faith and without fraudulent purpose, unless there was more extraordinary proof, such as actual violence against him or proof of a “gender reassignment surgery.”¹³³

122. *In re R.E.*, 142 N.E.3d 1045,1046 (Ind. Ct. App. 2020).

123. *Id.* at 1054.

124. *Id.* at 1047.

125. *Id.*

126. *Id.*

127. *See id.* at 1047-48.

128. *Id.* at 1047.

129. *Id.* at 1048.

130. *Id.*

131. *Id.*

132. *Id.* *See* IND. R. EVID. 702, 705 (relating to expert testimony). *See also id.* 803 (relating to hearsay).

133. *In re R.E.*, 142 N.E.3d at 1052.

In a searing retort, the Indiana Court of Appeals ruled, “the trial court made the same errors that we reversed in *In re A.L.* and *In re M.E.B.* when the court demanded that R.E. present some evidence of actual or imminent harm from the publication of his petition and the open court proceedings.”¹³⁴ The court had previously outlined that the statistical data regarding harm to the transgender community was sufficient indicia of reliability.¹³⁵ In its conclusion, the court also noted that the trial court made improper comparisons about R.E.’s appearance and failed to use his preferred pronouns.¹³⁶ For example, during one hearing, the trial court asked R.E. what evidence he had to support that he was, in fact, male beyond his mere assertion.¹³⁷ R.E.’s counsel held stern that such an inquiry was improper and that the statutory requirements had been met. R.E.’s counsel responded to the trial court’s concern by articulating that R.E. identifies as male, had been transitioning for some time, was taking testosterone, and appeared before the court with a beard and a deep voice.¹³⁸ In a response seemingly void of tone, the trial court responded by asserting that, “I [do not] mean this insensitively, [I have] got an aunt that has a significant amount of facial hair too, that [does not] make her a male.”¹³⁹ The Indiana Court of Appeals found the trial court’s statements dripped with derision and were beneath the dignity of an Indiana judicial officer.¹⁴⁰

1. Legal Error vs. Egregious Legal Error (Misconduct)

Five factors are typically considered in determining whether Judge Leach’s conduct was a legal error (something to be reviewed by an appellate court) or an egregious legal error (something to be reviewed by a misconduct commission).¹⁴¹ First, whether the issue demonstrates a pattern of practice or is an isolated incident must be determined.¹⁴² A pattern of practice can suggest the judge has not maintained a professional competence in the law and may not be fit for office.¹⁴³ Conversely, an isolated incident can suggest an issue that

134. *Id.* at 1054.

135. *Id.*

136. *Id.*

137. *See id.* at 1049-53.

138. *See id.* at 1049.

139. *Id.*

140. *See id.* at 1054.

141. *See* Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOUSTON L. REV. 1254 (2004).

142. *See id.* at 1265.

143. *See id.* at 1278.

is unlikely to reoccur.¹⁴⁴ Second, is to determine whether the infraction is a harmless error or a serious error.¹⁴⁵ A serious error can constitute something akin to violating a fundamental right (*i.e.*, right to counsel, lack of substantive due process), while a harmless error can be a skipped procedural step that had no negative impact.¹⁴⁶ Third, is to determine whether the judicial officer intentionally disregarded the law or whether the judge misread it.¹⁴⁷ Purposefully disregarding binding precedent can suggest an inability to comply with the law, while a misreading of the law, or a failure to stay abreast of recent decisions, may be due to a lack of diligence.¹⁴⁸ The critical distinction for the third prong is intent. Fourth, whether the legal error at issue was, a discretionary ruling or a statutory ruling is considered.¹⁴⁹ A discretionary ruling includes matters like rulings on objections, in which judges are given greater leeway in how they respond.¹⁵⁰ Conversely, if the legal error is based on a statute, failing to comply with unambiguous statutory language may question the judge's competency or impartiality.¹⁵¹ The fifth and final factor examines whether the judge committed the legal error in good or bad faith.¹⁵²

2. Analysis

In reviewing the first factor, Judge Leach's conduct does not appear to demonstrate a pattern of practice. If the Indiana Court of Appeals' decisions have revealed anything, these matters are to be sealed from public inspection. Therefore, while the records (both trial court and appellate) suggest that no other cases are available, only those with access to all cases can verify this assumption. A review of the second factor leans toward the conclusion that this error was a serious error. Beyond the fact that the precedent was unambiguous in its charge, the trial court in the *Matter of R.E.* required publication even after R.E. testified that he was fearful for his safety.¹⁵³ Given that the publication was an appellate procedure, there is an unknown likelihood of getting follow-up information on what harm, if any, R.E. suffered while his petition was publicly available. Nevertheless, the

144. *See id.* at 1263.

145. *See id.* at 1270.

146. *See id.*

147. *See id.* at 1250.

148. *See id.* at 1277.

149. *See id.* at 1252-53.

150. *See id.* at 1256.

151. *See id.* at 1239.

152. *See id.* at 1265.

153. *In re R.E.*, 142 N.E.3d 1045, 1046-47 (Ind. Ct. App. 2020).

record does reflect that the trial court unnecessarily placed R.E. in harm's way.

The third factor is slightly cumbersome. To determine whether Judge Leach intentionally disregarded the law or simply misread it, a review of the publication dates of the cases is essential. The underlying action within *In re Matter of R.E.*, filed on February 4, 2019, and finalized in October 2019, was decided by the appellate court on March 12, 2020.¹⁵⁴ However, the Indiana Court of Appeals decided *In re Petition for Change of Birth Certificate*¹⁵⁵ on December 4, 2014; *In re the Name Change of A.L.*¹⁵⁶ on August 10, 2017; and *In re the Matter of the Name Change of K.H.*,¹⁵⁷ and *In re the Matter of the Name Change of M.E.B.*¹⁵⁸ on June 21, 2019. Therefore, during R.E.'s proceedings, two seminal opinions were handed down by the Indiana Court of Appeals. Given that citizens cannot claim ignorance of the law as an excuse, it would likewise be inappropriate to permit a judicial officer to claim such an exception, especially considering their responsibility under the Code of Judicial Conduct to comply with the law¹⁵⁹ and remain competent of the law.¹⁶⁰

The fourth factor reveals that the trial court's decision was a statutory ruling. Therefore, a violation of an unambiguous statute calls into question a judge's ability to comply with the law. The final factor is determining whether this legal error was made in good or bad faith. When aggregated, Judge Leach did not comply with clear precedent, referred to a litigant as "whichever" and "it," and failed to use the litigants' preferred pronouns.¹⁶¹ Those three facts move the pendulum toward bad faith. However, the fifth factor could be challenged after obtaining the perspective of the judicial officer, hearing the court audio, interviewing the litigant and their counsel, and reviewing the entire case pleadings and hearings. While the rules contained in the Code of Judicial Conduct are primarily strict liability rules (without an intent requirement), it would nevertheless be helpful to understand Judge Leach's perspective.¹⁶²

154. *Id.* at 1046, 1049.

155. See 22 N.E.3d 707 (Ind. Ct. App. 2014).

156. See 81 N.E.3d 283 (Ind. Ct. App. 2017).

157. See 127 N.E.3d 257 (Ind. Ct. App. 2019).

158. See 126 N.E.3d 932 (Ind. Ct. App. 2019).

159. See IND. CODE OF JUD. CONDUCT R. 1.1 (IND. SUPR. CT. 2020).

160. See *id.* Canon 2, r. 2.5(A).

161. See *In re R.E.*, 142 N.E.3d 1045, 1050 (Ind. Ct. App. 2020).

162. Compare IND. CODE OF JUD. CONDUCT Canon 1, r. 1 (noting that "[a] judge shall comply" with the law and the Indiana Code of Judicial Conduct) with IND. CODE OF JUD. CONDUCT Canon 3 r. 3.5 (noting "[a] judge shall not intentionally disclose or use" non-public information acquired in the judge's "capacity for any purpose related to the judge's judicial duties"). Note that Rule 3.5 contains the word "intentionally," meaning the Indiana Supreme Court re-

II. SOLUTION TO THE PROBLEM

One way to determine whether Judge Leach violated ethical standards by not following the precedent and not referring to litigants by their preferred pronouns is to refer the case to the judicial misconduct board for review. This recommendation may seem draconian, but the referral seems just and proper when held under the light of former Chief Justice of the Indiana Supreme Court Randall T. Shepard's statements. In his foreword address in a judicial ethics textbook, Chief Justice Shepard insisted that:

The capacity of courts to play their larger mediating role rests on the credibility as places where the decision-makers possess competence, integrity, and impartiality, both actual and perceived. It is this fact that leads us sometimes to say that "courts have no power, only authority," by which is meant that we are a branch possessing neither the purse nor the army, but rather the persuasive force that comes from integrity, analysis, and explanation.¹⁶³

The Indiana Commission on Judicial Qualifications ("Commission") is the constitutional body charged with investigating complaints of ethical misconduct against all judicial officers in Indiana.¹⁶⁴ For guidance, the Commission has the Code of Judicial Conduct. While not providing an exhaustive list of acceptable behavior,¹⁶⁵ the Code "provide[s] guidance and assist[s] judges in maintaining the highest standards of judicial and personal conduct, and . . . provide[s] a basis for regulating their conduct through disciplinary agencies."¹⁶⁶

A. *Procedural Due Process*

Rule 25 of the Indiana Rules for Admission and Discipline of Attorneys is the mechanism to ensure that judicial officers are treated according to constitutional provisions.¹⁶⁷ This rule provides the procedural and substantive due process guideposts for the Commission's review process.¹⁶⁸ For example, Rule 25(VIII)(E)(4) states that:

The Commission shall have such jurisdiction and powers as are necessary to conduct the proper and speedy disposition of any investigation, including the power to compel the attendance of witnesses,

quires a *mens rea* component when determining whether a judge discloses of non-public information acquired in the judge's official capacity related to judicial duties.

163. See CHARLES GARDNER GEYH ET AL., *JUDICIAL CONDUCT AND ETHICS* 6-8 (Matthew Bender, 6th ed. 2020).

164. See IND. CONST. art. VII, § 9.

165. See IND. CODE OF JUD. CONDUCT R., Preamble, cl. 3 (IND. SUPR. CT. 2020),.

166. *Id.*

167. IND. R. FOR ADMISSION TO THE BAR & THE DISCIPLINE OF ATT'YS 25, Preamble (IND. SUPR. CT. 2022).

168. See *id.* 25(VIII)(E)(4).

to take or cause to be taken the deposition of witnesses, and to order the production of books, records, or other documentary evidence.¹⁶⁹

In exercising their subpoena power, the Commission could more accurately determine whether Judge Leach's conduct was a pattern of practice or an isolated incident.¹⁷⁰ Additionally, the Commission could make an initial inquiry, and if necessary, proceed to a full investigation to determine the extent of any misconduct or clear up any confusion.¹⁷¹ To assess the judge's intentions—which would assist in evaluating factors two, three, and five—the Commission could issue a notice of investigation.¹⁷² At that time, the Commission would describe the nature of the alleged violations and the complainant's name (whether it be a person or the Commission) to Judge Leach and provide him with a reasonable opportunity to respond.¹⁷³

B. Potential Rule Violations

The rule violations likely to be considered would be Rules 1.1,¹⁷⁴ 1.2,¹⁷⁵ 2.2,¹⁷⁶ 2.3(B),¹⁷⁷ 2.5(A),¹⁷⁸ and 2.8(B)¹⁷⁹ of the Indiana Code of Judicial Conduct. In examining Judge Leach's noncompliance with precedent, the Commission could review Rules 1.1,¹⁸⁰ 1.2,¹⁸¹ 2.2,¹⁸²

169. *Id.*

170. *See id.* 25(VIII)(E)(2); *see infra* Section I.E.1.

171. *See* IND. R. FOR ADMISSION TO THE BAR & THE DISCIPLINE OF ATT'YS 25(VIII)(E)(2).

172. *See infra* Section I.E.1; *see* IND. R. FOR ADMISSION TO THE BAR & THE DISCIPLINE OF ATT'YS R. 25(VIII)(E)(3).

173. *See* IND. R. FOR ADMISSION TO THE BAR & THE DISCIPLINE OF ATT'YS 25(VIII)(E)(5).

174. *See* IND. CODE OF JUD. CONDUCT R. 1.1 (IND. SUPR. CT. 2020) ("A judge shall comply with the law, including the Code of Judicial Conduct.").

175. *See id.* 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety").

176. *See id.* 2.2 ("A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.").

177. *See id.* 2.3(B) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.").

178. *See id.* 2.5(A) ("A judge shall perform judicial and administrative duties competently, diligently, and promptly.").

179. *See id.* 2.8(B) ("A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.").

180. *See id.* 1.1.

181. *See id.* 1.2.

182. *See id.* 2.2.

and 2.5(A).¹⁸³ The Indiana Court of Appeals held that “the trial court made the same errors that we reversed in *In re A.L.* and *In re M.E.B.* when the court demanded that R.E. present some evidence of actual or imminent harm.”¹⁸⁴ Instinctively, this behavior invokes Rule 1.1¹⁸⁵ (failure to follow the law) and 1.2¹⁸⁶ (failure to promote public confidence in the integrity of the judiciary). More importantly, Rule 2.5, which focuses on competency, would likely be a point of review.¹⁸⁷ How the trial court bypassed the appellate court’s specific guidance might be worth exploring in a deposition.

Regarding Judge Leach’s failure to use R.E.’s proper pronouns and referring to R.E. as “whichever” and “it,”¹⁸⁸ the Commission would likely review Rules 2.3(B)¹⁸⁹ and 2.8(B).¹⁹⁰ Rule 2.3(B) prohibits judicial officers from, through words or conduct, manifesting bias or prejudice based on gender.¹⁹¹ The Commission would need to determine whether the trial court was attempting to insult or belittle R.E. or whether the court just chose their words poorly. This distinction is paramount for a Rule 2.3(B) violation since Rule 2.3(D) explicitly allows judges to make legitimate references to gender or similar factors when relevant to an issue in a proceeding.¹⁹² While proving bias or prejudice is a substantial undertaking, determining a Rule 2.8 violation, which requires judges to be patient, dignified, and courteous, maybe a simpler one.¹⁹³ The dismissive use of “whichever” may be sufficient to satisfy the courteous requirement found in Rule 2.8. If that fails, then the trial court’s misgendering is likely to satisfy Rule 2.8’s lack of dignity requirement.¹⁹⁴

C. National Discipline Precedent

The idea of disciplining a judge for conduct similar to what occurred in *Matter of R.E.* is not novel. The Commission on Judicial Conduct for the State of Washington issued a comparable order on February 3, 1995. In *In re the Matter of the Honorable A’lan Hutchinson*, Judge Hutchinson conducted a hearing in which Cathy Mat-

183. See *id.* 2.5(A).

184. *In re R.E.*, 142 N.E.3d 1045, 1054 (Ind. Ct. App. 2020).

185. See IND. CODE OF JUD. CONDUCT R. 1.1.

186. See *id.* 1.2.

187. See *id.* 2.5(A).

188. *In re R.E.*, 142 N.E.3d at 1054.

189. See IND. CODE OF JUD. CONDUCT R. 2.3(B).

190. See *id.* 2.8(B).

191. See *id.* 2.3(B).

192. See *id.* 2.3(D).

193. See *id.* 2.8(B).

194. See *id.*

thews—a transgender woman—filed a petition for a name change.¹⁹⁵ Ms. Matthews was getting treatment to begin the process of gender affirmation surgery, but the judge denied the petition, holding that he would not consider any requests until after her surgery.¹⁹⁶

Just over two months later, Ms. Matthews filed a motion to reconsider.¹⁹⁷ In that subsequent hearing, the judge revealed that he had conducted an independent investigation into the propriety of gender affirmation surgery and that he was using said information to inform his decision-making.¹⁹⁸ In the crowded courtroom, the judge suggested that if Ms. Matthews, and other transgender individuals, were allowed to change their names, it “would pose a risk to those who ‘send their daughters into the ladies’ restroom.’”¹⁹⁹ The judge also commented that “I personally feel that this whole procedure is immoral. It evidences a mentally ill and diseased mind. I am [grateful] that the physicians of this state and the rest of the United States apparently have the attitude that this surgical amputation is something beyond the medical pale.”²⁰⁰ At some point, the misconduct commission was alerted, and they sent the judge a letter asking him to comment on the allegations of his poor demeanor and improper ex parte communications.²⁰¹ In describing how Ms. Matthews and others exited the courtroom, Judge Hutchinson said that after his denial of their name changes, “they stood up and *flounced* out of court.”²⁰²

The Commission ultimately determined that Judge Hutchinson violated several rules of the Code of Judicial Conduct, mainly those charged with ensuring that litigants receive an impartial, fair, and courteous jurist.²⁰³ The Commission found the judge’s response to Ms. Matthews to be sarcastic, disrespectful, and evidence of the judge lacking insight into the impropriety of his actions.²⁰⁴ The Commission highlighted each of the instances in which the judge “used words and descriptions that had the potential to disparage or demean, and did in

195. *In re Hutchinson*, No. 93-1632-F-47, 1995 WL 902265, at *1 (Wash. Com. Jud. Cond. 1995) (focusing on the demeanor issue which is most analogous to Indiana Code of Judicial Conduct Rule 2.8(B)); See IND. CODE OF JUD. CONDUCT R. 2.8(B) (requiring judges to be “patient, dignified, and courteous to litigants”).

196. *In re Hutchinson*, 1995 WL 902265, at *1.

197. *Id.*

198. *Id.*

199. *Id.* at *2.

200. *Id.*

201. See *id.*

202. *Id.* at *2 n.1 (emphasis added). See *Flounce*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/flounce> (last visited Mar. 27, 2022) (defining “flounce” as “to move with exaggerated jerky or bounce motions”).

203. *In re Hutchinson*, 1995 WL 902265 at *5.

204. See *id.* *6 n.1.

fact humiliate [Ms. Matthews].”²⁰⁵ The disciplinary body noted that the judge’s “ex parte investigation resulted in his reaching a conclusion before he gave the petitioner a right to respond and be heard.”²⁰⁶ The Commission concluded their rationale by underscoring that the judge’s choice to broadcast “his personal bias affected his ability to impartially dispose of the proceeding, and [that] he should have disqualified himself.”²⁰⁷

An advisory opinion handed down by the New York Advisory Committee on Judicial Ethics may also prove helpful. In their January 28, 2021, opinion, “[a] judge ask[ed] if they [could] ‘require a singular pronoun be used for a singular person’ in order to ‘keep order in the courtroom, and to have a clear record.’”²⁰⁸ In other words, the inquiry was whether the court could require a singular pronoun (*i.e.*, *he*, *him*, and *his*, or *she*, *her*, and *hers*) when a party expresses a preference for gender-neutral plural pronouns (*i.e.*, *they*, *them*, and *theirs*).²⁰⁹ The Committee ruled that the court could not do so.²¹⁰ They insisted that in order to avoid the appearance of impropriety and act without bias or prejudice; courts must not “adopt . . . rigid polic[ies] . . . [that] . . . could result in transgender, nonbinary or genderfluid individuals feeling pressure[] to choose between the ill-fitting gender pronouns of ‘he’ or ‘she.’”²¹¹ The Committee contended that for the courts to continue to promote public confidence in the judiciary, they must be welcoming to all.²¹² Finally, to address the grammatically inclined, the Committee emphasized that “they” had been specifically incorporated into the English vernacular to refer to a singular person in order to honor the existence of trans and non-binary individuals.²¹³

205. *Id.* at *2.

206. *Id.* at *3 (discussing Washington Administrative Code § 292-12-010(4), most analogous to Rule 2.6 of the Indiana Code of Judicial Conduct); *see* IND. CODE OF JUD. CONDUCT R. 2.6(A) (IND. SUPR. CT. 2020) (stating that “[a] judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”). *See also id.* 2.6(B) (stating that “[a] judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement”).

207. *In re Hutchinson*, 1995 WL 902265 at *2.

208. *Where a Party or Attorney Has Advised the Court that Their Preferred Gender Pronoun is “They,” a Judge May Not Require Them to Instead Use “He” or “She,”* N.Y. Jud. Adv. Op. 21-09, 2021 WL 2184862, at *1 (N.Y. St. Bar. Assn. Comm. Prof. Eth. Jan. 28, 2021).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*; *see also See Transgender People*, *supra* note 17 (“It is increasingly common for people who have a nonbinary gender identity and/or gender expression to use they/them as their pronoun. The singular they/them pronoun does not have gendered connotations.”).

D. Advantages of Commission Referral

The advantage of pursuing a review of Judge Leach's conduct before the Indiana Commission on Judicial Qualifications is that they are the body charged with investigating such allegations.²¹⁴ Additionally, this body has established disciplinary procedures that ensure judges are afforded their due process rights.²¹⁵ More specifically, Commissions typically use the *In re Matter of Honorable Mark S. Deming* factors to ensure that any decision is well reasoned.²¹⁶ In *Matter of Deming*, the Supreme Court of Washington, en banc, articulated several nonexclusive factors a court can use to determine if judicial misconduct and sanctions are warranted. Those factors include:

[W]hether the misconduct is an isolated instance or evidenced a pattern of conduct; the nature, extent, and frequency of occurrence of the acts of misconduct; whether the misconduct occurred in or out of the courtroom; whether the misconduct occurred in the judge's official capacity or in their private life; whether the judge has acknowledged or recognized that the acts occurred; whether the judge has evidenced an effort to change or modify their conduct; the length of service on the bench; whether there have been prior complaints about this judge; the effect the misconduct has upon the integrity of and respect for the judiciary; the extent to which the judge exploited their position to satisfy their personal desires.²¹⁷

These factors are somewhat of an extension to the five factors used to determine if legal error converted to egregious legal error.²¹⁸ Nevertheless, this thorough analysis preempts a judicial officer from asserting a wayward vendetta. Additionally, there are more discipline options available if misconduct is found. While the Commission has some powers to address improper judicial behavior, the Indiana Supreme Court has more. For example, the Commission can discipline through advisory letters, private cautions, or public commission admonitions.²¹⁹ The Indiana Supreme Court, however, has the option of removal, retirement, suspension, limitations or conditions on the performance of judicial duties, fines, assessment of reasonable costs and expenses, public or private reprimand, or any combination of these sanctions.²²⁰

214. See IND. CONST. art. VII, §9.

215. See IND. R. FOR ADMISSION TO BAR & DISCIPLINE OF ATT'YS 25(VIII)(F)(1-2) (IND. SUPR. CT. 2020).

216. *In re Deming*, 736 P.2d 639, 659 (Wash. 1987).

217. *Id.* (internal numbering omitted).

218. See *infra* Section I.E.1.

219. See IND. R. FOR ADMISSION TO BAR & DISCIPLINE OF ATT'YS 25(IV)(6), (9) (IND. SUPR. CT. 2022).

220. See *id.* 25(IV)(1)-(9).

E. Disadvantages of Commission Referral

Identifying a likely sanction in this case is difficult. Based on previous discussions, the unknown variables are too great to accurately estimate the ultimate decision. Nevertheless, given the public nature of the offense a public reprimand would not be out of the question. While “[a] public reprimand is a blemish on a sitting judge’s reputation, adversely affecting the public’s evaluation of the judge’s performance in office,”²²¹ the Court of Appeals decision amounts to the same thing. The question then becomes whether it is a good use of judicial resources to review the matter if a similar sanction has already been delivered. One perspective is that the intermediate appellate court gave the sanction instead of the court of last resort, which has “exclusive, original jurisdiction for the discipline” of judicial officers in the state according to the constitution.²²² Nevertheless, the appellate decision in *In re R.E.*²²³ is not logged in the caverns of judicial discipline lore, making it more intriguing whether its effects will be long-lasting. The most sobering reality is that the Indiana Supreme Court could decide to take no additional action, holding instead that the Indiana Court of Appeals decision is a statement sufficient to satisfy the public’s question of whether judicial behavior is being monitored and appropriately constrained.

F. A Missed Opportunity

This entire article could have been preempted if the three-judge Indiana Court of Appeals panel that decided *Matter of R.E.*²²⁴ included in their opinion a notation that they referred the judge’s behavior to the Indiana Commission on Judicial Qualifications for review. While a public referral is not required, nor would such a referral be released to the public before the filing of formal charges,²²⁵ it would have reinforced the idea that the Indiana Court of Appeals was upholding the integrity and impartiality of the judiciary. Moreover, such a public action would have demonstrated that the panel was mindful not only of a trial court judge’s responsibilities under the Indiana Code of Judicial Conduct, but also of their own ethical obligations to report judicial misconduct.²²⁶ After all, Rule 2.15(A) of the Indiana

221. *In re Newman*, 858 N.E.2d 632, 635-36 (Ind. 2006).

222. IND. CONST. art. VII, §4

223. See 142 N.E.3d 1045 (Ind. Ct. App. 2020).

224. *Id.*

225. See IND. R. FOR ADMISSION TO BAR & DISCIPLINE OF ATT’YS R. 25(VIII)(B)(1) (“before the filing and service of formal charges, the commission shall not publicly disclose information relating to a complaint, inquiry, or investigation.”).

226. See IND. CODE OF JUD. CONDUCT R. 2.15(A).

Code of Judicial Conduct states, “[a] judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.”²²⁷ This is not to say the Indiana Court of Appeals did not make a referral. The panel could have reported the trial court judge and simply not have shared it. However, had the panel shared its referral they could have modeled adherence to the Code of Judicial Conduct, while demonstrating that the judiciary can reprimand their own when they misstep.

CONCLUSION

Whenever there is a question of what the appropriate response is to an unfamiliar situation, the concept of a neutral disposition arises, and I remember the aristocratic teachings of the television character Violet Crawley in the British anthology, *Downton Abbey*. In her seminal role as the Dowager Countess of Grantham, actress Dame Margaret Smith portrayed a worried grandmother. After her eldest granddaughter inquired about her dismay and quickly dismissed her concerns about the mental state of her middle granddaughter, the matriarch delivered this didactic quip that is instructive here: “My dear, a lack of compassion can be as vulgar as an excess of tears.”²²⁸

Whether Judge Leach’s conduct results in disciplinary action before the Indiana Commission on Judicial Qualifications or the Indiana Supreme Court, it is essential to remember that how the judiciary interacts with the public is of the utmost importance. Therefore, in all interactions with the public, judicial officers should heed the words of the Supreme Judicial Court of Massachusetts in their 1998 decision *In re Matter of Frederick L. Brown* when they said:

For every litigation at least one-half of those involved are likely to come away sorely dissatisfied, and every citizen has reason to apprehend that one day [they] might be on the losing side of our exercise of judgment. Therefore, this arrangement requires an exacting compact between judges and the citizenry. It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over our fellow citizens requires that we appear to be so as well. How else are ordinary citizens to have the faith in us that we have in ourselves . . . ? An impartial manner,

227. See *id.*

228. *Downton Abbey* (ITV television broadcast Nov. 2, 2014); see Julie Miller, *Downton Abbey Recap: The Return of the Worst Dinner Guest*, VANITY FAIR (Feb. 15, 2015), <https://www.vanityfair.com/hollywood/2015/02/downton-abbey-season-5-episode-7-recap>.

courtesy, and dignity are the outward sign of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess. Surely it is arrogance for us to say to them that we may not seem impartial, but we know we are, and so they must submit. Precisely because the public cannot witness, but instead must trust, what happens when a judge retires to the privacy of [their] chambers, the judiciary must behave with circumspection when in the public eye.²²⁹

229. *In re Brown*, 691 N.E.2d 573, 576 (Mass. 1998).

In the Shadow of *Gideon*: No Sixth Amendment Right to Counsel at Parole Revocation Hearings

OLINDA MOYD

Unlike the drama that unfolds at a criminal trial before a judicial body, representing parolees at revocation hearings attracts minimal intellectual curiosity from academic scholars, and is foreign to most members of the bar. The law establishing due process rights at revocation hearings has primarily remained unchanged, and novel legal challenges are rare. Recent social unrests have forced the United States to open its eyes and become more “woke” to the racial and economic disparities inherent in our criminal legal system. It is therefore imperative that we examine the critical role lawyers play at every stage of the criminal system, in an effort to upend a justice system gone amiss. There is a glaring absence of the right to counsel at parole revocation hearings, even though the stakes are high, and loss of freedom is routinely the outcome. The movement towards making fairness of the law more attainable for everyone must include securing due process rights for those impacted long after the trial has ended and out of the public eye. The due process right to counsel at sentencing must extend to parole revocation hearings where sentencing routinely takes place and loss of liberty is a reality.

Every person facing parole revocation must be appointed counsel to guard against the administration of rouge justice. This is especially true considering that parole revocation hearings, like trials, can have dire consequences for individuals, their families and the community. At the micro level, findings of violation and sentences imposed at parole revocation hearings permanently impact the trajectory of a person’s life as they struggle to untangle themselves from the criminal legal web and rejoin society. On a more macro scale, parole violators who are returned to prison are one of the major contributors to mass incarceration

rates, even though most individuals are revoked for technical violations, such as missing meetings and addiction relapse.

*In this Article, we will revisit the evolution of due process rights afforded to persons who are facing revocation as developed by Supreme Court case law, examine how parole revocations result in increased prison population rates and the costs associated thereto, and scrutinize the quagmire of state and federal court decisions regarding the right to counsel at such hearings. This Article concludes by urging the Supreme Court to finish the task left undone in *Morrissey v. Brewer*,¹ and tackle the legal question of the right to counsel as a minimal due process guarantee.*

1. 408 U.S. 471 (1972).

In the Shadow of *Gideon*: No Sixth Amendment Right to Counsel at Parole Revocation Hearings

OLINDA MOYD*

TABLE OF CONTENTS

INTRODUCTION 35

I. WHAT HAPPENS BEHIND CLOSED DOORS? 37

 A. *Legal Representation Matters*..... 37

 B. *Fighting for Freedom Without Counsel*..... 44

II. THE EVOLUTION OF DUE PROCESS AT REVOCATION HEARINGS 47

 A. *Gideon v. Wainwright* 47

 B. *Morrissey v. Brewer* 49

 C. *Gagnon v. Scarpeli*..... 52

III. SENTENCING IN THE ABSENCE OF LEGAL REPRESENTATION 54

 A. *Sentencing that Takes Place at Parole Revocation Hearings* 54

 B. *Even the Threat of Loss of Liberty Demands Counsel* 56

IV. PAROLE REVOCATION IS A MAJOR DRIVER OF MASS INCARCERATION AND IS COSTLY..... 62

 A. *Feeding the Mass Incarceration Monster with Parole Violators* 62

 B. *The Hidden Costs of Returning Parole Violators to Prison for Technical Violations* 67

* Adjunct Professor of Law and Supervising Attorney, Reentry Clinic, Howard University School of Law; J.D., The Ohio State University Moritz College of Law. I am a prisoner's rights and parole attorney who was employed for three decades at the Public Defender Service for the District of Columbia as a Staff Attorney and Chief Attorney for the Parole Division. In addition to clinical teaching, I provide pro bono representation to individuals seeking parole release from Maryland institutions. I wish to thank Andrea Fenster, Staff Attorney at the Prison Policy Initiative, for her research and editing support, Fasika Delessa, Staff Editor, *University of Maryland Law Journal of Race, Religion, Gender & Class*, J.D. Candidate, University of Maryland Francis King Carey School of Law, for editing assistance, and Trevor Stime, Student Bar Association ("SBA") Representative, Captain & Lead Researcher, Goler Teal Butcher International Moot Court, Student Attorney, Reentry Clinic, J.D., Howard University School of Law.

V. THE QUESTION LEFT UNRESOLVED BY <i>MORRISSEY</i>	
LEAVES MANY IN LEGAL LIMBO	72
A. <i>State Court Interpretations of the Gagnon Test to</i>	
<i>Determine Who Gets Counsel</i>	72
B. <i>Let's Follow the Lead of the Federal System</i>	78
CONCLUSION: TAKING MORRISSEY ACROSS THE FINISH LINE ..	80

"Democracies die behind closed doors. . . . When government begins closing doors, it selectively controls information rightfully belonging to the people."

—Honorable Damon Keith, United States Circuit Judge of the
United States Court of Appeals for the Sixth Circuit

INTRODUCTION

Every day in administrative hearings across this nation, people are sentenced and resentenced without being afforded legal representation in forgotten-about, clandestine hearings. In many jurisdictions, those on parole have no statutory right to counsel, despite the fact that liberty interests frequently surface, and loss of freedom is routinely the outcome at these closed-door revocation hearings. This is evidenced by the startling number of people who are returned to prison as a result of parole board decisions finding violations of non-compliance. In stark contrast, the Supreme Court has established that sentencing is a critical phase of the criminal legal process where a person has a due process right to counsel.² However, until now, this opinion has been applied narrowly, and these procedural due process rights have not been extended per se to these post-conviction hearings. Due process can only be satisfied by the appointment of counsel in all final parole revocation hearings. It is time for the Court to finish the task it failed to address nearly three decades ago and include the right to counsel as a basic due process right afforded to persons facing parole revocation.

While there is no guaranteed right to parole release,³ it has been a fundamental step in the release process since the early part of the twentieth century. Parole allows a person to leave prison before serving the end of their sentence with the agreement that they will abide by conditions set by the court or another paroling authority. It is often referred to as "conditional liberty,"⁴ which represents the living status for scores of individuals in society on parole, probation, and supervised release. Probation, parole, and supervised release are all terms of supervision by a parole officer, commonly referred to as a community supervision officer, while outside prison. These terms may look the same but each bears a different relationship to the actual prison

2. *Mempa v. Rhay*, 389 U.S. 128, 133 (1967).

3. See *Greenholtz v. Inmates Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979) (holding that although there is no constitutional right to an inmate's release from prison prior to the expiration of a valid sentence, the specific wording of the Nebraska statute created a constitutionally protected expectation of parole and that the state's parole board's procedures were adequate).

4. H. Richmond Fisher, *Parole and Probation Revocation Procedures after Morrissey and Gagnon*, 65 J. CRIM. L. & CRIMINOLOGY 46, 46 (1974).

sentence. Probation and parole actually serve to reduce prison time by allowing the individual to avoid prison or obtain early release. Supervised release, by contrast, is part of the original sentence that adds to imprisonment by imposing more supervision *after completion* of the prison sentence. This Article focuses specifically on parole supervision and the sentencing revocation outcomes that follow allegations of violation. Excessive sentences and over-incarceration, especially in poor communities of color, have made parole more popular in many jurisdictions, where it is seen as an opportunity to give people a second chance and attempt to balance the scale of judicial inequities. Once released into society, a person is then subject to the supervisory authority of a parole officer or agent. However, while parole supervision is designed to help ease the transition from prison back to the community, it can have the opposite effect, setting unattainable goals, which when combined with heightened surveillance, often lands people back in prison.

It is a fairly conventional ritual that a person who enters a revocation hearing room leaves with a finding of violation (the functional equivalent of a finding of guilt in a criminal trial), an order to revoke their parole, and a punitive jail or prison sentence. This punitive sentence often includes both time that a person must serve in jail or prison for the violating behavior, followed by a new period of parole supervision and even more restrictive conditions. Because it is a sentencing, the skills of a lawyer can enhance the proceedings by presenting a legally sound defense and ensuring that the proceedings are fair and impartial.

This article proceeds in five parts. Part I details parole revocation cases demonstrating the need for counsel representation. Part II examines the evolution of the establishment of due process rights at revocation hearings. Part III provides insight into the resentencing that takes place at revocation hearings and the actual risk of loss of liberty. Part IV examines how revocation contributes to mass incarceration and probes the hidden costs attached thereto. Part V scrutinizes the *Gagnon* test⁵ and its application to determine who gets counsel and who does not and analyzes what we might glean from the federal system. The article concludes by urging the United States Supreme Court to answer the question left unresolved by *Morrissey*⁶ and determine that counsel appointment is a due process right to be afforded to all

5. See *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (established that parolees have no absolute right to counsel, but rather should be assigned attorneys on a "case-by-case" determination).

6. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

during revocation proceedings. Countless real-life stories demonstrate the fact that having counsel can solidify the difference between freedom and bondage. Perhaps, none is as compelling as the case of Mr. James Bain. In Florida, a law was passed entitling individuals to obtain DNA testing and, if the results are exculpatory, a reversal of their conviction. For eight years after the statute was passed, Bain sought to obtain DNA testing and filed several handwritten requests on his own with the court. Each of his hand-written petitions were denied. Finally, attorneys from the Innocence Project took up his case and his petition was granted. The testing proved his innocence and secured his freedom in December 2009, after he had been imprisoned for thirty-five years.⁷ Having legal representation can mean the difference between inequity and justice.

I. WHAT HAPPENS BEHIND CLOSED DOORS?

A. *Legal Representation Matters*

It was a quintessential cool fall morning in Washington, D.C., when my investigator and I met outside the lobby of an eight-story brick building. This hearing had been scheduled a month prior; today we were to prove Mr. K's innocence.⁸ We toted in our briefcases and wheeled my trial cart containing the D.C. Code, binders of exhibits and affidavits, my hearing outline, and other documentary evidence we would need to fight for Mr. K. We marched, not into the courthouse, but into the District of Columbia Correctional Treatment Facility in the heart of Southeast D.C., near the local jail.⁹ Mr. K had been

7. *James Bain*, INNOCENCE PROJECT OF FLA., <https://www.floridainnocence.org/james-bain> (last visited Jan. 30, 2022).

8. The Public Defender Service for the District of Columbia ("PDS") provides quality legal representation to indigent adults and children facing loss of liberty in the District of Columbia. It is a federally funded, independent organization that provides such representation through attorneys assigned to various divisions within the agency. PDS established a Parole Division, consisting of ten attorneys who are assigned to represent D.C. Code offenders at parole and supervised release revocation hearings before the U.S. Parole Commission. Attorneys are assigned to meet with each person arrested on a parole violator warrant and determine their eligibility for representation. Clients are represented at the preliminary interview and at the final revocation hearing by counsel. I worked as Chief Attorney, Parole Division at the Public Defender Service until my retirement in 2019.

9. The Correctional Treatment Facility opened in May 1992, and was operated by the Corrections Corporation of America, a for-profit private prison company, for twenty-one years. Currently, both men and women are housed in this medium-security facility and programming and treatment are limited, despite the name of the institution. This eight-story structure is now operated by the D.C. Department of Corrections and is located adjacent to the local jail facility in Southeast Washington, D.C. See *Central Detention Facility*, <https://www.doc.dc.gov/page/correctional-facilities> (last visited Mar. 15, 2022).

detained for six weeks for a parole violator warrant. He never anticipated being behind bars again.

After serving seven years of an eleven-year sentence for a drug offense, Mr. K was released on parole and subsequently made significant strides. He was in the community for three years without incident and was looking forward to completing his parole supervision successfully. He had only one year left under parole supervision until he would be released from the carceral stronghold. Unfortunately, he was stopped and questioned by D.C. police and subsequently arrested on suspicion of drug possession. Illegal drugs, which later tested positive for cocaine, were found on the ground in an alleyway near where he was standing with a group of other young Black men. When the officer approached them and asked if any of them were “on papers,”—referring to persons who are in the community but still under the authority of the courts or supervision agency—Mr. K readily admitted that he was still on parole supervision. For many African Americans, being “on papers” harkens to a time when recently freed enslaved people had to display their freedom papers upon demand in order to prove their legitimate status in society.¹⁰ “On papers” has historically carried a negative connotation and still does for many Black people.

Mr. K was the only person arrested among the group of five people, even though there was no additional evidence that connected the drugs to him more than the other people present. Additionally, the officer found no drugs on his person, and the case for constructive possession¹¹ was weak. Regardless, based on the way the illegal drugs were packaged—several small Ziplock baggies were inside of a larger Ziplock bag—Mr. K was not only charged with possession but with possession with intent to distribute illegal drugs. The prosecutor’s office quickly recognized the frailties of the case, and it was “no

10. Freedom papers and certificates of freedom were documents declaring the free status of formerly enslaved people. These documents proved the free status of a person and served as a legal affidavit. They were important because people lived with the constant fear of being kidnapped and sold into slavery. Toward the end of the enslavement period, the distinction between enslaved and free persons had diminished to a point that it was hardly distinguishable. Freed persons found it especially difficult to maintain their freedom. See JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: THE HISTORY OF NEGRO AMERICANS* 218 (3d ed. 1967) (discussing the several states that required the registration of free status, including Virginia, Tennessee, Georgia, and Mississippi. Florida, Georgia, and other states compelled freed persons to have white guardians. All southern states required them to have passes, and if a person was caught without a certificate of freedom, he was presumed to be a slave). Limiting movement and restricting the economic opportunities of freed persons was the means of control in most states.

11. See *Rivas v. United States*, 783 A.2d 125, 129 (D.C. 2001) (holding that to prove constructive possession, the prosecution must prove the defendant’s (1) knowledge of the drug’s presence, (2) ability to exercise dominion or control over it, and (3) their intent to do so).

papered”—meaning that no official charges were ever filed in D.C. Superior Court by the U.S. Attorney’s Office, the local prosecuting agency. However, since Mr. K was on parole supervision, he was not allowed to leave jail when the U.S. Attorney’s Office issued a release order in his criminal case.

His parole officer had submitted a report to the United States Parole Commission (the “Parole Commission”), the federal parole board, notifying them of the arrest and subjecting Mr. K to the authority of a federal agency for the parole violation warrant. Even though Mr. K’s original, eleven-year sentence had been ordered by the local court, this hearing was being conducted before the federal Parole Commission, which possesses paroling authority over D.C. Code offenders.¹² Since a standard condition of supervised release is to not incur any new arrests, an arrest alone can trigger revocation and a return to prison. The parole officer requested a warrant based on the new arrest, despite the significant strides that Mr. K made while on supervision. He managed to secure and maintain employment for three years, marry, and become a new father. Mr. K met all the requirements of his supervision, including regularly submitting urine samples to prove sobriety, leaving work to meet with his supervision officer, providing regular pay stubs, and earning permission to travel out-of-state. As a result, he had just had his supervision level decreased to a minimum, which would ease his supervision restrictions.

A week after his arrest, a Parole Commission hearing examiner conducted a probable cause hearing (also known as a preliminary interview); made a finding of probable cause and the Parole Commission hearing examiner recommended that Mr. K remain in detention pending a final revocation hearing. Pursuant to federal regulations, the purpose of the probable cause hearing is to determine whether

12. On August 5, 1997, Congress enacted the National Capital Revitalization and Self-Government Improvement Act of 1997, commonly known as the “D.C. Revitalization Act.” Pub. L. No. 105-33, 111 Stat. 712. The Act abolished the D.C. Board of Parole and transferred its responsibilities to the United States Parole Commission (“USPC”), and it created the Court Services and Offender Supervision Agency (“CSOSA”). As a federal agency, CSOSA is under the jurisdiction of the USPC, which has the sole authority to grant parole to eligible individuals, enforce parole conditions, and revoke parole if violations are found, and it has the authority to terminate a parole supervision period early. Congress intended to abolish the USPC in 1987 when the federal government transitioned from a parole system to a determinate sentencing system. The law abolishing the USPC provided a five-year transition period for an orderly shutdown, but it has become a thirty-four year quandary due to the passage of the Revitalization Act and multiple reauthorization terms passed by Congress. The USPC currently has authority for military cases, federal “old law” cases, Transfer Treaty cases, WITSEC cases (persons in federal witness protection), and District of Columbia cases, which make up 83% of the total USPC caseload. The USPC’s current reauthorization term expires on October 31, 2022.

there is sufficient probable cause to believe an individual has violated parole, and if so, whether they should be held in custody pending their final hearing.¹³ In most cases in the District of Columbia, individuals are held in custody since the statutory option of issuing a summons, allowing an individual to remain in the community, is rarely exercised. At the probable cause hearing, parolees are required to address the violations by admitting or denying the alleged violation behavior. An individual may request counsel by completing the appropriate form and is notified of the adverse witnesses the Parole Commission intends to subpoena to appear and testify at the final revocation hearing.

By the time he reached his final revocation hearing, Mr. K had already been terminated from his landscaping job and had been away from his family, including his three-month-old son, for six weeks. The final revocation hearing took place in a converted jail classroom. Typically present at these hearings are the defendant, defense counsel, the hearing examiner, and the parole officer who remains in the hearing for the duration of the hearing, despite being considered an adverse witness. All other adverse witnesses, including victims and police officers, are escorted to and from the hearing room when it is their turn to testify. Because it is not a criminal prosecution, there is no judge to sort through the factual and legal nuances of the case. These are administrative hearings, where the standard of proof is preponderance of the evidence, rather than beyond a reasonable doubt, despite the possible carceral consequences of the hearing. This lower standard of proof merely requires that the fact finder be convinced that there is a greater than 50% chance that the claim is true. After reading an opening statement into the record, the hearing examiner read the charges, and Mr. K had to admit or deny the alleged violation behavior. Mr. K, again, denied the alleged violation, meaning that the burden shifted to the Parole Commission to prove the case against Mr. K. Each witness was sworn in before presenting testimony. The hearing was audio recorded.

As expected, the government witnesses included Mr. K's parole officer, who testified against him. Upon direct examination, the parole officer testified that, although Mr. K's urine screenings were void of *any* drug use, she suspected that he had reverted to dealing drugs. This was seeming based solely on the original underlying offense for which he had already served his time and is currently on parole. Had her

13. 28 C.F.R. § 2.101(a) (2022).

testimony been uncontested, this may have been enough to revoke Mr. K's parole, landing him back in prison.

Luckily, as counsel, I was able to cross-examine the adverse witnesses testifying against Mr. K. Upon cross-examination, the parole officer admitted that Mr. K had made significant strides during the three years he had been under supervision. She even admitted that prior to the arrest, she had submitted a recommendation to decrease his supervision level based on his long-term successful compliance. She conceded that she never observed any evidence of drug use or trafficking during the many home visits she conducted at the residence of Mr. K over the three-year period. As his counsel, I submitted a Freedom of Information Act ("FOIA") request¹⁴ to the supervision agency and obtained the documents in his parole file evidencing all of his supervision contacts, employment verification documents, programming attendance, certificates, and character letters from his close contacts. When questioned about these documents, the parole officer authenticated their validity, permitting their entry into evidence. The only negative information that the supervision office could state about Mr. K was that he had been arrested. She deduced from this arrest alone that he must have reverted to his "old ways" because his original offense was drug related.

The arresting Metropolitan Police Department of the District of Columbia ("MPD") officer, Sergeant Smith, was subpoenaed by the Parole Commission. He appeared and testified at the hearing. He stated that he arrested Mr. K because he was closest in proximity to where the illegal drugs were found. Sergeant Smith had no independent recollection of the arrest, but read from the police report, signed on the date of the arrest, that he arrested Mr. K based on constructive possession of the contraband found, later proven to be illegal drugs. Yet, on cross-examination, he admitted that there were other individuals standing closer to the alleyway entrance, and many people scattered about in close proximity to where the drugs were observed on the ground. Sergeant Smith also admitted that the area was a high-drug area, that he did not actually observe Mr. K with any contraband, and that he found no drugs on his person when he searched Mr. K after his arrest. Mr. K did not consent to the search, but it was instead conducted based on the "lawful" arrest by Sergeant Smith.¹⁵ There was no tangible evidence linking the drugs found in the alley to Mr. K,

14. See 5 U.S.C. § 552(3)(a) (2018).

15. Search incident to lawful arrest is an American legal principle that allows police to perform a warrantless search of an arrested person. See *Terry v. Ohio*, 392 U.S. 1, 19 (1968); see *Chimel v. California*, 395 U.S. 752, 763 (1969).

and the officer did not observe him engage in any drug transaction. The cross-examination became contentious when the officer was questioned about his limited ability to observe the allegations documented in his report, since the area was poorly lit, and the arrest took place at night. The Sergeant had failed to turn on his body worn camera,¹⁶ so his approach of Mr. K and the others was not recorded. However, my investigator was able to canvas and photograph the scene and recreate the circumstances under which the arrest took place. He also spoke with nearby residents and eyewitnesses who saw the arrest and attested to the aggressiveness of Sergeant Smith. Two of these witnesses attended the hearing and testified as defense witnesses on behalf of Mr. K. The oral testimony provided by Sergeant Smith was not consistent with the information provided in his written report.

Moreover, Mr. K also testified at the hearing on his own behalf. The many hours spent preparing him for his direct examination and mooting him on cross-examination proved to be advantageous, and ultimately his testimony of not committing any illegal act was factually persuasive. We submitted character letters and affidavits from his friends and his employer. We introduced crime scene photos and other evidence to tell his story and demonstrate the life Mr. K had established since his release. His wife was able to secure childcare on the day of the hearing and she appeared to testify as a character witness on his behalf.

After all of the evidence was presented by both sides—the adverse witnesses and those who testified on behalf of Mr. K—the hearing examiner excused us from the hearing room while she reviewed all of the documentary and testimonial evidence and deliberated before issuing her ruling.¹⁷ The final revocation hearing is a combined evidentiary and sentencing hearing.¹⁸ If the hearing had resulted in a finding of violation, Mr. K risked being sentenced to up to another year in prison. We nervously waited thirty-five minutes before being summoned back into the room as she pronounced her decision. The hearing examiner determined that Sergeant Smith's testimony insufficiently established either a finding of possession or distribution of drugs and found that there was no violation on behalf of Mr. K. Ultimately, she ordered his release.

16. According to the District of Columbia Metropolitan Police Department ("MPD"), body worn cameras can benefit members of the community and MPD "by improving police services, increasing accountability and transparency for individual interactions, and strengthening trust among law enforcement and the communities they serve. See *MPD and Body-Worn Cameras*, METRO. POLICE DEP'T, <https://mpdc.dc.gov/page/bwc> (last visited Mar. 28, 2022).

17. 28 C.F.R. § 2.103(g).

18. *Id.*

Thankfully, Mr. K walked out of the hearing with a recommendation not to revoke his parole, but this did not end the decision-making process. Justice for Mr. K would be delayed even further. It was a mere recommendation and not a final decision because the Parole Commission, like many paroling authorities, delegates the hearing responsibility to persons who serve as hearing officers. They hear the case and write a summary of their findings with a recommendation, which does not become final unless it is approved by a commissioner or someone with higher authority who did not hear the case firsthand. Unfortunately for Mr. K, he had been detained for nearly three months awaiting a preliminary hearing, a final revocation hearing, and then waiting for the issuance of the written final decision based on the recommendation from the Parole Commission.

Walking out of Mr. K's hearing, having conducted a "mini-trial" with a lower standard of proof before a hearing examiner who had no legal training, and having successfully deflected the hostility of adverse witnesses, magnified the weight of the revocation process and need for counsel. The hearing lasted for nearly three hours. The Parole Commission, like many parole boards, has the authority to subpoena witnesses and evidence, speak with officials involved in the person's arrest, and hear testimony from case workers, counselors, treatment providers, victims and or family members. The hearing examiners are supposed to be impartial, but many are former police officers, corrections officials, or former parole supervision officers. It was the weighty responsibility of counsel to ensure that the evidence before the Board was reliable when determining whether Mr. K was guilty of the allegations and what, if any, conditions of parole should be modified or imposed upon his release. The fact that the hearing examiners are not lawyers also augments the need for representation at these hidden adjudicatory proceedings. Hearing officers and parole commissioners who are non-lawyers are often not aware of the intricacies of a person's basic rights to the same degree as attorneys. Having counsel present to make objections, cross-examine adverse witnesses, present appropriate documentary evidence, and prepare an individual to testify on their own behalf or advise them against doing so, all create orderly procedure while ensuring legal integrity. Like to many others who have traveled this road, I fear that Mr. K's extraordinary progress would have been derailed had he not been assigned legal representation.

B. Fighting for Freedom Without Counsel

Just as he had done countless times during the last three years, Mr. G phoned his parole officer for their quarterly check in. He was unusually excited about communicating with her to share his latest updates and to let her know that he was living his dream life. Two months earlier he has earned his commercial driver's license ("CDL") and this was his first assignment that required long-distance travel. Having accomplished few goals in his life before his imprisonment, Mr. G was particularly proud to reach this milestone.

Mr. G had served seventeen years in prison for a drug-related offense committed at the height of the "War on Drugs,"¹⁹ a government-sanctioned campaign with racist ramifications. This campaign left many communities of color in ruins and families separated by exorbitantly longer prison sentences for offenses involving the same amount of crack cocaine (used more often by Black Americans) as powder cocaine (used more often by white Americans).²⁰ Black people were targeted and arrested on suspicion of drug use at higher rates than whites, despite comparable rates of drug use.²¹ Mr. G was raised by a single mother who struggled with drug addiction, eventually inheriting her lifestyle and addictive behavior. At the age of twenty-one,

19. In June 1971, President Richard Nixon officially declared a "War on Drugs," stating that drug abuse was "public enemy number one." *War on Drugs*, HIST., <https://www.history.com/topics/crime/the-war-on-drugs> (Dec. 17, 2019). As part of the War on Drugs Initiative, Nixon increased federal funding for drug-control agencies and proposed strict measures, such as mandatory prison sentencing for drug crimes. *Id.* He created the Special Action Office for Drug Abuse Prevention ("SAODAP"), and in 1973, he created the Drug Enforcement Agency ("DEA"), a special police force committed to targeting illegal drug use and smuggling in the U.S. *Id.* In 1986, Congress passed the Anti-Drug Abuse Act, which established mandatory minimum prison sentences for certain drug offenses. *Id.* The drug war produced profoundly unequal outcomes across racial groups. Higher arrests and incarceration rates for poor and Black communities resulted from law enforcement's focus on urban areas, lower-income communities, and communities of color. *Race and the Drug War*, DRUG POL'Y ALLIANCE, <https://drugpolicy.org/issues/race-and-drug-war> (last visited Mar. 29, 2022). According to a January 2018 study by the Drug Policy Alliance, about 500,000 Americans were incarcerated for drug law violations. DRUG POL'Y ALLIANCE, *THE DRUG WAR, MASS INCARCERATION AND RACE 1* (2018), https://drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf. Blacks comprise 30% of people arrested for drug law violations and nearly 40% of those incarcerated in state or federal prison for drug law violations, citing Bureau of Justice Statistics, Federal Justice Statistics Program. *Id.*; see *Arrests by Race*, FED. BUREAU OF INVESTIGATION: UNIF. CRIME REPORTING PROGRAM, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-49> (last visited Mar. 29, 2022).

20. For an in-depth discussion about and analysis on the disparities of drug sentencing see DEBORAH J. VAGGINS & JESSICA MCCURDY, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK 1* (2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> (last visited Mar 4, 2022).

21. Policies led to a rapid rise in incarcerations for nonviolent drug offenses, from 50,000 in 1980 to 400,000 in 1997. In 2014, nearly half of the 186,000 people serving time in federal prisons in the U.S. were incarcerated on drug-related charges, according to the Federal Bureau of Prisons. See E. Ann Carson, *Prisoners in 2014*, U.S. DEP'T OF JUST., 1 (2015) <https://bjs.ojp.gov/content/pub/pdf/p14.pdf>.

he was sentenced to prison for drug distribution. He had been arrested twice on petty shoplifting charges, but this was his first sentence that would land him in “big” prison. The adjustment to prison life was difficult, but Mr. G managed to stay out of trouble and overcame his addiction through a peer education program. He spent his time behind bars focusing on his recovery and studying for his General Education Development (“GED”) diploma. His achievements were rewarded when he was granted parole at his first hearing before the parole board. He was released before the expiration of his sentence after serving twelve years and was placed on parole for five years.

During his time on supervision, Mr. G was determined to take advantage of the second opportunity he was given and learn from his mistakes. He moved into a middle-class Maryland neighborhood with his aunt and secured employment with a moving company. It was not his ideal job, but it was one of the few employers that would hire people with a criminal record.²² He was elated to have an honest and steady source of income. He worked during the day and enrolled in a six-week local trucking school to obtain his CDL through their training program. His dream job was to be a truck driver, so he saved his money to pay the hefty tuition. Eventually, he got his driver’s license and maintained an excellent, incident-free driving record. He passed the CDL knowledge tests and passed the CDL road skills test after hours of studying the manual and practicing vehicle controls and inspection.

So, when he secured a job with a trucking company and was assigned his first long-distance trip, he was ecstatic to share the news with his parole officer. He was unaware that this phone call would land him back in prison. He excitedly phoned her office to check in and proudly notified her that his new boss entrusted him with driving a load to Virginia. She immediately notified him that one of his parole conditions included not leaving the Maryland without permission. She was aware of his employment with the moving company, knew that he

22. Ban the Box (“BTB”) is a national campaign by advocates for formerly incarcerated persons, aimed at removing the check box on employment applications that asks if the individual has a criminal record on the hiring application. See BAN THE BOX CAMPAIGN, <https://banthebox-campaign.org> (last visited Mar. 28, 2022). The goal is to defer the criminal history inquisition until later in the hiring process to increase fairness and reduce automatic disqualifications due to criminal record. In 1998, Hawaii was the first state to pass a BTB law in 1998. *Ban the Box*, NAT’L CONF. OF STATE LEGIS. (June 29, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/ban-the-box.aspx>. A 2014 study on the effect of Hawaii’s ban the box law demonstrated that by mollifying the social stigma attached to a criminal record during the hiring process, Hawaii’s ban the box law proved to be extremely successful in attenuating repeat felony offending. See generally Stewart D’Alessio et al., *The Effect of Hawaii’s Ban the Box Law on Repeat Offending*, 40 AMER. J. CRIM. JUST. 336, 336 (2015) (arguing that Hawaii’s ban the box law reduced repeat offending).

had completed the CDL training, and actually congratulated him when he secured employment with the trucking company. However, the parole officer said she was unaware that he would be required to travel out of state. She instructed him to return immediately; he finished his assignment and returned that night. By the time he returned, she had already followed protocol and submitted a report of violation to the parole board. She recommended against revocation, however, her supervisor concluded that his behavior was a blatant disregard of his parole conditions and instead filed a recommendation to revoke Mr. G's parole. The parole board agreed, and Mr. G was arrested at his aunt's home by the sheriff's office. He was detained at the Maryland Reception, Diagnostic and Classification Center for a parole revocation hearing.

In Maryland, where Mr. G was arrested, local regulation entitles individuals charged with a parole violation to representation by counsel of the individual's choice. If eligible, counsel can be provided by the Office of the Public Defender.²³ However, representation was not assigned counsel, and Mr. G was unable to afford private representation. He therefore had his hearing with one commissioner and attempted to valiantly explain his predicament. There was no cross-examination of the parole officer, no character witnesses to testify on Mr. G's behalf, and no request and submission of his stellar prison records or achievements since his release into the community. There was no evidence presented to show that his travel to Virginia was a harmless error and not an intentional act of defiance.

Unfortunately, Mr. G was returned to prison for the remainder of his prison term, which amounted to approximately five years. His parole officer appeared to testify and documented that he signed that standard list of conditions when he was released nearly three years earlier. The parole board considered only this evidence and ignored the mitigation information presented by Mr. G. regarding his many achievements. He had no intention to deliberately snub his release conditions. This sentence, and return to prison for an administrative violation, was a significant setback for him financially. It also set him back psychologically as he found himself in a place that he vowed never to return due to an unintentional oversight. His life was forever changed, and all of his forward progress was voided when legal representation by counsel could have made all the difference.

23. See MD. CODE ANN., CORR. SERVS. § 7-401(b)(1) (West 2022).

II. THE EVOLUTION OF DUE PROCESS AT REVOCATION HEARINGS

A. Gideon v. Wainwright

The Sixth Amendment to the U.S. Constitution guarantees the right to counsel for criminal defendants to assist in their defense.²⁴ The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, and the right to know who your accusers are and the nature of the charges and evidence against you.²⁵ The *right to counsel* in America originally encompassed only the right to *retain* counsel, however, judicial interpretations of this Constitutional requirement have recognized that this right extends *beyond* retaining counsel.²⁶

Initially, the Supreme Court of the United States required the appointment of counsel for indigent defendants in state and federal felony proceedings.²⁷ So, even if a person could not afford to pay for a lawyer, one would be appointed by the court to represent him.²⁸ Since 1963, this has been a bedrock constitutional right at trial, grounded in the Due Process Clause of the Fourteenth Amendment which provides that no State shall “deprive any person of life, liberty, or prop-

24. U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

25. U.S. CONST. amend. VI.

26. See Johnson v. Zerbst, 304 U.S.458, 467-69 (1938) (holding that the right to counsel includes the right to appointed counsel, at the government's expense, because its deprivation is a jurisdictional bar to the Court's authority); Avery v. Alabama, 308 U.S. 444, 446-47 (1940) (finding that the right of counsel must be afforded in federal court, barring an intelligent waiver); Betts v. Brady, 316 U.S. 455, 471 (1942) (holding that the historical data did not support a finding of fundamentality requiring incorporation of the right to counsel to the States); Gideon, 372 U.S. at 340 (incorporating, without specificity, the right of counsel to the States).

27. See Powell v. Alabama, 287 U.S. 45, 68 (1932). Subsequent to Gideon v. Wainwright, 372 U.S. 335 (1963), in an opinion authored by Justice Thurgood Marshall, Mempa v. Rhay, 389 U.S. 128 (1967), the Supreme Court held that a defendant is entitled to representation of counsel at his probation revocation hearing. *Id.* at 130-32, 37 (1967). Here, the defendant, Mr. Jerry Mempa pled guilty to the offense of joy riding and was placed on probation for two years. *Id.* at 130. During this time, it was alleged that he was involved in a burglary and his probation was revoked without the presence of counsel. *Id.* at 131. He was sentenced to the maximum sentence of ten years in prison. He had not been asked if he wanted counsel. *Id.* Upon challenging his sentence, the Court held that a “lawyer must be afforded at these proceedings, whether they be labeled a revocation of probation or a deferred sentencing.” *Id.* at 130-31, 137. In the landmark decision Argersinger v. Hamlin, 407 U.S. 25, 26 (1972), the Court addressed the issue of whether the fundamental right to counsel applied to misdemeanor cases. *Id.* at 32, 40. The *Argersinger* Court held that the fundamental right to counsel attached to all criminal prosecutions, including misdemeanors, in which an “accused is deprived of his liberty.” *Id.* at 34-36. It is well established that indigent defendants are guaranteed the right to counsel at most pretrial and post-trial proceedings which the court deems critical. The denial of counsel at a critical stage of a state criminal proceeding may even require reversal of a conviction. *Id.* at 40 (asserting that, even in misdemeanor trials, no imprisonment may be imposed, regardless of the statutory language of the charge, without representation of counsel.).

28. See Zerbst, 304 U.S. at 458; see Gideon, 372 U.S. at 355.

erty, without the due process of law.”²⁹ In *Gideon*, the Supreme Court ruled unanimously that under the Sixth Amendment, incorporated by the Fourteenth Amendment, a criminal defendant has the constitutional right to legal counsel in both federal and state courts.³⁰ Mr. Gideon was arrested and charged in Florida and asked for counsel at trial, but the court denied his request based on their misinterpretation of the law that counsel may only be appointed for indigent defendants accused of capital offenses.³¹ Mr. Gideon had been charged with breaking and entering into a poolroom.³² He represented himself to the best of his ability, including cross-examining prosecution witnesses, presenting witnesses on his behalf, and making defense arguments, but he was ultimately found guilty and sentenced to five years in prison.³³ He filed a writ of habeas with the Supreme Court of Florida, but his petition was denied.³⁴ Upon appeal to the United States Supreme Court, Justice Hugo Black, writing for the majority, overturned the lower court ruling and recognized the constitutional right to counsel in all felony cases.³⁵ The Court examined the “special circumstances” test from *Powell v. Alabama*,³⁶ in which the Court considered factors such as age, educational background, mental health history, prior experience in the court, the complexity of the case, and the severity of the charges before reaching a decision about the defendant’s request for a lawyer.³⁷ The *Gideon* case was remanded, and when Gideon was re-tried with a lawyer, he was acquitted.³⁸

Probation revocation hearings are conducted in court before judges, while parole revocation proceedings are typically conducted in correctional institution settings. However, they are eerily similar in nature as they both impose or alter the original sentence ordered by the court. Probation is a court-ordered period of correctional supervision in the community and is generally used as an alternative to incarceration. In some cases, probation may be part of a combined sentence, where a term of incarceration is followed by a period of community supervision. Parole, on the other hand, is a period of conditional supervised release in the community following a term of in-

29. U.S. CONST. amend. XIV.

30. See *Gideon*, 372 U.S. at 339-340.

31. *Id.* at 336-37.

32. *Id.* at 336.

33. *Id.* at 337.

34. *Id.*

35. *Id.* at 340.

36. 287 U.S. 45, 71 (1932).

37. *Id.*

38. *The Legacy of Gideon v. Wainwright*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/archives/atj/legacy-gideon-v-wainwright> (Oct. 24, 2018).

carceration in state or federal prison. Persons on parole include people released through discretionary (release before reaching their full-term date) or mandatory (release at full term date minus any credit earned) supervised release from prison. Regardless of whether the individual is on parole or probation, it is typical for people facing these administrative decision-makers to leave the courtroom or hearing room with a new sentence of imprisonment.

B. *Morrissey v. Brewer*

Nearly a decade after *Gideon*, the Supreme Court laid out the due process rights guaranteed to persons facing revocation of their parole. In *Morrissey v. Brewer*, the Court held that a person on parole has a due process interest in maintaining their freedom in the community without arbitrary and capricious decisions of the state seeking to revoke his parole.³⁹ The *Morrissey* decision was a consolidated case of two defendants. John Morrissey was convicted for falsely uttering a check and was sentenced to no more than seven years in prison.⁴⁰ While on parole, he was arrested at his home for a parole violation and sent to jail.⁴¹ The Iowa Board of Parole reviewed a report written by his parole officer who recommended revocation, and he was returned to prison.⁴² His alleged parole violations included buying a vehicle under a false name, operating a vehicle without permission, and giving false insurance information to the police when he was involved in a minor car accident.⁴³ He did not have a hearing prior to the revocation of his parole.⁴⁴ The second case involved Donald Booher who was released on parole after serving time for forgery.⁴⁵ He, too, was arrested in his home based on allegations in a report written by his parole officer stating that he failed to keep gainful employment, operated a vehicle without permission, and failed to acquire permission when he obtained employment outside the territorial limits stipulated in his parole conditions.⁴⁶

Both defendants filed habeas petitions arguing that they should have had hearings before their parole was revoked.⁴⁷ The State of Iowa argued that no hearing was required.⁴⁸ The district court con-

39. 408 U.S. 471, 489 (1972).

40. *Id.* at 472.

41. *Id.*

42. *Id.* at 472-73.

43. *Id.* at 473.

44. *Id.*

45. *Id.*

46. *Id.* at 474.

47. *Id.*

48. *Id.*

cluded that Iowa's failure to conduct a hearing did not violate due process.⁴⁹ The Court of Appeals for the Eighth Circuit affirmed, stating that persons on parole are still "in custody" and not entitled to a full adversarial hearing.⁵⁰ The Court ruled that the minimum requirements of due process at parole revocation hearings include:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.⁵¹

This decision outlined the minimal due process rights courts must follow. However, the Court stopped short of addressing the most important legal issue raised and neglected to include the right to counsel in this mandatory list of basic due process rights. In fact, the Court explicitly failed to reach the question at all. The Court did not decide whether a person on parole is entitled to the assistance of counsel or the appointment counsel if he is indigent.⁵² The Court, however, referenced the Model Penal Code section 305.15(1) which provides that "the institutional parole staff shall render reasonable aid to the parolee in preparation for the hearing and he shall be permitted to advise with his own legal counsel."⁵³ The Court opined "we do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent."⁵⁴ Furthermore, the Court went on to state that "we have no thought to create an inflexible structure for revocation procedure."⁵⁵ In his concurring opinion, Justice Brennan, with whom Justice Marshall joined, recognized the important role that counsel plays in the revocation process, citing the landmark case *Goldberg v. Kelly*.⁵⁶ Justice Brennan

49. *Id.*

50. *Id.* at 475.

51. *Id.* at 488-89.

52. *Id.* at 489.

53. *Id.* at 489 n.16. (citing MODEL PENAL CODE § 305.15(1) (AMER. L. INST., Proposed Official Draft 1962)).

54. *Id.* at 489.

55. *Id.* at 490.

56. 397 U.S. 254 (1970).

noted that “[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of his client.”⁵⁷ Despite his clarity, Justice Brennan ultimately sided with the majority, failing to address the question of the right to counsel at all.⁵⁸ The Court was concerned about imposing a burden on the state’s parole proceedings, despite the fact that their opinion would already require state regulations to incorporate the minimal due process guarantees decreed in the opinion.⁵⁹

It was not that the Court was without inspiration as Justice Douglas wrote a contentious dissent in *Morrissey*. Justice Douglas again referenced *Goldberg*, where the Court found a procedural due process violation under the Fourteenth Amendment when a State terminated public assistance payments to a recipient without a prior evidentiary hearing.⁶⁰ Justice Douglas stated that “there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without a hearing, without effective assistance of counsel, without a statement of reasons.”⁶¹ He argued that, where there is a mere violation of a condition of parole, rather than the commission of a new offense, there should neither be an arrest of the person on parole, nor should that person return to the prison or to a local jail.⁶² Justice Douglas then rightfully concluded that the person on parole should be entitled to counsel.⁶³ Unfortunately, the majority was not convinced and stopped short of including the right to counsel among the due process rights guaranteed to those on parole when their freedom is at stake. Regrettably, states have been left to make individual decisions by examining the nature and weight of the liberty interests and balancing the state’s interests against the individual’s interest to determine what process is due. This Article argues that the Supreme Court should answer the question left unresolved in *Morrissey* and expand the right to counsel to all facing parole revocation. The Court has come close but failed to settle the issue once and for all.

57. *Morrissey*, 408 U.S. at 491 (Brennan, J., concurring).

58. *Id.*

59. *Id.* at 483, 490.

60. *Id.* at 494.

61. *Id.* at 495-96 (Douglas, J., dissenting) (citing *Kent v. United States*, 383 U.S. 541, 554 (1966)).

62. *Id.* at 497 (Douglas, J., dissenting).

63. *Id.* at 498 (Douglas, J., dissenting).

C. Gagnon v. Scarpelli

One year after *Morrissey*, the Court revisited the right to counsel question in *Gagnon v. Scarpelli*.⁶⁴ Ultimately, the Court held that because parole revocation hearings are not “part of a criminal prosecution,” the Sixth Amendment is not automatically triggered.⁶⁵ The majority held that those on parole have no absolute right to appointed counsel, and rather, they should be assigned attorneys on a “case-by-case” basis.⁶⁶ While the case formally addressed probation, not parole, the court found no “difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation.”⁶⁷ At the same time, they concluded that, in contrast with *Mempa*, each governing body must identify those cases which do require the appointment of counsel.⁶⁸ The Court reasoned that any “loss of liberty” resulting from a parole violation triggers due process because of the severe consequences, including loss of liberty. However, the Court stopped short of creating a per se rule making it constitutionally mandatory.⁶⁹ They instead deferred to local authorities to establish their own method for determining when counsel should be appointed.

The Court in *Gagnon* concluded that there are “certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide counsel for indigent probationers and parolees.” However, the determination as to whether counsel is required or not is made “on a case-by-case basis in the exercise of sound discretion by the state authority charged with the responsibility for administering the probation and parole system.”⁷⁰ Even though parole hearings are informal, the Court acknowledged that some persons on parole lack the skills necessary to effectively present their case or cross-examine witnesses. Yet, the Court still concluded that there was no constitutional requirement that counsel be provided in all revocation proceedings.⁷¹ In determining whether a case requires that counsel be appointed, the Court held that decision-makers should examine whether a person has denied the alleged violations, any complex mitigating factors against revocation, and, as the Court indicated, the indi-

64. See 411 U.S. 778 (1973).

65. *Id.* at 781.

66. *Id.* at 783-84.

67. *Id.* at 782.

68. *Id.* at 790. *Mempa* applies only in cases where there is a resentencing however, *Gagnon* ignored it because the Court was not resentencing.

69. *Gagnon*, 411 U.S. at 781.

70. *Id.* at 790.

71. *Id.* at 787.

vidual's ability to speak effectively for himself.⁷² For example, a person who relapsed on drugs and is facing revocation, might be better served by admitting to the relapse and arguing for treatment instead of imprisonment, which would be the appropriate response to such violation behavior. Furthermore, other sentencing alternatives may be more appropriate when addressing other behavioral and life skills issues people face upon reentry. In some cases, though, admitting to a violation might have repercussions that a person without legal training might not be able to disentangle. The Court concluded that in such cases having a lawyer present to provide legal guidance could serve to mitigate unintended negative consequences.

Two years after *Morrissey*, in *Wolff v. McDonnell*, the Supreme Court reviewed the procedural due process protections afforded to prisoners at disciplinary hearings that could result in the loss of good-time credits.⁷³ Justice White, writing for the majority, distinguished the revocation of parole, the deprivation at issue in *Morrissey*, from the loss of good-time credits, the deprivation at issue in *Wolff*, by stating:

Revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless "inflicts a 'grievous loss' on the parolee and often on others." Similarly put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee.⁷⁴

For the last five decades, the holdings in *Morrissey* and *Gagnon* have guided parole revocation hearings conducted by parole boards. However, far too often individuals find themselves facing a return to prison without the guidance of a trained lawyer. Many states do not provide counsel for indigent individuals, and some do not allow for counsel, retained or otherwise, at revocation hearings regardless of the consequences. Arguing for a laissez-fair approach to corrections and parole matters is untenable cherry-picking. The Court has clearly established procedural due process protections at the various corrections and parole proceedings, such as rights owed to incarcerated persons in disciplinary matters,⁷⁵ parole eligibility matters,⁷⁶ and involuntary transfers to mental hospitals.⁷⁷ The courts have also firmly established due pro-

72. *Id.* at 790.

73. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

74. *Id.* at 560-61.

75. *Id.* at 540.

76. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 4 (1979).

77. *Vitek v. Jones*, 445 U.S. 480, 500 (1980).

cess precedent in parole revocation matters, including the use of hearsay evidence without the right of confrontation,⁷⁸ whether the decision is “totally lacking in evidentiary support or so irrational as to be fundamentally unfair,”⁷⁹ the reliability of hearsay evidence,⁸⁰ and requiring a good cause finding for the absence of an adverse witnesses.⁸¹ Expansion of the Court’s decision to make the right to counsel mandatory in parole revocation proceedings is perilous as legal issues become more complex, resulting in disparate and racially inequitable outcomes at the tail-end of our criminal legal system.

III. SENTENCING IN THE ABSENCE OF LEGAL REPRESENTATION

A. *Sentencing that Takes Place at Parole Revocation Hearings*

Even though the Court has required the appointment of counsel for indigent defendants whenever a sentence of imprisonment is imposed, the Sixth Amendment’s right to counsel is illusory in the parole revocation context. Sentencing occurs anytime a punishment is imposed for wrongdoing. The punishments that result from parole violations, and the sentences imposed, have cataclysmic consequences.

While criminal trials differ in considerable ways from parole revocation hearings, both can result in sentences being imposed and orders of detention issued. In criminal prosecutions, a defendant faces prosecution in a court of law, and either a judge or jury determines guilt or innocence. After the prosecution and defense present all the evidence, the person on trial receives the verdict. This evidentiary hearing is the pinnacle phase in the prosecutorial process where the individual learns their guilt or innocence. In contrast, an administrative board conducts parole revocation hearings with no jury, a lowered standard of proof, and without formal rules of evidence. In fact most jurisdictions impose either the clear and convincing evidence or the preponderance of the evidence standard of proof when making a finding of violation determination.

Though evidentiary and sentencing phases are bifurcated in many criminal trials and combined in parole hearings, sentencing no less occurs. In court, if a defendant is found guilty, they are typically notified of a date to appear before a judge for the critical sentencing phase in the process. During this time individuals can regroup, collect state-

78. *Crawford v. Jackson*, 323 F.3d 123, 127 (D.C. Cir. 2003); *Ash v. Reilly*, 431 F.3d 826, 830 (D.C. Cir. 2005).

79. *Duckett v. Quick*, 282 F.3d 844, 847 (D.C. Cir. 2002).

80. *Birzon v. King*, 469 F.2d 1241, 1244 (2d Cir. 1972) (finding error when a parole board relied on anonymous statements in a report rather than receiving testimony directly).

81. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

ments of support, say goodbyes to family and loved ones, and mentally contextualize what comes next. Defense counsel can also prepare sentencing and mitigation arguments, review appropriate sentencing statutes, and strategize regarding the oral testimony of supporting witnesses, including the defendant. This is not the case with parole revocation. There is no return date regarding sentencing. Both the finding of a parole violation and the attendant imposition punishment collide during the revocation hearing. Where no violation is found, like Mr. K referenced above, then there is no sentencing phase. However, if a violation is found, like Mr. G,⁸² the hearing immediately pivots from an evidentiary hearing to a sentencing hearing.

It is undisputed that sentencing occurs at these administrative hearings. As the Supreme Court previously held in *Mempa* and *Townsend*,⁸³ sentencing is a critical stage in criminal proceedings, requiring the presence of counsel. The essence of a “critical stage” is the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel.⁸⁴ A sentence is typically defined as the punishment imposed on a person for an offense which violates a law, statute, or regulation.⁸⁵ Parole boards have the power to, and routinely do, punish those on parole via sentences of imprisonment, and counsel ought to be provided to each person facing such revocation sentencing.⁸⁶ In *Mempa*, the Court reaffirmed the *Townsend v. Burke* holding that a defendant was entitled to counsel at sentencing.⁸⁷ In *Townsend*, the petitioner plead guilty to two charges of robbery and two charges of burglary prior to sentencing.⁸⁸ During sentencing, the defendant was prejudiced by the prosecutor’s submission of misinformation regarding his prior criminal record and the judge’s misreading of the record.⁸⁹ The judge falsely stated that Frank Townsend was previously found guilty of receiving stolen goods (a saxophone) when, in fact, the charge for receiving the stolen saxophone had been dismissed earlier by a magistrate judge.⁹⁰ In two other charges which the judge recited at sentencing, larceny of an automobile and entry to seal and larceny, Townsend had actually been found not guilty.⁹¹ If counsel had been

82. See *infra* Part I.B.

83. See 389 U.S. 128, 133 (1967); 334 U.S. 736, 740-41 (1948).

84. See *United States v. Yamashiro*, 788 F.3d 1231, 1235 (9th Cir. 2015).

85. *Criminal Sentence*, BLACK’S LAW DICTIONARY (11th ed. 2019).

86. D.C. Code § 24-133(b)(2)(F) (2022).

87. See *Mempa v. Rhay*, 389 U.S. 128, 133 (1967).

88. *Townsend v. Burke*, 334 U.S. 736, 737 (1948).

89. See *id.* at 738-40.

90. See *id.*

91. See *id.*

present, they would have had an ethical duty to zealously argue to prevent the court from proceeding with the sentencing based on this false information.⁹²

Sentencing is a precarious juncture where counsel must be guaranteed, especially considering the skill and expertise that they bring to the proceeding. Counsel is vital, as the *Townsend* Court concluded, because counsel can take steps to assure that the sentence imposed is within the court's authority and that the sentence is not based on misinformation or some misreading of the court records.⁹³ A person is entitled under state and federal law to the assistance of counsel even when a sentence is vacated on appeal and the case remanded for a new sentencing hearing.⁹⁴ Just as a person has a right to counsel at a resentencing phase,⁹⁵ it is my opinion that a person *must* be afforded counsel at revocation hearings. Counsel also helps to assure the accuracy of facts and assure that the law is applied properly.⁹⁶ They help navigate victim impact statements, oversee the application of risk assessment instruments and psychiatric examinations, which often influence sentencing. The same evidentiary evaluation, legal analysis and data collection processes are executed during the parole revocation process.

B. Even the Threat of Loss of Liberty Demands Counsel

In any situation in which a defendant is facing loss of liberty, the right to counsel must attach. From the moment a person on parole walks into a revocation hearing room, the possibility of imprisonment is imminent. Americans enjoy the opportunity to live without the arbitrary denial of freedoms granted by the Constitution, or other laws, and the ability to live without fear of physical restraint or arbitrary control. When this basic freedom becomes unstable, it creates an atmosphere of heightened anxiety and insecurity that infringes on the very essence of American life. Unfortunately, many people on parole live in constant fear of being capriciously snatched from their daily existence. I recall representing a client who was on parole for simple assault. She had been in the community for four years before she was arrested and brought before the United States Parole Commission ("Parole Commission"), the federal parole board, for the technical vi-

92. *Id.* at 740.

93. *Id.*

94. *People v. Rouse*, 199 Cal. Rptr. 3d 360, 367 (Cal. Ct. App. 2016) (discussing Sixth and Fourteenth Amendments right to counsel concerns, holding that petitioner has a right to counsel at the resentencing phase).

95. *Id.*

96. *Townsend*, 344 U.S. at 740.

olation of failure to complete a drug treatment program. She was adamant that she did not need drug treatment and was mandatorily enrolled in the urine surveillance and collection regimen which supported her claims and evidenced no drug use. However, her parole officer instructed her that this was required based on her level of supervision, which was based on her underlying offense of simple assault. The Parole Commission did not sentence her to serve time in prison, but instead ordered her immediate placement into an inpatient drug treatment program. The Commission also determined that because her failure to go to treatment was “willful,” she would have to forfeit the four years that she was successfully in the community and it would be used to extend her period of supervision by four years.⁹⁷ For her, this meant that instead of completing supervision the following year as she had hoped, she would remain on supervision and likely not be permitted to attend her son’s graduation from Delaware State University as she has promised him. So, while she was not sentenced to serve time behind bars, the punishment imposed infringed on her liberty and impacted her life traumatically.

With opacity unmatched in any other criminal legal process, many parole revocation hearings occur before state-authorized parole boards. These hearings are contentious, with a slew of adverse witnesses testifying against the defendant, including the parole officer testifying when there are allegations of technical violations (most cases), and a police officer or complaining witness⁹⁸ testifying when there are allegations of new criminal conduct. This is particularly concerning given that in *Gagnon*, the Court examined the role of the parole officer to supervise rehabilitation.⁹⁹ The Court acknowledged that parole officers generally represent the interest of the individual, however, when there are alleged violations and the person on parole’s liberty is at stake, the parole officer who recommends revocation of parole becomes an adverse witness and serves in a prosecutorial role

97. U.S. Parole Commission Rules and Procedures Manual provides in section 2.52 that a parolee whose release is revoked by the Commission will receive credit on service of his sentence for time spent under supervision except where the Commission find that “such parolee intentionally refused or failed to respond to any reasonable request, order, summons or warrant or if the parolee is convicted of a new offense committed subsequent to their release on parole.” 28 C.F.R. § 2.52(c)(1). For many years it was the common practice of the U.S. Parole Commission to forfeit “street time” if any violation was found. This practice was challenged, and the U.S. Court of Appeals for the District of Columbia Circuit brought this practice to a halt and limited the cases in which street time can be forfeited. *Noble v. United States Parole Comm’n*, 693 A.2d 1084, 1086-87 (D.C. 1997).

98. “Complaining witness” is a term used to refer to the person who filed a complaint against the person being charged with a crime.

99. *Gagnon v. Scarpelli*, 411 U.S. 778, 783-84 (1973).

since these hearing are adjudicatory in nature.¹⁰⁰ The hearing examiner reviews evidence, assesses witness testimony, and holds the power to issue a sentence among the many other powers traditionally bestowed upon trial judges.

In *Argersinger* and *Scott v. Illinois*, the Court identified the sound principle that no person shall be “deprived of liberty” without the assistance of counsel.¹⁰¹ The *Scott* decision focused on the loss of liberty, not just imprisonment as a test for the application of the right to counsel.¹⁰² In his concurring opinion in *Argersinger*, Justice Burger stated that “any deprivation of liberty is a serious matter.”¹⁰³ Just like someone on probation, a person who is on parole supervision has restrictions on their liberty, which include restrictions on who they may associate with, restrictions on Fourth Amendment freedoms from unreasonable searches, and restrictions on travel and other daily activities. Courts understand that loss of liberty extends beyond physical restraints.¹⁰⁴ Similarly, a person who is granted parole has their liberty at stake when violations are alleged. While the Supreme Court of the United States has clearly stated that there is no constitutional right to counsel for prisoners to mount collateral attacks upon their convictions,¹⁰⁵ those cases are distinguishable because these persons are in custody. Therefore, there is no loss of liberty at issue and no risk of loss of liberty. The “guided hand of counsel” is necessary when one’s liberty is clearly in jeopardy.¹⁰⁶

Even in cases where a suspended sentence is imposed, the courts acknowledge the right to counsel at sentencing.¹⁰⁷ In *Alabama v. Shelton*, the Supreme Court of the United States affirmed that a de-

100. *Id.* at 784.

101. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); see *Scott v. Illinois*, 440 U.S. 367, 370 (1979).

102. *Scott*, 440 U.S. at 370.

103. *Argersinger*, 407 U.S. at 41 (Brennan, J., concurring).

104. See *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (“The Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint. Further, the Court has held that the ‘liberty’ specifically protected by Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), to direct the education and upbringing of one’s children, *Meyer v. Nebraska*, 262 U.S. 390, 399, 400, to enjoy marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), and to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438, 438 (1972).”).

105. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (declining to hold that prisoners have a constitutional right to counsel when challenging their conviction. This was based on the fact that state habeas relief is far removed from the criminal trial, and the proceedings are considered civil in nature); see also *Murray v. Giarrantano*, 492 U.S. 1, 4 (1989), (affirming *Finley* and held that there is also no right to counsel for capital defendants to file habeas corpus petitions).

106. *Argersinger*, 407 U.S. at 40.

107. *Alabama v. Shelton*, 535 U.S. 654, 674 (2002).

fendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel.¹⁰⁸ In that case, the defendant, LaReed Shelton, was convicted in an Alabama trial court of third-degree assault and was sentenced to a jail term of 30 days, which the trial court immediately suspended, placing defendant on probation for two years.¹⁰⁹ The Alabama Court of Criminal Appeals affirmed.¹¹⁰ The Supreme Court of Alabama reversed Shelton's suspended sentence, vacated the two-year term of probation, and the state petitioned for certiorari.¹¹¹ The Supreme Court of the United States, through Justice Ginsburg, held that a suspended sentence that may deprive a person's liberty may not be imposed unless the defendant was afforded assistance of counsel.¹¹² The Court, explicitly relying on *Argersinger*, reasoned that a suspended sentence that may "end up in the actual deprivation of a person's liberty" may not be imposed unless the defendant was accorded "the guiding hand of counsel" in the prosecution for the crime charged.¹¹³ This "actual imprisonment" standard from *Argersinger*, has been upheld many times by the Court.¹¹⁴

Placement on probation is a sentence and is subject to revocation.¹¹⁵ Some courts have held that an indigent person who receives a conditionally suspended sentence or probation without the assistance of counsel is constitutionally entitled to representation because that person has been sentenced to a term of imprisonment.¹¹⁶ If parole is revoked, it may be revoked for the balance of the unfinished maximum sentence or some lesser sentence. A person may also be: (1) revoked to serve a term as determined by loss of diminution credits and street time; (2) revoked and ordered to serve added absconder

108. *Id.*

109. *Id.* at 658.

110. *Id.*

111. *Id.* at 659.

112. *Id.* at 658.

113. *Id.* at 662 (citing *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (finding that once a suspended sentence is triggered, the defendant is imprisoned not for the parole violation but for the underlying conviction)).

114. See *Glover v. United States*, 531 U.S. 198, 203 (2001) ("[A]ny amount of actual jail time has a Sixth Amendment significance[.]"); see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996); see also *Nicholas v. United States*, 511 U.S. 738, 746 (1994) (citing *Scott v. Illinois*, 440 U.S. 367, 372 (1979) (The constitutional line is "between criminal proceedings that resulted in imprisonment, and those that did not.")). See also *Lassiter v. Dep't of Soc. Servs. of Durham City*, 452 U.S. 18, 26 (1981).

115. See *State v. Aldape*, 794 P.2d 672, 676 (Kan. Ct. App. 1990) (recognizing that the defendant was under a sentence from the beginning of his probation but was given conditional liberty which could be revoked if he violated the conditions of his probation).

116. See, e.g., *United States v. Reilly*, 948 F.2d 648 (10th Cir. 1991); *United States v. Foster*, 904 F.2d 20 (9th Cir. 1990); *United States v. Sultani*, 704 F.2d 132 (4th Cir. 1983); *United States v. Leavitt*, 608 F.2d 1290 (9th Cir. 1979); *United States v. White*, 529 F.2d 1390 (8th Cir. 1976).

time¹¹⁷ to extend a full sentence term; or (3) revoked and ordered to return to prison for the remainder of the mandatory parole period. All persons deserve due process protections during this sentencing determination.

Compounding the problem, sentencing deliberations themselves are complex, making counsel even more indispensable. The courts take many factors into consideration when making sentencing determinations, both in court and at revocation proceedings.¹¹⁸ Static factors, such as age and criminal history, as well as dynamic factors such as employability, family support and personal achievements, are all ripe for consideration when determining the appropriate sentence for a violation and risk of threat to the community. Just as actuarial risk assessment tools have been adopted by a substantial number of releasing authorities to assist in determining whether to grant or deny parole, paroling authorities use similar instruments for guidance in the revocation process. These risk assessment tools in revocation decisions include the Static-99, Level of Service Inventory-Revised (“LSI-R”), Correctional Offender Management Profiling for Alternative Sanctions (“COMPAS”), and the Client Management Classification (“CMC”) tool.¹¹⁹ Static-99 is a ten item actuarial assessment instrument created by Dr. R. Karl Hanson and Dr. David Thornton for use with adult male sex offenders who are at least eighteen years of age at time of release to the community.¹²⁰ It is the most widely used sex offender risk assessment instrument in the world, according to the National Institute of Corrections (“NIC”).¹²¹ LSI-R is a quantitative survey of offender attributes and offender situations relevant for making decisions about levels of supervision and treatment.¹²² COMPAS is a case management tool used to determine probation risk and needs.¹²³

117. “Absconder time” refers to time that a person was meant to be supervised but was not in contact with their parole officer.

118. See U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2021).

119. See EBONY L. RUHLAND ET AL., THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY 42 (2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final_national_parole_survey_2017.pdf.

120. *About*, SAARNA, <https://saarna.org/about> (last visited Mar. 28, 2022).

121. See *Static-99/Static-99R*, NAT’L INST. OF CORR., <https://nicic.gov/static-99static-99r> (last visited Mar. 28, 2022).

122. See *Assessing Risk and Needs: What is the LSI-R?*, GEO REENTRY SRVS. (Nov. 17, 2017), <https://www.georeentry.com/assessing-risk-needs-lsi-r>.

123. See *Northpointe Suite Case Manager*, EQUIVANT, <https://www.equivant.com/northpointe-suite-case-manager> (last visited Mar. 28, 2022); see Sam Corbett-Davies et al., Julia Angwin & Jeff Larson, *ProPublica Responds to Company’s Critique of Machine Bias Story*, PROPUBLICA (July 29, 2016, 11:56 AM), <https://www.propublica.org/article/propublica-responds-to-companys-critique-of-machine-bias-story> (concluding through an examination of Northpointe (now Equivant) software data that demonstrate Black people received disproportionately higher risk assessment scores even while taken into account differences in the rates of reoffending, criminal history, age, and gender).

The CMC system uses a scoring rubric and structured interview to help formulate individualized supervision programs.¹²⁴ These instruments are applied to determine the level of supervision and programming needs and understanding their scoring outcomes is an essential part of advocacy in the parole revocation arena.

Paroling authorities continue to rely heavily on the use of these assessment instruments even though they have been determined to be inherently unfair and racially biased in pretrial contexts.¹²⁵ Based on these assessments, defendants can be automatically returned to prison to serve the remainder of their sentence, regardless of the amount of time accumulated in the community without incident. The sentencing phase at revocation hearings can get quite technical with the calculation of street time, good time credits, and proper assessment and calculation of the instrument used to determine an individual's risk of recidivism. For example, under federal criminal jurisdiction, a person who is found guilty of violation behavior runs the risk of having their street time forfeited for certain violations.¹²⁶ This means that all the time that the person has served in the community successfully on parole supervision is forfeited and used to extend their original full-term date. Not only will the board determine how much time a person should serve as punishment for the new violation, but they will also determine how much longer the person will remain on parole supervision after their release, as well as the conditions under which such supervision will continue. The use of risk assessments amplifies the complexity of revocation hearings and reinforces the need for counsel.

Sentencing that takes place at revocation hearings can become quite complex and the guidance of counsel is indispensable. The standard of proof is lower, the hearing examiners have little to no legal training, and they often consider behavior that does not amount to a criminal conviction during sentencing. The threat of being returned to prison is often the carrot that parole officers dangle to entice compliance with the conditions of parole release.

124. See generally Kenneth Lerner et al., *Client Management Classification Strategies for Case Supervision*, 32 CRIME & DELINQUENCY 254 (1986) (providing a comprehensive overview of the CMC classification approach).

125. See PRETRIAL JUST. INST., UPDATED POSITION ON PRETRIAL RISK ASSESSMENT TOOLS 1 (2020).

126. 18 U.S.C. § 3565(a)(1)-(2) ("If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or (2) revoke the sentence of probation and resentence the defendant under subchapter A.").

IV. PAROLE REVOCATION IS A MAJOR DRIVER OF MASS INCARCERATION AND IS COSTLY

A. *Feeding the Mass Incarceration Monster with Parole Violators*

The United States leads the world in the number of people incarcerated in our jails and prisons.¹²⁷ Over 2 million people are in prisons and jails in our nation and an additional estimated four million are on probation, parole or supervised release.¹²⁸ One main driver of mass incarceration is the high rate of revocations and the return to prison for people on probation and parole supervision.¹²⁹ The case of rapper Meek Mill brought national attention to the ease with which people are returned to prison for technical violations.¹³⁰ Even though his probation officer testified that he was “meeting expectations,” Mill’s probation was revoked and he was ordered into custody for two to four years.¹³¹ His case became a rallying cry against the harsh treatment of people on supervision.¹³² He was eventually granted bail by the court and released from prison, and he vowed his continued commitment to the reform movement.¹³³ Technical violations, are one of the two ways that individuals on parole and probation face can revocation.¹³⁴ Technical or administrative violations occur when an individual on parole has failed to comply with one or more of the conditions listed on their parole release order and when no crime has occurred. While those of parole may also face revocation because of the commission of a new criminal offense, most violators who currently linger in our jails and prisons, have not committed a new crime, but rather, the government claimed they broke the rules of their parole.¹³⁵ Feeding the mass in-

127. NAT’L RSCH. COUNCIL ET AL., GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (2014).

128. *Id.*

129. *Id.* at 155.

130. Daniel Kreps, *Meek Mill Receives Up to Four Years in Prison for Violating Probation*, ROLLING STONE (Nov. 7, 2012), <https://www.rollingstone.com/music/music-news/meek-mill-receives-up-to-four-years-in-prison-for-violating-probation-123559>.

131. *Id.*

132. Richard Rys, *How Meek Mill Became a Movement*, PHILLYMAG (Mar. 14, 2019), <https://www.phillymag.com/news/2019/03/14/meek-mill-social-justice-reform>.

133. See Michelle Kim, *Jay-Z, Meek Mill, Van Jones, More Launch New Criminal Justice Reform Organization*, PITCHFORK (Jan. 23, 2019), <https://pitchfork.com/news/jay-z-meek-mill-van-jones-more-launch-new-criminal-justice-reform-organization>. (discussing Meek Mill’s partnership with Jay-Z to establish the Reform Alliance (or “Reform”), a criminal justice advocacy organization committed to changing mass supervision laws).

134. Substantive violations, conduct constituting separate offenses from the convictions underlying the supervision, can also result in re-imprisonment.

135. Andrea Fenster, *Technical Difficulties: D.C. Data Shows How Minor Supervision Violations Contribute to Excessive Jailings*, PRISON POL’Y INITIATIVE (Oct. 28, 2020), https://www.prisonpolicy.org/blog/2020/10/28/dc_technical_violations/#:~:text=nationally%2C%2045%25%20of%20annual%20prison,meetings%20with%20a%20parole%20officer. (citing national

carceration monster with parole violators, whose violative behavior might more appropriately be addressed through other intermediate sanctions, is re-traumatizing for returning citizens and their families, and can often exacerbate already-harrowing circumstances.

Like everyone else in prison, parole violators are subject to overcrowding and other harsh treatment.¹³⁶ More than a 500,000 people contracted coronavirus (COVID-19) in American prisons during the pandemic,¹³⁷ and at the time of this writing, variants continue to spread behind prison walls.¹³⁸ It is a heartbreaking reality that the first COVID-19 deaths at Rikers Island were Raymond Riveras and Michael Tyson, who were both held on technical violations.¹³⁹

The optimistic, euphoric outlook on life that people embrace when they finally exit the prison doors is often tempered by the exhaustive laundry list of conditions to which they must abide. The terms of supervision conditions can sometimes be onerous, difficult to understand, and may actually hinder successful reintegration. Those on parole are often required to attend several daytime or evening meetings, abstain from using drugs and alcohol, notify someone every time they change their residence or job, pay supervision fees, permit the parole officer to conduct unannounced visits at home and on job sites, and not associate with other people who have a criminal record, just to name a few. Special conditions are typically imposed for specific types of offenses such as offenses involving firearms, sex offenses, or those involving allegations of domestic violence. Convictions for these offenses involve added layers of restrictions, including monthly registrations, stay away orders, submission to polygraph and plethysmograph examinations,¹⁴⁰ and unannounced warrantless searches of

data showing that 45% of annual prison admissions is due to supervision violations and 25% are due to technical violations).

136. Shon Hopwood, *How Atrocious Prisons Conditions Make Us Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe#:~:text=prisons%20create%20social%20isolation%20by,autonomy%20and%20increase%20institutional%20dependence>.

137. See, e.g., Katie Park et al., *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, THE MARSHALL PROJECT (June 30, 2021), <https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic>. There were 512,864 cases of coronavirus reported among prisoners and staff through June 2021 according to the Marshall Project and Associated Press weekly data collection from state and federal prison agencies.

138. *COVID-19 in Prisons and Jails*, PRISON POL'Y INITIATIVES, <https://www.prisonpolicy.org/virus/index.html> (last visited Mar 5, 2022).

139. Olinda Moyd, *Racial Disparities Inherent in America's Fragmented Parole System*, AM. BAR ASS'N (May 1, 2021), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2021/spring/racial-disparities-inherent-americas-fragmented-parole-system.

140. See *Plethysmograph*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/plethysmograph> (A plethysmograph is "an instrument for determining and registering varia-

computer equipment. These conditions continue for many years and, in some cases, for decades. Excessively “long supervision terms, numerous [unrelated] and burdensome requirements, and constant surveillance—especially with electronic monitoring—result in frequent ‘failures,’ often for minor infractions like breaking curfew or failing to pay unaffordable supervision fees.”¹⁴¹ Technical violations are the primary reason parolees are returned to prison. In most states, the conditions are set by the releasing parole authority.¹⁴² “Changing residences without permission was the single largest condition that led to state parole violation proceedings in Pennsylvania from 2016 to 2019, accounting for about one third of all violations.”¹⁴³ “In Wisconsin, from 2017 through 2019, drug use was by far the most common violation leading to sanctions up to and including incarceration—accounting for one out of every five violations during that period.”¹⁴⁴

Persons on parole can also be returned to prison if they are arrested by the police or even if it is just alleged that they committed a new criminal offense. In such cases, a person can be returned to prison merely because they have a new arrest, regardless of whether they are eventually found guilty of the new criminal offense in court or even charged with any offense at all.¹⁴⁵ Shockingly, based on the lower standard of proof, a parolee can still face revocation even if the criminal offense is not prosecuted, dismissed by the government, or even if they are found not guilty in court by a judge or jury of their peers. Recall Mr. K’s story—his criminal case was dropped by prosecution because of the weak evidence, but he still faced revocation. Further, these conditions not only expose parolees to countless and seemingly unnavigable risks but impeded their ability to meaningfully reintegrate into society after release.

Restrictive supervision conditions such as the prohibition against residing in government-owned housing and the inability to obtain a

tions in the size of an organ, limb, or part resulting from changes in the amount of blood present or passing through [the instrument.]”).

141. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

142. EBONY L. RUHLAND ET AL., *supra* note 119, at 35 (“A total of [thirty-eight] releasing authorities [out of 41 respondents] determine the conditions driving parole or post-release supervision.”).

143. *Revoked: How Probation and Parole Feeds Mass Incarceration in the United States*, HUM. RTS. WATCH (July 30, 2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states#> [hereinafter *Revoked*].

144. *Id.*

145. See *infra* Section III.A.

professional or occupational license,¹⁴⁶ combined with collateral consequences that people experience when they leave prison,¹⁴⁷ plague people on parole and make reintegration almost unfeasible. Stricter sentencing policies, primarily for drug-related offenses, are the main culprit behind ballooning incarceration rates over the last three decades.¹⁴⁸ Tough-on-crime policies such as three strikes, truth-in-sentencing laws, and mandatory minimums have not resulted in decreased crime rates,¹⁴⁹ instead reversely serves to increase our prison and jail populations, especially for non-violent offenses. Although every person should have the right to a lawyer, it should be noted that “non-violent offenders make up over 60 percent of the prison and jail population.”¹⁵⁰ After serving lengthy prison terms, many people on parole need tangible support as they make important lifestyle changes and struggle to meet the demands of their onerous parole supervision conditions. These changes do not come easy. People on parole need access to resources and support to secure and maintain employment, find stable housing, earn enough money through legal channels to pay court costs or fines, obtain reliable and inexpensive transportation, and access adequate medical and mental health care. Many are undereducated, suffer from repeat trauma, have unaddressed mental illnesses, and need support to carry out everyday functions.¹⁵¹ Some people see parole supervision as a safety net and opportunity to access resources, but this is nearly impossible in many cases due to the trends toward law enforcement-like surveillance tactics expected from parole officers.¹⁵² Ironically, often what people on

146. AM. BAR ASSOC., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: JUDICIAL BENCH BOOK 7* (2018) (ebook).

147. *Id.* at 4.

148. Lauren Carroll, *How the War on Drugs Affected Incarceration Rates*, POLITIFACT (July 16, 2010), <https://www.politifact.com/factchecks/2016/jul/10/cory-booker/how-war-drugs-affected-incarceration-rates/>.

149. James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration>.

150. JOHN SCHMITT ET AL., *THE HIGH BUDGETARY COST OF INCARCERATION 12* (2010), <https://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

151. Fenster, *supra* note 135.

152. The use of electronic monitoring through GPS devices and ankle bracelets is common place for many supervision agencies. During the pandemic, use of the smartphone apps allow supervision officers to connect with parolees through text or video and track their location. See Sidney Fussell, *Apps Are Now Putting the Parole Agent In Your Pocket*, WIRED, <https://www.wired.com/story/apps-putting-parole-agent-your-pocket/#:~:text=the%20pandemic%20has%20stirred%20interest,parolees%20and%20people%20on%20probation> (Nov. 11, 2020).

parole receive are added levels of scrutiny, close monitoring and the rigid restrictions that do not accommodate normal life activities.¹⁵³

A staggering 4.3 million people live under parole supervision in the U.S. according to the Bureau of Justice Statistics of the United States Department of Justice (“BJS”).¹⁵⁴ An estimated one in fifty-nine adults in the U.S. were under community supervision at the end of 2019.¹⁵⁵ During the 2019 calendar year, the parole population decreased in twenty-three states and the District of Columbia and increased in twenty-six states and the federal system.¹⁵⁶ Among the 27 jurisdictions where parole populations grew, California, Missouri and Nevada accounted for 54% of the total increase.¹⁵⁷ California had the largest increase, which accounted for 31% of the total increase among jurisdictions where the parole population grew.¹⁵⁸ According to the Bureau of Justice Statistics, in the late 1970s, 16% of U.S. state and federal prison admissions stemmed from violations of parole and some type of probation.¹⁵⁹ This number climbed to a high of 36% in 2008, and in 2018, this number was 28%.¹⁶⁰ It is estimated that a significant number of people summoned before a local judge on any given day are on parole or some other form of supervision based on a previous offense.

Nationally, 45% of state prison admissions nationwide are due to violations of probation or parole for new offenses or technical violations.¹⁶¹ This means that, every day, nearly half of all persons who go through prison intake are there due to alleged failure to follow release conditions, including getting a new arrest. Approximately 22% of these admissions are for parole.¹⁶² Fourteen percent of overall state

153. Probation and parole can hurt the very people they’re supposed to help with long supervision terms, strict conditions, and intense surveillance. Supervision “failures” are the predictable result of probation and parole conditions and the intensive supervision resulting therefrom. See Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL’Y INITIATIVE <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html> (last visited Mar. 28, 2022).

154. BARBARA OUDEKERK & DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES 1 (2021), <https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf>. This number represents a slight decline driven solely by a reduction in probationers, while the number of parolees remained relatively steady during this reporting year.

155. *Id.*

156. *Id.*

157. *Id.* at 5.

158. *Id.*

159. *Revoked*, *supra* note 143.

160. *Id.*

161. *New Analysis Shows How Parole and Probation Violations Significantly Impact States’ Prison*, COUNCIL OF STATE GOV’TS (June 18, 2019), <https://csgjusticecenter.org/2019/06/18/new-analysis-shows-how-parole-and-probation-violations-significantly-impact-states-prison-populations-and-budgets>.

162. *Id.*

prison admissions nationwide are from parole technical violations alone, and only 8% of admissions are for new criminal offenses.¹⁶³ Technical violations make up more than a quarter of the violators sent back to prison nationwide.¹⁶⁴ In thirteen states, more than one in three people in prison on any given day are there for a supervision violation.¹⁶⁵ In twenty states, more than half of prison admissions are due to supervision violations.¹⁶⁶ Further, there are several states with a significantly high percentage of violators that make up the overall prison population.¹⁶⁷ In Utah, 79% of the state prison admissions are supervision violators, 77% in Missouri, and 70% in Wisconsin.¹⁶⁸ It is worth noting that Kentucky has a 64% admission rate for violators, the majority of which are for technical violations.¹⁶⁹ We are filling our prisons with parole violators and stretching our state budgets simply to keep the revocation wheel churning.

Even though high volumes of people held in state prisons are there for minor technical violations, little attention is paid to what happens at parole and probation revocation hearings. These decisions, however, result in filling our prisons with people who are overwhelmingly undereducated, unhoused, and unemployed. These verdicts are pronounced behind closed doors, outside the public eye. The clandestine and secretive nature of these hearings has thus far allowed serious due process concerns to flourish “under the radar.” The high rate of incarceration for parole violators is another factor that demonstrates the need for counsel at these hearings to abate this injustice. Counsel must be made available for people who live under the constant threat of loss of liberty and the fear of being returned to prison. Recent calls for “decarceration”¹⁷⁰ must include emptying our jails and prisons of this oft-forgotten violator population.

B. The Hidden Costs of Returning Parole Violators to Prison for Technical Violations

The price tag for returning parole violators to prison is exorbitant and steadily increasing. In 2008, federal, state and local governments

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Dennis Schrantz et al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, THE SENT'G PROJECT (Sept. 18, 2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/>.

spent nearly \$75 billion on corrections, with the large majority on incarceration.¹⁷¹ According to the BJS, the annual cost of federal mass incarceration in the United States is now approximately \$81 billion.¹⁷² The amount budgeted by the states for corrections departments across the country totaled just under \$43 billion.¹⁷³ States spend a total of \$9.3 billion annually, imprisoning people for violations of community supervision, not including costs of jailing them before hearings.¹⁷⁴ The average charge to taxpayers for each person in custody in these state prisons was \$33,274 annually.¹⁷⁵ The annual cost per individual was highest in the state of New York at \$69,355 and the lowest in Alabama at an average cost of \$14,780 per individual detainee.¹⁷⁶ In 2018, the Bureau of Prisons (“BOP”) reported the average cost for a federal detainee was \$36,299 per year or \$99.45 per day.¹⁷⁷ The total annual expense is nearly \$5.8 billion per year in the Federal Bureau of Prisons.¹⁷⁸ Costs increase for older people who develop chronic medical conditions as they age in prison and their need for medical care rises.¹⁷⁹ Keeping people housed in solitary confinement and other restrictive housing further adds to this already-high cost.

The cost of returning people to prison for technical violations is no exception to the exorbitant prison costs we all bare. According to a report by The Council of State Governments, on any given day, 280,000 people in prison (nearly one in four new admissions) are incarcerated as a result of supervision violations, costing states more than \$9.3 billion annually.¹⁸⁰ Technical violations account for \$2.8 billion of this total amount, and new offense supervision violations make up \$6.5 billion.¹⁸¹ These figures do not account for the substantial local costs of keeping people in jail for supervision violations.¹⁸² For example, in New York, the government (as a whole) spends approxi-

171. See JOHN SCHMITT ET AL., *supra* note 150, at 2.

172. See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

173. Chris Mai & Rab Subramanian, *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS 2010-2015*, VERA 1, 7 (2017), <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf>.

174. COUNCIL OF STATE GOV’TS, *supra* note 161.

175. Mai & Subramanian, *supra* note 173, at 7.

176. *Id.*

177. See 83 C.F.R. 18863 (2022).

178. Teo Spengler, *How Much Do Prisons Cost Taxpayers?*, GOBANKINGRATES (July 9, 2020), <https://www.gobankingrates.com/taxes/filing/wont-believe-much-prison-inmates-costing-year>.

179. *Id.*

180. COUNCIL OF STATE GOV’TS, *supra* note 161.

181. *Id.*

182. See SCHMITT ET AL., *supra* note 150, at 3 n.2 (“Prisons generally house people serving sentences of at least one year, and are usually operated by the federal for state governments. Jails generally house people serving sentences of less than one year, and are usually operated by

mately \$680 million incarcerating people returned to state prison for technical violations.¹⁸³ Localities across the state spend nearly \$300 million incarcerating these individuals accused of alleged parole violations while they await disposition of the charges.¹⁸⁴ In many jurisdictions, persons are returned to jail for their preliminary interview and final revocation hearing and subsequently transferred to prison to serve the sentence ordered by the board as punishment for the violation behavior. In Pennsylvania, Wisconsin, and Georgia, people are generally incarcerated while they fight revocation, even for minor violations.¹⁸⁵ Detention often lasts for months in jails that are overcrowded, unsanitary, and offer little or no treatment to address the violation behavior.¹⁸⁶

The high cost of incarceration often fails to include the collateral damage and the lasting impact that incarceration leaves behind, not just on the individual, but upon their families as well.¹⁸⁷ Parents, extended family members, and loved ones are all psychologically locked behind bars when parolees are returned to prison.¹⁸⁸ Valuable resources are stripped from households and the entire collective community experiences trauma that reverberates for years to come. Family, friends, and loved-ones bear emotional and psychological scars from witnessing their loved-ones' live in limbo and witnessing them get snatched back into prison for something as minor as missing an appointment or failing to answer the phone. In one case, Ms. Gwen Levi, a seventy-six-year-old woman who was in remission from lung cancer and who the Justice Department had declared non-violent, was released from federal prison during the pandemic.¹⁸⁹ She was free for thirteen months but was arrested after she missed phone calls from her halfway house caseworker while she was attending a com-

local governments. Alaska, Connecticut, Delaware, Hawaii, Rhode Island and Vermont operate integrated systems that combine prisons and jails.”).

183. COLUM. UNIV. JUSTICE LAB, *THE ENORMOUS COST OF PAROLE VIOLATIONS IN NEW YORK, A MORE JUST NYC* 17 (2021), https://justicelab.columbia.edu/sites/default/files/content/Cost_Parole_Violations_in_New_York.pdf (last visited Mar 6, 2021).

184. *Cost of Technical Violations of Parole*, NEW YORKERS UNITED FOR JUST., <https://nyuj.org/cost-of-technical-violations-of-parole>.

185. *Revoked*, *supra* note 143.

186. *Id.*

187. Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. FOR JUST. 1 (2017), <https://www.ojp.gov/pdffiles1/nij/250349.pdf>.

188. Kolina J. Delgado, *The Impact of Incarceration on Families: A Summary of the Literature*, CORE SCHOLARS 1, 2-3 (2011), https://corescholar.libraries.wright.edu/cgi/viewcontent.cgi?article=1004&context=psych_student.

189. Kristine Phillips, *Woman Who Was Arrested After Missing Officials' Phone Call While in Computer Class is Headed Home*, USA TODAY, <https://www.usatoday.com/story/news/politics/2021/07/06/gwen-levi-headed-home-after-judge-approves-compassionate-release/7877359002> (Mar. 5, 2021, 11:26 AM).

puter class—technology that had changed significantly since she was last able to use it.¹⁹⁰ Missing the phone call was deemed a failure of her home detention, and Ms. Levi was therefore put on escape status, even though she notified the supervision officer in advance of her attendance and even though she believed that she had approval to attend.¹⁹¹ During the thirteen months Ms. Levi was free, she had reunited with her sons, started learning new skills, and volunteered with several community groups.¹⁹² At the time of her release, she had served sixteen years in federal prison on drug conspiracy charges and had several years left to serve.¹⁹³ Ms. Levi could have been returned to prison for years.¹⁹⁴ The traumatic story of Ms. Gwen Levi is all too common. Luckily, in response to an outpouring of support from her family and community who staffed vigils in her support, she was ordered to be released after serving six weeks back in prison and was allowed to return to her family.¹⁹⁵ Because she was sentenced in federal court and was on supervised release, her case was heard before a federal court judge and she was represented by counsel.¹⁹⁶ For many people like her, being on supervision is akin to walking on eggshells; the precarious nature of her conditional freedom requiring exacting precision and inducing severe stress.

People on parole, their families, and entire communities are impacted, but this is especially true in communities of color. African Americans make up 30% of individual on community supervision—including probation and parole—yet make up just 13% of the U.S. adult population.¹⁹⁷ Black adults are about three-and-a-half times more likely than whites to be supervised and make up about 30% of the probation or parole population.¹⁹⁸ Sons and daughters, aunts and uncles, brothers and sisters, and intergenerational incarceration is all

190. *Id.*

191. *Id.*

192. Justin Moyer, *Grandmother Jailed After Not Answering Her Phone During Class is Ordered Released from Prison Sentence*, BALTIMORE SUN (July 6, 2021, 9:28 PM), <https://www.baltimoresun.com/news/crime/bs-wp-md-cr-gwen-levi-prison-compassionate-release-20210707-qejualcdhvhzrgzfahs6crwgte-story.html>.

193. Phillips, *supra* note 189.

194. *Id.*

195. Michelle Murillo, *Baltimore Grandmother Released After Violating Parole by Not Answering Phone*, WTOP News (July 7, 2021, 7:55 AM), <https://wtop.com/baltimore/2021/07/baltimore-grandmother-back-home-after-being-arrested-for-not-answering-her-phone>.

196. Moyer, *supra* note 192.

197. *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW CHARITABLE TRUSTS (Sept. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities>.

198. Jake Horowitz & Connie Utada, *Community Supervision Marked by Race and Gender Disparities*, PEW CHARITABLE TRUSTS (Dec. 6, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/12/06/community-supervision-marked-by-racial-and-gender-disparities>.

too familiar in some households. Parental incarceration creates trauma that has a ripple effect for generations.¹⁹⁹ Some of these hidden costs often cannot be measured or calculated.²⁰⁰ The human soul that becomes despondent about life and the children who inherit this hopelessness cannot be measured in dollars and cents. Some costs, however, we choose to ignore or whitewash. For example, every month, struggling families send money to commissary accounts for their loved ones behind bars.²⁰¹ Even though individuals in prison are given three meals a day and some personal hygiene items, like soap and toothpaste, people rely on commissary when they get hungry between the meager prison meals.²⁰² Families help individuals who are incarcerated survive the day-to-day realities of prison life.²⁰³ Maintaining familial contact during incarceration through prison phone calls or prison visits can become extremely expensive as well.²⁰⁴ Some facilities allow email communication and Skype visits since the COVID-19 pandemic began.²⁰⁵ However, even these visits can be costly and the restrictions for use are very intimidating since they are often accompanied by very strict use instructions and require several levels of security clearance to get approved.²⁰⁶ These costs rise during the holiday season when relatives of people behind bars try make more visits, call more often, and send more care packages just to keep their loved ones hopeful.²⁰⁷ The Prison Policy Initiative (“PPI”), an organization working to reduce mass incarceration, estimates that families spend \$2.9 billion a year on commissary accounts and phone calls.²⁰⁸ In a report by the Marshall Project, one family member reported that she spent \$100 a month on her boyfriend who was incarcerated for failing a drug test, a violation of his parole for an earlier offense.²⁰⁹ Expenses for toiletries, commissary snacks and phone calls

199. Martin, *supra* note 187.

200. *Id.*

201. Nicole Lewis & Beatrix Lockwood, *How Families Cope with the Hidden Costs of Incarceration for the Holidays*, N.Y. TIMES, <https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html> (Dec. 20, 2019).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Families Spend Millions on Phone Calls from Louisiana Inmates*, NOLA, https://www.nola.com/news/crime_police/article_257cf01d-e75f-5438-b8bc-249dedc0a87e.html#:~:text=A%20New%20Orleans%20family%20could,calls%20to%20India%20via%20Skype (July 7, 2021).

207. Lewis & Lockwood, *supra* note 201.

208. Wagner & Rabuy, *supra* note 172.

209. Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration>.

are not typically factored in when estimating cost-of-living in prison. More than a third of families go into debt to pay for phone time and visits alone, aside from lost wage-earners and other costs associated with supporting an incarcerated loved one.²¹⁰ Private vendors and substantial markups for service fees by private companies often rob families of their minimal earnings, especially when they are forced to only use certain vendors per institutional mandates.²¹¹ The cost in African American communities is especially devastating, since the number of Black individuals who are returned to prison for violations of their parole is disproportionate when compared to other communities.²¹²

The societal costs of incarceration are estimated at up to three times the base cost.²¹³ Any reasonable cost-benefit analysis would conclude that the costs that we continue to pay for incarcerating parole violators far outweighs any perceived public safety benefit we may reap as a society.

V. THE QUESTION LEFT UNRESOLVED BY *MORRISSEY* LEAVES MANY IN LEGAL LIMBO

A. *State Court Interpretations of the Gagnon Test to Determine Who Gets Counsel*

Because the *Morrissey* court stopped short of addressing the question of the right to counsel,²¹⁴ states have been left to fend for themselves to determine who gets counsel and who does not. In many states, the discussions about appointment of counsel often devolve into who will pay for such representation. Although there is no constitutional guarantee to the right to counsel in parole revocation proceedings, some jurisdictions afford such a right to counsel through locally codified regulations.²¹⁵ Some statutes outright ban lawyers from representing clients at the actual hearing.²¹⁶ Other states allow

210. SANETA DE VUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION OF FAMILIES 30 (2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

211. *Id.*

212. *Id.*

213. Tara O'Neill Hayes, *The Economic Costs of the U.S. Criminal Justice System*, AMERICAN ACTION FORUM (July 16, 2020), <https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/#:~:text=the%20societal%20costs%20of%20incarceration,justice%20system%20to%20%241.2%20trillion.>

214. See *Morrissey v. Brewer* 408 U.S. 471 (1972).

215. See, e.g., CAL. CODE REGS. tit. 15 § 2256 (2022); DEL. CODE ANN. tit. 11, § 4343 (2022).

216. See John Devendorf & Ally Marshall, *How to Prepare for a Parole Board Hearing*, LAW INFO (May 13, 2021), <https://www.lawinfo.com/resources/criminal-defense/sentencing/how-to-prepare-for-a-parole-board-hearing.html> (May 13, 2022).

counsel to be present and provide representation, but individuals must sometimes pay for such representation of counsel. In New York, there is a “conditional” right to counsel, which the parolee has to obtain; at the final hearing, there is a guaranteed right to counsel, appointed if necessary.²¹⁷ In Iowa, an individual may be appointed an attorney if certain criteria are met, including a request from the parolee and a request of indigency, so long as it is demonstrated that the person lacks skills to represent himself and has a colorable claim that the violation did not occur.²¹⁸ In Maryland, every alleged parole violator is entitled to be represented by counsel of their choice or, if eligible, counsel provided by the state’s public defender’s office.²¹⁹ Indiana does not provide counsel, leaving indigent people on parole at the mercy of the system.²²⁰ However, an individual’s access to justice should be based on principle and not on ability to pay. “Equal justice under law” is so embedded in our society that it is engraved on the United States Supreme Court building.²²¹ A person’s inability to pay places an unfair burden on people of lesser means and often renders justice unaffordable. In response, a few public defender offices have small revocation units who offer representation in a limited number of cases. The District of Columbia is one of the few jurisdictions where counsel is provided to every person facing revocation of their parole or supervised release who desires representation.²²² In many states, parolees must either represent themselves or garner funds to pay lawyers who charge fees for such representation, especially as local and federal defender offices struggle for funding to provide adequate representation to persons charged with typical misdemeanor and felony offenses. The result is a system of justice made only for those who pay for it. This remains true even though the role of counsel has proven to be pivotal, not only at the hearing and sentencing stage, but also during any legal challenges that arise from the revocation process.²²³ In a national survey of paroling authorities, it was reported that 71% included representation by counsel at the final revocation hearing.²²⁴ It is unclear, however, whether counsel was made available to every per-

217. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, § 8004 (2022).

218. See IOWA CODE § 908.2A (2014).

219. See MD. CODE ANN., CORR. SERVS § 7-401 (West 2022).

220. *Courts: State Public Defenders: Frequently Asked Questions*, IND. CTS., <https://www.in.gov/courts/defender/faq/> (last visited Mar 6, 2022) (stating that Indiana public defenders may not provide representation at a parole board hearing or a clemency proceeding).

221. *The Court and Constitution Interpretation*, <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Mar. 23, 2022).

222. D.C. Code § 11-2602 (2022).

223. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gagnon v. Scarpeli*, 411 U.S. 778 (1973).

224. EBONY L. RUHLAND ET AL., *supra* note 119, at 41.

son facing return to prison and whether indigent persons were afforded the right to counsel free of charge.

State courts have relied on the original finding that a person on parole has no absolute right to counsel during parole revocation proceedings to come to a plethora of mixed conclusions. For example, in *United States v. Carrillo*, Mr. Carrillo was arrested on new criminal charges while on state parole, and at the hearing, he challenged statements he made to police while in custody.²²⁵ The Court of Appeals for the Fifth Circuit found that he was not facing any state charges for which he was entitled to appointment of counsel and stated that the parole revocation hearing did not involve any circumstances that required the court to appoint an attorney for him under Texas or federal law.²²⁶ The court emphasized that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of sound discretion by the state authority.²²⁷ The courts conduct such independent evaluations and consider various factors regarding who is not entitled to counsel as they did in *Tems v. Director TDCJ-CID*.²²⁸ But as the court noted in *Carrillo*, borrowing language from *Scarpelli*, “there will remain cases in which fundamental fairness – the touch-stone of due process – will require that the state provide at its expense counsel for indigent probationers and parolees.”²²⁹ State courts have the discretion to identify the precise contours for reviewing the *Gagnon* factors.²³⁰ For example, the Texas Board of Pardons and Parole provides that the following factors shall be weighed in determining whether the release is to be appointed an attorney: (1) [W]hether the releasee is indigent; (2) whether the releasee lacks the ability to articulate or present a defense or mitigation evidence in response to the allegations; and (3) the complexity of the case and whether the releasee admits the alleged violations.²³¹ In *Carrillo*, the defendant’s request for the appointment of counsel was denied by the court.²³²

225. *United States v. Carrillo*, 660 F.3d 914, 925 (5th Cir. 2011).

226. *Id.*

227. *Id.*

228. See *Tems v. Director, TDCJ-CID*, No. 6:16CV91, 2018 WL 741984, at *2 (E.D. Tex. Nov. 7, 2018). *Tems* was not entitled to counsel because (1) the allegations were not complex; (2) *Tems* admitted to allegations; (3) *Tems* received a new conviction; and (4) *Tems* understood the proceeding and could speak for himself. They also concluded that he could read and write, had no mental health history, and during the hearing was able to articulate reasons to dismiss his claim regarding denial of his right to counsel. *Id.*

229. See *Carrillo*, 660 F.3d at 925 (citing *Meza v. Livingston*, 607 F.3d 392, 404 n.13 (5th Cir. 2010)).

230. *Id.*

231. 37 Tex. Admin. Code § 146.3 (2016); See *Manzano v. Dretke*, No. 3:02-CV-0799-L, 2004 WL 583591, at *3 (N.D. Tex. Mar. 23, 2004).

232. See *Carrillo*, 660 F.3d at 924.

Conversely, the Rhode Island Supreme Court held in *Jefferson v. State* that Mr. Jefferson's due process rights, and his right to counsel, were violated at his first and final revocation hearing.²³³ Leonard Jefferson had applied for post-conviction relief when his parole was revoked, and he was denied the possibility of parole in the future.²³⁴ He had received a life sentence for a murder conviction in Rhode Island and was subsequently paroled.²³⁵ Thereafter, he was arrested in Pennsylvania and convicted for aggravated assault, and subsequently incarcerated in Pennsylvania.²³⁶ After his arrest, but before his conviction, a probable cause hearing was conducted in Rhode Island because the Pennsylvania arrest violated his parole for the Rhode Island offense.²³⁷ He had a final revocation hearing while he was serving time on the Pennsylvania sentence, and the Rhode Island board held that he would no longer be eligible for parole.²³⁸ When he completed the Pennsylvania sentence, he was transported to a Rhode Island facility, and a second parole revocation hearing was conducted by the state parole board.²³⁹ The board affirmed the previous decision and notified Mr. Jefferson that he would forever be ineligible for parole consideration.²⁴⁰ Mr. Jefferson was not afforded counsel at either hearing. Ultimately, the Rhode Island Supreme Court concluded that Mr. Jefferson's case was so factually and legally complex that Mr. Jefferson should have been represented by counsel before the Board.²⁴¹ In his numerous requests for counsel, the court found that Mr. Jefferson had referenced that he was "wrongfully convicted" and stated that the case involved "complex issues."²⁴² The court, quoting *Gagnon*, stated that "the need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases."²⁴³ The court stated that fundamental fairness and due process required that counsel be provided, and they remanded the case with instructions to the parole board to conduct a new hearing.²⁴⁴

233. See 284 A.3d 1094, 1100 (R.I. 2018).

234. *Id.* at 1095.

235. *Id.* at 1096.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 1099.

242. *Id.*

243. *Id.* at 1099 (quoting *Gagnon*, 411 U.S. at 789).

244. *Id.* at 1100.

In Florida, the court denied the petitioner's habeas corpus petition and held that indigent defendants are not entitled to counsel in all parole revocation proceedings, reminding litigants and judges that the right to counsel should be determined on a case-by-case basis.²⁴⁵ In this case, the petitioner was convicted of armed robbery and sentenced to prison for ninety-nine years.²⁴⁶ He was released on parole to remain on supervision for twenty years, and four years later was charged with violating his parole because of his technical violations of failing to submit monthly reports and failing to pay supervision costs.²⁴⁷ The Florida Parole and Probation Commission refused his request for counsel at the preliminary hearing and the final revocation hearing.²⁴⁸ The court, however, erroneously concluded that unlike probation revocation, parole revocation does not lead to a sentencing hearing which necessarily requires the appointment of counsel. The majority of the justices had obviously not attended any parole revocation hearings. In his dissenting opinion, Justice Barkett agreed with the petitioner and stated that the court makes a failed attempt to distinguish between parole and probation.²⁴⁹ However, the Florida Supreme Court in *State v. Hicks* went beyond *Gagnon* and held that the State must furnish counsel to all persons charged with probation violations.²⁵⁰ Judge Barkett, in the *Floyd* dissent, concluded that parole and probation revocation proceedings are so similar as to be "constitutionally indistinguishable" for purposes of due process considerations.²⁵¹ In his dissenting opinion, Justice Kogan concluded that the cost of supplying indigents with representation is great:

However, in parole revocation hearings, where a defendant can summarily be placed in prison in some cases for the rest of his life, this same Court reasoned that such a cost is virtually inconsequential. When compared with such a dramatic deprivation of liberty, the financial burden appears nominal.²⁵²

Justice Kogan's assessment is irrefutable. Where personal freedom is at issue, and the resolution of a parole revocation hearing can mean the difference between life imprisonment or continued parole in the community with family and loved ones, the presence of an attorney is invaluable

245. *Floyd v. Parole & Probation Comm'n*, 509 So.2d 919, 920 (Fla. 1987).

246. *Id.* at 920.

247. *Id.*

248. *Id.*

249. *Id.* at 922.

250. *State v. Hicks*, 478 So.2d 22, 23 (Fla. 1985) (Barkett, J., dissenting); see *Floyd*, 509 So.2d at 920.

251. *Floyd*, 509 So. 2d, at 922 (Barkett, J., dissenting).

252. *Id.* (Kogan, J., dissenting).

In a 2008 New York case, the court held that the right to counsel was so essential that it remained intact even when the person facing revocation left the hearing room.²⁵³ During a final revocation hearing that spanned over three separate days, Blake Wingate, the individual facing revocation, was admonished for speaking out of turn and left the hearing room.²⁵⁴ Wingate was represented by a Legal Aid attorney; however, the attorney asked to be relieved once his client walked out of the room and the request was granted.²⁵⁵ Wingate was facing revocation based on administrative violations as well as alleged new law violations, and his parole officer and the arresting police officer were subpoenaed and testified as adverse witnesses.²⁵⁶ The hearing officer proceeded with the hearing without counsel and without the client and without making any effort to appoint new counsel.²⁵⁷ Even though he voluntarily left the hearing, Wingate claimed that he was denied the right to counsel and that there was no evidence that he waived his right to the assistance of counsel.²⁵⁸ He was not aware of any Legal Aid policy not to represent clients in absentia, and he thought he would still be represented by counsel after he left the hearing room.²⁵⁹ The court held that the right to counsel at a parole revocation hearing in New York is based on the due process clause of the New York State Constitution²⁶⁰ and New York statute.²⁶¹ Since liberty or imprisonment will be the result, the court found that the right to counsel is mandated because the outcome of a revocation hearing depends on the arbiter's findings.²⁶² The court held that the waiver of the right to be present did not also constitute a waiver of the right to the assistance of counsel.²⁶³ In other words, the court determined that Mr. Wingate was deprived of his statutory and constitutional right to the assistance of counsel, even though he walked out of the hearing. They ordered a new final revocation hearing.²⁶⁴

California initially addressed the issue of whether a person on parole has the right to a lawyer at parole revocation hearings in *In re Love* in 1974, where the California Supreme Court rejected an auto-

253. *People ex rel. Wingate v. N.Y. State Div. of Parolee*, No. 340213-08, 2008 WL 3081209, at *1 (N.Y. Supr. Ct. Aug. 4, 2008).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at *3.

259. *Id.*

260. *Id.*; N.Y. CONST. art. I, § 6.

261. *Ex rel. Wingate*, 2008 WL 3081209, at *3; N.Y. EXEC. LAW § 259 (McKinney 2022).

262. *Ex rel. Wingate*, 2008 WL 3081209, at *3.

263. *Id.*

264. *Id.*

matic right to counsel.²⁶⁵ The court primarily focused on the demands on the legal profession but held that even though they rejected the petitioner's contention that he was denied his right to counsel at the preliminary interview and formal revocation hearings, they concluded that a parolee might, in particular circumstances, be entitled to counsel at future revocation hearings citing *Gagnon*.²⁶⁶ However, California parolees challenged California's rejection of an automatic right to counsel at parole revocation hearings years later. In May 1994, the parolees in *Valdivia v. Davis* challenged the constitutionality of parole revocation procedures under the Fourteenth Amendment's right to due process, as defined in *Morrissey* and *Gagnon*.²⁶⁷ The district court granted partial summary judgment in favor of the parolees and held that California's parole revocation hearing system violated their procedural due process rights.²⁶⁸ Several years later in *Valdivia v. Schwarzenegger*, parolees filed a class-action lawsuit against the California Board of Prison Terms charging various violations of parolees' rights in revocation proceedings.²⁶⁹ The settlement included a right to counsel in all California parole revocation proceedings.²⁷⁰ Now, regardless of a person's disability, mitigating factors, or the complexity of the case, all persons on parole in California have the right to counsel at revocation hearings. This obliterates the need for any *Gagnon* test—everyone gets counsel regardless of the complexity of the case by right of statute if the Court fails to expand *Morrissey*. All states should follow this model, which is superior to other models in that it creates a system guaranteeing the presence of counsel, not just to protect the rights of the parolee, but also to ensure fairness in the dispensing of justice to every person. Those on parole are left in limbo unless the right to counsel is constitutionally mandated and available to all.

B. *Let's Follow the Lead of the Federal System*

Since 1987, persons who are sentenced in federal court are instead placed on supervised release.²⁷¹ If they violate the conditions of their supervision, they return to the federal court and may be revoked,

265. *In re Love*, 520 P.2d 713, 714 (Cal. 1974).

266. *Id.* at 714.

267. *Valdivia v. Davis*, 206 F. Supp. 2d 1068 (E.D. Cal. 2002).

268. *Id.* at 1078.

269. *See Valdivia v. Schwarzenegger*, 599 F.3d 984 (9th Cir. 2010).

270. *Id.* at 984.

271. The Sentencing Reform Act of 1984 ("SRA") Pub. L. 98-473, 98 Stat. 1837 (codified as amended at 18 U.S.C. § 1) abolished the federal parole system and instituted a determinate sentencing system for federal offenders.

resentenced, or have their conditions amended by their original federal sentencing judge. While parole has long been abolished in the federal system due to extreme sentencing, there are still persons on parole under the federal system.²⁷² Individuals who are on parole do not have the benefit of presenting their case before a familiar entity, their sentencing judge. Instead, they must face revocation before the Parole Commission, an agency previously slated for extinction, that was revived pursuant to the National Capital Revitalization and Self-Government Improvement Act.²⁷³ The Parole Commission has existed primarily for the last twenty-four years based solely on their permitted authority to make decisions regarding parole grant, parole denial, parole revocation, and parole termination for persons sentenced in D.C. Superior Court.²⁷⁴ A large percentage of the caseload of the Parole Commission consists of revocation hearings for persons sentenced in D.C. who are supervised in the District and other jurisdictions, and federal parolees with older convictions.²⁷⁵

Federal regulations make it clear that persons facing revocation before the Parole Commission are entitled to be represented by an attorney in connection with revocation proceedings. The U.S. Parole Commission Rules and Procedures Manual (“the Manual”) provides that a parolee who is re-arrested on a warrant issued by a Commissioner shall be given a preliminary interview by a designated official.²⁷⁶ Further, the Manual provides that a person can have the preliminary interview postponed to obtain representation and that if they cannot retain counsel, they may apply to the United States District Court for appointment of counsel for representation at the preliminary interview and at the final revocation hearing, both mandated in *Morrissey*.²⁷⁷ In *Valesquez v. U.S. Parole Commission*, the United States District Court for the Eastern District of New York held that the individual on parole was entitled to have counsel represent him at his preliminary parole revocation hearing, even though he had not yet been formally charged with any parole violation.²⁷⁸ Here, the individual had already been held for sixty-two days and invoked his statutory

272. See 18 U.S.C. § 1.

273. National Capital Revitalization and Self-Government Improvement Act, Pub. L. 105-33, 11 Stat. 251 (1997).

274. *Id.*

275. See FY 2019 Annual Report/FY 2021 Annual Performance Plan, U.S. DEP’T OF JUST., <https://www.justice.gov/doj/page/file/1249306/download> (last visited Mar. 28, 2022).

276. 28 C.F.R. § 2.48(a)

277. See U.S. PAROLE COMM’N, U.S. PAROLE COMM’N R. & PROC. MANUAL (2022), <https://www.justice.gov/uspc/documents/uspc-manual111507.pdf>.

278. *Valesquez v. U.S. Parole Comm’n*, 437 F. Supp. 3d 185, 198 (E.D.N.Y. 2020).

right to counsel pursuant to federal statute.²⁷⁹ Mr. Valesquez signed a statement indicating that he wished to apply to the district court for an appointment of counsel.²⁸⁰ He also signed an affidavit that he intended to invoke his right to counsel, identified his retained counsel, and stated that he would not make any statements outside the presence of his attorney.²⁸¹ Additionally, his attorney notified the Parole Commission of her representation.²⁸² His mandamus relief was granted, and he was eventually ordered released based on the extensive detention without a preliminary hearing, despite efforts by his counsel to schedule such a hearing.²⁸³ The court concluded that the sixty-two day delay was unreasonable, unnecessary, and likely a violation of his due process rights and ordered his immediate release.²⁸⁴

The right to counsel is rightfully embedded in federal statute for those on parole facing revocation before the Parole Commission. At the probable cause or preliminary interview, they are provided with an appointment of counsel form under the Criminal Justice Act and must submit this form to the hearing examiner or interviewer. The form is then processed by the Commission staff to assure that the federal defender office is notified, and counsel may be appointed. This practice must extend to include all persons who are facing revocation and sentencing regardless of the jurisdiction in which they just happen to reside.

CONCLUSION: TAKING MORRISSEY ACROSS THE FINISH LINE

Now is the time for the Supreme Court to tackle the question left unresolved by *Morrissey* and mandate counsel appointments in all parole revocation hearings. Just as the states adjusted their regulations to comply with the due process guarantees outlined therein, they will adjust their statutory regulations to comply with the constitutional protections that hail from the Court. Sentencing is a critical stage at which persons should be appointed counsel. This chronological overview of the expansion of the right to counsel that started with the Warren era and continued beyond, helps to establish the right to counsel for indigent people at parole hearings as the inevitable and natural next step in this series of cases.

279. *Id.* at 188.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 193.

284. *Id.*

People have better outcomes when lawyers are present at critical stages of the proceedings. Our legal system typically discourages criminal defendants in court from representing themselves without the assistance of counsel. English author, Henry Kitt, coined the phrase that “a man [or woman] who is his [or her] own lawyer has a fool for a client.”²⁸⁵ This adage supports the basic principle in United States law that an individual can represent himself but also recognizes that legal rules are complex, and emotions can cloud judgment. Arcane and complex laws make the practice of law challenging for one trained in the law, let alone one who has little or no formal legal education or experience. It seems absurd then, that in parole revocation hearings, where the stakes are grievous, individuals should be left to fend for themselves. People who are undereducated and those who suffer from mental illness are particularly vulnerable. Despite the informal nature of the proceedings and the absence of formal rules of procedure or evidence, the unskilled or uneducated may well have difficulty in presenting their version of a disputed set of facts, especially if cross-examination or dissecting of complex documentary evidence is required.²⁸⁶

A peek inside parole revocation hearing rooms where counsel is absent would reveal a setting where most people on parole face baseless accusations from parole officers who may be motivated by numerous factors to seek their return to prison, including decreased caseloads. Parole boards are not always welcoming to counsel at parole hearings. Some believe that allowing counsel would turn these non-adversarial hearings into legal battles and that it might be costly to mandate such legal representation. However, those costs are outweighed by the benefit to the individual facing revocation. First, revocation proceedings are already adversarial in nature. Parole officers, police officers, and complaining witnesses are often present to provide testimony adverse to the individual. The need for counsel who can temper the retributive nature of the other parties and balance the scales of justice to give each person a fairer chance is great. Furthermore, the cost of having counsel present at a revocation hearing would likely be offset by the savings to taxpayers in not having to bear the severe financial burden to house an individual who could otherwise be safely released. The fact that most revocation hearings are based on technical violations, rather than the commission of a new

285. HENRY KITT, *THE FLOWERS OF WIT* 115 (1825).

286. *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

criminal offense, demonstrates that seeking the revocation of parole is not always grounded in the quest for public safety.

Those on parole have a liberty interest in remaining in the community, and thus, all states should provide appointed counsel at revocation hearings regardless of the individual's ability to pay or whether the factors in *Gagnon* are met. Many states legislatures are increasingly making efforts to reverse the devastating effects of decades-long mass incarceration policies, including devising ways to shrink the carceral footprint.²⁸⁷ It is time to finish the Court's business, thereby expanding *Morrissey* to guarantee the right to counsel in all revocation proceedings in every state and federal jurisdiction. This fundamental right to counsel must be rooted in the basic principles of our United States Constitution.

287. *Governor Hochul Announces Major Actions to Improve Justice and Safety in City Jails*, N.Y. STATE, <https://www.governor.ny.gov/news/governor-hochul-announces-major-actions-improve-justice-and-safety-city-jails> (last visited Jan. 26, 2021) (On Friday, September 17, 2021, New York Governor Kathy Hochul signed into law the Less if More: Community Supervision Revocation Reform Act, a transformative parole reform bill that restricts the use of incarceration for non-criminal technical parole violations and bolsters due process in parole hearings. The effective date of the law is March 2022.); see also *Assembly Member Kalra Announces New California Racial Justice Act for All*, ASMDC (Jan. 15, 2021) <https://asmdc.org/press-releases/assemblymember-kalra-announces-new-california-racial-justice-act-all>.

Respecting the Identity and Dignity of All Indigenous Americans

BILL PIATT

The United States government attempted to eliminate Native Americans through outright physical extermination and later by the eradication of Indian identity through a boarding school system and other “paper genocide” mechanisms. One of those mechanisms is the recognition of some Natives but not the majority, including those whose ancestors were enslaved. The assistance provided to recognized tribes by the government is inadequate to compensate for the historical and continuing suffering these people endure. And yet the problem is compounded for those unrecognized Natives whose ancestors were enslaved and whose tribal identity was erased. They are subjected to a double-barreled discrimination. That is, they suffer the same discrimination and deprivation of resources as their recognized brothers and sisters yet are unable to qualify for government assistance. The system thus pits recognized Indians against unrecognized Indians in a struggle for inadequate resources. This leaves the majority of American Indians striving to survive as they attempt to maintain their Indian identity and dignity. While they continue to preserve the cultural and religious practices of their ancestors, they often find themselves to be the victims of “pretendian” attacks. This Article examines an approach to resolving this conflict, respecting the identity and dignity of all Indigenous Americans.

Respecting the Identity and Dignity of All
Indigenous Americans

BILL PIATT*

TABLE OF CONTENTS

INTRODUCTION 85

 I. ERADICATION 87

 A. *Physical Eradication* 87

 B. *Eradication of Indian Identity by the Federal Government* 89

 C. *Self-Eradication* 91

 D. *Eradication of Indian Identity Through Slavery* 92

 E. *Eradication of the Indian Identity of Other Tribes* .. 103

 II. RESURGENCE AND RECOGNITION OF NATIVE POPULATIONS 105

 A. *Resurgence* 105

 B. *Mechanics and Benefits of Federal Recognition* 106

 III. NON-RECOGNITION LEADS TO MARGINALIZATION 112

 A. *The Second Battle of the Alamo* 113

 B. *Law School Admission Practices* 116

 IV. NON-RECOGNITION LEADS TO “PRETENDIAN” SLURS... 117

 V. TOWARD JUSTICE AND PEACE 120

CONCLUSION 126

* Professor of Law and former Dean (1998-2007), St. Mary’s University School of Law. I am grateful to Moises Gonzales for his inspiration. I thank my brother, Byron Piatt, for his genealogical assistance, and Maria Vega for her technical assistance. And I thank my research assistants, Karen Crawford and Jacob Hernandez, for their work.

INTRODUCTION

No reasonable person would quarrel with the proposition that Indian¹ identity and dignity should be valued and respected. However, the United States government has created a system so complicated and inconsistent for determining who is an Indian that fair-minded people are often confused. Not-so-fair-minded people exploit the divisions the government has created. The bottom line is that while, according to the most recent census figures available, Natives in this country number 5,220,579,² the United States government only recognizes approximately 1,969,167³ of them. In other words, the government recognizes only about one-third of the Native population in this country. The inadequate federal assistance available to recognized tribes and Indians is generally not available to the remaining two-thirds of the Native population as noted in this article.

It is critical to understand, initially, that federally recognized Indians belong to sovereign nations which only obtained recognition after surviving genocidal attempts to exterminate them. The treaties into which they entered required the surrender of lands, and in many instances, the forced repatriation onto remote and nearly uninhabitable areas. These nations, and only these nations, have the right to determine membership in their nations. Nothing in this article intends to

1. As I have previously noted, and as argued in this article, cultural, racial, and ethnic identity are very important concerns. Attaching labels to groups and individuals is often problematic. Without intending offense or a lack of sensitivity, throughout this article I use the terms, "Indian," "Native American," and "Indigenous" interchangeably. Steven L. Pevar, who is the author of one of the leading legal treatises, explains his use of the term, "Indian" as follows:

Considerable thought was given to using Native American rather than Indian in this book. Indian was chosen for several reasons. For one, many Indians use the terms Indian and Native American interchangeably, but there seems to be a preference for the word Indian. For instance, noted Indian author and scholar Vine Deloria, Jr. uses the word Indian in all of his books rather than Native American. In addition, most Indian organizations and groups, including the National Congress of American Indians and the Society of American Indian Government Employees use Indian in their titles. Moreover, virtually all federal Indian laws (such as the Indian Reorganization Act) and federal agencies (such as the Bureau of Indian Affairs) use Indian.

STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 1 (4th ed. 2012) (cited in Bill Piatt et al., *Law Schools Harm Genízaro and other Indigenous People by Misunderstanding ABA Policy*, 49 N.M. L. REV. 236, 236-37 (2019)).

2. Tina Norris et al., *U.S. Census Bureau, The American Indian and Alaska Native Population: 2010* 7 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>. Some of these Indians are of "mixed race." Of course, many Americans from a racial minority background are "mixed race." Former President Barack Obama is one example. The portion of white blood in President Obama, and in the Indians in this census, does not diminish or detract from their respective minority identities. The federally recognized Indians identified in the next footnote also includes many of "mixed race" and "mixed tribal" background. That fact, of course, similarly does not detract from their Indigeneity any more than it detracts from the Indigeneity of the non-federally recognized Indians.

3. U.S. DEP'T OF INTERIOR, 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 74, 78, 90, (Jan. 16, 2014), <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf>.

disparage the rightful claims to sovereignty these nations continue to exercise. Rather, this article analyzes how the United States government either intentionally, or unintentionally, promotes and foments discord among Indians and non-Indians alike. It maintains a system that has the effect of encouraging Natives to fight with one another for resources and for their very identity as Natives. The resulting chaos undermines the ability of Natives to work toward achieving equality, destroying the dignity of many in the process. This article examines this horrible and growing phenomenon and offers solutions that will enable people of good faith to de-escalate the conflict and work towards justice for all Indigenous Americans.

In sum, as this article examines the policy of the United States toward Native Americans was that of extermination throughout the 1800s and into the early 1900s.⁴ Extermination was pursued physically and through the eradication of the Indian identity of the survivors. Fortunately, the ultimate goal of genocide was not accomplished due to the resiliency of the Native peoples. From the 1900s forward, the policy shifted to the protection of Indian tribes and Indians.⁵ Indigenous populations have rebounded. Unfortunately, this preservation goal has not been completely realized. The resources and policies committed to this protection have not been adequate. And importantly, many Indians and their tribes are ineligible for assistance because the aftereffects of the efforts to eradicate Indians continue.

Still, the United States developed a series of benefits for the tribes and individuals it chooses to recognize. These include educational opportunities, housing, land development, health care, employment, and others.⁶

One author noted that “[v]irtually every federally recognized tribe receives significant financial and technical assistance under one or more of these programs, and some tribes would suffer severe economic hardship without this assistance.”⁷ Moreover, importantly, many Indians and their tribes are ineligible for assistance because the aftereffects of the efforts to eradicate Indians continue. Part I of this article explores how enslavement, the federal government, and “self-eradication” attempted to erase Indian identity. Part II considers the mechanisms of obtaining federal recognition and the benefits that re-

4. Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 715 (1986).

5. *Id.*

6. PEVAR, *supra* note 1, at 35; BILL PIATT & MOISES GONZALES, *SLAVERY IN THE SOUTHWEST, GENIZARO IDENTITY, AND DIGNITY AND THE LAW* 54-60 (2019).

7. PEVAR, *supra* note 1, at 35.

sult from such determinations. Part III examines the failure of the federal recognition program to provide adequate stewardship of Native tribes, Natives it recognizes, and its adverse actions toward non-recognized Indians. Part IV discusses the continued painful attacks launched against unrecognized Indian individuals and Indian tribes by illustrating two examples. Finally, Part V constructs a model for reconciliation of these conflicts.

I. ERADICATION

We begin with an examination of the historical realities of colonization. It is a gross understatement to assert that the lives of Indigenous people, in what is now the United States, have been precarious since the arrival of Europeans. As we will explore, while there is no longer an overt and active campaign to exterminate Natives, at least in a physical sense, nonetheless, there is a continuing pattern of “paper genocide”⁸ undermining, if not eliminating, their identity, cultures, and dignity.

A. Physical Eradication

It is not clear exactly how our Indigenous ancestors arrived on this continent. Early theories involved the migrating of peoples via a land bridge from Asia into what is now Alaska, then down into what is now North America.⁹ The creation stories of various tribes offer and preserve another perspective: Native peoples originated in what is now the Americas. Native creation stories vary from tribe to tribe. For example, the Cherokees believed that the Earth was first created as a floating island above the sea, which was suspended at each of its four corners by cords connected to giant rock known as the sky vault.¹⁰ Similarly, the Iroquois concluded that human beings came from both the sky and the Earth and that their great ruler created the world as a floating island.¹¹ Like these two stories, many tribes held their own beliefs about the origin of life, stemming anywhere from a hollow tree trunk (Kiowa Tribe),¹² to animals dancing and singing life into exist-

8. See, e.g., Cecily Hilleary, *Some Native Americans Fear Blood Quantum is Formula for ‘Paper Genocide,’* VOICE OF AMERICA (July 24, 2021, 3:29 AM), https://www.voanews.com/a/usa_some-native-americans-fear-blood-quantum-formula-paper-genocide/6208615.html.

9. SUSAN A. STEBBINS, *NATIVE PEOPLE OF NORTH AMERICA* 39 (2013).

10. *THE PORTABLE NORTH AMERICAN INDIAN READER* 86-88 (Frederick Turner ed., Penguin Books 1977).

11. *Id.* at 36-39.

12. N. SCOTT MOMADAY, *THE WAY TO RAINY MOUNTAIN* 16 (1969).

tence (Miwok).¹³ One common factor that these stories share is that Indigenous people did not migrate to the Americas, but were created here instead.

What is not in dispute is that Indigenous people preceded the arrival of Europeans by tens of thousands of years. Nations and civilizations flourished in the Western Hemisphere. Complex and sophisticated governmental systems, architecture, agriculture, and trade had developed among the estimated 75 to 145 million people in the Americas by the time Christopher Columbus arrived in 1492.¹⁴ One estimate is that the Indigenous population, in what is now the United States and Canada, consisted of between 7.5 million and 18 million people.¹⁵ Another study suggests that the population, in what is now the continental United States, was around 5 million people at the time of Columbus's arrival.¹⁶ There is some evidence that northern Europeans arrived on the eastern seaboard of what is now the United States centuries before Columbus's arrival.¹⁷

The impact of European immigration and conquest upon the Indigenous population was devastating. Active campaigns to kill as many Natives as possible were conducted in some regions by the Spanish, and later by Americans. David E. Stannard's *American Holocaust* details some of these horrific examples. One includes the practice by some Spanish conquistadores of hanging and burning Natives alive in groups of thirteen in order to "honor" Christ and the twelve apostles.¹⁸ Additionally, American soldiers slaughtered Indigenous women and men, cut off their genitals, and proudly wore them on their hats.¹⁹ While these practices were horrific, disease caused an even more catastrophic decline in the Indigenous population. Smallpox alone may have caused the death of 75% of Indians in what is now the United States.²⁰ The ultimate effect was a death toll as high as 100 million people in the Western Hemisphere.²¹ The late Rennard

13. NATIVE AMERICAN ANIMAL STORIES 3-4 (Joseph Bruchac ed., Fulcrum Publishing 1992).

14. DAVID E. STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* 267 (1992).

15. *Id.*

16. SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 14 (1989).

17. BILL PIATT, *IMMIGRATION LAW CASES AND MATERIALS* 7 (1994).

18. STANNARD, *supra* note 14, at 268.

19. Genevieve M. Le May, *The Cycles of Violence Against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013*, 12 PSU MCNAIR SCHOLARS ONLINE J., 2018, at 1, 5. See also, *Massacre of the Cheyenne Indians*, REP. ON THE CONDUCT OF THE WAR, H.R., 38th Cong., 2d Sess. (Washington, Government Printing Office 1865).

20. DONALD R HOPKINS, *PRINCES AND PEASANTS: SMALLPOX IN HISTORY* 204 (1983).

21. STANNARD, *supra* note 14, at 268.

Strickland provided historical examples regarding the role of law in the process of eradicating Natives.²² He detailed horrific massacres, performed unlawfully, even under the laws at the time. Moreover, he explained how the legal system provided a framework for the genocidal activities of federal and state governments of the United States.

Nonetheless, Indian deaths did not exclusively occur because of European conquest and policies. Native tribes engaged in warfare against one another and captured and enslaved their adversaries throughout this time period.²³ However, the utter devastation resulting from disease and warfare by Europeans accounts for the vast majority of this tragedy.

By the best estimates, by the time the United States of America was founded, the Indian population had plummeted from over five million to perhaps less than one million people. If smallpox alone had reduced the Native population by 75%, and additional deaths were attributed to other diseases, starvation, and warfare, then perhaps fewer than one million Natives remained alive at the time of the founding of the new nation. The exact numbers are not easily determined because Indians were not a listed race within the United States Census between 1790 and 1840.²⁴

B. Eradication of Indian Identity by the Federal Government

The physical destruction of Native communities was not the only attempt by the United States government to eradicate Native culture and civilization. Indian boarding schools were established by the federal government throughout the United States under the Civilization Fund Act of 1819.²⁵ These schools operated for more than 150 years. Native children were forced out of their communities and into the schools with the stated purpose of assimilating them into American society.²⁶ As Richard Pratt, the founder of the Carlisle School, infamously stated: “Kill the Indian and save the man.”²⁷ Pratt was not

22. See Strickland, *supra* note 4, at 713.

23. See JAMES F. BROOKS, CAPTIVES & COUSINS: SLAVERY, KINSHIP, AND COMMUNITY IN THE SOUTHWEST BORDERLANDS (2002); see ANDRES RESENDEZ, THE OTHER SLAVERY (2016); see PIATT & GONZALES, SLAVERY IN THE SOUTHWEST, *supra* note 6.

24. CENSUSES OF AMERICAN INDIANS, U.S. CENSUS BUREAU, https://www.census.gov/history/www/genealogy/decennial_census_records/censuses_of_american_indians.html (last visited July 12, 2021).

25. Pub. L. 15-85, 3 Stat. 516b, ch. 85.

26. *US to Investigate ‘Unspoken Traumas’ of Native American Boarding Schools*, GUARDIAN (June 22, 2021, 5:56 PM), <https://www.theguardian.com/us-news/2021/jun/22/us-investigation-native-american-boarding-schools>.

27. Strickland, *supra* note 4, at 729 n.33. See Becky Little, *How Boarding Schools Tried to ‘Kill the Indian’ Through Assimilation*, HISTORY, <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation> (Nov. 1, 2018).

referring to the physical killing of the Indian; rather, Pratt sought to kill the Indian identity of the individual removed from his tribe and entrusted to his care. The horrors of this attempted eradication of Indian identity were underlined by Secretary of the Interior, Debra (“Deb”) Haaland,²⁸ the first Native American to hold that position. In an opinion piece published in the Washington Post on June 11, 2021, Haaland noted:

Many Americans may be alarmed to learn that the United States has a history of taking Native children from their families in an effort to eradicate our culture and erase us as a people. It is a history that we must learn from if our country is to heal from this tragic era.²⁹

Haaland, citing statistics from the National Native American Boarding School Healing Coalition, indicated that by 1926, more than 80% of Indigenous school-age children attended boarding schools run by the federal government or by religious organizations.³⁰ Many unexplained graves of Indian children have recently been discovered at the sites of Indian schools in Canada.³¹ Secretary Haaland has ordered an investigation to determine if a similar situation exists in the United States.³²

There is no doubt that these efforts to force assimilation had a devastating impact on the identity of Natives. For example, many of those who survived the boarding school process chose to no longer identify as Indian. These survivors, along with their descendants who did not know of their Indian identity, would not appear on Census rolls, yet they were just as genetically “Indian” as those who continued to identify as such. These descendants could not share in the kinship and culture of their tribes because they were forcibly removed from them, and in many instances, their emotional attachment to tribal identity was destroyed. Their descendants who might later learn of their Indian identity through DNA testing, historical records, and the

28. GUARDIAN, *supra* note 27.

29. Deb Haaland, *Opinion: My Grandparents Were Stolen from Their Families as Children. We Must Learn About This History*, WASH. POST (JUNE 11, 2021, 9:00 AM), <https://washingtonpost.com/opinions/2021/06/11/deb-haaland-Indigenous-boarding-schools/>. See Memorandum from Deb Haaland, Secretary of U.S. Dep’t of Interior, to the Dep’t of Interior (June 22, 2021), <https://www.doi.gov/sites/doi.gov/files/secint-memo-esb46-01914-federal-indian-boarding-school-truth-initiative-2021-06-22-final508-1.pdf> [hereinafter Haaland Memorandum] (requesting the Department of Interior to investigate the deaths and lasting consequences of residential Indian boarding schools in the U.S.).

30. GUARDIAN, *supra* note 27.

31. Dan Bilefsky & Ian Austen, *Hundreds More Unmarked Graves Found at Former Residential School in Canada*, N.Y. TIMES (July 30, 2021), <https://www.nytimes.com/2021/06/24/world/canada/Indigenous-children-graves-saskatchewan-canada.html>.

32. See Haaland Memorandum, *supra* note 29.

other means discussed below, certainly are Indigenous even though they no longer maintain the political affiliation with a sovereign Indian nation. Many of the survivors of these efforts are not recognized as being Indians by the U.S. government because they cannot demonstrate affiliation with a recognized tribe, explained below, thereby furthering the goal of Indian eradication.

Another mechanism of Indian eradication employed by the federal government is the requirement of a “blood quantum” of “Indian blood” in the recognition process.³³ That is, the government requires an individual demonstrate that the person possesses some fraction, at least one-sixteenth, of “Indian blood.”³⁴ Some have suggested that this mechanism was designed to extinguish Indian identity, regardless of active membership in a tribe, when successive generations of intermarriage “diluted” the blood.³⁵ Not every tribe maintains a “blood quantum” requirement for tribal membership. Recently, the Cherokee Nation agreed to remove the requirement because it led to the exclusion of descendants of enslaved African Americans, held by Cherokees, who were eventually accepted as tribal members.³⁶ By comparison, “one-drop” of “[B]lack blood” was considered sufficient to categorize a person as Black for purposes of Jim Crow laws.³⁷

C. Self-Eradication

The assimilation forced by the boarding schools and the horrors experienced by Indian parents as their children were removed from

33. See Kat Chow, *So What Exactly Is ‘Blood Quantum’?*, NPR (Feb. 9, 2018, 6:00 AM), <https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum#:~:text=OF%20your%20tribe.,Blood%20quantum%20was%20initially%20a%20system%20that%20the%20federal%20government,part%20of%20their%20citizenship%20requirements> (explaining how blood quantum was initially a system the U.S. federal government placed onto Indian tribes in an effort to limit their citizenship”).

34. See *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) (discussing how courts have “judicially explicated” the term “Indian,” and the generally accepted conjunctive test for “Indian status” considers (1) the degree of Indian blood; and (2) the tribal or government recognition as an Indian).

35. See e.g., KIM TALLBEAR, *NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE* 45 (2013).

36. Allison Herrera, *Cherokee Nation Supreme Court Rules Citizenship not Determined ‘By Blood,’* THE WORLD (Mar. 4, 2021, 4:15 PM), <https://www.pri.org/stories/2021-03-04/cherokee-nation-supreme-court-rules-citizenship-not-determined-blood>.

37. F. James Davis, *Who is Black? One Nation’s Definition*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/jefferson/mixed/onedrop.html> (last visited Sep. 29, 2021). See *Plessy v. Ferguson*, 163 U.S. 538, 552 (1896) (including a discussion of the *any ascertainable* Negro blood standard which was the *one drop rule* in effect in many states at the time). See also, *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia’s anti-miscegenation statute violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* “Colored persons,” according to the Virginia statute, were those in whom there was “ascertainabl[y] any Negro blood.” *Id.* at 4 n.4. By contrast, a person with one-sixteenth or less of Indian blood, and no other nonwhite blood, would be considered white. *Id.*).

them prompted many Indians to hide or even deny their identity. The bitter sting of discrimination aimed at Indians undoubtedly caused many to claim an identity other than Indian to minimize that discrimination. Some denied Indian identity by claiming to be Spanish or Mexican. Fair-skinned Natives claimed to be white. The trauma of discrimination was internalized by many, so their children were never told who they really were.³⁸

D. Eradication of Indian Identity Through Slavery

Europeans did not invent slavery. It has existed since recorded history.³⁹ Egyptian slavery of the Jews forms the basis of the book of Exodus in the Old Testament.⁴⁰ The New Testament contains the urging of slaves and slave masters to respect one another.⁴¹ Slavery was an important feature of ancient Roman and Greek societies.⁴² Natives had captured and traded slaves for thousands of years on what is now the North American continent.⁴³ Yet, Native slavery usually involved incorporating captives into the tribe. While their original tribal identity and membership would be lost, their indigeneity was not; the captives were still Indian, and become members of the tribe of their Indian captors.⁴⁴ European slavery, on the other hand, extinguished Native identity because enslaved Indians could not identify their tribal origins, particularly, if their enslavement occurred when they were young or if the enslaved Natives became part of non-Indian households. Today, Indigenous people who are not members of a federally recognized tribe are generally not considered to be Indians by the United States government.⁴⁵ Recognition as an “Indian” by the federal government depends upon the political reality of enrollment of an individual in a federally recognized sovereign Indian nation.⁴⁶

European slavery began with the Spanish. The Spanish arrived in the “New World,” or what is now known as North America, South America, and the Caribbean, beginning in 1492, seeking to enrich and

38. Carol Morello, *Native American Roots, Once Hidden, Now Embraced*, WASH. POST (Apr. 7, 2001), <https://www.washingtonpost.com/archive/politics/2001/04/07/native-american-roots-once-hidden-now-embraced/8897fa1e-762e-4151-85f3-7b377a96d9ae/>.

39. CHERYL TAYLOR PAGE & BILL PIATT, *Human Trafficking* 5 (2016).

40. See *Exodus*.

41. *Colossians* 3:22, 4:1.

42. *Slavery in Ancient Greece*, Crystalinks, <http://www.crystalinks.com/greekslavery.html> (last visited July 21, 2021).

43. BROOKS, *supra* note 23, at 33.

44. *Id.* at 6, 18.

45. See discussion *infra* Part II.

46. *Id.*

expand the Spanish colonial empire.⁴⁷ They also sought to propagate the Catholic faith. The Spanish then headed north, arriving at what is now New Mexico, in 1540. They moved eastward, and on to what is now Kansas, in a futile attempt to locate the Cities of Gold.⁴⁸ The Cities, according to legend, were established by Spanish bishops fleeing with their gold to the New World to escape the Muslim invasion of Spain.⁴⁹ The fall of Merida, Spain in 1150 C.E. prompted the legend.⁵⁰ One can imagine the Spanish conquistadores asking Natives where the cities of gold could be found, and having the Natives point ahead urging the Spanish to keep searching for the nonexistent legendary cities.

After realizing the legendary cities did not exist, the Spanish returned to what is now New Mexico to establish settlements. The Spanish needed a labor force to build and maintain these settlements, thus, the Spanish enslaved the Natives. Additionally, the Spanish purchased other Indians from various tribes that enslaved other Indians.⁵¹ Slave markets in Taos Pueblo and Pecos, in what is now New Mexico,⁵² provided ample opportunities for the Spanish to purchase Indian captives. The Spanish distributed these enslaved Indians to the colonials and the Roman Catholic Church (“the Church”) through a system of “encomienda.”⁵³ These slaves became known as “Genízaros,” taken from the Turkish word *yeniceri* or *janissary*. *Yeniceris* were Christian captives of the Turkish Empire, forcibly abducted as children. After being trained as soldiers, they were required to defend the Ottoman Empire.⁵⁴

In addition to providing slave labor to the Spanish colonizers and the Church, Genízaros were used for military purposes by their Spanish slave masters. Spanish settlements came under repeated attacks by Indians in the surrounding plains. To protect their communities, the Spanish began to afford some limited autonomy to Genízaros by al-

47. PIATT & GONZALES, *supra* note 6, at 14-20.

48. *Id.* 18.

49. *Id.* at 17.

50. *Id.* at 17-18. Ironically, one of the Indian gaming casinos in New Mexico is named, “Cities of Gold,” https://www.reservations.com/hotel/cities-of-gold-casino?rmcid=tophotels&utm_source=googleads&gclid=CJ0KCCQjw9O6HBhCrARIsADx5qCRevOcxD98ysd_y_y2WYnYs8Ou5DKjmX31SBeij0oSQs1gk1g2wJ0aArxiEALw_wcB (last visited July 23, 2021).

51. PIATT & GONZALES, *supra* note 6, at 18.

52. Taos Lightnin’, UNITARIAN CONGREGATION OF TAOS, <https://uutaos.org/wp-content/uploads/2014/03/Slave-Trade-in-NM.pdf> (last visited July 22, 2021); see Marc Simmons, *Slavery Thrived in Colonial New Mexico*, SANTA FE ALWAYS ONLINE, <https://www.sfaol.com/history/slavery.html> (last visited July 23, 2021).

53. WARREN A. BECK, *NEW MEXICO A HISTORY OF FOUR CENTURIES* 65 (1982).

54. See *infra* note 72; see Malcolm Ebright, *Genízaros*, N.M. STATE REC. CTR. ARCHIVES, <http://newmexicohistory.org/people/genizaros> (last visited Oct. 29, 2018).

lowing them to live in defensive outposts to protect against invading Indians.⁵⁵

The first recorded Genízaro settlement was located in the Barrio de Analco, in my hometown of Santa Fe. Early records indicate that by 1750, Genízaros were functioning as a semi-autonomous defensive perimeter south of the Santa Fe River, protecting the Spanish colonists. Besides their defense of Santa Fe, the colonial governor of New Mexico sent Genízaro warriors from Analco to defend the perimeters of the Spanish colonial settlements in what is now northern New Mexico. Genízaros demonstrated their skill as mounted soldiers, which added to their value as protectors of the Spanish colonial interests.⁵⁶

Besides their value as warriors, Genízaros also provided their talent in constructing the Spanish settlement within Santa Fe. Genízaros built the San Miguel Chapel in 1610, which still remains as the oldest church in the United States.⁵⁷ However, the Analco settlement was met with tragedy. In August of 1680, a coalition of Indians led by a Native medicine man named Popé rebelled against the Spanish rule and against the imposition of the Catholic faith, in particular. The Genízaro *barrio* was wiped out by the rebels during the early fighting.⁵⁸ Many Spanish settlers were killed, along with over twenty Franciscan friars.⁵⁹ A monument to those friars, the Cross of the Martyrs, overlooks Santa Fe. A statue of Popé, who led the first revolution against European colonizers, is one of the two New Mexico statutes in place in the United States House of Representative.⁶⁰

The Spanish fled south in 1680 to the area of what is now El Paso, Texas.⁶¹ They did not give up on their colonial and conversion mission. They returned to Santa Fe in 1692, along with their Indian allies who had fled with them, and a wooden statue of Our Lady known as “La Conquistadora.”⁶² Their bloodless “reconquest” of Santa Fe, and

55. NACIÓN GENÍZARA: ETHNOGENESIS, PLACE, AND IDENTITY IN NEW MEXICO (Moises Gonzales & Enrique R. Lamadrid eds., 2019) 27-35 [hereinafter NACIÓN GENÍZARA].

56. *Id.* at 19.

57. SAN MIGUEL CHAPEL, <https://www.sanmiguelchapel.org> (last visited Nov. 29, 2021).

58. PIATT & GONZALES, *supra* note 6, at 27-29; Ebright, *supra* note 54.

59. History of the Archdiocese of Santa Fe, ARCHDIOCESE OF SANTA FE, <https://archdiocese.org/asf-history> (last visited Oct. 1, 2021). See generally Michael P. Gueno, Among the Pueblos: The Religious Lives of the Franciscan Missionaries, Pueblo Revolutionaries, and the Colony of Nuevo Mexico, 1539-1722 (2010) (Ph.D. dissertation, Florida State University) (exploring the presence of religion within daily life through the history of the Pueblo and Spanish colonists of New Mexico from pre-European settlement to the Pueblo Revolt of 1680).

60. Po’pay Statute, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/explore-capitol-campus/art/popay> (last visited July 21, 2021).

61. W.H. Timmons, *El Paso del Norte*, TEX. STATE HIST. ASSOC. HANDBOOK OF TEX. (Jan. 1, 1995), <https://www.tshaonline.org/handbook/entries/el-paso-del-norte>.

62. “La Conquistadora” means “the conquering woman” in Spanish. Since 1997 though the Church has referred to her as, “Our Lady of Peace.” History of La Conquistadora, SANTA FE:

what is now New Mexico, is celebrated each year as a fulfillment of a promise made by the Spanish “Conquistadores” to “La Conquistadora” that a celebration would be held each year in her honor if the reconquest could be peaceful.⁶³ Although the celebration continues today, controversy over its origins has led to its modification to account for Native sensibilities.⁶⁴ This modification seeks to correct the historical inaccuracy that the reconquest was “bloodless.” After the initial Spanish entry was peaceful, a series of reprisals, including hangings, were carried out against those who continued to resist Spanish rule.⁶⁵ Following their return, the Spanish created additional defensive Genízaro settlements. Genízaros were awarded land grants in Belen, Abiquiu, Rancho de Taos, Carnué, and Las Huertas-Placitas.⁶⁶

Today, the Genízaro communities still exist. In the mountain pass east of Albuquerque, where the original Route 66, now Interstate 40, traverses, the village and people of Carnué continue to maintain a sophisticated governance structure based upon the land grant awarded by Spain, and carried forward through Mexican governance, into the present recognition by the United States and New Mexico.⁶⁷ The same is true of the Pueblo de Abiquiu, north of Santa Fe. Other Genízaro outposts remain as communities in New Mexico. The remaining Genízaro population is widely distributed throughout New Mexico, Colorado, and the Southwest.⁶⁸ Another non-federally recognized Indigenous pueblo in New Mexico is Tortugas Pueblo near Las Cruces.⁶⁹ This tribe includes the descendants of some of the Indians who fled during the 1680 rebellion.⁷⁰

The contributions of Genízaros, and their identity as Indigenous people is explained in a resolution adopted by the legislature of the State of New Mexico:

NEW MEXICAN, https://www.santafenewmexican.com/news/local_news/history-of-la-conquistadora/article_ca342910-fe14-5b69-a766-8cb9000ac3d8.html (last visited Jan. 21, 2022).

63. Bill Piatt, *Entrada: Slavery, Religion and Reconciliation*, 13 INTERCULTURAL HUM. RTS. L. REV. 1 (2018).

64. FIESTA DE SANTA FE, <https://www.santafefiesta.org> (last visited Jan. 21, 2022).

65. SANTA FE NEW MEXICAN, *supra* note 62.

66. NACIÓN GENÍZARA *supra* note 55. The locations of the Genízaro land grants are located on an unpaginated map within the source.

67. CANÓN DE CARNUÉ, <https://www.canondecarnuelandgrant.org> (last visited Mar. 9, 2022).

68. *E.g.*, NACIÓN GENÍZARA, *supra* note 55.

69. Welcome to Tortugas Pueblo, TORTUGAS PUEBLO, <https://tortugas Pueblo.com/about> (last visited Jan. 21, 2022).

70. Diana Alba Soular, *Local Tribe's History Rooted in Spanish Conquest*, LAS CRUCES SUN NEWS (Mar. 26, 2016, 8:03 PM), <https://www.lcsun-news.com/story/news/local/2016/03/26/local-tribes-history-rooted-spanish-conquest/82176602/>.

A MEMORIAL RECOGNIZING THE ROLE OF GENIZAROS IN NEW MEXICO HISTORY AND THEIR LEGACY.

WHEREAS, indigenous captivity and servitude were common in frontier society that became New Mexico; and

WHEREAS, various indigenous peoples, including Apache, Dine (Navajo), Pawnee, Ute and Comanche, were captured; and

WHEREAS, indigenous people became part of New Mexican communities and households through capture in war, kidnapping, trade fairs, punishment for crimes, adoption, abandonment and the sale of children; and

WHEREAS, baptismal records reveal that at least four thousand six hundred one captive indigenous persons were baptized between the years 1700 and 1880, becoming part of Spanish, Mexican and territorial households; and

WHEREAS, numerous primary source records document the captivity, presence and experience of indigenous people displaced in this way, including marriage records, court cases, wills and censuses; and

WHEREAS, the experiences of captives, while varied, included being raised and serving within households, and sometimes remaining in a captor's home for a lifetime; and

WHEREAS, the practice of taking Indian captives lasted through the Mexican and into the American period in New Mexico; and

WHEREAS, there were many terms to describe Indian captivity and servitude in New Mexico, including "cautivos," "criados," "coyotes," and "famulos" but the most common used prior to 1821 and into the Spanish colonial period was the term "genizaro"; and

WHEREAS, the term "genizaro" derives from the Turkish word "yeniceri" or "janissary," terms used to describe Christian captives who, as children, had been forcibly abducted, traded and trained as the nucleus of the Ottoman empire's standing army; and

WHEREAS, genizaro families could be found in various communities throughout the colony, including the major villages of Albuquerque, Santa Cruz de la Canada, Santa Fe and El Paso del Norte; and

WHEREAS, in the mid-eighteenth century, many genizaros were again relocated strategically at the edges of Hispanic communities, thus providing both an initial line of defense against raiders and the foundation for communities such as Abiquiu, Belen, Carnuel, Las Trampas, Ojo Caliente, Ranchos de Taos, San Miguel del Vado and Tome; and

WHEREAS, by 1776, genizaros comprised at least one-third of the entire population of the province; and

WHEREAS, genizaros and their descendants have participated in all aspects of the social, political, military and economic life of New Mexico during the Spanish, Mexican and American periods; and

WHEREAS, eventually the migration patterns of cautivos and genizaros paralleled that of all New Mexicans with communities extending southward to El Paso del Norte (Ciudad Juárez) and northern Chihuahua, Mexico, as well as northward in Colorado and beyond; and

WHEREAS, the direct result of the Indian slave trade was the emergence of generations of racial and cultural mixtures often referred to in the colonial period with terms such as coyotes, colores quebrados, lobos and mestizos; and

WHEREAS, many New Mexicans can trace their ancestry to these [I]ndigenous peoples;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NEW MEXICO that the important role of genizaros and their descendants have had in the social, economic, political and cultural milieu of New Mexico and the United States be recognized; and

BE IT FURTHER RESOLVED that the house of representatives recognize the existence and importance of this [I]ndigenous group and the presence and importance of its descendants today; and

BE IT FURTHER RESOLVED that a copy of this memorial be transmitted to the office of the state historian."⁷¹

The enslaved Genízaro, many of whom were captured as children, had their tribal identity stolen from them because they were re-named by their Spanish colonial masters, and by the Church, without inclusion of a tribal identity.⁷² A Genízaro would appear on many early census rolls as "Indian servant," or *criada* (servant).⁷³ Thus, the descendants of the Genízaros, through no fault of their own or their ancestors, cannot identify with a specific tribal affiliation. Despite this, descendants of the enslaved Genízaro identify as Indigenous because of their significant Native DNA and their maintenance of tribal identities, governance, and practices for centuries. Further, Genízaro Natives have received state recognition and would be recognized under

71. H.R. Mem'l 40, 48th Leg. 1st Sess. (N.M. 2007); S. Mem'l 59, 48th Leg. 1st Sess. (N.M. 2007).

72. See Piatt & Gonzales, *supra* note 6, at 20-27.

73. FRAY ANGELICO CHAVEZ, 9 SMITHSONIAN, INSTITUTION HANDBOOK OF NORTH AMERICAN INDIANS (1979).

the United Nations Declaration on the Rights of Indigenous People (“UNDRIP”).⁷⁴ However, Genízaros are not recognized by the United States federal government. *Slavery in the Southwest* summarizes the importance of self-identification as a fundamental criterion for protection under the United Nations Declaration on the Rights of Indigenous People:

But who exactly is protected by this declaration? Importantly, the Declaration does not define ‘[I]ndigenous peoples.’ That is because the Declaration adopts the International Labour Organization’s (ILO) ‘Convention Concerning [I]ndigenous and Tribal Peoples in Independent Countries (No. 169).’ That Convention recognizes that ‘self-identification as [I]ndigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.’ So, initially, it is important to note that Genizaros or other non-tribal Indians have the right under the authority of the United Nations Declaration to determine their own identity as ‘[I]ndigenous or tribal,’ without requiring the approval of the United States government, nor those of the states.⁷⁵

Yet Genízaros continue to maintain their Indigenous identity whether or not the federal government recognizes it. A *New York Times* article notes a renewed interest in this Indigenous identity.⁷⁶ Sophisticated DNA studies by Miguel Torres continue to demonstrate the scientific basis for the Indian identity of Genízaros.⁷⁷ Religious and cultural practices, practiced for centuries, continue among these people. A growing body of scholarship supports and advances the knowledge of Genízaro history and identity.⁷⁸ A photo exhibit by Russel Albert Daniels regarding the Genízaro Pueblo of Abiquiú is on display at the Smithsonian National Museum of the American Indian in Washington, D.C.⁷⁹ Native filmmaker, Gary Medina Cook, is creating a documentary entitled *The Genízaro Experience* at the at the

74. G.A. Res. 61/295, United Nations Declaration on the Human Rights of Indigenous Peoples (Sept. 13, 2007).

75. PIATT & GONZALES, *supra* note 6, at 145 (footnote omitted).

76. Simon Romero, *Indian Slavery Once Thrived in New Mexico. Latinos Are Finding Family Ties to It*, N.Y. TIMES (Jan. 28, 2018), <https://www.nytimes.com/2018/01/28/us/indian-slaves-genizaros.html>.

77. NACIÓN GENÍZARA, *supra* note 55, at 305-25.

78. Some of these, from most recent, include: PIATT & GONZALES, *supra* note 6; NACIÓN GENÍZARA, *supra* note 55; Piatt et al., *supra* note 1; Piatt, *supra* note 58, at 1; Gonzales, *supra* note 63; See BERNARDO GALLEGOS, POSTCOLONIAL INDIGENOUS PERFORMANCES: COYOTE MUSINGS ON GENÍZAROS, HYBRIDITY, EDUCATION, AND SLAVERY (2017); Ebricht, *supra* note 54; See ESTEVAN RAEAL-GALVEZ, IDENTIFYING CAPTIVITY AND CAPTURING IDENTITY: NARRATIVES OF AMERICAN INDIAN SLAVERY. COLORADO AND NEW MEXICO, 1776-1934 (2002).

79. Russel Albert Daniels, *The Genízaro Pueblo of Abiquiú*, AMER. INDIAN MAG., <https://www.americanindianmagazine.org/story/genizaro-pueblo-abiquiú> (last visited July 23, 2021).

time of this writing.⁸⁰ Contemporary music by Felix Peralta incorporates traditional songs dating back centuries, that preserves and communicates the Genízaro experience.⁸¹ Further, director of the Abiquiu Library and Cultural Center, Isabel Trujillo, expanded upon the collection of documents and experiences of the Pueblo de Abiquiu.⁸²

Annual feasts and religious celebrations are held in Genízaro communities throughout New Mexico.⁸³ Traditional dances, such as the *Matachines*, are performed commemorating the mixture of Native and Catholic religious history.⁸⁴ In Carnué, New Mexico, members gather to pray, celebrate, and witness the dancing at the end of the summer. Moises Gonzales, a Genízaro scholar and historian, is one of the *danzantes* (dancers) during these events.⁸⁵ His passion and commitment to his people is infectious. The steep canyon walls east of Albuquerque, part of the land grant, form the backdrop for the dancing and celebrations. A procession of community members follow the dancers to the village church, tucked away in the Sangre de Cristo mountains. Once at the church, *danzantes* move in the traditional centuries old *Matachines* dance to the rhythm of a violin and guitar.⁸⁶ A

80. Gary Medina Cook, *The Genízaro Experience Trailer*, YOUTUBE (Dec. 6, 2021), <https://youtu.be/b4y7OU74eJs>.

81. Felix Gato Peralta, *Comanche Highway*, BANDCAMP, <https://felixgato-peralta.bandcamp.com/track/comanche-highway> (last visited July 23, 2021). The lyrics are as follows:

Comanche highway passing thru the canyon
Comanche spirit Mother Earth and companion
Captured by the unknown,
Now I'm a landless [Genízaro]
Blood & Pain Terrorize the
Desert land
Servants sold I just can't understand
Like a pelt of Buffalo I'm a landless Genízaro
Once a warrior on the eastern
plains I ride
Enslaved by the Spaniard [c]lan, learned to love Jesus Christ
Our religion was the Buffalo I'm a landless [Genízaro]
Comanchera[,]Coyote de Apache
Two religions fightin['] within me
Like a pelt of Buffalo I'm a landless [Genízaro]

Id.

82. EL PUEBLO DE ABIQUIU LIBRARY & CULTURAL CENTER, <http://abiquiupl.org/index.html> (last visited July 26, 2021).

83. John Burnett, *Descendants of Native American Slaves in New Mexico Emerge from Obscurity*, NPR (Dec. 29, 2016, 4:13 PM), <https://www.npr.org/2016/12/29/505271148/descendants-of-native-american-slaves-in-new-mexico-emerge-from-obscurity>.

84. MATACHINES! (Claude Stephenson ed., 2008); Wu Mingren, *The Controversial Role of La Malinche in the Fall of the Aztec Empire: Traitor or Hero?*, ANCIENT ORIGINS (Feb. 2, 2016), <https://www.ancient-origins.net/history-famous-people/controversial-role-la-malinche-fall-aztec-empire-traitor-or-hero-005284> (July 24, 2019); Adelaida R. Del Castillo, *La Malinche*, ENCYCLOPEDIA, <https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/la-malinche> (last visited July 23, 2021).

85. Co-author of SLAVERY IN THE SOUTHWEST: GENÍZARO IDENTITY, DIGNITY AND THE LAW; co-editor, A GENÍZARA: ETHNOGENESIS, PLACE, AND IDENTITY IN NEW MEXICO.

86. This author has observed the *Matachines* as performed in Carnué on several occasions, including 2019 and 2021. Photos and videos, of these dances are on file with the author.

little girl in a white First Communion outfit accompanies the adult dancers. She represents the introduction of Catholicism to the New World, according to at least one interpretation of the dance.

At Abiquiú Pueblo, Indigenous people celebrate the feast of Santo Tomas (St. Thomas), the patron saint of their Pueblo, with dancing and feasts the weekend following Thanksgiving.⁸⁷ I was born in Santa Fe and my maternal Indigenous Hispanic lineage extends back centuries. My Genízaro relatives still live in Abiquiú. Some of my family members have served as leaders of the “Merced del Pueblo de Abiquiú” (Land Grant of the Pueblo of Abiquiú). Some of my ancestors are buried in Abiquiú and it is particularly moving to visit Abiquiú over the years to participate in feasts and engage in book discussions. The world knows Abiquiú as the site of Georgia O’Keefe’s residence and the magnificent natural beauty of the area.⁸⁸ My family, including my family members who were friends and associates of O’Keefe, know the area as the ancestral homeland, calling us back to experience its beauty and to hear the voices of our ancestors. I cannot completely share in this article the experience of walking the paths of my ancestors, visiting their graves, and feeling their presence. It is impossible to re-create the sights and sounds of the celebration. Nobody who spends time in the community of Abiquiú, and in particular, nobody who attends the feast of Santo Tomas can doubt that the people of Abiquiú Pueblo are Indigenous. Until you visit these feasts, my words suffice.⁸⁹

Abiquiú Indian women and girls, some as young as four or five, dance inside and outside the church. As they wear traditional dresses, village members watch, sing, and join in the dances in the crisp New Mexico autumn air. An elder circulates among the crowd offering paper cups and a shot of whiskey to help spectators “keep warm” as a light snow falls and the dancing continues. Occasionally, a shotgun is fired into the air. Then, as the dancing winds down, the crowd moves into the parish hall for a shared feast of traditional dishes of posole, chile, beans, tortillas, pastries, and more shots to “keep warm.” Back outside, dancers from one of the nearby pueblos arrive to offer their dancing to the celebration. Members of that pueblo circulate among the crowd, tossing store-bought candies (a delicacy in rural northern

87. *The Genízaro Pueblo of Abiquiú*, NATIONAL MUSEUM OF THE AMERICAN INDIAN, <https://americanindian.si.edu/developingstories/daniels.html> (last visited Oct. 1, 2021).

88. GEORGIA O’KEEFE MUSEUM, <https://www.okeeffemuseum.org/home-and-studio> (last visited Jan. 22, 2022).

89. The description is from my November 2019 observation. I have photos and videos on file. Dances were not held in 2020 due to the coronavirus (COVID-19) pandemic.

New Mexico) to the crowd. This occurs as the feasting, prayers, and celebration continues.

Members of the Tortugas Pueblo, near Las Cruces, New Mexico, who self-identify as *Los Indigenes de Nuestra Senora de Guadalupe* (The Indigenous People of Our Lady of Guadalupe), conduct an annual feast and celebration in December. Participants gather to pray and embark on a thirteen-mile roundtrip pilgrimage from the church at Tortugas Pueblo to the top of “A” mountain, east of Las Cruces, New Mexico for a mass in honor of Our Lady. I have had the wonderful experience of participating in these pilgrimages, celebrations and feasts in Tortugas.⁹⁰

Although this is only a brief summary of some of the Genízaro feasts and celebrations, no summary would be complete without the mentioning of two other Genízaro religious celebrations. The first of these celebrations is the annual pilgrimage to El Santuario de Chimayo in Chimayo, New Mexico. I have participated in this pilgrimage many times over the last forty-plus years. The church was constructed on the site of an older Indian settlement. It has gained a reputation over the years as a healing place. Indeed, dirt from El Santuario is believed to have miraculous healing powers. Rows of crutches line the room where the dirt is available from the *poza* (hole) in the floor. These crutches, photos, and notes left in the room, attest to the miraculous recovery of those who made the pilgrimage and touched the dirt.⁹¹

The pilgrimage to the Santuario takes place on the days leading up to Good Friday. Mass is celebrated in the early morning hours on that day, which means pilgrims from surrounding areas begin their journeys to be present on Holy Thursday and Good Friday. I have commenced this 28-mile journey from my hometown of Santa Fe on numerous occasions, leaving on Holy Thursday evening to arrive at the Santuario in the *madrugada* (dawn) the next morning. Some pilgrims walk from as far away as Albuquerque, almost 90-miles to the south. A few carry crosses and some even make part of the journey on their knees.

And further north, Genízaro *penitentes* (penitents) commemorate Holy Week in ceremonies which extend back centuries. Charlie Carrillo and Felipe Mirabal note, “[t]he mystery of the *Hermanos*

90. Again, the description is from my personal observations, December 2019. I have photos and some video on file. The pilgrimage was not held in 2020 due to the coronavirus (COVID-19) pandemic.

91. See *Easter Pilgrimage to Chimayó*, THE PLURALISM PROJECT, <https://pluralism.org/easter-pilgrimage-to-chimay%C3%B3> (last visited July 23, 2021).

[(Brothers)] or *Penitentes* that belong to the *Cofradía de Nuestro Padre Jesús Nazareno* [(Brotherhood of Our Father Jesus the Nazarene)] has baffled and fascinated scholars, journalists, Protestant missionaries, and the local Catholic clergy for decades.”⁹²

Much has been written on the *penitentes* with often a great deal of misunderstanding on the part of outside observers. Ramon A. Gutierrez offers an important explanation of the complex Genízaro origins of the *Hermanos Penitentes* in *Nación Genízara: Ethnogenesis, Place, and Identity in New Mexico*.⁹³ These dances, feasts, celebrations, and pilgrimages are always moving spiritual events, renewing kinship ties. Genízaros sharing space with other Genízaros in the presence of the Creator. There is no doubt in the mind of any of the Genízaros that they are Indigenous people. They carry on the traditions and rituals of their ancestors, passing along the traditions to their children just as those traditions have been passed along to them by their elders.

Still, Genízaros are not recognized as Indians by the United States government. They are, however, listed in the Smithsonian Museum’s Handbook of North American Indians.⁹⁴ As will be seen, the badges of servitude imposed upon their Genízaro ancestors, and now upon them, continue. They are often subjected to mocking and ridicule for the lack of their federal recognition, as described below. Yet the slavery imposed upon their ancestors, and lack of recognition by the United States government has not prevented Genízaros from maintaining their cultural and religious practices as noted in this section and in the discussions to follow. However, with or without federal recognition, their kinship, culture, and identification as Indians will endure, as contemporary Genízaros continue to learn of, and assert their Indigenous identity.⁹⁵ This resurgence in Genízaro practices, customs, and now a growing body of scholarship all means that the eradication of Genízaros and their identity has not, and will not, be accomplished.

92. Charlie M. Carrillo & Felipe R. Mirabal, *The Mystery of the Penitentes*, EL PALACIO <https://www.elpalacio.org/2019/12/the-mystery-of-the-penitentes> (last visited Mar. 9, 2022).

93. *Id.* See NACIÓN GENÍZARA, *supra* note 55, at 80-117.

94. See generally HANDBOOK OF NORTH AMERICAN INDIANS (William C. Sturtevant ed., 1978) (addressing, through a series of fifteen volumes, documenting information about all Indigenous peoples of North America).

95. *E.g.*, NACIÓN GENÍZARA, *supra* note 55; see also, John Burnett, *Descendants of Indian Slaves in New Mexico Emerge from Obscurity*, WFDD (Dec. 30, 2016, 12:25 PM), <https://www.wfdd.org/story/descendants-native-american-slaves-new-mexico-emerge-obscurity>.

E. Eradication of the Indian Identity of Other Tribes

Although other non-federally recognized tribes do not have a similar enslavement background, they share many of the same burdens as Genízaros. Additionally, they share the same commitment to maintain their Indigenous identities and pass their culture to their children, whether or not the federal government recognizes them. A complete discussion of all of these tribes and nations would fill volumes. But it is critical to understand this topic by identifying some of them, without intending to diminish the importance of the many not listed in this brief summary.

The Tap Pilam Coahuiltecan Nation⁹⁶ is an Indigenous group in Texas, and the American Indians in Texas at the Spanish Colonial Missions (“AITSCM”) is the non-profit arm of the Nation.⁹⁷ I serve on the Board of the AITSCM, and more about this Indigenous nation follows later in Section IV of this article. Below, the AITSCM website identifies the work they perform:

[AITSCM] is a nonprofit organization established by the Tap Pilam Coahuiltecan Nation, descendants of the aboriginal people who populated South Texas and Northeast Mexico. The organization works for the preservation and protection of the culture and traditions of the Native American tribes and other [I]ndigenous people who resided in the Spanish colonial missions.⁹⁸

The brutality directed at Natives, in what is now Texas, is chronicled in Professor Milo Colton’s article titled *Texas Indian Holocaust and Survival*.⁹⁹ Professor Colton notes that the genocidal policies of Texas drove many Indians out of the state and many into hiding.¹⁰⁰ In 1965, it became obvious that the Coahuiltecan Texans never died out. They had practiced their ceremonies and exercised their religion for generations. When the Church in San Antonio permitted archeologists to excavate Indian decedents in an Indian cemetery at one of its missions place the remains in a local state university, the Tap Pilam objected, and subsequently in 1999, reached an agreement for the return of the bones of their ancestors.¹⁰¹ Then Archbishop Patrick Flores held a mass and issued an apology for allowing graves at the San

96. See TAP PILAM COAHUILTECAN NATION, <https://tappilam.org> (last visited July 22, 2021).

97. *Who We Are*, AMERICAN INDIANS IN TEXAS AT THE SPANISH COLONIAL MISSIONS, <https://aitscm.org/about> (last visited July 22, 2021).

98. *Id.*

99. See Milo Colton, *Texas Indian Holocaust and Survival*: McAllen Grace Brethren Church v. Salazar, 21 ST. MARY L. REV. ON RACE & SOC. JUST. 51 (2019).

100. *Id.* at 62-77.

101. *Id.* at 78.

Juan Capistrano Mission to be unearthed.¹⁰² The struggles by AITSCM and Tap Pilam against removing Coahuiltecan bones continues as discussed in Part III.

Another Texas tribe, unrecognized by the federal government, is the Lipan Apache Tribe of Texas.¹⁰³ Despite their lack of federal recognition, they have won important civil rights victories, including recognition of the Tribe as Indians for purposes of religious freedom issues afforded by federal statutes to Indians in federal courts.¹⁰⁴ More about the Lipan Apache Tribe follows below.

Other important Indian nations continue their existence as Natives, with all of the characteristics of recognized tribes with one important exception: the United States has failed to completely recognize them. One of these is the Lumbee Nation. A review of their website and an examination of their history demonstrates their continuing Indian identity. They identify their history and culture in this summation:

In southeastern North Carolina, amongst the pines, swamps, and dark waters of the Lumbee River, you will find the heart and homeland of the Lumbee People. The ancestors of the Lumbee came together in the shelter of this land hundreds of years ago—survivors of tribal nations from the Algonquian, Iroquoian, and Siouan language families, including the Hatteras, the Tuscarora, and the Cheraw. The ancestors of the Lumbee were recognized as Indian in 1885 by the State of North Carolina. In 1956, Congress recognized the Lumbee as an Indian tribe while denying the People any federal benefits that are associated with such recognition—an action that the Lumbee continue to fight today.¹⁰⁵

The Lumbees have a proud history of military service on behalf of the United States. In addition to defending this country against foreign enemies, they have also served as a bulwark against the establishment of the Ku Klux Klan in North Carolina, driving out the Klan in a battle that has contributed to the folklore surrounding the Lumbee Nation.¹⁰⁶ Their struggle for federal recognition stretches over eighty years.

Many other Indigenous tribes and nations exist within the United States. Many maintain formal governance structures and have main-

102. *Id.* at 77-78.

103. LIPAN APACHE TRIBE OF TEXAS, <https://www.lipanapache.org> (last visited July 22, 2021).

104. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 468 (5th Cir. 2014).

105. LUMBEE TRIBE OF NORTH CAROLINA, <https://www.lumbeetribe.com> (last visited July 22, 2021).

106. Malvina Reynolds, *The Battle of Maxton Field*, W. KY. UNIV., <https://people.wku.edu/charles.smith/MALVINA/mr011.htm> (last visited July 22, 2021).

tained cultural identity and kinship as Natives. Many of their members demonstrate high percentages of Indigenous DNA, and in many instances, they even carry a higher level of Indigenous DNA than members of recognized tribes. Consider for a moment that generally, a person must be able to demonstrate some pre-determined fraction (usually at least one-sixteenth) of “Indian blood” and demonstrate membership in a recognized tribe to be considered Indian under many federal statutes.¹⁰⁷ That means that recognized tribal members might carry only slightly more than 6% “Indian blood.” Yet DNA testing by Miguel Torrez consistently reveals a much greater percentage than 6% of “Indian blood” among Genízaros in northern New Mexico, averaging 30%,¹⁰⁸ or close to five times the minimum required under most federal “blood quantum” statutes.¹⁰⁹ On a personal level, my own percentage of “Indian blood,” and that of my immediate relatives is much higher than one-sixteenth. And as mentioned in Part I, the Cherokee Nation has removed the requirement of any percentage of “Indian blood” for membership.¹¹⁰

II. RESURGENCE AND RECOGNITION OF NATIVE POPULATIONS

A. Resurgence

The number of American Indians in the United States has risen dramatically in the last few decades.¹¹¹ Some of this can be attributed to predictable population growth.¹¹² Some is the result of renewed interest in Native identity made possible by DNA testing.¹¹³ Some have found newly discovered links to their ancestors.¹¹⁴ Undoubtably, some have decided to self-identify as Native with little or no basis for it to gain perceived affirmative action advantages in college admission, employment opportunities, healthcare, political career advancement, and the like. Some of the increase may be attributed to the United States Census now allowing people to self-identify as Indians rather than re-

107. See PIATT & GONZALES, *supra* note 6 (citing *United States v. Diaz*, 679 F. 3d 1183, 1187 (10th Cir. 2012)).

108. See NACIÓN GENÍZARA, *supra* note 55, at 320 50, (displaying the genealogical chart within chapter thirteen (*Genízaro Identity and DNA: The Helix of our Native American Genetic History*)).

109. *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005).

110. Allison Herrera, *Cherokee Nation Supreme Court Rules Citizenship Not Determined ‘By Blood,’* THE WORLD (Mar. 4, 2021, 4:15 PM), <https://www.pri.org/stories/2021-03-04/cherokee-nation-supreme-court-rules-citizenship-not-determined-blood>.

111. U.S. DEP’T OF THE INTERIOR, *supra* note 3.

112. *Id.*; see *infra* Part I.B.

113. Romero, *supra* note 76; see also NACIÓN GENÍZARA, *supra* note 55 (discussing the Torres study).

114. *Id.*

lying on door-to-door headcounts or tribal rolls.¹¹⁵ Whatever the reasons, the Indian population has rebounded back to pre-colonization levels.¹¹⁶

B. *Mechanics and Benefits of Federal Recognition*

After years of warfare against Indians, and even genocidal attempts at extermination, why did the federal government ultimately create and maintain a system of recognizing tribes? An overly simplified and optimistic view is that the eventual realization that Indians should not be exterminated led to the conclusion that the federal government had a trust obligation to them.¹¹⁷ Perhaps there was also some element of maintenance of control and eventual assimilation involved in the identification and cataloging of tribes and their members.¹¹⁸ As Natives were herded onto reservations, the federal government recognized their tribes and undertook a trustee relationship with them and their lands in a sovereign-to-sovereign relationship.¹¹⁹

The Bureau of Indian Affairs (“BIA”) within the United States Department of the Interior (“DOI”) was designated to supervise this process.¹²⁰ Complicated mechanisms were put in place to recognize “new” tribes. The current BIA regulations are set out within its Procedures for Federal Acknowledgement of Indian Tribes.¹²¹ Section 83.11 of the Procedures provides guidance regarding “the criteria for acknowledgment as a federally recognized Indian tribe,” providing seven major areas to which a successful tribal applicant must conform.¹²²

The first of these criteria requires that “[t]he petition[ing] [tribe] has been identified as an American Indian entity on a substantially continuous basis since 1900 [and that] [e]vidence that the group’s character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that this criterion has not

115. *2020 Census Includes Tribal Affiliations*, NAT’L INDIAN COUNCIL ON AGING (Jan. 27, 2020), <https://www.nicoa.org/2020-census-includes-tribal-affiliations>.

116. *Demographics*, NAT’L CONG. AMER. INDIANS, <https://www.ncai.org/about-tribes/demographics> (last visited July 22, 2021).

117. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011).

118. See Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 877 (2016); see Robert J. Miller, *Consultation or Consent: The United States Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 47 (2015); see Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 681-82 (2016) (Feb. 13, 2015).

119. PÉVAR, *supra* note 1, at 29-44.

120. Indian Reorganization Act of 1934, 25 U.S.C. § 2701 *et seq.* (2018).

121. 25 C.F.R. § 83.

122. *Id.* § 83.11.

been met.”¹²³ The regulation goes on to identify the types of evidence for determining the group’s Indian identity.¹²⁴ These are actually quite broad; it includes identification of a number of bases and importantly, including “[i]dentification as an Indian entity by the petitioner itself.”¹²⁵ Genízaros, Coahuiltecans, and the other groups mentioned can easily satisfy this requirement. Self-identification is an accepted criteria for inclusion in the United States Census.¹²⁶ It is also a defining criterion for Indigenous recognition under the United Nations Declaration on the Rights of Indigenous People.¹²⁷

The next requirements, two through four, also do not pose insurmountable burdens on the tribes we have discussed. The second requirement is that “[t]he petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present.”¹²⁸ Again, the regulation would make it relatively easy for Genízaros, Coahuiltecans, and others, identified above, to meet this criterion. The third requirement requires that “the petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the present.”¹²⁹ This too could be easily met by the groups identified. The fourth requirement calls for petitioning entities to produce a governing document containing membership criteria.¹³⁰ If there is no governing document, the tribe must provide a written statement which describes “its membership cri-

123. *Id.* § 83.11(a). The provision reads as follows:

(a) Indian entity identification. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group’s character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group’s Indian identity may include one or a combination of the following, as well as other evidence of identification.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group’s Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(7) Identification as an Indian entity by the petitioner itself.

124. *Id.*

125. *Id.* § 83.11 (a)(7) (emphasis added).

126. *About the Topic of Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> (last visited Mar. 10, 2022).

127. Self-identification as “Indian” is also the standard in the United Nations Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/295, art. 33, United Nations Declaration on the Human Rights of Indigenous Peoples (Sept. 13, 2007).

128. *Id.* § 83.11(b) (2022).

129. *Id.* § 83.11(c).

130. *Id.* § 83.11(d).

teria and current governing procedures.”¹³¹ Again, this would probably not be an insurmountable problem.

However, the fifth requirement, entitled “Descent,” is a formidable obstacle.¹³² Tribes are required to show “the petitioner’s membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and function as a single autonomous political entity.”¹³³ For Genízaros who were stolen away from their tribes, many as children, it is difficult to prove the specific descent from an identifiable historical tribe. There are some complicated methods for proving descent outlined in the regulation, but the minimal records of the slaves captured and traded, such as those which appear in census data or in baptismal records, rarely contain the tribal identification of the captive. Still, there is some hope of meeting this requirement, such as a provision that would allow the petitioner to show “other records or evidence” of this descent from historical Indian tribe. In this regard, sophisticated DNA testing and based upon family affiliation, such as the work Miguel Torres has undertaken,¹³⁴ might be of assistance.

The sixth requirement requires the tribe to show that its membership “is composed principally of persons who are not members of any federally recognized Indian tribe.”¹³⁵ And finally, the applicant must show that “[n]either the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.”¹³⁶

These requirements are difficult and result in low success rates for tribes seeking formal recognition through the BIA.¹³⁷ In fact, these requirements may take up to thirty years or more to complete.¹³⁸ It

131. *Id.*

132. *Id.* § 83.11(e).

133. *Id.*

134. Miguel Torrez et al., *El Pueblo de Abiquiu and its Genizaro Identity*, 58 N.M. GENEALOGIST 8 (2019).

135. 25 C.F.R. § 83.11(f).

136. *Id.* § 83.11(g).

137. Emily Ann Haozous et al., *Blood Politics, Ethnic Identity, and Racial Misclassification among American Indians and Alaska Natives*, J. ENV'T & PUB. HEALTH, 2014, at 1. Between 1978 to 2012, 352 groups sought recognition. *Id.* at 3. Eighty-seven of these were able to satisfy all the submission requirements. *Id.* Seventeen were ultimately recognized by the Department of Interior. Another nineteen were resolved by merger with other tribes or by congressional action. *Id.* Of the eighty-seven with submitted and completed applications thirty-three were denied recognition and as of 2014, eighteen groups were still bogged down in the quagmire of seeking federal recognition. *Id.* The BIA maintains a website providing a detailed listing of the status of recognition petitions, and outlining the process for new petitions. See *Office of Federal Acknowledgement (OFA)*, U.S. DEPT OF THE INTERIOR, <https://www.bia.gov/as-ia/ofa> (last visited Mar. 10, 2022) [hereinafter *OFA*].

138. *Id.*

requires the expenditure of substantial time and resources, and the location of obscure records. It occasionally provokes opposition from federally recognized tribes who may be justifiably concerned that federal recognition of other tribes might decrease the share of government resources and services available to them. And, for those tribes which operate casinos, the recognition of a new tribe creates the very real prospect of economic competition.¹³⁹

However, the administrative process established by the BIA is not the only method of obtaining federal recognition. Congress reserves the right to recognize new tribes by direct Congressional action.¹⁴⁰ Of course, the likelihood that a group of Indians could obtain a majority vote of both houses of the Congress and then the signature of a president appears to be quite difficult. These actions may even provoke political opposition from existing recognized tribes.¹⁴¹

Nonetheless, there are many tribes who have found success in obtaining recognition by the BIA. As a result of these processes, there are currently 574 federally recognized tribes in this country. There are 229 tribes located in Alaska, and the remaining 345 are scattered throughout thirty-four other states.¹⁴²

These federally recognized tribes have the power to determine who is a member of the tribe.¹⁴³ However, a tribal determination that a person is or is not a member of the tribe is not always binding upon the United States.¹⁴⁴ Thus, someone could be considered an Indian for federal purposes but still not be considered a tribal member by a tribe. Conversely, someone could be considered to be an Indian by a tribe and not considered to be an Indian under state law.¹⁴⁵ These inconsistent legal approaches leave great confusion as tribes and individuals seek the benefits afforded to federally recognized tribes.

Regarding Indian benefits under federal law, the issue of who is an Indian becomes more difficult. The United States government has

139. Bruce Henderson, *Largest Tribe in East Called NC Home for Centuries. Feds Say it's Not Indian Enough*, THE CHARLOTTE OBSERVER <https://www.charlotteobserver.com/news/local/article224518065.htm> (Mar. 11, 2019).

140. For example, the United States Senate voted to officially recognize the Little Shell Tribe of Chippewa Indians in Montana on December 20, 2020. See S. REP. NO. 116-190 (2020). "Congress, and not the Department of the Interior, has the final word as to whether a tribe should be federally recognized and whether a non-recognized tribe may nevertheless receive certain federal benefits." Pevar, *supra* note 1, at 274.

141. Henderson, *supra* note 139.

142. *Tribal Nations & The United States: An Introduction*, NAT'L CONG. AMER. INDIANS, <https://www.ncai.org/about-tribes> (last visited Jan. 22, 2022) (discussing the 229 in Alaska and the 345 in 35 other states); *Demographics*, *supra* note 116.

143. Piatt et al., *supra* note 1, at 46.

144. *United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir. 2005).

145. PIATT & GONZALES, *supra* note 6, at 46.

adopted differing definitions of who is an Indian in statutes regarding Indian benefits.¹⁴⁶ The Constitution of the United States mentions “Indian” three times,¹⁴⁷ but “Indian” is not defined in the Constitution. The Declaration of Independence refers to the “merciless Indian savages”¹⁴⁸ that the British were inciting to harass the colonists. Of course, the Declaration of Independence did not attempt to define “Indian.” In fact, there are at least thirty-three differing definitions of “Indian” in federal statutes.¹⁴⁹ And in some statutes Congress has created programs to assist Indians without providing a definition of who qualifies.¹⁵⁰ Federal agencies administering these programs make the determination under varying, and sometimes conflicting, requirements.¹⁵¹

Despite the confusion over exactly who qualifies under the various programs, there are significant benefits for federally recognized tribes and individual Indians.¹⁵² Federally recognized tribes operate as sovereigns.¹⁵³ Tribes can create their own judicial and law enforcement systems.¹⁵⁴ Importantly, the Indian Child Welfare Act¹⁵⁵ allows tribes to adjudicate child custody proceedings in their own courts. State courts have no jurisdiction over the custody of Indian children living on a reservation.¹⁵⁶ Extensive procedural and substantive rights apply in custody issues of Indian children living off the reservation. This statute provides an important mechanism to counter the efforts akin to Indian boarding schools, discussed in Part I, which sought to eliminate tribal influence over Native children, ultimately resulting in the dilution and extinguishment of Indian tribes by eradicating Indian identity within Indian children.¹⁵⁷

146. *Id.* at 46 n.7, 47.

147. U.S. CONST. art. I, §§ 2, 8; U.S. CONST. amend. XIV, § 2.

148. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

149. Brooke Jarvis, *Who Decides Who Counts as Native American?*, N.Y. TIMES MAG. (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html?smid=url-share>.

150. PEVAR, *supra* note 1, at 18.

151. PIATT & GONZALES, *supra* note 6, at 47.

152. U.S. DEP’T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, BUDGET JUSTIFICATIONS & PERFORMANCE INFORMATION FISCAL YEAR 2022 (2021).

153. *E.g.*, *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020).

154. Indian Self-Determination and Education Assistance Act of 1975, 28 U.S.C. § 5301 (2018).

155. 25 U.S.C. § 1901 (2018).

156. *Id.* § 1911(a).

157. I had the opportunity to assist a tribe in the Midwest in the early 1980s in creating its juvenile court system. Native children were no longer subjected to the ongoing practice whereby well-intentioned social workers, with approval of local state judges, would remove children from impoverished Native families and place them in white homes with the ultimate goal of having them adopted into a “better” environment.

Tribes can operate casinos and other gambling establishments even though state laws prohibit non-Indians from engaging these endeavors.¹⁵⁸ In 2009, more than 400 casinos, producing over \$26 billion in annual revenues were operated by 230 tribes in twenty-eight states. Twenty-nine of these casinos are located in my home state of New Mexico.¹⁵⁹ An entrepreneurial spirit, coupled with federal recognition of their tribes, has enabled tribes to reap economic reward as they create impressive resort and recreation areas to accompany the casinos.¹⁶⁰

Individual Indians in federally recognized tribes are eligible for affirmative action programs in federal hiring.¹⁶¹ Federal courts have upheld the constitutionality of these preferences because in carrying out its trust responsibilities, the federal government may treat Indians and Indian tribes differently from other individuals and groups without creating an unlawful suspect classification.¹⁶² In upholding Indian hiring preferences, the Supreme Court noted that the power to create this preference “turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a guardian-ward status, to legislate on behalf of federally recognized Indian tribes.”¹⁶³ Federal regulations grant recognized Indians the right to use eagle and other feathers for religious purposes.¹⁶⁴ Non-Indians are forbidden by various laws, including the Bald and Golden Eagle Protection Act,¹⁶⁵ from this use. Recently though, a federal court decision recognized the rights of Lipan Apaches, a non-federally recognized tribe, to the exercise of these same rights.¹⁶⁶ Other statutes grant federally recognized Indians the right to hunt and fish in locations and under circumstances unavailable to non-federally recognized Indians, among other benefits.¹⁶⁷

158. Indian Gaming Regulatory Act, 25 U.S.C. § 2701.

159. *List of New Mexico Indian Casinos*, 500 NATIONS, https://www.500nations.com/New_Mexico_Casinos_List.asp (last visited July 26, 2021).

160. See, e.g., SANDIA RESORT & CASINO, <https://www.sandiacasino.com/> (last visited July 23, 2021). The Sandia Resort & Casino is located just north of Albuquerque, New Mexico.

161. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(i) (1982).

162. Courts have not always been adequately respectful of Indian sovereignty. See, e.g., Steele, *supra* note 118; see Lawrence Baca, *40 Years of U.S. Supreme Court Indian Law Cases: The Justices and How They Voted*, 62 FED. LAW. 18 (2015).

163. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (internal quotations omitted).

164. Permits for Indian Religious Purposes 39 Fed. Reg. 1183, 1184 (1974). See 50 C.F.R. § 22.22 (a)(5) (2022) (providing the requirements concerning permits for the use of bald or eagles for Indian religious purposes).

165. 15 U.S.C. 668(a).

166. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

167. PIATT & GONZALES, *supra* note 6, at 83.

These efforts to improve the lives of Indians through federal recognition, whatever the motivation, may be insufficient, but are nonetheless consequential for addressing the longstanding mistreatment by the United States of its Indigenous peoples. Nothing in this article should be construed as an attempt to impede these efforts on behalf of sovereign Indian nations or their members.¹⁶⁸

III. NON-RECOGNITION LEADS TO MARGINALIZATION

If the purpose of recognition was to afford stewardship, and in some small manner, make up for the history of mistreatment of Natives, the recognition process has failed. While tribal communities are able to exercise some degree of governance and economic development, Indians, particularly those on reservations, face unacceptable levels of substance addiction, malnutrition, disease, and other ailments.¹⁶⁹ Being recognized by the federal government is not an effective manner of alleviating these continuing effects of oppression.

Moreover, the failure of the federal government to recognize all Indigenous people creates confusion among the otherwise well-intentioned people who are charged with administering and enforcing the laws affording benefits to Indians. These laws seek to partially address past discrimination but are thwarted when administrators do not understand who is an Indian. One example is the law school admission issue, to be discussed in subpart B of this section, below. There is also a great possibility that the confusion as to who qualifies as an “Indian” can be used to actually impose a compounded discrimination and oppression. That is, all Indians, recognized and otherwise, have suffered from past discrimination directed against them and their ancestors. Unrecognized Indians then suffer a double oppression by being excluded from the minimal efforts being made to address the past iniquities, such as the protection of Indian burial sites, also discussed in subpart B. Consider the Indian burial and the law school admissions issues, as they both illustrate the marginalization resulting from non-recognition.

168. My interest in maintaining and expanding the opportunities for federally recognized Indians is personal as well as academic. I am the proud grandfather of a member of the Choctaw Nation.

169. *Profile: American Indian/Alaska Native*, OFF. MINORITY HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62> (Jan. 11, 2022).

A. *The Second Battle of the Alamo*

The Alamo is the first of five missions founded by the Church in what is now the San Antonio area.¹⁷⁰ These missions have been designated as a world heritage site under the auspices of the United Nations.¹⁷¹ The missions were founded by the Franciscan religious order, which is the same order that accompanied the Spanish into what is now New Mexico to convert the Natives there. The presence of the Franciscans helped implement the Genízaro system in New Mexico¹⁷² and establish the mission system in what is now Texas.

At each of the five missions, Natives were brought to live, work, die, and be buried. They were not enslaved like the Genízaros in New Mexico, but they were separated from their original tribal identities in the process of religious conversion.¹⁷³ Moreover, like the Genízaros, they acquired a military role in the defense of the Spanish settlements from attacks by Indians from the surrounding plains. For example, the northernmost mission, San Antonio de Valero, was established in its present location in 1727, and is known now as the Alamo. On June 30, 1745, mission Natives defended the Presidio de Bejar, known now as the City of San Antonio, from attacks by the Apaches. The mission Natives, consisting of members of the Coahuiltecan Nation, preserved the Presidio from destruction by some 300 Apache attackers.¹⁷⁴ The descendants of the original Coahuiltecan Nation in the San Antonio area did not disappear. They live now as the Tap Pilam Coahuiltecan Nation, and its non-profit arm, the American Indians of Texas at the Spanish Colonial Missions.¹⁷⁵

These Indians have not forgotten their ancestors who are buried at these missions. Each year, the members of the Nation gather at the Alamo at daybreak on a Saturday in September. Historically, they would enter the Alamo to pray for their ancestors, especially those who are buried at the Alamo. Then, those who can, leave on a Spiritual Run to all of the five missions, a twelve-to-thirteen-mile journey, singing along the way with sage blessings and prayers at each stop.

However, that situation changed in 2019. In that year, an effort was launched by a consortium of developers, the State of Texas, and

170. Spanish Missions, EXPLOROS, <https://www.exploros.com/summary/Spanish-Missions> (last visited Oct. 1, 2021).

171. *San Antonio Missions*, UNITED NATIONS EDUC. SCI. & CULTURAL ORG., <https://whc.unesco.org/en/list/1466/> (last visited July 23, 2021).

172. PIATT & GONZALES, *supra* note 6 at 18.

173. RAMON VASQUEZ Y SANCHEZ, *THE HISTORIC MISSION TRAIL* (2003) (on file with author).

174. *Id.*

175. *Who We Are*, *supra* note 97.

the City of San Antonio to “reimagine” the Alamo. Already the most visited tourist site in Texas, the Alamo Trust sought to renovate the Alamo into an even larger attraction.¹⁷⁶ More than \$450 million was raised for these efforts. In the view of critics, these renovation efforts were intended to create a Disneyland-like attraction, demeaning the religious and historical significance of the site and ignoring the graves of Indians and non-Indians alike.¹⁷⁷ To the Coahuiltecs, these renovation efforts represented something worse. The planned excavation and construction would destroy the graves of their ancestors buried there. And they, Coahuiltecs, objected; their attorney cited a federal law which protects against the destruction of native graves.¹⁷⁸ At a minimum, the statute requires consultation with the Native descendants of the Indian ancestors who are buried at a particular site. Attorneys for the Coahuiltecs filed lawsuits, which are still pending as of this writing.

The struggle based by the Coahuiltecs evoked similar painful memories of earlier battles the Nation had to endure. They recall their struggle when the Catholic Church approved an archaeological dig that removed the bones of their ancestors from the Mission San Juan Capistrano, discussed above.¹⁷⁹ As one author put it:

Indians believe that when you disturb a person’s remains, you interfere with their existence in the afterworld. Archaeologists, however, justify their work by saying that is the only way to learn about a lost culture. Central to this thinking is the presumption that a culture is lost, and there are no ancestors.¹⁸⁰

The response of the Alamo Trust to the objections of the proposed grave disturbances was cynical and vicious.¹⁸¹ The Trust determined that because the Coahuiltecs were not a federally recognized tribe, the Trust did not need to consult with them. Moreover, the commission then contracted with some federally recognized tribes, none

176. *Reimagining the Alamo*, SAN ANTONIO EXPRESS-NEWS (Mar. 23, 2021), <https://www.expressnews.com/projects/2020/timeline-alamo-plaza-renovation>.

177. Bill Piatt, *Remember the Alamo-It's Also a Cemetery*, MY SAN ANTONIO (Sept. 17, 2019), <https://www.mysanantonio.com/opinion/commentary/article/Remember-the-Alamo-it-s-also-a-cemetery-14447307.php>.

178. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (2018).

179. Colton, *supra* note 99, at 79; John Moritz, *Remember the Alamo: Native American Group Says Up to 1,300 Buried at Historic Texas Shrine*, CORPUS CHRISTI CALLER TIMES (Dec. 18, 2019, 12:16 PM), <https://www.caller.com/story/news/local/texas/state-bureau/2019/12/18/texas-alamo-history-predates-battle-texas-independence/2668319001>.

180. Colton, *supra* note 99, at 78; John Davidson, *Coahuiltecs*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2001, at 5H.

181. Scott Huddleston, *Alamo's Buried Past*, SAN ANTONIO EXPRESS NEWS, <https://www.expressnews.com/news/local/article/Legal-battle-looming-over-Alamo-cemetery-in-14287737.php> (last visited July 23, 2021).

of which had ancestors buried at the Alamo, to help approve and speed up the process.¹⁸² Then, when I attended the Coahuiltecans gathering in September 2019, at the Alamo to conduct their annual prayers and Spirit Run, we were met with armed Alamo police officers preventing the Indians from entering the Alamo. At the same time, tourists present were allowed to enter.¹⁸³ Nonetheless, Coahuiltecans prayed for the ancestors outside the Alamo and then went on the Spiritual Run to the remaining missions.¹⁸⁴

In 2020, when I was there once again for the annual prayers and Spirit Run, the Alamo Trust changed its visitor scheme, and we were informed that a limited number of visitors would be allowed to sign up to enter the Alamo. A handful of Indians were allowed to register and were then let inside the Alamo along with tourists. When they entered, the Coahuiltecans began to pray. They were ordered by an armed guard to refrain from prayer, but they ignored the order. After praying, they rejoined the rest of the group outside to begin the Spiritual Run.

In 2021, the Lipan Apaches, another non-federally recognized tribe, joined forces with the Coahuiltecans.¹⁸⁵ The attorneys for the Lipans supported the efforts at prayer and respect for Indian graves, and pressed for the respect of the Coahuiltecan ancestors.¹⁸⁶ This is particularly significant, given that the Lipans and Coahuiltecans had traditionally been hostile to one another.¹⁸⁷ The Alamo Trust has not succeeded in dampening the efforts to protect the graves. It has, however, succeeded in bringing old enemies together to resist their efforts as the litigation continues at the time of writing this article.¹⁸⁸

182. *Id.*

183. See *Tip Pilam Coahuiltecan Nation v. Alamo Trust, Inc.*, 489 F. Supp. 3d 611, 617 (W.D. Tex. 2020).

184. I witnessed these events and participated in the prayers and run in 2019 and 2020. I was honored in 2019 by being asked to carry the Eagle Staff on the last leg of the run. I have photos on file of the event.

185. Elaine Ayala, *Lipan Apaches Become Ally to Tap Pilam*, SAN ANTONIO EXPRESS NEWS (Mar. 25, 2021), https://www.expressnews.com/news/news_columnists/elaine_ayala/article/Ayala-Lipan-Apaches-become-ally-to-Tap-Pilam-in-16051079.php?fbclid=IWAR3TApJ-2DrTnoXGX_9DJewFEdRq9h2A0yMZrIT5DSThU-yxqJrZFmoshe4.

186. See Brief for Yale Law Sch. et al. as Amici Curiae Supporting Plaintiffs-Appellants, *Tip Pilam Coahuiltecan Nation v. Alamo Trust, Inc.*, No. 5:19-CV-1084 (5th Cir. Mar. 15, 2021) (No. 20-50908), 2021 WL 1018441.

187. Ayala, *supra* note 185.

188. Scott Huddleston, *Dispute over Human Remains at the Alamo Could be Headed to the U.S. Supreme Court*, SAN ANTONIO EXPRESS NEWS (2021). <https://www.expressnews.com/news/local/article/Dispute-over-human-remains-at-the-Alamo-could-be-16044456.php> (last visited July 23, 2021).

B. Law School Admission Practices

American law schools seek to admit diverse student bodies in order to create diverse learning environments. Law schools also seek to educate and train attorneys who can represent clients in an increasingly diverse society.¹⁸⁹ While these schools may not enforce rigid racial or ethnic quotas to achieve diversity,¹⁹⁰ they nonetheless can take race and ethnicity into account as one of many factors in a “holistic” admission process.¹⁹¹ There are no law school “identity police” regarding a claim by an applicant of racial or ethnic minority status—except in the case of those who claim to be Indian. This is because, beginning with concerns expressed by the Native American Bar Associations (“NABA”) in 2007, some applicants were claiming to be Native on their law school applications with no basis for it. In 2011, the American Bar Association (“ABA”) published a report noting:

The fraudulent self-identification as Native American on applications for higher education is particularly pervasive among law school applicants. Anecdotally, it is well-documented within the Native American legal community that a large percentage of individuals in law school who identified themselves on their law school application as “Native American”, were not of Native American heritage and have had no affiliation either politically, racially, or culturally within the Native American community. This phenomenon is so pervasive it is commonly understood and referred to within the Native American community as “box-checking.”¹⁹²

As a result, in 2011 the ABA announced: “the [ABA] urges the Law School Admissions Council and ABA-approved law schools to require additional information from individuals who indicate on their applications for testing or admission that they are Native American including [t]ribal citizenship, [t]ribal affiliation or enrollment number, [or] . . . ‘heritage statement.’”¹⁹³ Note that the policy provides that applicants can prove Native identity by a tribal citizenship document *or* the use of a heritage statement.

The difficulty is that, as demonstrated in our article,¹⁹⁴ most law schools surveyed for this article believed they could *only* accept a tribal enrollment card from a federally recognized tribe to satisfy this requirement. Schools continue to ignore the heritage statement possi-

189. PIATT, GONZALES ET AL., *supra* note 1, at 236.

190. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

191. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

192. *Resolution*, AM. BAR ASS’N 1, 5 (2011) http://www.americanbar.org/content/dam/aba/directories/policy/annual-2011/2011_am_102.pdf; see PIATT & GONZALES, *supra* note 6, at 5.

193. *Resolution*, *supra* note 192, at 5 (emphasis added).

194. Piatt et al., *supra* note 1.

bility. No other minority group member is required to provide documentation of their minority status. As a result, many applicants who possess Indigenous DNA, are culturally, and even identify as Native, will not be eligible for consideration under law school diversity admission programs. The most learned legal minds, at some of the nation's best law schools, are unwilling to try to understand or follow the ABA policy. There is not a lawful quota or limit to the number of Natives, or of any other racial or ethnic group, who can be admitted to law schools.¹⁹⁵ It is simply not clear that anyone is harmed by the admission of Natives who can "only" prove their identity through heritage statement.

IV. NON-RECOGNITION LEADS TO "PRETENDIAN" SLURS

The Alamo situation and the law school admissions issues are two quick examples of the confusion and injustice which arise when people acting in good faith, or acting with at least some good faith, misunderstand the underlying issues involved with Indian identity. But the confusion is not limited to the misunderstanding or ignorance of people who can become better informed, or even subjected to judicial action that may trigger them to act appropriately.

Undoubtably, there are people who, without any cultural, tribal, DNA, or familial connection, make knowingly false claims of Indian identity. That was the concern which led the ABA to issue its 2011 Resolution offering guidance on how law schools could verify the claim of Indian identity by law school applicants.¹⁹⁶ Some people might make similar claims for economic or political gain. Some might do so for any other number of reasons, perhaps out of some feelings of guilt for the tragedies Natives have endured. In any event, the phenomenon is not new. Historical examples abound of "fake Indians" using that status for undue advantage. For example, one of the most dramatic involves the usurpation of Osage tribal identity, and even murder of Natives, by individuals seeking to steal tribal oil and gas profit allotments.¹⁹⁷ In Canada, the government has encouraged researchers to seek out and disprove falsely claimed Indigenous identity of politicians and celebrities.¹⁹⁸

195. *Bakke*, 438 U.S. at 319; *Grutter*, 539 U.S. at 334.

196. See *Resolution*, *supra* note 192.

197. DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* (2017).

198. Colleen Flaherty, *Allegations of 'Playing Indigenous,'* INSIDE HIGHER ED. (June 15, 2020), <https://www.insidehighered.com/news/2021/06/15/allegations-playing-being-Indigenous-queens-u>.

Clearly not all non-federally recognized Indians are “fake Indians.” Their tribal, DNA, familial and cultural connections are as strong or stronger than many who enjoy recognition. Many belong to tribes recognized by state governments. For example, Genízaros are recognized by the New Mexico Legislative Resolutions.¹⁹⁹ Lipan Apaches are recognized by a Texas Senate Resolution.²⁰⁰ The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) requires that all signatory governments, including the United States, respect the Indian identity of these people.²⁰¹ It requires those governments to protect those tribes and people from harassment and discrimination. The United States government itself, through its census, counts all self-identifying Indians, not just Indians that are members of federally recognized tribes. Therefore, the census counts all those who identify as Indian. As noted, this self-identification is an element which can satisfy even the formidable Bureau of Indian Affairs (“BIA”) process for federal recognition and is the defining element under the UNDRIP for determining Indigenous status.

However, some have taken it upon themselves to attack non-federally recognized Indians using the slur of “pretendians.” This ugly, hate filled accusation thus far has not received the condemnation that other racial slurs would attract.

One does not have to look very hard to find podcasts, newsletters, and social media posts dedicated to seeking out “pretendians.” The victims of these attacks are typically academics or community leaders. In some instances, they are actually members of federally recognized tribes. The attackers make the argument that the recognized tribes of these individuals should not have afforded them membership. Some include racist attacks alleging that those with African American ancestry, or Hispanic or Chicano ancestry are not Indigenous. This of course, is an attack not only on the individuals, but also on the sovereignty of the tribe that enrolls these Indians as members. Some of these attackers are not themselves members of federally recognized tribes, yet cast themselves in the role of *identity police*. These ugly, gleeful attacks offend both Indian individuals and Indian tribes and continue to cause pain and disruption.

It would only cause additional pain to specifically identify the victims. Identifying the attackers would also cause a hardening on the

199. H.R. Mem'l 40, 48th Leg. 1st Sess. (N.M. 2007); S. Mem'l 59, 48th Leg. 1st Sess. (N.M. 2007).

200. S. 274, 87th Leg., Reg. Sess. (Tex. 2021).

201. G.A. Res. 61/295, United Nations Declaration on the Human Rights of Indigenous Peoples (Sept. 13, 2007).

part of the attackers who might eventually be persuaded to abandon this horrible position. So, these victims are intentionally unnamed. Several quick examples, however, afford some illustration of the damage or attempted damage that is being done.

Patty Mills played professional basketball for the San Antonio Spurs. He was born in Australia, where the first inhabitants of that country are identified as “aboriginal.”²⁰² Patty is the only known Indigenous player in the National Basketball Association.²⁰³ His involvement and concern for Indigenous people worldwide led him to offer assistance and recognition to the American Indians in Texas (“AIT”). On January 19, 2020, the Spurs hosted “Indigenous Night.”²⁰⁴ Members of the AIT danced outside before the game, and on-court during halftime. At halftime the Spurs presented the AIT with a check to assist in their efforts. AIT members watched the game as guests of the Spurs. It was a beautiful, moving event. Within days, hate-filled attacks against the AIT, its dancers, and individual AIT members, were launched on social media. The gist of the complaints were that the AIT members were not members of a federally recognized tribe and were therefore not Indigenous. This is the most polite characterization I can muster: the actual words were vicious, gleeful, hateful attacks to which we choose not to give further dissemination.

In another example, an outspoken Genízaro student at a state university in New Mexico defended himself and his people on a social media platform against a pretendian attack. The student did not direct his defense at any particular individual or individuals. Nonetheless, another student at the same institution felt “offended” by his defense and complained to the chair of the department in which they were both enrolled as PhD students. The chair, in conjunction with several other faculty members, demanded an apology from the Genízaro student. When the Genízaro student responded, offering an apology if the other student was offended by his comments, but explaining that the defense against the pretendian attack was not directed at any individual nor was it intended to offend, the Chair rejected it. The Chair

202. The term “aboriginal” generally refers to “a member of race of people who were the first people to live in a country, before any colonists arrived. *Aboriginal*, CAMBRIDGE ADVANCED LEARNER’S DICTIONARY (4th ed. 2013). When referring to American first peoples as ‘Natives’, ‘Indigenous’ or ‘Indians’, one of the two groups of Indigenous people of Australia are commonly referred to as ‘Aboriginal’. Ronald M. Berndt, *Australian Aboriginal Peoples*, BRITANNICA, <https://www.britannica.com/topic/Australian-Aboriginal> (last visited Jan. 22, 2022).

203. Billy Witz, *Flying 3 Flags and Seeking One Banner*, N.Y. TIMES (June 14, 2014), <https://www.nytimes.com/2014/06/15/sports/basketball/the-diverse-heritage-of-san-antonio-spurs-patty-mills.html>.

204. Sports2Nite TV, *Spurs Host NBA’s First-Ever Indigenous Night*, YOUTUBE (Jan. 21, 2020), <https://youtu.be/fKifVnUFFlw>.

threatened to have the Genízaro student expelled from the PhD program if he did not make an unqualified apology and voluntarily withdraw from the program. The Genízaro student refused any further apology and refused to withdraw. With the assistance of this author, he is pursuing legal remedies. He continued in the PhD program.²⁰⁵

Another broad attempt to identify pretendians involves the publication of names of individuals, where the authors claim without evidence, that the individuals are not Indigenous. An attempt is being made to deny these people continuing employment. As noted, some of the people on the list of pretendians are actually members of federally enrolled tribes. Others belong to tribes recognized under the laws of various states. Podcasts and social media posts attacking pretendians in gleeful and ugly terms include attacks by people who themselves are not members of federally recognized tribes. The number of these attacks seems to be on the increase.

V. TOWARD JUSTICE AND PEACE

We must start constructing the model for reconciling these issues relating to the loss of Indian identity and the mistreatment which results with some important understandings. The United States has not yet met its goal of providing resources and assistance to the sovereign nations it once sought to extinguish. Inadequate health levels, high disease rates, and substandard housing plague recognized Native communities.²⁰⁶ However, the government has provided opportunities and resources which attract some people to falsely claim an Indigenous identity—an identity which is not supported by kinship, culture, family, or DNA.²⁰⁷ Others make the false claims of indigeneity for political or personal advantage. There is no need to name names to cause anybody further embarrassment, yet news stories carry accusations of this type of behavior. And, just as some Indians in the past hid their Indigenous identity because of discrimination and other societal pressures,²⁰⁸ some white people now seem to want to falsely claim an Indigenous identity perhaps based upon a feeling of guilt for their whiteness.

There are others, such as the Genízaros, Coahuiltecans, Lipan Apaches, Abiquiu Pueblo, Tortugas Pueblo and Lumbees, to quickly

205. I represent the student on a pro bono basis. The matters cited are all based on my personal knowledge of the case.

206. Strickland, *supra* note 4, at 717.

207. See, e.g., Piatt et. al, *supra* note 1 (discussing the false claim of Indigenous identity to gain law school admission).

208. Colton, *supra* note 99, at 76.

name a few, who identify as Indigenous with good faith claims to that status.²⁰⁹ Their members have lived under a governance structure (particularly in the land grant communities), and have maintained kinship, cultural, and family ties, in some instances, for centuries. Many of their members carry greater portions of “Indian blood” than some members of recognized tribes.²¹⁰ Still others are on a journey trying to identify ancestral and contemporary connections.²¹¹

So, what is to be done regarding the assertion of Indigenous status by those who are not members of recognized tribes? The absolute worst approach, if we are seeking to live in peace and accommodate conflicting legal, moral, sociological and historical concerns, is to continue to tolerate the gleeful, ugly “pretendian” outings and insults. Those who make an unsubstantiated false claim of indigeneity out of ignorance or guilt can be counseled and educated by employers and community members. Those who make the false claim knowing it to be false can be dealt with in a civil process, which guarantees due process. For example, the employee who has secured a position or awarded a contract based on a false claim can be given the opportunity to explain, and if appropriate, resign from the position or contract. Of course, there is very little civility in the political process so the candidate for public office who falsely asserts a Native background should be prepared for the public shaming which is likely to occur.

But there needs to be another discussion regarding Genízaros, Coahuiltecan, and the other tribes discussed above. They carry state recognition of one form or another. They clearly meet the criteria identified in the United Nations Declaration on the Rights of Indigenous People (“UNDRIP”). Genízaros, in particular, cannot demonstrate a particular tribal connection because their ancestors were enslaved and removed from their tribes, all with the sanction of the Spanish, Mexican, and later, the United States government. Their situation is not unlike how our legal system once treated children born out of wedlock in this country. Generally, these children were not entitled to support from their fathers, nor were they able to inherit property from them. They were subject to the disparaging, and now, shocking, label of “illegitimate children.” Even worse, and while I do not intend to offend, these children, these little human beings, were

209. See the websites of these tribes referred to in this article.

210. See *NACIÓN GENÍZARA*, *supra* note 55, at 320.

211. Romero, *supra* note 76.

referred to legally as “bastards.”²¹² Yet, those children were not responsible for that status. They had no choice as to whether their parents would be married when they were born. They were not at fault. Nonetheless, the law denied them the rights afforded to children whose parents were married when those children were born. The legal system allowed, and even encouraged, the public mocking of these “bastards.” The state did not recognize their identity nor their dignity.

Genízaros and other non-federally recognized Indians are being treated as legal “bastards” today. Genízaros did not choose their enslavement, and as a consequence, descendants are not entitled to the benefits the law provides to their “legitimate” brothers and sisters in the recognized tribes. So far, the law has allowed, if not encouraged, others to mock them as “pretendians.”

There is another legal analogy which can be drawn regarding Genízaros and similar tribes. This one has recently produced some hope for those asserting an identity claim. We refer to the concept of gender identity. The Supreme Court recently acknowledged the right of gay and transgender employees to employment protection under the federal law by prohibiting employment discrimination on the basis of sex.²¹³ Here, the employee identified as a man when hired, but was terminated by her employer after she began affirmatively presenting herself as a woman.²¹⁴ The Court recognized that her termination violated the “sex” employment discrimination prohibition under Title VII of the Civil Rights Act of 1964.²¹⁵ By analogy, Genízaros, Coahuiltecans, and others, should have the legal system respect their claim to identity as Natives, particularly when that claim is supported by the elements of family, kinship, culture, and DNA ties.

Another analogy can be drawn to the concept of dignity as applied by the Supreme Court to protect the rights of people in same sex relationships²¹⁶ and marriage.²¹⁷ Same sex couples have the right to that identity and to express it without government interference with that expression. Genízaros, Coahuiltecans, and others, have the right to their Native identity and to the expressions of that identity. The government should recognize these identities and protect their dignity

212. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, Faculty Scholarship at Penn Law (2015), https://scholarship.law.upenn.edu/faculty_scholarship/1593 (last visited July 25, 2021). R. Thomas Farrar, *Does the Bastard Have a legitimate Complaint?*, 22 U. MIAMI L. REV. 884 (1968).

213. See *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731 (2020).

214. *Id.* at 1738.

215. *Id.* at 1754.

216. See *Lawrence v. Texas*, 539 U.S. 558 (2003); See *United States v. Windsor*, 570 U.S. 744 (2013).

217. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

by affording them equal treatment as Natives. The government must protect them within the civil justice system from the “pretendian” attacks by recognizing a cause of action against the slurs, just as it protects other minority members from racist slurs.²¹⁸

These approaches would not mean that Genízaros, Coahuiltecos, or others, would necessarily receive all the benefits of federal recognition, such as the right to operate casinos, presently given to federally recognized tribes. There might be some middle-of-the road approach which would afford recognition by the federal government, allowing Genízaros and others to be eligible for affirmative action considerations, respect for religious practices, access to public health and education, and the like. Such an approach might blunt the “pretendian” accusations by giving an official sanction to the Indigeneity of the tribes and their members.

There are some limited purely legal remedies available to non-federally recognized tribes and Indians. Rather than dealing with the BIA process which could take decades, tribes could seek formal recognition through an act of Congress. Regarding more limited issues, such as the right to use religious symbols, individual Indians and tribes could seek judicial determinations, such as in the Lipan eagle feather case. This case is but one example of non-federally recognized Indians being held to be judicially entitled to the same treatment as federally recognized tribes and individuals. State action denying non-federally recognized tribes and Indians the same affirmative action benefits as federally recognized Indians could be challenged under an equal protection analysis. Further, there is no government-to-government sovereignty between state governments and the tribes that allows for this preferential treatment, unlike the sovereign-to-sovereign status for federal affirmative action plans.²¹⁹ Moises Gonzales and I have previously outlined legal remedies which non-federally recognized Indians might pursue in *Slavery in the Southwest: Genízaro Identity, Dignity and the Law*.²²⁰

But there continues to be some serious drawbacks for non-federally recognized Indians who seek recognition in Congress or through the judiciary. One involves the time and resources required to mount

218. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C. L. L. REV. 133 (1982). Brief of Plaintiff-Appellants, *McPherson v. Kimberly-Clark Tissue Co.*, No. 00-14282-AA (11th Cir. October 2000), 2000 WL 33994825; Brief & Special Appendix for Plaintiff Appellant, *Miller v. New York State Police*, No. 20-3976-cv, 2021 WL 1327101, *1 (2d Cir. Apr. 5, 2021), 2021 WL 1327101; *Seah v. Schwan Food Co.*, No. 09-3289, 2010 WL 2721859, at *1 (C.D. Ill. July 8, 2010).

219. See *Morton v. Mancari*, 417 U.S. 535 (1974).

220. PIATT & GONZALES, *supra* note 6.

formal legal challenges.²²¹ An even more devastating drawback is that in most instances, formal legal challenges would continue to pit Indian against Indian in a fight for inclusion in programs that have not been adequate thus far for even the relatively few federally recognized Indians.²²² The real problem is the inadequacy of the programs aimed at assisting Indians. Resources will need to be directed in a more meaningful and effective manner and increased to an extent such that sovereign nations are not forced to fight with non-recognized Indians for scraps.

Indians have had a long, slow journey in obtaining recognition of their legal rights, and this recognition struggle mirrors the long slow process Indians have endured. Natives, even those born in this country, did not have the right to recognized citizenship in the United States until 1924.²²³ Natives were not finally granted voting rights until 1965.²²⁴ And although the Emancipation Proclamation was announced on January 1, 1863,²²⁵ and the Thirteenth Amendment to the Constitution of the United States, which outlawed slavery was ratified in 1865,²²⁶ it required a separate act of Congress in 1867²²⁷ to outlaw the peonage system which continued to keep Genízaros in New Mexico in bondage.

So, while Natives can wait while the legal system slowly grinds toward justice for them, there are other, better approaches. In the best of circumstances, sovereign Indian nations can join with their Native brothers, sisters, and cousins to compel federal, state, and the Catholic Church (“the Church”) authorities into a reconciliation process. In

221. *Id.* at n.6, 79-108.

222. *See, e.g.*, the efforts of the Lumbees, whose application for recognition has been opposed by a recognized tribe, discussed in PIATT & GONZALES, *supra* note 6, at 106. Regarding resources, refer again to the Strickland article, *supra* note 4, at 717.

223. *See* Indian Citizenship Act of 1924, Pub. L. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. 1401(b) (2018)). This Act “overturned” *Elk v. Wilkins*, 112 U.S. 94 (1884), where the Court held that an Indian cannot become a United States citizen without the consent and cooperation of the federal government. *See*, Cami Fraser, *Protecting Native Americans: The Tribe As Parents Patriae*, 5 MICH. J. RACE & L. 665, 665 (2000); *see* Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1185 (2016).

224. *Voting Rights for Native Americans*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans> (last visited Mar. 11, 2022) (“Though the Fifteenth Amendment, passed in 1870, granted all U.S. citizens the right to vote regardless of race, it wasn’t until the Snyder Act that Native Americans could enjoy the rights granted by this amendment. Even with the passing of this citizenship bill [Snyder Act], Native Americans were still prevented from participating in elections because the Constitution left it up to the states to decide who has the right to vote. After the passage of the 1924 citizenship bill, it still took over forty years for all fifty states to allow Native Americans to vote.”)

225. Abraham Lincoln, A Proclamation (Jan. 1, 1863), *in* 12 Stat. app. 1268, 1269.

226. U.S. CONST. amend. XIII.

227. Peonage Abolition Act of 1867, ch.187, 14 Stat. 546, 546 (codified at 42 U.S.C. § 1994 (2018)).

fact, the Church has been willing to admit its role in the horrible instances of child abuse that it ignored for years.²²⁸ Pope Francis has apologized for the Church's mistreatment of Natives.²²⁹ The Church may be willing to continue to acknowledge its role in the mistreatment of Indians and participate in discussions with tribes and governments seeking to bring about some healing.

One can also imagine a series of shared cultural events among Natives, followed by informal discussions, perhaps even leading to summits. Then, Natives could involve governmental units in discussions of addressing ongoing inequities directed at all Natives. United Nations reporters might be invited to examine the issues and issue a report along the lines of its efforts in other countries.²³⁰ While there would probably be some initial distrust among all parties, it might be that the mediation services of the United States Department of Justice could assist.

There is no guarantee that any of this would produce any immediate benefits. It will take continuing participation of Natives and elected officials to put any meaningful change into effect. There may be setbacks. There may be distrust. Some may not ideally behave in every circumstance during this process. There may still be some who view justice as a zero-sum game. That is, there would be the concern that if one group of Natives received some benefit, it would only come at the expense of other tribes which had already been recognized. It may take a great deal of time and effort to create winning situations. This may be a long, slow, and non-linear process. Nonetheless, dialogue itself is a desirable achievement.

Regarding the "pretendian" accusations, one strategy is to ignore the malicious accusers. Those accusers might be acting out of jealousy, spite, bigotry, or they might even be doing the bidding of others with more nefarious intentions. Indians who have maintained tribal, familial, and cultural connections know they are not pretending anything. Their identity, their dignity, and their works are not diminished by the cries of wrongdoers. It will be difficult and painful sometimes to follow this "sticks and stones" approach. It is particularly galling for an Indigenous person to be accused of being a "pretendian" by an at-

228. Erik Ortiz, *Pope Apologizes for Priest Sex Abuse Scandal with 'Sorrow and Shame,'* NBS NEWS (Aug. 20, 2018) <https://www.nbcnews.com/news/pope-francis/pope-francis-apologizes-catholic-priest-sex-abuse-scandal-sorrow-shame-n902121>.

229. Nicole Winfield, *Pope Asks Pardon for Church's 'Crimes' Against Indigenous*, AP NEWS (July 9, 2015), <https://apnews.com/article/b57b7c946fe84e4892bf0f4b80b71b83>.

230. PIATT & GONZALES, *supra* note 6, 141-72; 182-83. See also, Office of the High Commissioner, *The United Nations Human Rights Treaty System Fact Sheet No. 30* 1, 43 (2012), <https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>.

tacker who themselves is not a member of a federally recognized tribe—a “pot calling the kettle white”—attack. But our energy must not be wasted in responding to unfounded attacks. In many instances, that is exactly what the accusers seek to accomplish: drawing the Indigenous person away from the pursuit of justice for their communities in a pointless exchange with the “pretendian” accusers. Those on the journey to rediscovering their stolen or lost identities need not be intimidated by the vicious attacks launched against others who are further along on the journey. If the attacks rise to the level where a response is required, such as an attempt to have a person fired from employment, Indigenous people can first seek to educate their employers. If that fails, there are legal remedies.

What approach might members of sovereign Indian tribes take in defending their non-federally recognized brothers and sisters from “pretendian” attacks? The long-severed bonds can begin to be restored. Most would agree that the Creator gave life to their Indigenous ancestors and that those ancestors now watch over their living children. Then a next step might occur. Some might come to believe that those children include not only those recognized by the government which sought to extinguish them, but also include those children whom the same government has chosen to ignore. Undoubtedly, the Creator and our revered ancestors do not look on approvingly while pain is inflicted on some of their children by a few ignorant people.

CONCLUSION

Colonization and slavery nearly eliminated the Native population in this country. The ultimate survival of Indigenous people was due to their resilience, and to the eventual realization by the United States government that the physical genocide of its Indigenous people was not the appropriate course. While the system of recognition of sovereign Indian nations has afforded some justice and has resulted in the allocation of some resources to the people the United States had tried to eliminate, the resources thus far have been inadequate.

The problems are exacerbated for those Indians the government has failed to recognize. This failure of the United States government to recognize the Indigenous identity of all its Natives, including those whose ancestors were enslaved, leaves the majority of American Indians striving to maintain their Indian identity and dignity. Many continue to maintain the cultural and religious practices of their ancestors, preserving these traditions and passing them along to the coming generations. Many of them struggle for resources, while de-

fending themselves and their tribes against “pretendian” attacks. The time has come to take the steps outlined in this article, to bring recognition to the identity and dignity of all Indigenous Americans.

Age is Nothing but a Number: Raising the Age on the Prohibition of Mandatory Juvenile Life Without Parole in Light of *Miller v. Alabama*

HAYDEN A. SMITH

In the 2012 seminal case of Miller v. Alabama,¹ the Supreme Court held that a state may not sentence a juvenile,² or someone under the age of eighteen years old under U.S. law, to mandatory life imprisonment without the possibility of parole (“LWOP”), concluding that such a sentence is unconstitutional and in violation of the Eighth Amendment’s Cruel and Unusual Punishment Clause.³ The rationale provided by the Court—one that relied almost exclusively on now outdated neuroscience and psychology—focused on the ideas that juveniles cannot be held legally culpable as an adult because they lack a sense of maturity due to brain development, and juveniles have a greater chance of rehabilitation than adults.⁴ However, due to advances in modern science, evidence demonstrates that (1) young adults⁵ beyond the age of eighteen also lack maturity as the brain continues to develop until age twenty-five, and (2) young adults also have a high chance of rehabilitation when provided with positive stimuli while incarcerated, such as education and job training programs. Therefore, in order to remain consistent with its conclusion and rationale in Miller, the Court should consider raising the age of prohibiting mandatory LWOP to twenty-five years old, or in the alternative, consider abolishing mandatory LWOP in its entirety as a violation of the Eighth Amendment.

1. 576 U.S. 460 (2012).

2. A juvenile is defined as “[a] person who has not reached the age (usu[ally] 18) at which one should be treated as an adult by the criminal-justice system.” *Juvenile*, BLACK’S LAW DICTIONARY (11th ed. 2019).

3. U.S. CONST. amend. VIII.

4. Miller, 576 U.S. at 479.

5. For purposes of this Note, the term “young adult” refers to persons between the ages of 18-25 years of age.

Age is Nothing but a Number: Raising the
Age on the Prohibition of Mandatory
Juvenile Life Without Parole in
Light of *Miller v. Alabama*

HAYDEN A. SMITH*†

TABLE OF CONTENTS

INTRODUCTION 132

I. A HISTORICAL CONTEXT: THE EIGHTH AMENDMENT,
LWOP, & THE AGE OF MAJORITY 133

 A. *The Eighth Amendment: Cruel and Unusual
 Punishment* 133

 B. *Origins of LWOP in the United States* 135

 C. *The Legal Age of an Adult and the “Age of
 Majority”* 136

II. THE COURT’S CONSIDERATIONS OF CONSTITUTIONAL
PUNISHMENT THROUGH EXAMINING BRAIN SCIENCE ... 138

 A. *Roper v. Simmons* 138

 B. *Graham v. Florida* 139

 C. *Miller v. Alabama* 140

 D. *Jones v. Mississippi* 141

III. THE APPLICATION OF MODERN SCIENCE AND
STATISTICS TO OLD LAW: FLAWS IN THE *MILLER*
PREMISES 142

 A. *Miller Failed to Account for Advances in
 Neuroscience Regarding Maturity* 142

 1. *Young Adults are More Similar to Juveniles
 than Older Adults Regarding Risky/Criminal
 Behavior* 144

* B.A., Xavier University of Louisiana; Graduate Certificate, Georgetown University; J.D., Howard University School of Law. I would like to thank the following: Professor Jasbir (Jesse) Bawa for her continued guidance as my Faculty Advisor during the drafting process; Professor e. christi cunningham and Dean Danielle Holley-Walker for their edits and valuable input; and to my colleagues on the *Howard Human and Civil Rights Law Review* for their hard work and edits. Any errors are my own.

† Hayden Smith is the winner of the *Howard Human & Civil Rights Law Review* (“HCR”) Pauli Murray Prize. The Pauli Murray prize is a nationwide competition that selects the best student note focused human and civil rights.

2021]	AGE IS NOTHING BUT A NUMBER	131
	2. Sensation-seeking and Impulse Control Theories	145
	3. The Imbalance Model	146
	B. Miller <i>Underestimated Adults' Capacity for Rehabilitation: A look at Adequate Education Programs in Prisons</i>	147
IV.	IN THE ALTERNATIVE, LWOP SHOULD BE ABOLISHED IN ITS ENTIRETY	149
	A. <i>The Negative Effects of Life Imprisonment on Adults and Their Families</i>	149
	1. Psychological Trauma and Mental Illness	150
	2. Isolation from Family and Friends	151
	3. Prison Conditions and Violence	151
	4. Restricted Access to Rehabilitative Programs ..	152
	B. <i>The U.S. is Behind on its Sentencing Practices Compared to the Rest of the World</i>	152
	C. <i>The Irrationality of Continued Punishment</i>	155
V.	ALTERNATIVES TO LWOP	155
	A. <i>Restitution in Lieu of LWOP</i>	155
	B. <i>Presumptive Life Sentences in Lieu of LWOP</i>	157
	CONCLUSION	158

INTRODUCTION

Life imprisonment without the possibility of parole (“LWOP”) is a draconian sentence that permanently tears an individual from society and causes a plethora of psychological issues⁶ for the offender as well as their loved ones. As of 2016, there were over 53,290 people serving LWOP sentences within the United States alone, with one in seven people incarcerated serving some general form of life in prison.⁷ What is even more unsettling than the high rates of individuals serving LWOP, is the idea that juveniles⁸ are not shielded from such a harsh sentence. Despite the fact that more than 2,000 juveniles are serving LWOP and the U.S. is “unique in the world in its use of life imprisonment without parole for crimes committed by teenagers,” the U.S. criminal justice system continues to impose this archaic form of punishment.⁹ It was not until the *Miller v. Alabama* decision in 2012 when the Supreme Court of the United States would finally take the first step in deeming *mandatory* juvenile LWOP to be in violation of the Eighth Amendment’s Cruel and Unusual Punishment Clause.¹⁰ In *Miller*, the court took the unprecedented stance of focusing an opinion around the neuroscience and psychology of the juvenile mind and its lack of development.¹¹ The general premise is that the juvenile mind is immature, which leads to an idea of diminished culpability for persons under the age of eighteen. However, the Court neglected to address one major flaw in its reasoning: science continues to advance over time.

This Note argues that in light of the Supreme Court’s rationale in *Miller*, mandatory LWOP should be unconstitutional and in violation of the Eighth Amendment’s Cruel and Unusual Punishment clause for juveniles *and* young adults¹² up to twenty-five years old, since modern science proves the following: (1) young adults also have a great capacity of being rehabilitated, and (2) young adults also lack maturity, similar to their juvenile counterparts, as the brain continues to develop until age twenty-five. In the alternative, this Note argues that the Court should consider completely abolishing LWOP sentences due to the vast array of negative mental and social effects the sentence casts upon individuals, in addition to the United States being in the minor-

6. See discussion *infra* Section IV.A.

7. See THE SENT’G PROJECT, THE FACTS OF LIFE SENTENCES 1 (2018).

8. *Juvenile*, *supra* note 2.

9. THE FACTS OF LIFE SENTENCES, *supra* note 7, at 2.

10. 576 U.S. 460, 479 (2012); U.S. CONST. amend. VIII.

11. *Miller*, 576 U.S. at 479.

12. For purposes of this Note, the term “young adult” refers to persons between the ages of eighteen and twenty-five years of age.

ity of countries that still proscribes such a harsh punishment. Part I of this Note provides a historical context of the Eighth Amendment, LWOP, and the legal age of majority, which is the age the courts use to distinguish between adults and juveniles. Part II examines the evolution of Supreme Court precedent that led to the abolishment of mandatory LWOP for juveniles. Part III analyzes how science has evolved regarding the young adult mind, and why the Supreme Court should expand its holding in *Miller* to include young adults up to age twenty-five in the prohibition of mandatory LWOP. Part IV explains the negative effects of LWOP and provides arguments, in the alternative, as to why all forms of LWOP should be completely abolished. Finally, Part V provides alternative sentencing solutions to LWOP.

I. A HISTORICAL CONTEXT: THE EIGHTH AMENDMENT, LWOP, & THE AGE OF MAJORITY

When one thinks of the phrase “cruel and unusual punishment,” it rings as a form of punishment that is inhumane and torturous; something that no person should ever be subjected to. As the legislatures and courts have grappled with how to define this phrase, one thing remains clear: someone who engages in a form of punishment that falls under this category would be in violation of the Constitution.¹³ As the Supreme Court of the United States determined that certain criminal sentences, such as mandatory LWOP for juveniles, are identical to cruel and unusual punishment and inappropriate for persons under the age of eighteen,¹⁴ the question arises as to why the Court stopped at eighteen? Since the age of eighteen—known as the legal age of majority¹⁵—is an arbitrary number chosen by legislatures and not linked to modern brain science, it is clear that *Miller’s* “maturity” rationale is inaccurate and should be updated to determine that LWOP is also cruel and unusual punishment for those beyond age eighteen.

A. *The Eighth Amendment: Cruel and Unusual Punishment*

The Eighth Amendment of the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁶ Essentially, the amendment places a prohibition on the federal government “from

13. See U.S. CONST. amend. VIII.

14. See *Miller*, 576 U.S. at 465.

15. See *infra* Section I.C.

16. U.S. CONST. amend. VIII.

imposing unduly harsh penalties on criminal defendants, either as the price for obtaining pretrial release or as punishment for crime after conviction.”¹⁷ However, the Cruel and Unusual Punishments Clause may be the most controversial and debated clause of the Eighth Amendment as there are many interpretations to its meaning.¹⁸ Since its inception, this clause has raised many questions such as: “What does it mean for a punishment to be ‘cruel and unusual?’ How do we measure a punishment’s cruelty? And if a punishment is cruel, why should we care whether it is ‘unusual?’”¹⁹

Historically, the phrase “cruel and unusual punishments” was first written into the English Bill of Rights 1689 by Parliament during the ascension of William and Mary to the throne.²⁰ Scholars believe that the English Bill of Rights focused its ideas on “punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved.”²¹ However, unlike their English predecessors, the drafters of the American Constitution adopted the phrase “cruel and unusual punishments” with a primary concern of “proscribing ‘tortures’ and other ‘barbarous methods of punishment.’”²² Originally, the Constitution did not contain a prohibition against cruel and unusual punishment when it was first ratified by the states.²³ This addition did not come until after lengthy debates out of fear that the Constitution would provide Congress with too much power, which included the ability “to use cruel punishments as a tool for oppressing the people.”²⁴ During the Massachusetts Ratifying Convention, Abraham Holmes, one of the staunchest opponents of the Constitution, compared Congress’ potential misuse of power to “that diabolical institution, the Inquisition” and believed that Congress would begin to torture convicted felons.²⁵ Holmes further argued that Congress is “nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their

17. Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103> (last visited Sept. 25, 2020).

18. *Id.*

19. *Id.*

20. Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 420 (1995).

21. *Id.*

22. *Id.* at 420-21.

23. Stevenson & Stinneford, *supra* note 17.

24. *Id.*

25. *Id.*

discipline.”²⁶ Additionally, during the debate in the Virginia Ratifying Convention, Patrick Henry echoed Holmes’ view:

Congress . . . may introduce the practice of France, Spain, and Germany of torturing, to extort a confession of the crime. They . . . will tell you that there is such a necessity of strengthening the arm of government, that they must . . . extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.²⁷

Scholars believe that it is because of the comparisons and direct opposition, that Congress amended the Constitution to include cruel and unusual punishments.²⁸

Around 1890, the Supreme Court first applied the Eighth Amendment in the *In re Kemmler*²⁹ decision when the Court “compar[ed] challenged methods of execution to concededly inhuman techniques of punishment.”³⁰ The issue that the Court focused on was the “mode of execution” and whether or not the challenged mode was similar to “torture and other barbarous methods.”³¹ Eventually, the Court decided to expand its interpretation of the Eighth Amendment beyond those “barbarous methods of punishment that were generally outlawed in the [eighteenth] [c]entury” to encompass a much more broadened perspective.³² Over the years, “[t]he [true] meaning of the Cruel and Unusual Punishments Clause has not been fixed, but has been allowed to grow ‘as public opinion has become enlightened by a humane justice.’”³³

B. Origins of LWOP in the United States

LWOP is a criminal sentence that “eliminate[s] the possibility of release from prison except in the rare case of clemency or commutation by the executive branch.”³⁴ As of 2016, approximately 53,290 people were serving life sentences, which amounts to “one in every 28 [incarcerated individuals] overall.”³⁵ Moreover, these “sentences [were] administered disproportionately in a handful of states: com-

26. *Id.* (internal quotation omitted).

27. *Id.*

28. *Id.*

29. See *In re Kemmler*, 136 U.S. 436, 447 (1890) (discussing how “[p]unishments are *cruel* when they involve torture or a lingering death”) (emphasis added).

30. Bukowski, *supra* note 20, at 422-23.

31. *Id.* at 423.

32. *Id.*

33. *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

34. Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, THE SENT’G PROJECT (May 3, 2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>.

35. *Id.*

bined, Florida (16.7%), Pennsylvania (10.1%), California (9.6%), Louisiana (9.1%), and the federal system (7.2%) comprise just over half (52.7%) of the nation's total LWOP population."³⁶ Furthermore, "[d]espite historic crime lows and falling prison figures, the number of people serving life sentences—life without the possibility of parole sentences in particular—has continued to rise."³⁷

As of a century ago, LWOP was rarely imposed within the United States, with the exception of four states that enacted legislation to replace the death penalty with life without parole.³⁸ During the 1970s, defendants who were convicted of crimes and sentenced to life without parole were "invariably eligible for parole, often after a relatively short prison term."³⁹ In the federal criminal system, beginning around 1913 "those sentenced to 'life' were eligible for parole after just fifteen years," and "sixty years later, Congress reduced the minimum term for parole eligibility to ten years."⁴⁰ However in *Furman v. Georgia*,⁴¹ the Supreme Court placed a temporary moratorium on executions, which led to a rising interest in the alternative: life without parole.⁴² This curiosity led to many states using life imprisonment, which along with other numerous factors, began a dramatic increase in the prison population during the 1980s.⁴³ Due to the "apparent foreclosing of the death penalty, coupled with a perception of rising crime rates," the support for LWOP increased.⁴⁴ Many of its supporters "hailed [it] as a sentence that not only deterred [persons accused of crimes] but also satisfied the community's demand for proportionate punishment."⁴⁵

C. *The Legal Age of an Adult and the "Age of Majority"*

In the United States, the "Age of Majority" is defined as "the age at which a person is granted by law the rights (as ability to sue) and responsibilities (as liability under contract) of an adult."⁴⁶ In early Ro-

36. *Id.*

37. *Id.*

38. Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1115 (2013).

39. *Id.*

40. *Id.*

41. 408 U.S. 238 (1972).

42. See Lerner, *supra* note 38, at 1115; see also *Furman*, 408 U.S. at 239-40.

43. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, THE SENT'G PROJECT (Nov. 5, 2018), <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment>.

44. See Lerner, *supra* note 38, at 1115.

45. *Id.* at 1115-16.

46. *Age of Majority*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/age%20of%20majority> (last visited Feb. 16, 2020).

man law, the age of majority was “the age by which individuals would presumably have attained the intellectual capacities required to exercise full citizenship, manage their affairs, and become parents and the heads of families themselves—age fifteen for males.”⁴⁷ However, even though the Romans believed that fifteen-year old males had the capacity to become parents, they did not believe that males at that age attained intellectual maturity.⁴⁸ Accordingly, at age fifteen, males were placed under the guardianship of Curators, who were tasked with approving “formal acts or contracts until they reached twenty-five years of age,” also known as “*plenam maturitatem*, or full maturity.”⁴⁹

In other portions of Europe, legal maturity was determined by attaining a certainly level of physical capacity, specifically the ability to fight in a war.⁵⁰ The age of majority remained at fifteen until the Middle Ages, when the weight of armor increased and the introduction of “mounted cavalry” that required a greater amount of strength.⁵¹ Due to the change in requirements for warfare, the age of majority evolved to “the age of knighthood” and was determined to be twenty-one.⁵² The increase in age correlated to the idea that at age twenty-one, males “gained the strength and completed the training required of those who fought in the heavy cavalry.”⁵³ For centuries, twenty-one remained the age of majority throughout England.⁵⁴

Since much of the law within the United States is based on English common law, many states originally adopted twenty-one as the age of majority.⁵⁵ The U.S. maintained the age of majority from the country’s original founding until around 1942.⁵⁶ However, this age became flexible once the need for military troops during World War II increased: Congress lowered the draft age to eighteen.⁵⁷ Despite the draft age being lowered to eighteen, the voting age was still set at twenty-one, which prompted many debates within Congress and eventually led to the development of the Twenty-Sixth Amendment in 1971—extending the voting to age eighteen.⁵⁸ Currently, “forty-four

47. Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 *TUL. L. REV.* 55, 63 (2016).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 63-64.

53. *Id.* at 64.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 65.

58. *Id.*; U.S. CONST. amend. XXVI.

states have adopted eighteen as the presumptive age of legal majority. Six have set their ages of majority higher, with five states setting it at nineteen and one at twenty-one.”⁵⁹ The widespread adoption of eighteen as the age of majority likely “reflected a widely held consensus that young people reached or generally attained adult-like capabilities before age twenty-one.”⁶⁰ As history has dictated, the lowering of the age of majority to eighteen was a direct response to the need for an increase in military power and had little to do with “maturity of judgment [as opposed to] . . . physical maturity.”⁶¹ Despite a lack of emphasis on mental maturity, or brain development, the age of majority is where the American court system developed this notion that the age of eighteen is when a juvenile is considered an adult; a decision that would have dire consequences for generations to come.

II. THE COURT’S CONSIDERATIONS OF CONSTITUTIONAL PUNISHMENT THROUGH EXAMINING BRAIN SCIENCE

Ever since the Eighth Amendment’s inception in 1791, the Supreme Court neglected to determine the parameters of cruel and unusual punishment in the context of juveniles. However, in 2005, through a string of cases, the Court finally began to define those parameters in an unprecedented way—by focusing almost exclusively on neuroscience and psychology. The Court began with *Roper v. Simmons*⁶² and further developed its rule under *Miller v. Alabama* to determine that LWOP is undeniably cruel and unusual punishment for someone under the age of eighteen.⁶³ Despite a recent shift in the Courts views in *Jones v. Mississippi*,⁶⁴ which will be discussed below, there is still a chance for the Court to resume its momentum and advance the findings in *Miller* to reflect modern science.

A. *Roper v. Simmons*

In the 2005 case of *Roper v. Simmons*, the Supreme Court was presented with the question of whether it was unconstitutional under the Eighth Amendment to sentence a juvenile to capital punishment.⁶⁵ The case involved seventeen-year-old Christopher Simmons, who devised a plan to commit a murder by breaking into the victim’s

59. Hamilton, *supra* note 47, at 65.

60. *Id.*

61. *Id.*

62. See 543 U.S. 551 (2005).

63. See *Miller v. Alabama*, 576 U.S. 460, 479 (2012).

64. 593 U.S. ___, 141 S. Ct. 1307 (2021).

65. See *Roper*, 543 U.S. at 555-56.

home, tying the victim up, and finally throwing the victim off a bridge.⁶⁶ Simmons was convicted of murder by a jury and received a death penalty, but later resentenced to life imprisonment without the possibility of parole.⁶⁷ The Supreme Court affirmed the lower court and held that the death penalty is a “disproportionate punishment for offenders under [eighteen]” making it a violation of the Eighth Amendment.⁶⁸ In reaching this holding, Justice Kennedy concluded that a juvenile’s culpability is diminished due to an inherent immaturity and punishment from juveniles should differ from adults because juveniles possess a greater capacity for reform.⁶⁹ Furthermore, Kennedy proposed a more social policy argument that the Court should also consider “evolving standards of decency” when determining if a sentence is so disproportionate to be considered “cruel and unusual” under the Eighth Amendment.⁷⁰

B. *Graham v. Florida*

Five years later in *Graham v. Florida*, the Supreme Court was now charged with determining whether the Eighth Amendment prohibited juveniles from being sentenced to life imprisonment without parole for nonhomicide crimes.⁷¹ This case involved sixteen-year-old Terrance Jamar Graham, who attempted to rob a restaurant in Jacksonville, Florida.⁷² Under Florida law, Graham was charged as an adult for armed burglary with assault and battery, and attempted armed robbery, where he was sentenced to three years in prison.⁷³ Six months after his release, Graham was subsequently arrested and pled guilty to a home invasion robbery, possessing a firearm, among other nonhomicide crimes.⁷⁴ The trial court sentenced Graham to life imprisonment without the possibility of parole and the Florida appeals court affirmed the ruling, concluding that “Graham’s sentence was not grossly disproportionate to his crimes.”⁷⁵ However, the Supreme Court overturned the state court’s ruling and held that the Eighth Amendment prohibits juveniles to be sentenced to life without parole for nonviolent crimes because juveniles possess a limited culpability

66. *Id.* at 556.

67. *Id.* at 558, 560.

68. *Id.* at 575.

69. *Id.* at 570, 572.

70. *Id.* at 560-61.

71. See *Graham v. Florida*, 560 U.S. 48, 52-53 (2010).

72. *Id.* at 53.

73. *Id.* at 53-54.

74. *Id.* at 55.

75. *Id.* at 57-58.

for nonhomicide crimes, combined with the severity of life without parole sentences, makes the sentence cruel and unusual.⁷⁶

C. *Miller v. Alabama*

In 2012, the Court reached a seminal decision in *Miller v. Alabama*, holding that “mandatory life without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment’s prohibition on “cruel and unusual punishments.”⁷⁷ Furthermore, the Court did not foreclose on the possibility of life sentences for juveniles, allowing for *discretion*, and stated that “a judge or jury must have the opportunity to consider mitigating circumstances” before imposing what is considered to be “the harshest possible penalty for juveniles.”⁷⁸ The case involved two fourteen-year-old boys who were convicted of homicide and sentenced to life imprisonment without the possibility of parole.⁷⁹ In 1999, Kuntrell Jackson along with two other boys robbed a local video store.⁸⁰ During the robbery, the store clerk refused to give the money to the boys and after she threatened to call the police, one of the other defendant’s shot and killed her.⁸¹ Under Arkansas law, which allows for fourteen-year old children to be tried as adults, a jury found Jackson guilty of capital murder and aggravated robbery, sentencing him to LWOP.⁸² In 2003, fourteen-year old Evan Miller was home with a friend when one of the neighbors, Cole Cannon came over to purchase drugs from Miller’s mother.⁸³ After the deal, the boys accompanied Cannon back to his home and once Cannon fell asleep, they stole money out of Cannon’s wallet.⁸⁴ A physical altercation occurred between Miller and Cannon that led to Cannon’s death from the injuries and smoke inhalation from a fire that was set by Miller and his friend.⁸⁵ Under Alabama law, Miller was charged as an adult with murder in the course of arson and sentenced to LWOP.⁸⁶

Drawing from settled precedent in *Roper* and *Graham*, Justice Kagan based her opinion on the idea that “children are constitution-

76. *Id.* at 76.

77. 576 U.S. 460, 465 (2012).

78. *Id.* at 489.

79. *Id.* at 465.

80. *Id.* at 465.

81. *Id.* at 465-66.

82. *Id.* at 466.

83. *Id.* at 468.

84. *Id.*

85. *Id.*

86. *Id.* at 468-69.

ally different from adults for purposes of sentencing.”⁸⁷ The Court focused on two lines of argument: (1) the idea that juveniles have a “diminished culpability,” and (2) juveniles have “heightened capacity for change,” or a greater chance of rehabilitation.⁸⁸ In assessing a child’s diminished culpability, the Court looked at multiple “mitigating qualities of youth,” including a child’s lack of maturity, irresponsibility, impetuosity, and reckless behavior.⁸⁹ *Miller* marked one of the rare occasions when the Court would heavily rely on science to reach a conclusion: A choice that subsequently left the rationale weak and open to criticism, attack and provided an opportunity for development based on scientific advancement.

D. Jones v. Mississippi

Despite the Court’s steady progress in juvenile LWOP, 2021 marked a shift in the Court’s view when it substantially weakened the *Miller* protections in the *Jones v. Mississippi* decision.⁹⁰ In *Jones*, the Court concluded that *Miller* and *Montgomery v. Louisiana*⁹¹—a case that created the retroactive application of the *Miller* mitigation factors to cases on collateral review⁹²—“did not impose a formal factfinding requirement” when assessing the mitigating factors and “a finding of fact regarding a child’s incorrigibility⁹³ . . . is not required.”⁹⁴ The case involved Brett Jones, a fifteen-year-old boy who lived with his grandparents.⁹⁵ Jones and his grandfather got into an argument one morning regarding Jones sneaking his girlfriend into his bedroom without permission.⁹⁶ Later that afternoon, Jones and his grandfather got into another argument in the kitchen, when Jones grabbed a knife and stabbed his grandfather a total of eight times, ultimately killing him.⁹⁷ Jones was charged with murder and under Mississippi law, and later sentenced to *mandatory* LWOP.⁹⁸ Upon a grant of certiorari to the Supreme Court, Jones argued that *Miller* concluded that in order to propose LWOP for someone under age eighteen, the sentencer has to

87. *Id.* at 471.

88. *Id.* at 479.

89. *Id.* at 476.

90. 593 U.S. ___, 141 S. Ct. 1307 (2021).

91. 577 U.S. 190 (2016).

92. *See id.* at 206.

93. Incorrigibility is defined as a “[s]erious or persistent misbehavior of a child, making reformation by parental control impossible or unlikely.” *Incorrigibility*, BLACK’S LAW DICTIONARY 945 (11th ed. 2019).

94. *See Jones*, 141 S. Ct. at 1314-1315 (quoting *Montgomery*, 577 U.S. at 211).

95. *See id.* at 1312.

96. *See id.*

97. *See id.*

98. *See id.*

“make a separate factual finding that the defendant is permanently incorrigible.”⁹⁹

The Court ruled against Jones and Justice Kavanaugh based the opinion on the ideas that “on-the-record sentencing” (1) is not necessary to ensure that defendant’s youth is considered, (2) is inconsistent with *Miller*, (3) is inconsistent with death penalty precedent, and (4) is inconsistent with any state-level sentencing practices.¹⁰⁰ Although the Court did not completely disregard the discretion of the lower courts to impose LWOP on juveniles, it minimized the lower courts’ responsibility to provide on-the-record, transparent, and complete explanations of their rulings on a child’s incorrigibility, which allows for potential prejudice, error, and a lack of thoroughness in determining something as important as whether to place a youth behind bars forever. Instead of weakening the juvenile LWOP sentencing practices in *Jones*, the Court had a perfect opportunity but missed opportunity to advance *Miller*’s ruling by revisiting the premises and building upon its original arguments.

III. THE APPLICATION OF MODERN SCIENCE AND STATISTICS TO OLD LAW: FLAWS IN THE *MILLER* PREMISES

As mentioned, the Court’s conclusion that Juvenile LWOP is unconstitutional was a logical and meaningful step in reforming the criminal justice system through an examination of sentencing practices. However, the Court’s rationale in *Miller* failed in two ways: (1) The Court neglected to consider that science is a constantly evolving field and determining a case based on such a premise would become outdated, and (2) offenders eighteen and over also have elevated chances of rehabilitation when they have access to education, which helps to integrate offenders back into society, thus leading to lower recidivism rates.¹⁰¹ This section will address each rationale in turn.

A. *Miller Failed to Account for Advances in Neuroscience Regarding Maturity*

It is difficult to accept any premise that may suggest that once an individual reaches legal adulthood, that individual has also reached the peak of their maturity. According to Elizabeth Scott, a Columbia Law School professor who was cited in the *Roper* case, “[p]eople are not magically different on their [eighteenth] birthday . . . [t]heir brains

99. *Id.* at 1313.

100. *See id.* at 1319.

101. *See* discussion *infra* Section III.B.

are still maturing, and the criminal justice system should find a way to take that into account.”¹⁰² Adolescence, or a term describing the “transition state between childhood and adulthood,” is a stage where the human brain undergoes “various morphological and physiological changes.”¹⁰³ Moreover, due to one of those changes, known as *synaptogenesis*,¹⁰⁴ adolescence is purported to be “one of the most dynamic events of human growth and development, second only to infancy in terms of the rate of developmental changes that can occur within the brain.”¹⁰⁵ Accordingly, these developmental changes continue well beyond the age of eighteen, which is contrary to the stance of the criminal justice system.

In order to determine when the adolescent brain reaches maturity, scientists focus on the prefrontal cortex.¹⁰⁶ The prefrontal cortex, located behind the forehead, provides an individual with the capacity to exercise good judgement in difficult situations.¹⁰⁷ It is also the portion of the brain “responsible for cognitive analysis, abstract thought, and the moderation of correct behavior in social situations.”¹⁰⁸ Overall, the prefrontal cortex receives information from an individual’s senses and creates thoughts and actions “to achieve specific goals.”¹⁰⁹ Additionally, due to the prefrontal cortex being “one of the last regions to reach maturation,” scientists believe that there is a direct correlation between lag in maturation and adolescents exhibiting behavior immaturity.¹¹⁰ Based on these findings in the prefrontal cortex, scientists concluded that the adolescent brain development is not complete until age twenty-five.¹¹¹

In a radio interview with neuroscientist and co-author of the book, *Welcome to Your Child’s Brain*, Dr. Sandra Aamodt was asked

102. Tim Requarth, *Neuroscience Is Changing the Debate Over What Role Age Should Play in the Courts*, NEWSWEEK (Apr. 18, 2016, 10:01 AM), <https://www.newsweek.com/2016/04/29/young-brains-neuroscience-juvenile-inmates-criminal-justice-449000.html>.

103. Mariam Arian et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451 (2013).

104. Synaptogenesis is a phase of human brain development when “[t]he formation of synaptic contacts in human cerebral cortex was compared in two cortical regions: auditory cortex (Heschl’s gyrus) and prefrontal cortex (middle frontal gyrus)” and occurs “late in childhood, earlier in auditory cortex, where it has ended by age 12 years, than in prefrontal cortex, where it extends to midadolescence.” Peter R. Huttenlocher & Arun S. Dabholkar, *Regional Differences in Synaptogenesis in Human Cerebral Cortex*, 387 J. OF COMP. NEUROLOGY 167, 167 (1997).

105. Arian et al., *supra* note 103, at 451.

106. *Id.* at 450.

107. *Id.* at 453.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

if it were true that an eighteen-year-old's brain is not yet fully developed.¹¹² In response, Dr. Aamodt stated the following:

Yes. The car rental companies got to it first, but neuroscientists have caught up and brain scans show clearly that the brain is not fully finished developing until about age [twenty-five] . . . [s]o the changes [in the brain] that happen between [eighteen] and [twenty-five] are a continuation of the process that starts around puberty, and [eighteen-year-olds] are about halfway through that process. Their prefrontal cortex is not yet fully developed. That's the part of the brain that helps you to inhibit impulses and to plan and organize your behavior to reach a goal. And the other part of the brain that is different in adolescence is that the brain's reward system becomes highly active right around the time of puberty and then gradually goes back to an adult level, which it reaches around age [twenty-five] and that makes adolescents and young adults more interested in entering uncertain situations to seek out and try to find whether there might be a possibility of gaining something from those situations.¹¹³

According to Harvard neurologist, Dr. Leah Somerville, links in the frontal lobe "are still forming at age [thirty], if not beyond."¹¹⁴ Research shows that brain scans of people in their mid-twenties when responding to activity-inducing stimuli "revealed that the regions of their brains in which emotion is processed were unusually active, while areas dedicated to keeping those emotions under control were weak."¹¹⁵ The author of this study and psychologist at Temple University, Laurence Steinburg, noted that "[t]he young adults [brain] looked like teenagers."¹¹⁶ This similarity further demonstrates how the brain of a young adult remains in an immature state well past eighteen years old.

1. Young Adults are More Similar to Juveniles than Older Adults Regarding Risky/Criminal Behavior

Generally, modern science shows that younger adults in their early twenties "are more likely than either children or somewhat older adults to engage in risky behaviour."¹¹⁷ When placed into a line graph,

112. *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011, 12:00 PM), <https://www.npr.org/templates/story/story.php?storyId=141164708>.

113. *Id.*

114. Carl Zimmer, *You're an Adult. Your Brain, Not So Much*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much.html>.

115. *Id.*

116. *Id.*

117. Laurence Steinburg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents' Criminal Culpability*, 14 NATURE REV. NEUROSCIENCE 513, 515 (2013).

this risk-taking behavior creates “an inverted U shaped curve with age, increasing between childhood and adolescence, peaking in either mid or late adolescence (the peak age varies depending on the specific type of risky activity) and declining thereafter.”¹¹⁸ Violent and nonviolent crimes also follow a similar pattern which is formally known as the “age-crime curve.”¹¹⁹ More specifically, this curve represents an “emergence of criminal behavior” during male adolescence.¹²⁰

Based on a psychological perspective, young adults’ involvement in criminal activity should be viewed

[A]s a specific instance of risk-taking more generally, both because patterns of age differences in criminal activity are similar to those of many other types of risky behaviour—including those that have nothing to do with crime, such as self-inflicted injury or accidental drowning—and because many of the hallmarks of juvenile offending are similar to those that characterize adolescent recklessness more generally.¹²¹

Furthermore, it is believed that the majority of juvenile crimes, similar to the majority of young adult risk-taking, involve impulsive actions “committed without full consideration of their possible long-term consequences.”¹²² The following subsections will discuss two different psychological theories that further illustrate that the young adult mind is markedly more similar to the brain of a juvenile.

2. Sensation-seeking and Impulse Control Theories

As studies of the brain have progressed over the years, a psychological theory has developed emphasizing that “the relationship between age and risk-taking is best understood by considering the developmental trajectories of sensation-seeking and impulse control.”¹²³ Sensation-seeking, or “the tendency to pursue novel, exciting and rewarding experiences,” was found to *substantially increase* during the years of puberty.¹²⁴ Once at a heightened state, these sensation-seeking urges remain embedded in an individual until they reach their early twenties; it is not until this point that these urges finally begin to

118. *Id.*

119. *Id.*

120. Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 TRENDS COGNITIVE SCIS. 63 (2014).

121. Steinburg, *supra* note 117, at 515.

122. *Id.*

123. *Id.*; see, e.g., K. Paige Harden & Elliot M. Tucker-Drob, *Individual Differences in the Development of Sensation Seeking and Impulsivity During Adolescence: Further Evidence for a Dual Systems Model*, 47 DEVELOPMENTAL PSYCH. 739 (2011).

124. Steinburg, *supra* note 117, at 516.

decline.¹²⁵ Alternatively, the second developmental trajectory known as ‘impulse control’ begins in a low state during childhood and incrementally improves through adolescence and into early adulthood.¹²⁶ A developmental phase known as ‘mid-adolescence,’ which encompasses the height of sensation-seeking but also when individuals are continuing to develop impulse control, is a combination that “predisposes individuals towards risky behaviour.”¹²⁷ Prior to reaching adolescence, “individuals are typically impulsive, but they are not especially prone towards sensation seeking.”¹²⁸ However, as the individual progresses into young adulthood, “sensation seeking is still relatively high, but by then, individuals have developed a more mature level of impulse control.”¹²⁹ Based off of these findings, it is clear that young adults more closely favor juveniles than older adults, and therefore should be treated as such under the law.

3. The Imbalance Model

According to the imbalance model of brain development, “differential development of brain regions can lead to an imbalance in their activity, with greater reliance on emotional regions than on prefrontal control regions during adolescence as compared to both childhood and adulthood, when the circuitry is either in the process of developing or fully mature.”¹³⁰ When situations arise that are not highly emotional, “prefrontal circuitry helps direct attention and action toward relevant information while suppressing responses to irrelevant information.”¹³¹ As this prefrontal circuitry continues to develop throughout adolescence, the individual’s actions and judgment may be considered inferior relative to an adult’s actions and judgment.¹³² In response to highly emotional circumstances, the less developed circuitry tends to also lack the capability to regulate the encountered emotions and actions.¹³³ As a result, adolescents will exercise a lower amount of self-control and make risky decisions, even when they are self-aware that the actions should not be taken.¹³⁴ Accordingly, the Imbalance Theory concludes that “the neurobiological and psychological immaturity of adolescents may render them more vulnerable to

125. *See id.*

126. *See id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Cohen & Casey, *supra* note 120, at 63.

131. *Id.*

132. *See id.*

133. *See id.* at 63-64.

134. *See id.* at 64.

making poor decisions in such contexts,” but also determines that the “diminished self-control” is only temporary and becomes “finetuned with experience and time.”¹³⁵ In light of a young adults’ propensity to exercise lower amounts of self-control and make poor decisions—similar traits commonly present in juveniles—young adults should be regarded similarly to juveniles under the law and mandatory LWOP should not be imposed.

B. Miller Underestimated Adults’ Capacity for Rehabilitation: A look at Adequate Education Programs in Prisons

Another flawed argument that the *Miller* Court weighed heavily in determining that mandatory LWOP sentences for juveniles violated the Eight Amendment as cruel and unusual punishment focused on the premise that children have a greater capacity to be rehabilitated than their adult counterparts.¹³⁶ This argument is highly inaccurate. A substantial path to rehabilitation is providing adequate education programs in prisons, job training, and pathways to work post-release.

According to research compiled between 1980 through 2017, individuals who participate in education programs while incarcerated are 43% less likely to return to prison.¹³⁷ In Texas state prisons, for example, research shows that out of 833 people who obtained college degrees while incarcerated, “27.2 percent of associate degree holders and 7.8 percent of bachelor’s degree holders had recidivated, as compared to 43 percent of people who did not participate in postsecondary education programming.”¹³⁸ Similarly, incarcerated individuals in Oklahoma who participated in the prison education programs through Tulsa Community College recidivated at a mere 5%.¹³⁹ By providing incarcerated individuals with the necessary education while they are incarcerated, they are more prepared to reenter society and find work opportunities and reduce recidivism rates, thus becoming rehabilitated.

135. *Id.*

136. See *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

137. See Kathleen Bender, *Education Opportunities in Prison Are Key to Reducing Crime*, CTR. FOR AM. PROGRESS (Mar. 2, 2018, 9:00 AM), <https://www.americanprogress.org/issues/education-k-12/news/2018/03/02/447321/education-opportunities-prison-key-reducing-crime/>. See generally *The Case For Correctional Education in U.S. Prisons*, RAND CORP., <https://www.rand.org/blog/rand-review/2016/01/course-correction-the-case-for-correctional-education.html> (last visited Aug. 25, 2021).

138. Hayne Yoon, *Back to School: A Common-Sense Strategy to Lower Recidivism*, VERA INST. OF JUST. (Sept. 19, 2019), <https://www.vera.org/blog/back-to-school-a-common-sense-strategy-to-lower-recidivism>.

139. See *id.*

Generally, an important aspect of achieving rehabilitation through prison education is to make certain that the programs provided to incarcerated individuals are, in fact, adequate. A type of program that fits this criteria would ensure that, (1) the incarcerated individuals are able to obtain jobs once they are released and (2) ensure that the “credits are transferrable to both another correctional institution and to the college or university an individual may attend in the future.”¹⁴⁰ In 2017, New York Governor, Andrew Cuomo, provided over seven million dollars in grants to New York state prison education programs and partnered with universities, including Cornell University and New York University, to physically teach courses at state prisons.¹⁴¹ Through these courses, the incarcerated individuals “could conceivably qualify for bachelor’s or associate’s degrees,”¹⁴² and with degrees from such institutions, the incarcerated individuals would certainly be competitive in the job market.

Conversely, despite the logical benefits of investing in prison education as a pathway to recidivism, some may argue that the Supreme Court would never find soundness in an argument that proposes a burden on non-parties, such as an increase in taxpayer dollars, for funding these programs. However, due to the overwhelming benefits, including cost savings, it is implausible that the Court would object. For example, it is estimated that for every dollar spent in providing prison education, taxpayers will save four to five dollars that they would have spent on incarceration.¹⁴³ Of course, this leads to economic growth as previously incarcerated individuals are able to enter into the job market as competitive contributors.¹⁴⁴ According to Forbes, by investing in prison education, Missouri taxpayers saved an average of \$25,000 per year for every former inmate that did not return to prison.¹⁴⁵

140. Bender, *supra* note 137.

141. See Jesse McKinley, *Cuomo to Give Colleges \$7 Million for Courses in Prisons*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/nyregion/cuomo-to-give-colleges-7-million-for-courses-in-prisons.html>.

142. *Id.*

143. Bender, *supra* note 137.

144. See *id.*

145. See David Skorton & Glenn Altschuler, *College Behind Bars: How Educating Prisoners Pays Off*, FORBES (Mar. 23, 2013, 5:43 AM), <https://www.forbes.com/sites/collegeprose/2013/03/25/college-behind-bars-how-educating-prisoners-pays-off/?sh=A31f07827077>.

IV. IN THE ALTERNATIVE, LWOP SHOULD BE ABOLISHED IN ITS ENTIRETY

In addition to the potential age advancements required under *Miller*, there are policy reasons for why LWOP sentences for juveniles and adults should be abolished altogether within the United States. First, this sentence causes a plethora of negative impacts on the incarcerated individuals and their families, including psychological trauma and mental illness, while also exposing young adults to potential prison violence.¹⁴⁶ Second, the United States is one of few countries that continues to impose LWOP as a punishment on its citizens.¹⁴⁷ Moreover, even if the prison system's *true goal* is punishment and not rehabilitation, it raises ethical issues as to how long someone should have to pay for a crime. Accordingly, this treatment is irrational. Public policy and the U.S. Constitution both agree that LWOP should not exist.

A. *The Negative Effects of Life Imprisonment on Adults and Their Families*

In numerous interviews conducted by the ACLU, incarcerated individuals reported feeling hopelessness, loneliness, fear, and isolation from their families, with many struggling to find purpose and meaning in their lives.¹⁴⁸ Other incarcerated individuals specifically spoke about being absent from their children's lives, being unable to care for ailing parents, missing funerals of those who died during their incarceration, and even being forgotten by family and friends.¹⁴⁹ Even the Supreme Court recognizes the gravity of the negative impact life imprisonment has on individuals.¹⁵⁰ According to Justice Sotomayor, "[a] life-without-parole sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.'"¹⁵¹

146. See discussion *infra* Section IV.A.

147. See discussion *infra* Section IV.B.

148. AMER. CIV. LIBERTIES UNION, UNITED STATES' COMPLIANCE WITH THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING, TREATMENT OR PUNISHMENT 67 (2014), https://www.aclu.org/sites/default/files/field_document/aclu_cat_shadow_report_2014_v2.pdf.

149. See *id.* at 67-68.

150. See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (noting that a life without parole sentence is "the second most severe penalty permitted by law").

151. *Campbell v. Ohio*, 138 S. Ct 1059, 1059-60 (2018) (quoting *Graham v. Florida*, 560 U.S. 48, 70) (2010).

1. Psychological Trauma and Mental Illness

Individuals who are incarcerated with no release date are known to suffer from extensive psychological trauma.¹⁵² According to clinical researchers, the psychological effects of LWOP demonstrate that the “mental health impact of LWOP sentences differs from parole-eligible sentences in which a prisoner has a release date that he or she is likely to reach during his or her lifetime.”¹⁵³ Moreover, a higher percentage of individuals serving LWOP sentences tend to suffer from mental illness, such as serious depression, than those who are eligible for parole.¹⁵⁴ Further studies on the mental health consequences of LWOP show that indefinite terms cause detainees to “develop feelings of hopelessness and helplessness that lead to depressive symptoms, chronic anxiety, despair, and suicidal ideation.”¹⁵⁵

Dr. Terry Kupers, a psychiatrist specializing in the mental health effects of incarceration, stated that a particular despair exists among incarcerated individuals serving LWOP.¹⁵⁶ This despair arises when people have future goals for themselves and a hope that life will get better, but because of LWOP, realize that they will never be able to leave and begin to “despair of ever having another life, [which] just gets wiped out.”¹⁵⁷ Moreover, Dr. Kupers notes that despair may exacerbate an existing mental illness as “[p]eople with a history of depression or [who] are prone to depression or suicidal feelings will become suicidal” and “[p]eople who are prone to psychosis will become psychotic.”¹⁵⁸ According to a study of Bureau of Justice Statistics data conducted by The Sentencing Project, approximately one in five, or 18.4% of incarcerated individuals within the United States that are currently serving life sentences suffer from a form of mental illness.¹⁵⁹ These alarmingly high rates of mental illness among incarcerated individuals serving life sentences “raises particular concern about the deleterious effect of LWOP and life sentences on these [incarcerated individuals’] mental health.”¹⁶⁰

152. See AMER. CIV. LIBERTIES UNION, *supra* note 148, at 68.

153. *Id.*

154. See *id.*

155. *Id.*

156. See AMER. CIV. LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 184 (2013), https://www.aclu.org/sites/default/files/field_document/111813-lwop-complete-report.pdf.

157. *Id.* at 184-85.

158. *Id.* at 185.

159. *Id.*

160. *Id.*

2. Isolation from Family and Friends

Serving a LWOP sentence can also have a devastating impact on familial bonds as incarcerated individuals are isolated from family and friends and maintain “severely limited contact with loved ones.”¹⁶¹ As a direct result of LWOP, their marriages sometimes end due to the no prospect of reunification.¹⁶² Additionally, incarcerated individuals’ roles as parents are limited because they are forced to miss milestones in their children’s lives including “children’s first steps, graduations, marriages, births of grandchildren, and day-to-day parenting.”¹⁶³ Incarcerated individuals have also reported feelings of guilt and worry because they are unable to support their children and elderly or ill parents.¹⁶⁴ Furthermore, many individuals with LWOP sentences are prohibited from attending funerals of family members, adding to the grief from the deaths of loved ones.¹⁶⁵ Some individuals who have already served more than a decade of their sentence mention feeling a complete sense of isolation, because all of their family members have died, leading to a lack of visitors or phone calls for years.¹⁶⁶

3. Prison Conditions and Violence

Generally, individuals serving LWOP sentences are housed in maximum and minimum-security facilities, which tend to be overcrowded as well as dangerous.¹⁶⁷ On a daily basis, they are subjected to “inadequate and subpar food and hygiene, and limited access to fresh air and sunlight.”¹⁶⁸ To add to an already-extensive list of deplorable conditions that individuals serving LWOP face, they are also confronted with a serious dearth of privacy, regular shakedowns, and lockdowns, all of which force them to remain in their cells for long periods of time.¹⁶⁹ Many individuals serving LWOP sentences are forced to live in constant fear of violence, sexual abuse, and instances of rape.¹⁷⁰ According to a report by the ACLU, over 75% of incarcerated individuals confirmed that they were victims of assault or personally witnessed incidents of rape or murder, with little to no protection by correctional staff.¹⁷¹ Between the daily fights among incarcerated

161. *Id.* at 186.

162. *See* AMER. CIV. LIBERTIES UNION, *supra* note 156, at 186.

163. *Id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.* at 187.

168. *Id.*

169. *See id.*

170. *See id.*

171. *See id.*

individuals and the animosity received by correctional staff, those serving LWOP received delayed healthcare, including delays in necessary medication.¹⁷²

4. Restricted Access to Rehabilitative Programs

Due to some prisons' policies, individuals serving LWOP sentences are sometimes denied "drug treatment, counseling, vocational and educational programs, and other rehabilitative services."¹⁷³ Additionally, some state prisons do not provide adequate access to education, meaningful work, or productive programs to individuals serving LWOP sentences, instead prioritizing individuals with release dates.¹⁷⁴ As a result of this systemic and discriminatory treatment of individuals serving LWOP sentences, many of them must wait years to obtain a GED or receive vital drug treatment.¹⁷⁵ For example, in the state of Florida, approximately 51% of incarcerated individuals reported being unable to access rehabilitative programs in prison.¹⁷⁶ In South Carolina, an incarcerated individual was deemed "ineligible" and prohibited from enrolling in a drug treatment program because of his LWOP status.¹⁷⁷ Similarly, in Oklahoma, an incarcerated individual stated, "I can't improve my life, I can't go to work and get a job because of my sentence," after being unable to take a vocational training course.¹⁷⁸

B. The U.S. is Behind on its Sentencing Practices Compared to the Rest of the World

In the Supreme Court's own words, it has concluded that despite not looking to "[t]he judgments of other nations and the international community [to be] dispositive as to the meaning of the Eighth Amendment . . . [t]he Court has looked beyond [its] Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual."¹⁷⁹

Currently, the United States is in the minority of countries (20% worldwide) that provide LWOP sentences with absolutely no possibility of release, and is "virtually alone in its willingness to sentence peo-

172. *See id.*

173. *Id.* at 189.

174. *See id.*

175. *See id.*

176. *See id.*

177. *Id.*

178. *Id.* at 190.

179. *Graham v. Florida*, 560 U.S. 48, 80 (2010).

ple to die behind bars” in the context of nonhomicide crimes.¹⁸⁰ Moreover, over 100 countries signed onto the Rome Statute of the International Criminal Court (“ICC”), which requires a review of all life sentences after twenty-five years “*even for the most heinous offenses*” including war crimes and genocide.¹⁸¹ There are even a number of countries that have gone as far as to abolish LWOP entirely.¹⁸² Some European countries are without statutes that mention, or impose, LWOP, even for very serious crimes like murder.¹⁸³ As of 2012, statistics showed that “the per capita number of [incarcerated individuals] serving LWOP sentences in the United States is 51 times that of Australia, 173 times that of the United Kingdom, and 29 times that of the Netherlands.”¹⁸⁴

Countries that prohibit LWOP sentences tend to do so based on deep commitments to fundamental rights, humane treatment, and rehabilitative principles.¹⁸⁵ These are all principles that the United States purports to uphold, despite its alarming use of the drastic sentence. In Croatia, for example, the maximum prison sentence available to the courts is between twenty to forty years, with an opportunity for release after a prisoner has served one-half or one-third of the sentence.¹⁸⁶ In Norway, the maximum prison sentence that may be imposed is twenty-one years, with the possibility of release after a prisoner has served twelve years.¹⁸⁷ The maximum prison sentence in Portugal is between twenty-five years to thirty years.¹⁸⁸ The laws of Slovenia provides for a maximum sentence of thirty years, even though the country has yet to ever impose such a lengthy sentence.¹⁸⁹ Incarcerated individuals in Slovenia with sentences longer than fifteen years may qualify for release contingent upon serving at least three-quarters of the sentence.¹⁹⁰ Furthermore, Spain also imposes a maximum sentence of thirty years.¹⁹¹ Despite the fact Iceland’s laws allow for life sentences, the country has not imposed such a sentence since

180. See *Key Facts*, PENAL REFORM INT’L., <https://www.penalreform.org/issues/life-imprisonment/key-facts> (last visited May 16, 2020); see also AMER. CIV. LIBERTIES UNION, *supra* note 156, at 200.

181. AMER. CIV. LIBERTIES UNION, *supra* note 156, at 200.

182. See *id.*

183. See *id.* at 200-01.

184. *Id.* at 201.

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.*

189. See *id.*

190. See *id.*

191. See *id.*

1940.¹⁹² Many Latin American countries also prohibit the use of LWOP in their respective constitutions.¹⁹³

Going beyond merely prohibiting LWOP sentences, some countries, including Germany, France, Italy, and Namibia, have concluded that there exists a fundamental right for incarcerated individuals to be released.¹⁹⁴ As an example of other countries' disapproval of LWOP sentences, Mexico currently refuses to extradite persons accused of crimes to the United States if they face life imprisonment, and the European Union courts are split as to whether to extradite incarcerated individuals to the United States when LWOP may be imposed.¹⁹⁵ Furthermore, the German Federal Constitutional Court has condemned LWOP on the record. The court specified that the state "strikes at the very heart of human dignity if [it] treats the prisoner without regard the development of his personality and strips him of all hope of ever earning freedom," while also imposing that the prison system has a duty to incarcerated individuals sentenced to life to "strive towards their resocialization."¹⁹⁶ The South African Constitutional Court held:

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.¹⁹⁷

As the U.S. Supreme Court has already held in *Miller*, "Life without parole 'foreswears altogether the rehabilitative ideal.'"¹⁹⁸ As the rest of the world continues to take a more humanitarian and rehabilitative approach in issuing life sentences, the Court should follow this global trend and hold that mandatory life sentences for *anyone* is a violation of the Eighth Amendment as it is Cruel and Unusual Punishment.

192. *See id.*

193. *See id.*

194. *See id.*

195. *Id.*; *see, e.g.*, Emily MacKenzie, *A Right to Hope? Extradition to the U.S. and Life Without Parole*, AM. SOC'Y OF INT'L L. (Sept. 28, 2018), <https://www.asil.org/insights/volume/19/issue/22/right-hope-extradition-us-and-life-without-parole>.

196. AMER. CIV. LIBERTIES UNION, *supra* note 156, at 202.

197. *S v. Dodo* 2001 (3) SA 382 (CC) at 417 para. 38 (S. Afr.).

198. *Miller v. Alabama*, 576 U.S. 460, 473 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 74 (2010)).

C. *The Irrationality of Continued Punishment*

When people think of punishment in the criminal justice system, one theory that seems to permeate throughout is an idea of retribution, which many scholars have seen as the primary objective for punishment.¹⁹⁹ However, this idea presents ethical questions: How long is too long for someone to be punished? What if the person has changed? When a court determines that an individual should spend the rest of their adult life in prison (LWOP), it is providing continued punishment for a crime that someone committed many years ago, despite the fact that the individual may have changed over time.²⁰⁰ Essentially, the mere idea of LWOP completely negates the fact that a person's "[c]urrent self[f] and future self[f] can vary from one another no less than two altogether distinct people do."²⁰¹ Continuing to imprison someone who realizes their wrongdoing, works to become a better person, and becomes a potential positive contributor to society not only raises a question of morality but can also be seen as highly irrational.²⁰²

V. ALTERNATIVES TO LWOP

A. *Restitution in Lieu of LWOP*

One alternative to sentencing individuals to LWOP would be requiring them to pay some form of monetary restitution to the court system or to the parties injured by their crimes. Traditionally, restitution was defined as "a monetary payment by the offender to the victim for the harm reasonably resulting from the offence."²⁰³ Under the current and more encompassing version, restitution is defined as an "[a]ct of restoring; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification."²⁰⁴ Contrary to retributive justice, which seems to be the true goal of punishment within the United States, restitution can potentially "repair the financial. . .and relational harm" caused by

199. See generally Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19 (2003).

200. See Judith Lichtenberg, *Against Life Without Parole*, 11 WASH. U. JUR. REV. 39, 64 (2019).

201. Jennifer Lackey, *The Irrationality of Natural Life Sentences*, NW. NOW (Feb. 1, 2016), <https://news.northwestern.edu/stories/2016/02/opinion-nyt-times-life-sentences>.

202. See *id.*

203. Christopher Bright, *Restitution*, CTR. FOR JUST. & RECONCILIATION, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/restitution/#sthash.gMmEd5Gv.dpbs> (last visited Sept. 25, 2020).

204. *Id.*

the crimes.²⁰⁵ In addition to providing compensation to the victims and their families, restitution also “allows the offender to express guilt” in a more succinct manner and is less stigmatizing than incarceration, thereby facilitating integration back into society.²⁰⁶ With such positive aspects for both the victims and offenders, restitution is a much more appropriate sentence over LWOP.

When this idea was first presented in the early 1990s, providing monetary restitution to the families of murder victims was “strongly supported by those choosing alternatives to the death penalty.”²⁰⁷ However, this sanction may have small hurdles—one of which being the fact that incarcerated individuals receive very low pay.²⁰⁸ Keeping this potential hurdle in mind, one suggestion would be to raise the pay for prison work, allowing incarcerated individuals to pay for necessities and fulfill their duty to the victims of their crimes.

Currently, there is an example of a successful restitution scheme being implemented within the United States. In Quincy, Massachusetts, they have an “Earn-In programme” that “combines restitution orders (scheduled, monitored and enforced by the juvenile courts) with the support of the local business community in hiring and paying probationed [sic] juveniles to work.”²⁰⁹ From the money earned by the juvenile offenders, a portion of it goes directly to the courts to satisfy the restitution judgment.²¹⁰ In order to calculate how much the offender must pay, the court factors in the “[a]ctual loss suffered by the victim and [the] offender’s ability to pay.”²¹¹ Finally, even if the offender is unable to pay the full restitution, a state compensation scheme supplements the balance, ensuring that the victims receive compensation, and the offenders have a chance at rehabilitation far from a LWOP sentence.²¹²

205. *Id.*

206. *Id.*

207. *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 19, 1993), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/sentencing-for-life-americans-embrace-alternatives-to-the-death-penalty>.

208. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> (noting that the “average of the minimum daily wages paid to incarcerated workers for non-industry prison jobs is now 86 cents, down from 93 cents reported in 2001. The average maximum daily wage for the same prison jobs has declined more significantly, from \$4.73 in 2001 to \$3.45 today.”).

209. Bright, *supra* note 203.

210. *See id.*

211. *Id.*

212. *Id.*

B. *Presumptive Life Sentences in Lieu of LWOP*

Another realistic and humane alternative to LWOP would be states imposing statutory presumptive life sentences with a goal to “bifurcate the sentencing decision in serious criminal cases.”²¹³ Presumptive life sentences would begin with the court imposing a fixed term of years.²¹⁴ Once this fixed term has been completed, there would be a second sentencing hearing that would be reviewed *de novo* by the original sentencing court, in order to “determine the appropriate future sentence.”²¹⁵ Furthermore, during the second sentencing hearing, there would be a presumption that the offender would receive an additional term of years, with the burden then shifting to the offender to prove that they “deserve[] to return to society.”²¹⁶ William Barry III, a professor at the University of Mississippi School of Law, provided an example of what a presumptive life sentence would look like:

[A] state could develop a system with different tiers of presumptive life sentences: non-violent offenders, violent offenders, and the “worst of the worst” offenders. For all categories, the second part of the sentencing would occur after 15 years. For non-violent offenders, the presumption would be that the state would release the offender, with the state having the burden to demonstrate that the offender deserved an additional ten-year term. For violent offenders, the presumption would be that the state would not release the offender, and the offender would serve an additional ten-year term, unless the offender could prove by a preponderance of the evidence that additional incarceration was unnecessary. For the “worst of the worst” offender, the presumption of continued incarceration would be higher, and another ten-year sentence would commence unless the offender could demonstrate by clear and convincing evidence that additional incarceration was unnecessary.²¹⁷

One of the more promising aspects of a presumptive life sentence is the fact that the offender has a chance of returning to a normal life. The rehabilitative outlook on this sentence would satisfy those who seek assurance that an offender receives due punishment for their crime, while remaining open to the sheer possibility, or rather likelihood, that an individual may change and become a positive contributor to society.

213. William W. Berry, *Life-With-Hope-Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1082 (2015).

214. See *id.*

215. *Id.*

216. *Id.*

217. *Id.*

CONCLUSION

The Supreme Court in the *Miller* decision took the necessary first step in chipping away at mandatory LWOP sentences by forcing states to take a subjective look at juveniles before locking them up and throwing away the keys forever. The Court certainly was correct in determining this treatment is a pure violation of the Eighth Amendment as cruel and unusual punishment. However, instead of continuing to progress in the realm of juvenile justice, the Court took a small step backward in weakening the sentencing requirements in *Jones*. Despite this setback, it is not too late for the Court to get back on track. The time is ripe for the Court to build upon its original science-based precedent in *Miller* and raise the age on the prohibition on mandatory LWOP from eighteen to twenty-five years of age to coincide with advancements in neuroscience and psychology. In the alternative, given the vast array of negative impacts LWOP has on offenders and their families, the fact that the U.S. is in a minority of countries that still imposes the archaic sentence, and that the irrationality of continued punishment goes well beyond what is necessary or humane, and given the variety of viable alternatives, the Court should deem LWOP as a violation of the Eighth Amendment and abolish the sentences completely. As the Court continues to shift with changes in society and become more progressive in its interpretation of the Constitution and public policy, this will hopefully be an attainable goal in the very near future.

Critical Justice: Transforming Mass Incarceration, Mental Health, and Trauma

BRYONN BAIN

Remixing lessons on critical race, gender, and class studies, learned from legendary legal scholar Lani Guinier, prison scholar and activist Bryonn Bain shares the perspectives of credible messengers, visionary advocates, and rebel voices. Bain engages a dynamic collective of movement leaders including Melina Abdullah, Shaka Senghor, Topeka Sam, and Joel Aguilar. These system-impacted and formerly incarcerated luminaries of the Black Lives Matter generation discuss their work, and experiences of the detrimental impact incarceration has on youth and families. Their journeys take us from police and prison trauma—from mental health challenges in prison to those women and children face behind bars—to healing strategies that individuals and organizations pursue to effectively address these issues.

**Critical Justice: Transforming Mass
Incarceration, Mental Health,
and Trauma**

BRYONN BAIN*

TABLE OF CONTENTS

INTRODUCTION 161
I. OVERVIEW 165
II. THE DIALOGUE 166

* Working in prisons for more than 30 years, I am the founding director of the UCLA Prison Education Program, and Associate Professor within the Department of African American Studies and Department of World Arts and Cultures/Dance at UCLA. I am an abolitionist and graduate of Columbia University, New York University and Harvard Law School. This piece is adapted in my latest work, *REBEL SPEAK: A JUSTICE MOVEMENT MIXTAPE* (2022).

INTRODUCTION

After decades of struggle, shattering glass ceilings, and breaking up old boys' networks, Lani Guinier became the first woman of color to serve as a tenured professor at Harvard Law School ("HLS"). As groundbreaking an achievement as that was, for me she became so much more. Entering law school in 1998, the same year she joined the faculty in Cambridge, I never dreamed that twenty years later, she would become not only my teacher and mentor, but ultimately a long-time collaborator and dear friend. Never a fan of the static title "role model," Lani believed nonetheless in the invaluable role of mentors. For all her visionary mentorship, she never hesitated to recognize that she too stood on the shoulders of the critical and rebellious visionaries who came before her.

Before meeting Lani, I met critical race studies pioneer and legal scholar Derrick Bell.¹ He advised me to accept the offer of admission I received from the nation's oldest law school—over other enticing offers to half a dozen of the other leading schools in the country. This was noteworthy because he famously quit his job teaching there in protest of HLS's failure to hire a woman of color to a tenured professorship in their 181-year history. That was before Lani. It was Bell's sacrifice, along with countless others who supported the movement to desegregate the faculty of the nation's oldest and most elite law school, which laid the foundation for Lani's last gig before her retirement—and to our very first meeting.

I entered her course "Critical Perspectives on the Law: Gender, Class and Race" by the skin of my teeth. As the first person in my family to attend law school, I was out of the loop on the ins and outs of securing a spot in the most popular classes. I missed the deadline for the formal paperwork students were supposed to submit to get into her seminar. None the wiser, I showed up anyway. As the only man in a class of twenty-six, I would be pushing the course past its mandated cap. Lani asked me to leave the room and after a rigorous debate, the students voted to allow me into the class. I learned years later that the votes were divided along racial lines. All the white students voted against me. All the Black students voted to keep me in the class. Several Black women even offered to take turns remaining silent for entire class meetings—if it made the white women feel as if I would cost them too much of their coveted time with the world's top

1. Derrick Bell authored several groundbreaking books on race and racism in the United States. See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993).

voting rights expert. As absurd as it was that such an offer had to be made, that vote, those visionary Black women, and the process Lani orchestrated, changed my life forever.

While home in New York City one weekend in the middle of the term, I was racially profiled by the New York Police Department (“NYPD”) and unjustly jailed with my brother and my cousin. The following week, Professor Guinier asked the class to write a reflection essay on “an experience of injustice” which led me to write and publish the story run by *The Village Voice* as a cover story called “Walking While Black” which went viral, setting a record by receiving over 100,000 responses.² It also landed me on *60 Minutes* telling my story to Emmy award-winning journalist Mike Wallace to over 20 million households.³ Lani’s invaluable edits and notes on that piece undoubtedly contributed to its rhetorical and analytical nuances, broad resonance, and widespread impact. The story of that incident has been a defining experience in my personal and political development, and in my professional work.

The following year, Lani asked me to return the favor (as if it was possible) by reviewing the unpublished manuscript of her forthcoming book, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy*.⁴ Written in collaboration with her longtime friend, colleague, and Chicano legal scholar Gerald Torres,⁵ even *the process* through which the book was created reflected the virtues of multiracial coalition-building and solidarity advocated and urged by *the product* itself. Guinier and Torres’ critical analysis of the *gross* investment in prisons by states like New York,⁶ as compared to their shameful relative underinvestment in public schools, stands out two decades later as a tragedy we continue to relive like Groundhog Day. We shared this revealing information in prisons, at performances venues, public schools, and community spaces. It was evidence that the

2. See Bryonn Bain, *Walking While Black*, VILL. VOICE (Oct. 18, 2005) <https://www.villagevoice.com/2005/10/18/walking-while-black-2>.

3. David Bain, *60 Minutes: Prison and Harvard Mike Wallace Interviews Bryonn Bain*, YOUTUBE (Feb. 7, 2013), <https://youtu.be/suTXhLXrqYc>.

4. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2003).

5. Gerald Torres is currently a professor of Environmental Justice at the Yale School of the Environment with a faculty appointment at the Yale Law School. See Gerald Torres, YALE L. SCH., <https://law.yale.edu/gerald-torres> (last visited Mar. 24, 2022).

6. Tracy L. Huling, *Prisons as a Growth Industry in Rural America: An Exploratory Discussion of the Effects on Young African American Men in the Inner Cities*, PRISON POL’Y (Apr. 15, 1999), https://www.prisonpolicy.org/scans/prisons_as_rural_growth.shtml (explaining that in 1999, New York Governor George Pataki, vetoed a \$500 million investment in school construction and instead proposed to spend \$180 million for constructing a new maximum security prison, which was on top of another \$180 million already allocated to prison construction by summer 2000).

criminal justice system is not broken but is in fact in dire need of both disruption and radical reimagining and rebuilding.

Guinier's allegorical use of the canary in the coal mine, as a frame for critical race, gender, and class analysis, had a lasting effect on me.⁷ If the canary's fragile respiratory system suffered from toxins in the mine long before any human lungs began to experience negative effects, we should see the bird's vulnerability as a call to action for us all to do more than give it an oxygen mask. Like political reforms that serve to support and maintain oppressive, toxic systems, more than mere "oxygen mask" reforms, we need to completely change the air in the mine. By focusing on the needs of the most vulnerable, we have the capacity to build a healthier world in which we live and breathe humanely.⁸ I understood the metaphorical "mine" as analogous to America and the toxic systems in it. It was obvious that among "the vulnerable"—the canaries—were women, people of color, the working, the poor, queer identifying individuals, and people incarcerated, formerly incarcerated, and impacted by the carceral system. What I failed to see was that Lani was also speaking so prophetically about herself and others who ultimately struggle with mental health challenges.

Named after Alois Alzheimer (1864-1915),⁹ the German neurologist credited with identifying the disease, Alzheimer's is a progressive mental deterioration that often occurs in middle age or later in life, due to a general deterioration of the brain.¹⁰ Largely underdiagnosed

7. GUINIER & TORRES, *supra* note 4, at 11-12 (using canary in the mine as a metaphor for the experiences of people of color. It embodies the challenge to rethink race and the role of those excluded from, or underrepresented in, positions of authority or decision making in society).

8. In July 2014, Eric Garner, a Black man, was killed by a New York City police officer in a prohibited chokehold after calling out eleven times "I can't breathe." Ashley Southhall, *'I Can't Breathe' 5 Years After Eric Garner's Death, an Officer Faces Trial*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html>. The incident generated wide national attention and massive protests and ignited debates over race and policing. *Id.* Garner's death has been cited as one of many police killings of Black Americans protested by the Black Lives Matter ("BLM") movement. See Syreeta McFadden, *Black Lives Matter Just Entered Its Next Phase*, ATLANTIC (Sept. 3, 2020), <https://www.theatlantic.com/culture/archive/2020/09/black-lives-matter-just-entered-its-next-phase/615952>. The killings of George Floyd and Breonna Taylor in 2020 continue to expose violence against people of color from law enforcement, leading to ongoing massive protests. See Josh Wood & Tim Craig, *As Breonna Taylor Protests Stretch into 12th Week, Calls for Officers' Arrests Intensify*, WASH. POST (Aug. 18, 2020), https://www.washingtonpost.com/national/as-breonna-taylor-protests-stretch-into-12th-week-calls-for-officers-arrests-intensify/2020/08/18/ce6f2b9a-d823-11ea-930e-d88518c57dcc_story.html.

9. Esther Heerema, *How Alzheimer's Disease was Discovered*, VERYWELL HEALTH, <https://www.verywellhealth.com/who-was-alois-alzheimer-how-was-alzheimers-disease-discovered-3858664> (June 21, 2020).

10. *Alzheimer's Disease and Related Dementias*, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 26, 2020), <https://www.cdc.gov/aging/aginginfo/alzheimers.htm>.

and underreported, studies show mild cognitive impairment (“MCI”) may remain unrecognized in up to 80% of affected patients in primary care.¹¹ Given the devastating effects and lingering historical impact of medical exploitation on marginalized communities, communities of color are reluctant¹²—especially Black folks in the United States—to engage in mental health institutions that have never effectively met, or intended to meet, our needs, causing exponentially compounded challenges for women of color wrestling with mental health ailments.¹³ Regarding the population at large, there is already a “reluctance of patience and care partners to report signs or symptoms due to stigma” around the disease, and a vastly disproportionate lack of “diagnostic resources” to which we generally have access.¹⁴

At Lani’s retirement gathering on a February morning in an old Radcliffe building, her son Niko, with insight beyond any I had to offer, spoke to the village convening to honor his mother by saying, “[t]his disease takes away the two things my mother’s made her life with—her memory and her family.”¹⁵ Memory and family. And not even a second passes after he speaks this truth before I think: those are two words anyone who spends anywhere from one day to an entire decade in a jail cell cannot help but wrestle with endlessly while inside. The memories of what led to our incarceration. The memories of specific moments that could have altered the course our lives in immeasurable ways. The family we find ourselves pulled far away from and increasingly out of touch with except for in the rarest of

11. *The Importance of Early Detection and Diagnosis of Mild Cognitive Impairment due to Alzheimer’s Disease, Identify Alzheimer’s Disease Earlier*, IDENTIFY ALZHEIMER’S DISEASE EARLIER, https://www.identifyalz.com/en_us/home/diagnosing-mild-cognitive-impairment.html (last visited Mar. 24, 2022) [hereinafter *The Importance of Early Detection of Alzheimer’s Disease*].

12. *The Tuskegee Timeline*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/tuskegee/timeline.htm> (last visited Jan. 23, 2022). See also, *Tuskegee Study, 1932-1972*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/tuskegee/index.html> (last visited Jan. 23, 2022) (explaining that “The Tuskegee Experiment” was an unethical medical experiment on Syphilis disease that began in 1932 and lasted for 40 years). The experiment recruited 600 Black men without informing them the real purpose of the study and without treating their conditions as promised—even when the treatment became available. The study caused needless suffering for participants and their families. *Id.* It serves as a case-in-point for the exploitation of people of color through medical experiments.

13. Erica Richards, *The State of Mental Health of Black Women: Clinical Considerations*, PSYCHIATRIC TIMES (Sept. 21, 2021) <https://www.psychiatristimes.com/view/the-state-of-mental-health-of-black-women-clinical-considerations>.

14. *The Importance of Early Detection of Alzheimer’s Disease*, *supra* note 11.

15. The convening was filled with Lani’s colleagues and friends. Niko recognized that he was, in fact, surrounded by family. From critical race theory luminaries like Patricia Williams, lifelong collaborators like legal scholars Susan Sturm and Gerald Torres to colleagues in a range of fields like theater guru Tim Mitchell and political scientists like Phillip Thompson, who gave me Lani’s *Tyranny of the Majority* when I studied contemporary Black politics with him as a sophomore.

situations. The memories that help keep us human amidst the challenge of maintaining the familial bonds necessary to survive inside and out after release.

Yet without the barbed wire gates and iron bars, without the towers in the sky manned by guards holding military-grade weapons, without the physical violence and inhumane isolation of solitary confinement in a six-by-nine-foot cell, this mental affliction chose my brilliant and beloved mentor as its host and aggressively began eroding critical aspects of her life and world. If we were the proverbial canaries in the mine before, how much more did this ailment place her at the very center of her own analysis twenty years later? Given the presence of more people in American prisons struggling with mental health challenges than in mental health institutions, how much more traumatic is that experience of loss for those who are grappling with the dual crisis of mass incarceration and mental health—under systems very intentionally designed to break our bodies and our minds?

I. OVERVIEW

The discussion above is among the experiences and issues I brought with me to a dialogue I facilitated, joined by national experts and leaders of community-based justice movements on May 24, 2018. Part of the annual “We Rise” Conference in Los Angeles, the Mental Health Awareness Month initiative originally incubated by Los Angeles County Department of Mental Health, and has evolved into an independent, grassroots, community-driven initiative.¹⁶ Mental illness was not the only concern we examined. Our dynamic discussion interrogated a diverse range of problems at the heart of the prison crisis. However, as I have learned from the challenges my mentor is facing in her ongoing battle with Alzheimer’s (and now the coronavirus (“COVID-19”) pandemic), the impact of mental health challenges on individuals, families, and communities shares much in common with the trauma endured by those systematically dehumanized by America’s *criminal* justice system. This trauma personally impacted the four system-impacted activists I engaged in the critical conversa-

16. See *About Why We Rise*, WHY WE RISE, <https://whywerise.la/about-why-we-rise> (last visited Mar. 24, 2022). Funded by Proposition 63, the Mental Health Services Act (“MHSA”), CAL. WELF. & INST. CODE § 5891 (West 2004), and a wide range of sponsors including: Gina Belafonte, actress, producer, and Executive Director of Sankofa.org, see *About Us*, SANKOFA, <https://www.sankofa.org/about-us> (last visited Mar. 24, 2022); Cristina Pacheco of The Underground Museum, see *About Us*, UNDERGROUND MUSEUM, <https://theunderground.museum/about/team> (last visited Mar. 24, 2022); and Yosi Sergeant of TaskForce, see *Our Mission*, TASKFORCE, <https://www.taskforce.us/about> (last visited Mar. 24, 2022), to which special thanks is due for this dialogue.

tion on Justice that follows. The comrades who joined me included living movement legends. Melina Abdullah is a founder of Black Lives Matter Los Angeles (“BLMLA”) and Chair of the Pan-African Studies Department at California State University, Los Angeles. Shaka Senghor is the bestselling author of *Writing My Wrongs*, and a formerly incarcerated movement leader and former Executive Director of the Anti-Recidivism Coalition (“ARC”).¹⁷ Topeka K. Sam is the formerly incarcerated Founder and Executive Director of The Lady of Hope Ministries.¹⁸ Joel Aguilar is a formerly incarcerated Program Manager for Mass Liberation and a member of the Anti-Recidivism Coalition (“ARC”) leadership.¹⁹

II. THE DIALOGUE

Bryonn Bain:

We’re here to talk about the impact of incarceration on our families. And I want to jump right in. You know, as a parent, and as someone who just this morning like I spend several mornings every week at the juvenile hall in Sylmar at BJN,²⁰ where recently they had a young brother who was nine years old, who was incarcerated at the facility. And it was devastating to realize that our babies are taken at that early age. So, I want to ask each of my brothers and sisters here to tell us what, in your opinion, are the consequences that children face when they’re caged behind bars. What are the consequences that the youngest of the young face when they experience incarceration?

Joel Aguilar:

The cycle of trauma continues. I grew up a couple of miles away from here on the southwest area of Los Angeles. And you know, it’s different. It’s something normal to us. But it can be negative and destructive to the rest of America. So, you go to sleep hearing gunshots, helicopters. And if you want to make things worse, you know, if your parents are dealing with addiction, then maybe they cannot wake up to dress you, to feed you, to go to school. And if you want to make things a little bit grimmer . . . what if they’re addicted to crack? What

17. See SHAKA SENGHOR, *WRITING MY WRONGS: LIFE, DEATH, AND REDEMPTION IN AN AMERICAN PRISON* (2017).

18. See TOPEKA SAM, <https://topekasam.com/bio> (last visited Mar. 24, 2022).

19. ANTI-RECIDIVISM COALITION, <https://antirecidivism.org> (last visited Mar. 24, 2022).

20. BJN stands for Barry J. Nidorf, a juvenile hall located in Sylmar, a neighborhood north of Los Angeles. See *Juvenile Hall*, CNTY. OF L.A. PROB., <https://probation.lacounty.gov/juvenile-hall/> (last visited Mar. 24, 2022).

if through their pregnancy, they used crack? And what do you have now? A crack baby? So, it's very difficult, like dehumanization begins from the very conception. And it just continues. It continues in the neighborhood. It continues in school. It continues in prison, or in juvenile hall to prison.

Melina Abdullah:

I hesitate on this question because it's such an appalling question, right? What's the effect of incarceration on our children? The response that the city gives to our children, and we want to be real clear we're talking specifically about black and brown children and poor children who are targeted for incarceration. The notion that they can see them as something other than children is appalling. And it's shocking when you ask them.²¹ And then I started to think, because before anything, I'm a mother, right? And I have three children. I have a daughter who's fourteen, another daughter that's eleven, and a son that's eight. And just kind of processing the question, I thought about the fact that two of my three children have already been targeted for criminalization.²² Now I'm a college professor. I grew up in the hood . . . but they have resources that many of our children don't have. My daughter, my eleven-year-old daughter was seven-years old the first time the police were called on her in school. And they came. The principal told me if I didn't beat the police there, they were going to take her into custody for bringing vitamin C to campus because they have a zero-tolerance policy, right?²³ My son as a first

21. Leila Morsy & Richard Rothstein, *Mass Incarceration and Children's Outcomes: Criminal Justice Policy Is Education Policy*, ECON. POL'Y INST. (Dec. 15, 2016), <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes> (According to a study published by the Economic Policy Institute, "[y]oung African American men are no more likely to use or sell drugs than young white men," but are "nearly three times as likely to be arrested for drug use or sale; once arrested, they are more likely to be sentenced; and, once sentenced, their jail or prison terms are 50 percent longer on average.").

22. Many books and articles have exposed the discriminatory practices of criminalizing children of color. See MONIQUE W. MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* (2016) (Exposing the lives of Black girls facing school-related arrests and reveals how girls are abused, trafficked for sex, harassed, and violated because of their race, gender, and sexual orientation. As Morris moves through the juvenile justice system, she notes that these crimes rarely come to light. Instead, Black girls are pushed out of school and into prison, unemployment, and homelessness. Simultaneously, Black girls are labeled "delinquent" and left without any meaningful connection to school. Ultimately, Morris documents the increasing cases of Black girls impacted by criminalizing policies and practices that render them vulnerable to abuse, exploitation, dehumanization, and death.).

23. See CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM: CHALLENGING SUSPENSIONS AND EXPULSIONS* (2010) (discussing how "zero-tolerance" rules have led to some of the harshest forms of school discipline today). These policies originated in the 1990s in response to the surge in school violence and presence of firearms brought to schools by students. Zero-tolerance rules have been expanded beyond expulsion of

grader, right before the end of first grade happened, we got a visit to my house from the gang unit for my first-grade son, right? So, when we talk about what's happening to our children . . . I think that there was a report that came out at the beginning of this year by the Economic Policy Institute. And it looked at comparatively where we are as Black people now in 2018 as opposed to where we were in 1968. It found that by every measure, we're worse off now than we were in 1968.²⁴ If anybody knows anything about the Economic Policy Institute, it is not a radical think tank, right? The conclusion they reached is that the reason we're worse off is because of this society's failure. I'll say it's worse than that. It's a refusal to directly address racism . . . what we're experiencing is what we've been experiencing since the moment we were stolen from Africa, since the moment we were told that we were chattel. They tried to create us into these dehumanized beings instead of people, right? They're treating our children exactly the way that they treated us when we were enslaved. And so, this is why they can take our children and lock them in cages, treat them like they're not people. And I think that that's why we're appalled because we've been told that we've been done with slavery, right? But not really.

Bryonn Bain:

I want to ask Shaka and to begin to think about it in an additional way. What is the impact, not only on our young people, but what is the impact on the families of these young people? The parents? The brothers and sisters? How are the folks who are experiencing incarceration by losing their child to the system for the period of time that they're incarcerated? What's *that* impact? What's *that* effect?

students for bringing firearms as it presently applies to the suspension or expulsion of children from school for everything from weapons, drugs, smoking, and fighting. See Russell Skiba, *Zero Tolerance: The Assumptions and the Facts*, 2 EDUC. POL'Y BRIEFS, Summer 2004, at 1-2. In addition, these zero-tolerance rules apply to dress-code violations, truancy, or tardiness. See Sarah Carr, *Do 'Zero Tolerance' School Discipline Policies Go Too Far?*, TIME (May 22, 2012), <http://content.time.com/time/nation/article/0,8599,2115402,00.html>.

24. Janelle Jones et al., *50 Years After the Kerner Commission: African Americans are Better Off in Many Ways but are Still Disadvantaged by Racial Inequality*, ECON. POL'Y INST. (Feb. 26, 2018), <https://www.epi.org/publication/50-years-after-the-kerner-commission> (Explaining that while Black workers and their families are in many ways better off in "absolute terms" than they were in 1968, "they are still disadvantaged in important ways relative to whites." *Id.* Applying the research published by the Economic Policy Institute, this article points to three key findings. *Id.* First, Black Americans today are better educated than they were in 1968. *Id.* Second, the higher educational attainment of Black Americans resulted in higher incomes and better health within the population compared to that in 1968. *Id.* And third, the Black American community regressed because of low rates of homeownership, and high rates unemployment and incarceration. *Id.*).

Shaka Senghor:

So, when you ask that question, the first thing that came to mind was Khalif Browder.²⁵ That's what prison does to kids.

Bryonn Bain:

Can you explain for folks who aren't familiar with his case?

Shaka Senghor:

So Khalif Browder was a young man in New York, who was arrested for a crime he didn't commit. At age fifteen, he was incarcerated on Rikers Island, where he remained for three years, two of which was in solitary confinement. The crushing weight and reality of solitary confinement damaged him to such a point that when he got released, he ended up committing suicide. The reality is when kids go into that environment, the trauma is so penetrating and so deep that they'd never come out the same. I'm very fortunate to work in a space that allows us to actually go inside and work with these young men and women to ensure that they're not broken beyond repair. But this is what our system does to young people, and the impact it has on families is devastating. I was a producer on a show called *Released*, which some of you guys may have seen, and it showed the other side of coming home. It showed the other side of the impact of incarceration that it has on families and how devastating it is to try to go see your loved one when you can't afford to. To try to take those phone calls that often times cost more than mortgages, cost more than rent. To try to go see your loved one in prisons so far from home that they might as well be in another country.

This is what we do to people in this country. In Germany, where I went and studied their prison system, they're very intentional about ensuring that if you happen to be incarcerated, you maintain a relationship with your family and your loved ones. It's part of their constitution, because they recognize the men and women who want to follow the law as their fellow citizens. In this country, we recognize them as "those people over there," and that's problematic.

25. See generally, Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> (providing details of Khalif Browder enduring three years within New York City's main jail complex on Rikers Island without a trial and his subsequent death by suicide).

Bryonn Bain:

Thank you, Shaka. Topeka?

Topeka K. Sam

I think the only thing that I would add is when I think about young people, when I think about youth incarceration, I think about our young girls. And I think about how, you know, 86% of women who are incarcerated are women who suffered from sexual trauma, abuse, or violence.²⁶ And that's reported, right? Some people don't talk about the trauma that they've experienced, so I think about that woman who was a young girl. When young girls are abused, victimized, and criminalized, they are ripped out of schools and put in prisons or baby jails (juvenile facilities). I think about how Black women and women of color are always looked at as criminal just because of the color of our skin. And it's just such a heavy question. I think that's why I kind of waited, you know, because our girls turn into women, and then when women end up in prison, they end up in relationships that have them suffering. You know our sisters are dying in prison due to the systems and these abuses, and the decades of trauma. So, I just want to lift up all of our young girls and our women that are in this space. Just like the young sisters who came on just a moment ago, we have to love each other. We have to recognize the beauty in each other; and when we see each other struggling, we have to be there to lift each other up.

Bryonn Bain:

It is somewhat of a taboo, especially with Black folks, to talk about mental health, in some circles, right? There are a lot of folks who don't like to talk about mental health issues and it's so critical that we do talk about it because it's something that so many of us are facing on a daily basis. We now have more people in prisons in this country struggling with mental health challenges than we have in mental health institutions.²⁷ Over the last several decades, we have seen, na-

26. See generally, Shannon Lynch et al., *Women's Pathway to Jail: The Roles & Intersections of Serious Mental Illness & Trauma*, BUREAU OF JUST. ASSISTANCE 5-6 (2012), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Women_Pathways_to_Jail.pdf (discussing qualitative data that demonstrates the nexus between that experiencing multiple traumas, including childhood sexual abuse, and the onset of "criminal behaviors" such as running away and using illicit drugs).

27. See E. Fuller Torrey et al., *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States* 8 (2010), https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf?utm_source=April+2016+Newsletter

tionwide, the closing of mental health facilities because of the unspeakable abuses in these institutions around the country. We've also seen the unprecedented expansion of the prison industrial complex.²⁸ Neither one of these is an acceptable way to deal with the mental health issues we're facing in our communities, even as we see the criminalization of those with mental ailments in our communities. Why has this happened? What strategies should we be pursuing to address this crisis?

Professor Melina Abdullah:

It's happened because we've allowed it to happen. It's happened because we've given people power or submitted to their power. We've given the folks who were invested in creating these conditions more power, right? So here in Los Angeles, 53% of the city's general fund goes to the LAPD.²⁹ directly, right? But then there's more than that, because there's money that's hidden. So yesterday, like we do every week we went to the police commission meeting. We, as voters, as Angelenos, voted for these funds to address homelessness. Do you know where the city directed those funds? To the LAPD, because LAPD is seen by this city's governance as the front line for everything, right? LAPD for the city and the jails for the county, right? They're proposing to spend three and a half billion dollars on a new jail in Los Angeles. We already know the L.A. County jail system is the largest mental health provider. Not that jails can provide mental health because we know that folks who go into jails and prisons with mental health conditions have those conditions exacerbated when they're on the inside because they're traumatized. That's what Brother Shaka was talking about that happened with Khalif, but you also see it in the "Central Park Five."³⁰ When you talk to them, or see

&utm_campaign=April+2016&utm_medium=email (Revealing data that evinces that within the United States by 2005, there were three times more individuals with serious mental illnesses within jails and prisons than within hospitals. *Id.* at 8. Notably, the incarceration rate of individuals with serious mental illness between 2004 and 2005 is remarkably similar to the rate of individuals incarcerated with serious mental health issues in the 1840s. *Id.*).

28. The number of U.S. residents incarcerated per 100,000 grew from 161 in 1972 to 707 in 2012. JEREMY TRAVIS ET AL., GROWTH OF INCARCERATION IN THE US: EXPLORING CAUSES AND CONSEQUENCES 33 (2014).

29. The City of Los Angeles Police Department is commonly referred to as "LAPD". See *Inside LAPD*, L.A. Police Dep't, <https://www.lapdonline.org/inside-the-lapd/> (last visited Mar. 24, 2022).

30. The "Central Park Five" were five teenage boys wrongfully charged for attempted murder, rape and assault of a white woman jogger in 1989; ultimately, each teenager spent "between six and [thirteen]-plus years" in prison. Aisha Harris, *The Central Park Five: 'We Were Just Baby Boys,'* N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us.html>.

them, it is clear that these conditions have been exacerbated. We have allowed our so-called leaders to prioritize things in a way that works for the few. Jails, prisons, and police work for the few. The rest of us, especially if you're seen as not quite human, if you're Black, brown, poor, homeless, or mentally ill, you are seen as food for that system. So, we have a choice to claim power. We have a choice to say we are the leaders we've been waiting for.

We have the capacity to shift things, one of the people that's outside . . . I hope that you have all been signing the "Reform: L.A. County Jails" petition.³¹ We're saying we want to divest from jails. We want to invest in real mental health services. We want to invest in rehabilitative services. We want to invest in the answer to homelessness, not more police on the streets. House keys not handcuffs, right? So, we have to commit ourselves to fighting against the very same system that evolved from what you opened with. This country is based on genocide, the stealing of indigenous land, unpaid black labor, and the dehumanization of black people, right? That's what's evolved. That's what's in power. We can see it in D.C. like we see nowhere else, right? So, what is our response? What is the new anti-slavery movement? The new anti-lynching movement? The new Black power movement? The new Chicano power movement? What does that look like and what are we committed to do to make sure that we tackle this kind of system once and for all?

Bryonn Bain:

I've had a chance to do some work at the California Institute for Women, "CIW," the state's oldest prison for women which is still working and functioning.³² Ninety percent of the women there are incarcerated and have experienced some form of abuse, intimate partner violence, or domestic violence, often at the hands of a man who they retaliated against. I know at least one or two students who were in my classes are here tonight and I want to give it up for them for making it out and being here. Wendy Staggs³³ . . . on the crew here tonight for "We

31. "Reform: L.A. County Jails" is a "coalition of Los Angeles residents, community leaders, businesses, and organizations fighting to permanently reduce the population of people cycling in and out of jail. REFORM: L.A. JAILS, <https://reformlajails.com> (last visited Mar. 24, 2022).

32. CAL. INST. FOR WOMEN (CIW), <https://www.cdcr.ca.gov/facility-locator/ciw/> (last visited Mar. 24, 2022).

33. Wendy was a student in the University of California, Los Angeles's ("UCLA's") first Creative Writing Workshop at CIW Prison in 2016, an Inaugural UCLA Beyond the Bars LA Fellow in 2017, and a UCLA Beyond the Bars Fellowship Project Manager in 2021. Wendy earned two associate degrees in "Biblical Studies/Alcohol/Drug Counseling" with an emphasis on co-existing disorders. Having overcome her own trauma, Wendy has a passion to speak for

Rise” . . . part of what’s happened there also is that they have the highest suicide rate in the country. The [suicide] rate is five times the national average, and eight times the state average.³⁴ So, what has been your experience in coming into contact with mental health issues with the women you work with and what are some strategies that your organization has been pursuing?

Topeka K. Sam

When I think about my direct experiences when I was incarcerated, I think about the women, or the women that I would see, or other people who’ve been incarcerated. You all know about pill line, right?³⁵ I remember just hearing the pill line call and seeing probably more than 50% of the women who were in places that I was going to line up for a pill. I remember not really understanding what that looked like and why, right? It was like, “Okay, why is everybody going to get something just to take themselves out of a situation that they just come from?” I will continue to ask these questions. Then, I started to find out that people were just being medicated; they were being pushed into a different level of addiction. Then they will go out, and then they would be looking for the same things that they were on. Then they would be having to cope and substitute that with the same drugs that they were addicted to before they went in. And then it will be . . . you know, they couldn’t get jobs because of the criminal conviction. They

those silenced not only by their trauma, but by the judicial and prison systems. Her journey of self-discovery was nurtured by participating in the arts while incarcerated. She is a social and criminal justice reform advocate who has spoken in conferences across the nation. A former teaching artist for The Actors’ Gang Theater Prison and Reentry Projects, see *Prison Project, THE ACTORS’ GANG*, <https://theactorsgang.com/theprisonproject> (last visited Mar. 24, 2022), and she serves as a member of The Anti-Recidivism Coalition and California Coalition for Women Prisoners, see ANTI-RECIDIVISM COALITION, *supra* note 19. Wendy was the first alumna of the Prison Arts Collective program, see PRISONS ARTS COLLECTIVE, <https://www.prisonartscollective.com/pac> (last visited Mar. 24, 2022), and inaugurated Project Alice, see *Project Alice*, PRISON ARTS COLLECTIVE, <https://www.prisonartscollective.com/project-alice> (last visited Mar. 24, 2022), a visual arts group and open studio for formerly incarcerated individuals, foster children, and those system impacted.

34. “[A]lthough incarcerated women made up about [four] percent of California’s prison population from 2014 through 2016, they accounted for about [eleven] percent of the suicides.” *California Department of Corrections and Rehabilitation*, CAL. STATE AUDITOR 9 (Aug. 17, 2017), <https://www.auditor.ca.gov/pdfs/reports/2016-131.pdf>. “Almost all the suicides during this period occurred at the California Institution for Women (CIW)” *Id.* See also, Hillel Aron, *Why Are So Many Inmates Attempting Suicide at the California Institution for Women?*, LA WEEKLY (July 20, 2016), www.laweekly.com/news/why-are-so-many-inmates-attempting-suicide-at-the-california-institution-for-women.

35. “Pill line” is when imprisoned individuals form a *queue* or *line* to receive medication before returning to their prison housing unit. See Seth Ferranti, *How Rx Drugs Spread Through Prisons*, THE FIX (July 31, 2012), <https://www.thefix.com/content/psych-meds-prison90452>.

couldn't get housing because of all these barriers. Then it would be back to just what they knew that landed them back in prison.

And so, the work that I do specifically at the *Ladies of Hope Ministries*,³⁶ we help women through education, entrepreneurship, advocacy and spiritual empowerment. And when I think about mental health, and I know you had said earlier we don't talk about it . . . in a lot of our communities, specifically in communities of color, a lot of times . . . I know even when I think of traumas and things that I had been through, it was like we talked about it internally. Then you don't talk about it again, and you pray, that's the way they were supposed to handle things. You know, I am a firm believer in prayer, prayer does change things. But I also know through my experience that if I had gone to someone, to a specialist, and talked through some of the issues that I had been through in my life as it related to relationships and things, that I had been in abusive relationships . . . the cycle of abuse that I found myself in wouldn't have landed me through all of the victimizations and things that I had in my own life. So, I tried to help women and really give them this access [to resources,] so they can tap into their spiritual self. Once they really understand what that looks like, then [I] also tap them into different services, . . . [including] speaking to a social worker that actually is faith-based . . . it doesn't matter to me who you're connected to. I know for my journey that I connect with God. And that's what got me through. A person is able to connect to whatever higher power that also helps them through different treatments and that can also give them a level of accountability. That's a lot of the stuff we do.

Bryonn Bain:

Joel and Shaka, you both spent time behind the walls and have come home, as activists, as leaders in this movement. I really want to get your sense of what are the resources and services that are available to folks when they come home? What was your experience of mental health issues inside? What you experienced firsthand and then coming home? What are the greatest resources and the greatest gaps in resources for folks when they come home?

36. LADIES OF HOPE MINISTRIES, <https://www.thelohm.org> (last visited Mar. 24, 2022).

Joel Aguilar:

I think that's something that's not being said. You know, there's an emotional and spiritual aspect to this as well. And that comes through volunteers. Like in prison for example, we get help because volunteers come. And they spend time and that's something that's very essential for a person to be humanized, to be heard, to be seen. And this is what we do out here with ARC as well. It's like a family. It is the human contact. It is to be present. And I think that we need that. I think that's very essential.

Look, I think you know there's a psychological factor to this. There's also biological, if there's genetic, I don't know. There are also societal factors. I think that we, as a community, we need to be involved. We need to spend time, quick numbers by this, by the age of eighteen. Once you turn eighteen, you [have] spent 158 [thousand] hours on Earth. *One hundred and fifty-eight*. So, if you go to school every day, 180 days, six days, for six days a week, the number totals 13,000 hours. When you combine that . . . just think about that, that's 9% of time that you're under the leverage, or under the influence of education of a school. Now the other 91%, who's influencing you? And when you add, you know, like I said, the negative, the destructive, the destruction in our neighborhoods, in our homes. I mean, who's influencing our children? 91%. I was amazed. But that's what exactly . . . that's my life. That's what led me to this criminal lifestyle that led me to prison. In there, it was a shift. Something happened because people took interest groups, process groups. For example, the chapel, spirituality. I think that's the element that we're missing. A lot of our mental health brothers in prison are neglected. Like even from prisoners. But if you offer them coffee, a piece of bread, all of a sudden, they just kind of react; they're responsive. When I was a kid, I used to model my father because I looked up to him. And I think that, as humans we model each other in the same way.

Bryonn Bain:

Thank you. Shaka?

Shaka Senghor:

I spent a total of nineteen years in prison. Seven of those years in solitary confinement. What I witnessed in solitary confinement was unimaginable. The intentional breaking and destroying of the human mind. I watched man after man lose their mental faculties up under

the strict watch of the State. To me it is one of America's blind spots. As a country, we've fallen asleep at the wheel. We've allowed a level of suffering, dehumanization, degradation of our fellow citizens, our brothers, our sisters, our mothers, our cousins, our loved ones are suffering.

Anytime that you lock a human being in the cell for twenty-three hours a day, for extended periods of time, that's intentional torture.³⁷ They say that the majority of people begin to lose their mind within the first ninety days of being in solitary confinement. I've watched that happen in the first ninety hours, because a lot of these men that I was around, they had already suffered adverse childhood experiences, early in their childhood. Most of us went to prison with [post-traumatic stress disorder,] PTSD, and came out with compounded PTSD because we never got treated for the things that we deal with in our community. To be Black, to be brown, to be poor and white in America is to have a mental illness, is to be afflicted by the trauma that you see around you and your everyday interactions, as a human being. You can't exist in this country when you fall under one of those *otherings*. It's not healthy that when you drive you see police, you automatically shrink as a human being. That impacts you psychologically. It's not okay when you were a child, and you experienced the first murder before you experienced the first graduation. That's mental trauma.

We expect our children to see life through a lens that oftentimes isn't that clear. For people who have never been traumatized, who have never been around gun violence, who have never been around police brutality, they're seeing the world through these crystal-clear lenses. For our kids who the first time they were struck and saw that it was done out of love even though it was hurtful, and it was harmful, they begin to see that life from that point forward through those same glasses that have been dipped in the mud of abuse, harm, and hurt. From that point forward you can't see life clearly. And so, what's happening in our prisons is that we're seeing the normalization of the abnormal. We don't think nothing about a human being trapped in solitary confinement for seven years. Sometime our first response is:

37. *Solitary Confinement: Torture in U.S. Prison*, CTR FOR CONST. RTS. (May 31, 2012), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/torture-use-solitary-confinement-us-prisons>. See, Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 104 (2010). See HEALTH AND HUMAN RIGHTS IN A CHANGING WORLD 316-21 (Michael Grodin et al. eds., Routledge 3d ed. 2013) (1999).

“What did he do?” But what did the system actually do? You know, when we see our children being dragged out of classrooms and justify [the action as them being] adults, that is a mental illness.

I’m fortunate . . . to work with amazing human beings. We have therapists because we realize that you can’t go through that traumatic experience and walk the path of freedom alone. We have life coaches because we know that we all need a little bit of help to get to that next level. But more importantly, we have a common sense of community. So, when I look at this brother, we can communicate without even talking. When I look at this sister who has been through some of the most harmful degrading experiences, and we have an understanding that you don’t just have if you’ve never walked in our shoes. That’s a model that should be replicated in every community throughout this country. In order for that to happen, we have to be honest about what we’re intentionally doing to the people in this country. It is not okay to lock kids up for the rest of their lives. It’s not okay to lock people in cages for hours upon hours upon hours. If you did that to an animal, if you did that to little Sparky and put little Sparky’s ass in a cage for seven days straight, 23 hours, without letting him out, PETA will be at your door!³⁸ But you can do it to Sam. You can do it to Samantha. You can do it to Terrence. You can do it to Shaka. Until we change that reality, we will always be dealing with these issues.

Bryonn Bain:

Shaka touched on this eloquently and I want to put it out there to everyone before we open for questions. There are deep structural forces at the root of much of the harm in black and brown communities. I want to open this space to talk about what those structural forces are. We talked about a little bit, but I want to explicitly call out the largest structural institutional forces that are behind, not just poverty, but everything that’s linked to leading us to incarceration. The second part of this is: What are the most effective alternatives to prisons and police that you see in your work, and what would you recommend we take a more serious look at? How do we avoid using those tactics to deal with the problems in our communities that police and prisons only make worse and don’t do anything to really solve?

38. “PETA,” or the People for the Ethical Treatment of Animals, is an American animal rights organization based in Norfolk, Virginia. See PETA, <https://www.peta.org> (last visited Mar. 24, 2022).

Professor Melina Abdullah:

I think we need to be real explicit, right? We live under a system of white supremacist, patriarchal, heteronormative capitalism. That is the structure we live under. We can't pretend like the system isn't racist, like the system is colorblind, like Black people are treated like everybody else. And we need to also be clear. And I'm processing and talking at the same time so that's never a good idea but I'm still going to do it. So, I pray that the words that come out are right. I think it's important to look at the way in which white supremacy affects different communities differently, right? Anti-blackness is a particular form of white supremacy. So, we have to be very clear about the ways in which Black people are targeted by the State. This doesn't mean that poor white folks aren't targeted by the State. It doesn't mean that Latino folks aren't targeted by the State, but I think that we need to look at how that targeting looks different for each community. This is because even though there's lots of solidarity, there's also very clear ways in which we must resist. We must recognize we live under a white supremacist State. And I don't think anybody can miss it right now because we have a blatant white supremacist patriarchal capitalist in the *damn* White House, right? And he's doing it, and this regime is doing it in every single way. They're carrying out that mission in every single way, right? So, if we think about the rhetoric that comes out, what did he say yesterday about the national anthem. If you don't want to stand for the national anthem, maybe you don't need to be in this country. Maybe *you* don't need to be in this country, homie! Right?

So, there's the rhetoric, but we also need to think about how that rhetoric translates into both policies, and violence on the ground. Policy, in terms of how the prison system and police harass and abuse our folks, right? We're seeing, for one of the first times actually, the highest number to date of police killings. In terms of keeping record of numbers of people . . . who are killed by police. This year exceeds previous years, right?³⁹ We're also seeing a surge for the first time on record in hate crimes,⁴⁰ right? Historically, hate crime statistics have

39. The number of fatal police shootings grew from 996 in 2018 to 1004 in 2019 and the number amongst Black Americans is disproportionately higher than that for any other ethnicity—31 fatal shootings per million as of August 2020. *Number of People Shot to Death by the Police in the United States from 2017 to 2022, By Race*, STATISTICA (Mar. 2, 2022), <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race>.

40. See *FBI Reports Hate Crimes at Highest Level in 12 Years*, EQUAL JUST. INITIATIVE (Sept. 9, 2021), <https://eji.org/news/fbi-reports-hate-crimes-at-highest-level-in-12-years>; see Adeel

always shown a downward trend. This is the first time . . . actually this isn't the first time. It was the months that, right before the election took place. You saw a surge in hate crimes. So that rhetoric empowers violent white supremacy.

We also need to think about the way that patriarchy plays in. So, oftentimes we talk about the men who are imprisoned, but I'm glad that you're here, sis, because we need to talk about the way in which Black women are targeted for imprisonment, right? We need to think about that the vast majority of those of us who were in prison have mental health conditions. And it's gendered. Black women who were imprisoned suffer with mental health conditions. It is at an even higher rates than black men, right?⁴¹ We need to also think about capitalism. And, I know that some people like to do two things. They like to sum everything up. You know those on the left say everything is just about class: "It's just about class. And, if we just engage in class struggle, we'd be free." Right? But then, there's people on the other side, who say, "You know, we can neglect it."

We have to understand Manning Marable. If you haven't read the book: *How Capitalism Underdeveloped Black America*,⁴² that needs to be on your summer reading list. At the conclusion of that book, he says, "The road to black liberation must also be the road to socialist revolution." Right? And what he's talking about is the intertwining of racism. He doesn't talk explicitly about sexism, but sexism is in there along with class struggle. And so, when you talk about these systems, these systems are what created policing. These systems are what is expanding the prison industrial complex. That's trying to expand L.A. jails, right? That's what the system is doing. And then we need to think about how do we resist, and that resistance needs to take place in many different forms. So, we have to vote. We have to engage in that, and I know that's not always popular. I don't happen to vote for

Hassan, *Hate-Crime Violence Hits 16-Year High*, *F.B.I. Reports*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html>.

41. According to the study conducted by the Bureau of Justice Statistics in 2017, more than two-thirds of incarcerated women had "a history of mental health problem[s]" or were previously "been told they had a mental health disorder;" significantly outnumbering the approximately one-third of incarcerated men who have had a history of mental health or were previously told they had a mental health disorder. Jennifer Bronson & Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*, BUREAU OF JUST. STATS. 4 (2017), <https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/imhprpji1112.pdf>. See *More Incarcerated Women than Men Report Mental Health Problems*, EQUAL JUST. INITIATIVE (July 10, 2017), <https://eji.org/news/more-incarcerated-women-report-mental-health-problems>.

42. See MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY AND SOCIETY* (1983) (studying the intersection of race and class in the United States).

mainstream candidates very often, but you know we do have to elect folks. And voting can make a difference. We can think about cities like Newark, New Jersey that elected Ras Baraka. We can think about Jackson, Mississippi, where we elected Chokwe Antar. And Cat Brooks, the co-founder of the Anti-Police Terror Project is running for mayor of Oakland, right?⁴³ We can think about these opportunities to elect folks. And some people go: "We shouldn't vote." Look, the Black Panther Party ran Elaine Brown and Bobby Seale for office. So, don't buy this thing about it's not revolutionary to run for office, right? It's part of our history, but this is what we've done. We've left it in the hands of these elected folks to lead us. We've never won that way. You can't give up the struggle on the ground. So, I know y'all want to come to the forums or say, "I voted and now I'm done." Put that little sticker, you know, that stupid sticker they give you when you vote, right? Okay, maybe wear the sticker, right? But you aren't done. You're not finished with your work because you have an "I voted" sticker on, right? You're finished with your work when you've given everything you can to honor our ancestors. When you've given everything that you can to honor those warriors who've walked before us by giving all that you can to the struggle for our liberation. And that means signing petitions. That means voting. But it also means. . . it's Ramadan, so I'm gonna just say, "Shut stuff down." That's not actually our chant, right? But "Shut stuff down!" We got to shut stuff down. As long as we allow white supremacist, patriarchal, heteronormative capitalism to churn as if there's nothing happening, they're going to keep doing what they're doing, and pour more into the system that keeps us oppressed.

Shaka Senghor:

She always just drops so many jewels. I think it's so important. So, my personal belief is that all too often, we allow people to control our energy through their unhealthy narratives. Every time the current administration says something, we find ourselves in emotional turmoil. To me, there's nothing more disempowering than playing pity politics. Meaning that you're looking for people to pity you because you're allowing somebody to hurt your feelings. I believe empowerment is what disrupts and turns over systems. We have to stop wasting so much of our energy worrying about what they are not doing and worry about what we can do. Period. The world wasn't changed by

43. See ANTI-POLICE TERROR PROJECT, <https://www.antipoliceterrorproject.org> (last visited Mar. 24, 2022).

somebody whining about somebody else. It's changed because people actually got up and did something and made it happen. We recently had a relief concert around a bill that's currently sitting in the house. And this bill is a criminal justice reform bill. And some of my esteemed colleagues were invited to the White House. And because we're so emotional around the issue. People attacked these men and women who fight every day against the system. No sleep.

This sister Topeka sitting right here is one of my personal heroines. She fights every day for dignity for women who are incarcerated. Every day. When she walked into that White House, people judged her. And it *pissed me off* because I know her spirit, I know her heart, I know her commitment, I know her passion, and I know her wisdom. And she's wise enough to know that when there are these moments, where these conversations are being had, we have a responsibility to step in those rooms, even when we dislike the company that we know we'll be keeping—that is our responsibility. We have to push the envelope. We have to challenge these systems by actually doing the real work. Making a tweet that sound fancy and sound smart, it's not real work. You probably didn't even get off the bed or off the toilet to do that. Real talk. I know y'all be up in the morning. Let's be honest. We all get up and go.

But I'm serious, in the sense that that we have to be mindful of what we're doing to people. It was unfair for them to treat my colleagues like that. I was actually invited. Had I not had a prior commitment I would have gone because it's my responsibility. We have been duped into believing that people who haven't worked in our best interest are serving us while we criticize this system. And the rest of my colleagues, we celebrated Bill Clinton, we celebrated Hillary Clinton when they passed some of the worst criminal justice bills in the history of this country. So, we have to stop playing petty politics. We have to develop more critical thinkers. We have to have more critical analysis. But most importantly when you don't like what's happening. We got to get off our ass and get out there and make it happen and build the shit that we want to see.

Bryonn Bain:

Before we open up, I want to ask Joel and Topeka to jump in on this, but I want to focus the question in a very specific way. Part of what I've heard from Melina and Shaka is this sentiment challenging the popular idea that the system is broken. It's the idea that the system is

broken. And if we get to just fix it and make it work better, if we could just, you know, tape up the edges and bandage it up. And when in fact, the system is actually working exactly as it was designed to work. And so, we need to shift the paradigm of our thinking and begin thinking about how do we actually *break or, at least, disrupt* a system functioning just as it was designed to, and replace it with something more humane? How do we transform it into something that is humane? Because it was not designed to be humane, and it never functioned that way. Alright? So, my specific question for you, Joel and Topeka is: what are the skills that the folks in this room coming into this work need to have? What are the skills that are most needed right now in terms of the training and preparation? We got a lot of spirit being willing but if the flesh is weak, if the flesh is not prepared, if folks are not properly set up to actually do the work, then the work can't get done the way it needs to be done. And y'all are on the frontlines, work every day. What are the skills you need to see more of in terms of preparation for folks who are engaging in this movement that y'all are in the leadership of today?

Topeka K. Sam:

First, I want to thank you, Shaka, for those words, because it has been incredibly difficult over the last week. And thank you for acknowledging that. I really appreciate that. I love you. And so, when I think about the skills that are needed, I think about. I mean I'm a spirit animal, right? So, I think about just having the spirit of humility. I think in doing this work you have to remain humble. You have to learn how to put your ego aside. And you have to always check your own intentions. I've learned in the last three years because I'm new to just this movement. I'm new to this work. Since my release from prison in 2015 is when I really got involved. And it's been these different times. It's times when people want to come together. And you want to build coalition. You want to collaborate. When you believe that you're following the same mission and goals. And then, when people start to elevate based on their learning and understanding, then we want to pull and hold each other back and criticize people.

I think we need to start to look at this beast as a beast. And we need to understand that each of us up here have a different lane. Each of you in here have a different lane. And you just need to find what that lane is, right? If it's not your lane, then you have to learn how to cede, and to give it to someone else. Like this sister was kicking and dropping jewels. There's no need for me to add anything to what she's

saying, right? Because she got it. And then sometimes when you just sit back and you listen, you can learn. And then when you learn, you can develop a different way of critical thinking. You know? And then I think what's incredibly important, too, and learning through this last week is the adage of reading is fundamental. I'm gonna go back into a course I took when I first came home. It was Biblical Exegesis. And I remember being in this course, and there were all these theologians and PhDs, and I'm just new. And I'm like, "Wow, I don't know how I'm gonna make it through this class." All these brilliant minds. The professor was like, "You are going to be one of the best people in this class because you come in here with an open heart and open mind." I wasn't coming in there with these beliefs based on things that I had learned before. But it was also about not just: "Because the Bible says this." You need to read it for yourself.

Bryonn Bain:

How does that dynamic impact your justice movement work?

Topeka K. Sam

I think about these bills, and I think about these laws, and I know that I have been doing my work based on spirit work. But also, in learning and moving in this work, you depend on your elders and your allies a lot of times in the work. And sometimes we just go ahead, and we sign off on things. And we don't look at it because we believe that the person who was teaching us is telling us the right thing to do. And then you soon learn that people have their own political agendas, their own intentions. And a lot of times it's not even for the people that they're supposed to be serving. So, what I've learned is that it is incredibly important for you to do your own due diligence, to take your time, whether it's to read to understand, whether it's to learn to heal. Because we can't lead unless we really have healed ourselves. Because then what you end up doing is pouring your trauma into someone else's trauma and that perpetuates trauma. And you know, we have a big mess. So, I think that's how to dismantle a system, because we're not trying to fix it. It is really to transform yourself. And it starts from within.

Bryonn Bain:

Thank you. Joel, what needs do you see in your own movement work?

Joel Aguilar:

Yeah, I'll start with what I said at the very beginning. We all have a stake at this. Just look at the model of ARC.⁴⁴ What ARC has done here in California, at the forefront of changing laws, of going into prisons and sponsoring education, higher learning groups. And it's out here preparing. It's like there's a saying in recovery that, "You clean your own side of the street." And the men that are coming home are being received with open arms from their brothers who were in there. What we do out here, we do for the next man who's sitting in that cell, thinking what he's going to do when he gets out. And it's about being involved. Mobility. I mean the civil rights movement started with people. We begin this change because we all have a stake in this. This is a national defense crisis. If another foreign country was doing this to us, this would be deemed as an act of war. So we all have to mobilize. We all have to be part of this solution. And look, if we shift the blame just on one entity, then the implication is that that one entity is going to fix our problems. And that's not true. It never happened. I take responsibility. That's what I learned in prison. And I'm out here, paying it forward.

Bryonn Bain:

As we close, I want to acknowledge some of the other folks I know who have been doing this work for a very long time: *A New Way of Life*,⁴⁵ Dignity and Power Now,⁴⁶ Youth Justice Coalition,⁴⁷ Black Lives Matter, Inside Out Writers,⁴⁸ among many more than I can name here. There's a lot of folks out here doing this work. I see you. We see you.

44. "ARC" is the Anti-Recidivism Coalition, a non-profit organization founded by Scott Budnick, James Anderson and other formerly incarcerated activists in 2013, working to end mass incarceration in California. The organization provides support network comprehensive reentry services, and opportunities to advocate for policy change. See ANTI-RECIDIVISM COALITION, *supra* note 20.

45. See A NEW WAY OF LIFE REENTRY PROJECT, <https://www.anewwayoflife.org> (last visited Mar. 24, 2022) (providing housing, case management, pro bono legal services, advocacy, and leadership development for individuals rebuilding their lives after incarceration).

46. See DIGNITY & POWER NOW, <https://dignityandpowernow.org> (last visited Mar. 24, 2022) (Dignity & Power Now organizes programs centered around activism, health and wellness, and leadership building, including "a coalition to end sheriff violence, a coalition to stop jail construction . . . [and] a leadership institute for [individuals] coming home from prison.")

47. See YOUTH JUST. COAL., <https://www.youthjusticela.org> (last visited Mar. 24, 2022) (working to build a youth, family, and incarcerated peoples movement to challenge drug addiction to incarceration and race, gender and class discrimination in Los Angeles).

48. See INSIDEOUT WRITERS, <https://www.insideoutwriters.org> (last visited Mar. 24, 2022) (working towards reducing juvenile recidivism by providing a range of services that meets the unique needs of presently and formerly incarcerated youth and young adults).

Audience Member #1:

I represent *A New Way of Life* . . . I want to say to the audience: I'm a number's person, and . . . I've been following the numbers. And as a taxpaying citizen what scares me the most in California is that we have our governor spending eleven and a half billion dollars to fund thirty-three prisons in California. That's at a cost of about \$76,000 per prisoner.⁴⁹ And we are funding that as taxpaying citizens. They're taking money away from everything. And what bothers me is *what we don't have*. We are getting that information out, but I would like for us to be aware of the monies that are being spent. . . . The money we can divert to other programs and other things that will help people instead of incarcerating people. We're spending \$76,000, the amount that it costs to send somebody to Harvard—just to lock somebody up every day. All day long.

Bryonn Bain:

That's an incredibly important point. Thank you.

Professor Melina Abdullah:

There is this website called Million Dollar Hoods that your colleague (to Bryonn), Kelly Lytle Hernandez, developed. Please check it out because it is about the choices we're making. What could we be doing with that money if we weren't spending it on incarceration?

Bryonn Bain:

Yes! Thank you. I see your hand there.

Audience Member #2:

With mass incarceration, it seems like a lot of it stems from stigmatizing stereotypes by people that are decision makers. They make decisions off of presumptions about people. Groups. Things like that. So how much do you think mis-education with American history plays a part? It seems like a lot of people don't know about convict leasing. They don't know about destruction of Tulsa, Oklahoma—Black Wall Street. And so, if the school system isn't teaching proper American history, accurate and inclusive American history, people grow up not

49. As of 2022, annual cost to incarcerate an inmate in California is \$106,131 annually per person. *How Much Does It Cost to Incarcerate an Inmate?*, LEGIS. ANALYST'S OFF., https://lao.ca.gov/policyareas/cj/6_cj_inmatecost (last visited Mar. 24, 2022).

knowing that these stereotypes are rooted in history. They were made by people in power. Do you think we could ever change the American history classes or implement implicit bias training? Something that addresses the stigmatizing stereotypes that lead to mass incarceration?

Bryonn Bain:

Great question. Mis-education, stigmatization, stereotypes, how much of that is related to what we are talking about?

Shaka Senghor:

Thank you for asking a great question. One of my mentors, Joi Ito at MIT Media Lab says, “Education is what they do to you. Learning is what you do for yourself.” I say that to say this: Ava DuVernay and her artistic brilliance directed the film *13th*.⁵⁰ It gave the most accurate historical breakdown of our current prison system. Is what it is. It’s not just stereotypes. It’s actually written into the constitution that nobody should be subjected to involuntary servitude except for those duly convicted of a crime. So basically, through the constitution, slavery was reinvented in its modern form—also known as mass incarceration.⁵¹ So it’s not so much a stereotype as it is legislation, which is why it’s so important for us to be in those rooms when it comes to trying to change policies and trying to undo the harm that the constitution, which is the fabric of this country, has done over the course of many decades.

The more we learn . . . we don’t have to be relying on educational institutions which are basically like cousins of the prison industrial complex, so to speak. I mean sometimes you walk in one and you can’t tell the difference which one you are walking in—especially if you come from the hood. I’m from Detroit so walking in our schools is

50. The 2016 documentary, *13th*, director, Ava DuVernay, uses both historical footage and interviews that provides in-depth look at the prison system in the United States and how it reveals the nation’s history of racial inequality. *13TH* (Netflix 2016). The Thirteenth Amendment to the United States Constitution abolished slavery, but it also included a provision many people don’t know about and that is what this documentary brings to view. Ratified in 1865, the first section of the Thirteenth Amendment provides: “Neither slavery nor involuntary servitude, *except* as a punishment for crime whereof the party shall have been duly convicted, shall exist.” U.S. CONST. amend. XIII, § 2 (emphasis added). This exception justifies the use of forced labor if the laborer is incarcerated. The documentary makes the case that this loophole is only one of the justifications for continuing the subjugation and exploitation of people of color.

51. See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 953 (2019); see also, Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177>.

like walking in San Quentin or Folsom because it's real out there. But also the intention behind the school is just as catastrophic in terms of the outcome that it is producing where we're basically just training people not to think for themselves . . . you can't think for yourself, you can't empower yourself. Therefore, you can't change the environment in a way that honors who you are. So, it's all about learning. We have to stop relying on these broken institutions to inform us of what are the things that we need to know. Instead, let's take this opportunity to really build. Go watch the film *13th*. Start a conversation online . . . it's still restricted, but it's not as restrictive as the past where we couldn't communicate across all these spaces. So those are the opportunities that we have right in front of us that we have to take advantage of.

Professor Melina Abdullah:

Can I just quickly add to that? I'll say there's also a difference between schooling and education. . . . I think brother Shaka is absolutely right. . . . Everybody read Paulo Freire's work . . . we need to think about how do we build educational models that are liberatory. We're coming up on the 50th anniversary of Black Studies/Ethnic Studies. We need to think about what my discipline was created to do. It wasn't created by the institution . . . Black folks and brown folks, and the Third World Liberation front . . . demanded that the institutions be shut down so that we can build models of education that are actually liberatory. In LAUSD, and this is about the power of people, right? Just a couple years ago, it was students and teachers, and community organizers who demanded that within LAUSD we have an Ethnic Studies requirement. And so, my daughter who's now a ninth grader is going to be the first class of students who graduate with an Ethnic Studies requirement. Now it doesn't fix everything that happens in the classroom, but it's very different. It adds tremendously to what they've been learning. And what it does is that it teaches them that they have the power. That *we* have the power to transform systems – to topple systems that are oppressive, and build something new.

Bryonn Bain:

Brilliant! Thank you.

Audience Member #3:

This is an amazing night! Thank you so much. My son was in Twin Towers and it's like being in a sardine can. If anyone's ever seen what it's like . . . there's nothing for the inmates to do. And he was in jail for mental health. I thought I heard about EBI (Educational-Based Incarceration).⁵² And I asked him if he could be part of that. I found out that none of the mentally ill—mental health inmates—were allowed to even be considered for EBI. And I just want to encourage you all to try to see if you could get more because I did a lot of activism about that. And now they do have it, but not enough. So I really think when they're in jail, try to help them move forward because otherwise they get sicker. . . . Do you have any other ideas about that? I'd love to know.

Bryonn Bain:

Topeka? Joel? Either of you have a response? More of these kinds of services inside facilities? Were there particular programs that you participated in that were more than just the usual okey-doke programs inside the facility? Programs that actually made a difference? Made an impact that you would like to see more of an investment in—for folks who are in this room and committed to doing that kind of work?

Topeka K. Sam:

For me, there were none. I was in federal prison. And then the two federal prisons that I was in. . . If you did not have your GED, then they offer the GED course. There were no Pell Grants.⁵³ So if a person wanted to do any college courses, they didn't offer them in the prison, and you had to do a correspondence course. Which you had to pay for. And you all know that people are making \$5 a month. So

52. *See* EDUCATION-BASED INCARCERATION AND RECIDIVISM: THE ULTIMATE SOCIAL JUSTICE CRIME-FIGHTING TOOL (Bria D. Fitch & Anthony H. Normore eds., 2011) (When connecting education-based incarceration to leadership and social justice, several issues come to mind, beginning with the universal understanding that definitions of social justice are based on a variety of factors, like political orientation, religious background, and political and social philosophy. An increased body of researchers in educational leadership, ethics, law, sociology, corrections, law enforcement, criminal justice, and public health agree that social justice is concerned with equal justice, not just in the courts, but in all aspects of society. Social justice demands that people promote a just society where people have equal rights and opportunities; everyone, from the poorest person on the margins of society to the wealthiest deserves an even playing field.).

53. A Pell Grant is a federal financial aid program usually awarded to undergraduate students with exceptional financial needs and "have not earned a bachelor's, graduate, or professional degree." The grant usually does not need to be repaid. *Federal Pell Grants Are Usually Awarded Only to Undergraduate Students*, FED. STUDENT AID, U.S. DEP'T OF EDUC., <https://studentaid.gov/understand-aid/types/grants/pell> (last visited Mar. 24, 2022).

there's no way they could pay for a college course. This is in federal prison. For women, they offered us knitting and crocheting and beading and plastic canvassing. I mean it was really a joke.

I always say that for me, in my experience, that prison didn't change me. It was the women that were in there that did. So, your resources for me were right there through the sisters. Through the books and things that they would tell me to read . . . I was very fortunate; I had a support network at home. I had a mentor that came in and saw me. I had visits every week. So, I had a plan. I was very spiritually grounded. I knew what I wanted to do. But it had nothing to do with the prison. That's why it's very important for us to think about alternatives to incarceration, and how do we reinvest that into community-based organizations that are led by formerly incarcerated people and directly impacted people.

Bryonn Bain:

On point. Thank you, Topeka.

Shaka Senghor:

When I was inside, I was fortunate. I just had incredible mentors. . . . They're currently dying in prison. They've been in prison for 40, 50 years now. But one of the things I really want to lift up is the model that ARC has. Seriously. And I'm not just saying that because I'm the Executive Director. I'm serious and very intentional about this. We have very important "in-reach" programs. A lot of people do outreach. We have a member team called Hope and Redemption. The leader of that team is our director, Sam Lewis. . . . He's dealing with some things. We sent a prayer up for Sam. These are lifers—men who literally have gotten out of prison after thirty-something years. 20 years. 30 years. They go back into prison four times a week. Four times a week to provide hope and love to men who hope to be them one day. We have a team that goes into several juvenile halls and spends time with the young men to make sure that they don't end up graduating to the prison system. Those models can be replicated because it's peer to peer. It's people who've lived through it. And the crazy thing is that people are resistant to that outside of California. And I couldn't share this information without acknowledging the founder of ARC who's actually here, Scott Budnick.

This organization serves hundreds of members and was sparked by him just going inside and having proximity to young men who were suffering. And he decided to do something about it. Now, nearly five years later, hundreds of members serve. . . . It is working. Super low recidivism rate. Seventy percent of people go back to prison. Less than 10% of ARC members end up back in that environment. Literally just because somebody decided to do something different. Going inside, showing a little love, showing a little care produces different outcomes. Everybody in this room is capable of doing that. You don't have to join ARC to do it, but you can do it. A little bit of love. A little bit of care, and a lot of hope goes a long way.

Bryonn Bain:

I have to underscore what you said by mentioning that two summers ago ARC did a survey of its over 250 formerly incarcerated members, in which they asked what were the top three things you need when you come home from prison. On that top three list, housing and employment were two and three. But number one, if I recall correctly—and I'm sure I'll be corrected if I'm mistaken, but I think I'm not—number one was mentors. Mentors! Folks who've been through what brothers and sisters inside are going through and have not forgotten about this struggle and remain committed to making sure they give a guiding light and a pathway to freedom on the path that they're on. So, I want to acknowledge and celebrate what you just said as well, Shaka. Thank you.

Someone in the back had a hand up?

Audience Member #4:

Hi . . . I'm currently in the United States Navy . . . I just wanted to get your opinion about how you feel about people who serve in the military, especially those of color. And my other question was, with me, all my life since 2008, when I was 18, I've always been a libertarian. I don't agree with what Democrats or Republicans were saying. So how do I go off. . . and find a party that represents what I feel?

Bryonn Bain:

I want to make sure I heard the question correctly. I think it is was: What do you think about the military industrial complex? People of color in the military? Any thoughts?

Shaka Senghor:

They probably got PTSD too.

Bryonn Bain:

I'll say this: I spent a lot of time on Rikers Island. I'm from Brooklyn, New York. The East Coast. Been here for less than three years. LA has the most folks incarcerated in any jail system in the world, but New York and Rikers Island is the largest penal colony. One space with ten jails—over 15,000 people when I started teaching the young folks there. And inside the largest High School at Rikers, because there are several, there is a big sign when you first walked into Island Academy High School. They have a picture of a man who was split in half. And on the back half he has his green prison outfit on, and the front half, he has a camouflage military outfit on— holding an M-16. And over the top it says: "Choose your green." As if to say for the sixteen to nineteen years old, over 4,000 to 5,000 every year are at Rikers, these are your options. These are your choices. Choose to be in prison. Or choose to go give your life and pledge allegiance to the flag of a country that has never pledged allegiance to you.

I say that as the son of an Army veteran who, with a medical disability, had to fight just to get the basic minimum disability he was promised, because after experiencing the trauma that he experienced in the US Army, he came home and did not get the basic dignity and respect that any human being deserves. Alright? Especially one who's put their life on the line. . . . So, I think there's a lot of parallels for us to think about in terms of the experience of folks who are incarcerated— folks who experience the prison industrial complex and folks experience the military industrial complex.

Last thing I'll say is this: before (President) Eisenhower left office, one of the things I recall he had to say was that you should beware conflating your interest in security and safety with the profit motive.⁵⁴ Beware of allowing your interest in generating capital and profits with

54. In President Dwight D. Eisenhower's farewell address in 1961, he urges the needs to seek balance amongst a range of different interests. Eisenhower states, "each proposal must be weighed in the light of a broader consideration: the need to maintain balance in and among national programs—balance between the private and the public economy, balance between cost and hoped for advantage—balance between the clearly necessary and the comfortably desirable; balance between our essential requirements as a nation and the duties imposed by the nation upon the individual; balance between action of the moment and the national welfare of the future. Good judgment seeks balance and progress; lack of it eventually finds imbalance and frustration. *President Dwight D. Eisenhower's Farewell Address (1961)*, NAT'L ARCHIVES, <https://www.archives.gov/eisenhower/>

being mixed up with the idea of national security. Because, ultimately, that's what happened. We've seen it not just with the military industrial complex, but with the prison industrial complex. We know both are driven by this idea that they can generate huge profits off our suffering and on the backs of other people. I don't lay blame folks who feel like they have few options and few choices and feel forced into these small spaces where their lives are not respected and given dignity and fundamental decency. I don't blame folks, but I want to call for a sense of critical consciousness and thinking about those choices within the broader context of what our communities are facing. I see we have another hand. We have a microphone back there?

Audience Member #5:

Thank you very much. Listening to you guys and following the current events, I cannot stop and think about Palestine. I just came back three weeks ago so everything is fresh in my mind. In Palestine, they arrest young children. They have administrative detention. Kids are tortured. You guys heard about Ahed Tamimi?⁵⁵ You guys know what happened to her when she slapped a soldier? It's not in the news, but an Israeli soldier shot her 15-year-old cousin. Almost blew his brains out. Once Ahed Tamimi found out that her 15-year-old cousin got his brains blown out, she reacted like anyone else would react, and she slapped the soldier. So, the news came out that, "Why is this Palestinian slapping an Israeli soldier?" That was the news. And then she is incarcerated. Her mom recorded that slap, and because she uploaded that video on Facebook, she has been detained for that. So, there's a lot of connections to the way Palestinians are treated to the way that our black and brown brothers and sisters are treated here. Add to that the fact that this country—your country—America, gave Israel \$38 billion to support Israeli apartheid.

Now, if we bring it on a local level . . . thirty-eight billion dollars to Israel to continue this same type of torture—the way the city of LA put a lot of money to the police department. We got to change the way

/www.archives.gov/milestone-documents/president-dwight-d-eisenhowers-farewell-address (Feb. 8, 2022).

55. Ahed Tamimi is a teenage activist in Palestine who was incarcerated for confronting Israeli soldiers. The incident was filmed and went viral internationally. She is seen as a symbol of the Palestinian resistance. Yasmeen Serhan, *A Symbol of the Palestinian Resistance for the Internet Age*, ATLANTIC (January 5, 2018), <https://www.theatlantic.com/international/archive/2018/01/internet-famous-in-the-west-bank/549557>. See also, Oliver Holmes & Sufian Taha, *Ahed Tamimi: 'I Am a Freedom Fighter. I Will Not be the Victim'*, GUARDIAN (July 30, 2018, 1:40 PM), <https://www.theguardian.com/world/2018/jul/30/ahed-tamimi-i-am-a-freedom-fighter-i-will-not-be-the-victim-palestinian-israel>.

this country puts a lot of money in the defense budget. We got to shift our narrative from security to criminalizing our people—defense budget to bombing other countries—in order for us to secure and have public safety. To ensure public safety means that our children have to have a good education. Our elders should have senior housing. We have to talk about the basic human rights. And that is how you have public safety on a local level. That's how you have social national security on a national level. So let's shift the security aspect and make it more humane.

Bryonn Bain:

That was more of a comment, but I'm grateful for it.

Audience Member #6:

How are you doing? I'm from a program called Repent Atlantic City, New Jersey. Yeah, give me a clap. I have had the unfortunate experience of going through the incarceration process. I have been in that Twin Towers unfortunately. I did over 10 years in prison in New Jersey. I found ways to try to overcome those obstacles in getting out and doing so—diligently striving to do so—the obstacles that I found most is with some of the programs in that “nonprofit” system. That is really not set up for us to be able to do peer to peer because they really don't recognize our value. How do we overcome these obstacles that are set up amongst us? We already deal with all the other problems when we're trying to get out there and really help. You got people who have monies that are intentionally blocking these avenues. How can we reach out to brothers who are like yourself? Sisters who are like yourselves? Who have been there and know how to do it? And be able to replicate that elsewhere? Because right now the struggle is serious, and we need your help.

Topeka K. Sam:

Thank you for that question. I could just talk about it from my experience. When you talk about systems and funding and how do you do replicate models. I have *Hope House* – which is a safe housing space for women and girls in the Bronx. And my house is a replication model of *A New Way of Life*—which is Susan Burton's housing, and we started off of a grant from Susan Burton. And so, I share that because that's another formerly incarcerated woman that I had reached out to, who I heard was doing the work that I wanted to do.

And after having conversations with her, she invested and poured into me, right? So that I can do what I needed to do. And that helped me get started. And once I started to move, and I was able to get the house full. And through all the adversities that we have in the community, I was still able to go to different foundations because I had tangible work. And then the foundation started to fund us.

So, I think first, again, when we think about the network, and we got to think about it, you know? Also, before I was incarcerated, I was an entrepreneur. I always think about like diversifying portfolios. You don't always have to go after the same foundations in the same ways of funding that you see everyone else doing. It's how do you find different creative ways in order to fund the work that you do. But it also starts with building community and within your network. So yes, you can do replication models. And maybe that's something that you can talk about with ARC—with the brothers up here because there might be something that's working or that can work in Atlantic City. And also look for other things that are happening within your community. There's a large national movement of formerly incarcerated leaders. And so, tap in . . . there's a few up there in Jersey, so we can always connect you too. But social media has given us the ability to really connect in ways that we wouldn't have before. So, I think it's really not as difficult. I'm just saying this based on my experience, right? I think the difficulty is that we always go after what we see other people doing, and not necessarily doing our research and due diligence to see, like, "Hey, how can I get something done?" You don't want to be tied into a lot of these foundations anyway, to be honest . . . we can talk afterwards.

Bryonn Bain:

Thank you. We have time for just one more question. Right here please?

Audience Member #7:

I'm part of Transitions Collective, a student organization at Cal State San Marcos. We are composed of formerly incarcerated students, and students who have family members who have been impacted by the criminal injustice system and allies. And my question for you is: we just started about a year ago at the university, how can we better assist in offering our services and our help and guidance for folks who are

coming out of the prison system—to better reintegrate and succeed in higher education?

Joel Aguilar:

Yeah, I'll share a little bit. So, I'm back in college. I just finished my semester maybe two weeks ago. And I think that you know a lot of the times I think with me, for example, I had to deal with the aspect of shame of not coming out in a sense. I was in a closet. So, I was going to school, and no one knew . . . no one knows that I'm formerly incarcerated. And that was just psychological. It was probably a defense for me to protect myself because I didn't want to be judged. So, I think your first approach . . . that it should be kind of like very sensitive. Every case is different. I don't think we're going to find something that's categorical, that's going to fit everyone. So, I would just kind of like approach it individually. Each person is different, at a different stage in their life, even when you come. . . For example, I wasn't sure what I really wanted to major in. And it was me just going in school and figuring that out. And what was truly my passion was, for example, having mentors. I have mentors that aren't just formerly incarcerated. I have mentors who are attorneys . . . like Elizabeth Calvin . . . Efty Sharoni. These are the people that I go to and I ask, "What do you think I should do?" And they guide me. So, like I said, and for the brother . . . it applies for him, too. We're fortunate here in California that we have an organization like ARC and a lot of nonprofits who are allies with ARC and are part of this work that we do. But to affect the life, you don't need ARC. You don't need all these other allies. You can do it on your own. You can impact one life and that's enough. You're saving a live. This is a human crisis. You're saving one life. And I think that's enough.

Bryonn Bain:

I'm getting the signal that we are at time, so I want to close out by thanking our powerful guests: Topeka, Melina, Joel and Shaka. Please give them a big round of applause. I want to thank Gina Belafonte and Christina Pacheco for their leadership and work to pull this together. All of the We Rise organizing staff, the team, everybody involved in doing all the work. I want to end by sharing words given to me by a mentor of mine, Harry Belafonte, who told me a worker's anthem that I will never forget: "Calculate carefully and ponder it

well; And remember this when you do; My two hands are mine to sell;
They built your machines; They can stop them too.”⁵⁶

Thank you. Peace, and power. Good night!

56. BARBARA DANE, *SONG OF MY HANDS* (Paredon Records 1973).

Reimagining Literacy: The Inextricable Nexus Between Subsidized School Meals and Basic Minimum Education

ELORM K. SALLAH

In 2020, Gary B. v. Whitmer, the Sixth Circuit of the United States Court of Appeals announced that embedded within the Due Process Clause of the Fourteenth Amendment of the United States Constitution is the fundamental right to basic minimum education.¹ Concurrently, a growing number of schools and school districts are adopting universal free meals (“UFM”) programs, providing free lunch and breakfast for all students, regardless of income. Advocates of these programs believe they will reduce the stigma that limits participation within the federal programs discussed in the previous section, reduce administrative burdens, address food insecurity amongst students, and significantly improve students’ readiness to learn. To support this point, contemporary empirical research presents convincing results demonstrating that school districts that implement UFM programs increase student mathematics and reading test scores. Based on these findings and the holding of Gary B., this Note advances the reexamination by the Supreme Court of the United States of whether basic minimum education is a fundamental right embedded within the Fourteenth Amendment.

1. 957 F.3d 616 (6th Cir. 2019), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem.); see U.S. CONST. amend. XIV.

**Reimagining Literacy: The Inextricable
Nexus Between Subsidized School
Meals and Basic Minimum
Education**

ELORM K. SALLAH*

INTRODUCTION	200
I. A REVIEW OF THE FOURTEENTH AMENDMENT: CITIZENSHIP, DUE PROCESS, AND EQUAL PROTECTION .	202
A. <i>Citizenship</i>	202
1. Origins and Substantive Citizen Rights	202
2. National Citizenship	204
B. <i>Due Process</i>	205
1. Due Process Clause	205
2. Compulsory School Attendance	207
C. <i>Equal Protection</i>	208
1. Equal Protection Clause	208
2. Discriminatory Intent	209
II. CONTEMPORARY SUPREME COURT OF THE UNITED STATES JURISPRUDENCE OF THE FUNDAMENTAL RIGHT TO BASIC MINIMUM EDUCATION.....	210
A. <i>Brown v. Board of Education</i>	210
B. <i>San Antonio Independent School District v. Rodriguez</i>	211
C. <i>Plyler v. Doe</i>	212
D. <i>Gary B. v. Whitmer</i>	214
1. Conditions Alleged in Detroit Schools.....	215
2. Educational Outcomes in Detroit Schools	216
3. A Fundamental Right to a Basic Minimum Education.....	216

* J.D., Howard University School of Law, 2022; B.B.A., The George Washington University, 2016. Thank you to Professor Sha-Shana Crichton for her guidance as my faculty advisor during the drafting process; Maya Lowe for her friendship, edits, and constructive feedback; and to my incredible colleagues on the *Howard Human and Civil Rights Law Review* for their bright minds and hard work.

III. FEDERAL EFFORTS TOWARDS FREE ACCESS TO MEALS WITHIN PUBLICLY FUNDED PRIMARY AND SECONDARY SCHOOLS	217
A. <i>National School Lunch Program and School Breakfast Program</i>	218
B. <i>Community Eligibility Provision</i>	219
C. <i>Summer Food Service Program</i>	220
IV. STUDENT ACCESS TO SUBSIDIZED MEALS IN SCHOOLS ADVANCE EDUCATIONAL ATTAINMENT	221
A. <i>Low-Income, Limited Nutritional Value, and Brain Development</i>	221
B. <i>Empirical Studies of Universal Free Meals</i>	222
1. New York	222
2. South Carolina	225
V. SUBSIDIZED SCHOOL MEALS ARE CONSEQUENTIAL TO ENSURING STATES PROVIDE ALL STUDENTS WITH A BASIC MINIMUM EDUCATION	228
A. <i>National Citizenship Requires Literacy</i>	228
B. <i>Immersed within the Due Process Clause is the Fundamental Right of a Basic Minimum Education</i>	229
1. Literacy is a Component of American History and Tradition	230
2. Literacy is Implicit in the Concept of Ordered Liberty	233
C. <i>Access to Literacy is an Equal Protection Issue</i>	234
1. A Legitimate Government Interest Does Not Support Unsubsidized School Meals	235
2. Discriminatory Intent Underlies Many State Education Funding Schemes	236
VI. COMBATTING THE CHALLENGES TO BASIC MINIMUM EDUCATION	237
A. <i>Defining Basic Minimum Education as a “New” Fundamental Right is Proper</i>	237
B. <i>Although the Constitution is a Charter of Negative Rights, Not Positive Rights, the Right to Literacy is a Fundamental Right</i>	238
CONCLUSION	239

INTRODUCTION

In 2020, the coronavirus (COVID-19) pandemic transmuted public elementary, middle, and high school instruction from in-person to Internet platforms.² As a consequence of the pandemic, on March 18, 2020, Congress passed the Families First Coronavirus Response Act (“FFCRA”), allowing the Food and Nutrition Service (“FNS”) to subsidize all school meals provided by the National School Lunch Program (“NSLP”) and School Breakfast Program (“SBP”) “at [a] free rate [for five] school days” until September 30, 2020.³ Subsequently, on October 1, 2020, Congress extended the NSLP and SBP subsidy to September 30, 2021, when it passed the Continuing Appropriations Act 2021 and Others Extension Act.⁴ On April 20, 2021, the FNS published a policy memorandum articulating the establishment of a waiver of the Seamless Summer Option (“SSO”).⁵ The waiver stipulated that SSO, a program that ordinarily provided free meals to qualifying students during summer vacations,⁶ may operate during the “regular school year, through June 30, 2022.”⁷ Under these authorities, students enrolled in SSO schools may access free meals without establishing eligibility according to the pre-pandemic FNS requirements.⁸

In March 2020, every Wisconsin public school district opted into the SSO program.⁹ However, on June 9, 2021, the Waukesha School District, which at the time served 14,000 students in the Milwaukee metropolitan area, opted out of the federal program.¹⁰ Between 2018 and 2019, 4,249 students of the Waukesha School District qualified for free or reduced-price meals, amounting to 36% of the student body.¹¹ The Waukesha School District’s board cited desires to return to pre-pandemic operations and concerns about SSO impacting future NSLP applications once the universal offering expires on June 30, 2022.¹²

2. See Rachel F. Moran, *Persistent Inequalities, the Pandemic, and the Opportunity to Compete*, 27 WASH. & LEE J. CIV. RTS. & SOC. JUST. 589, 591 (2021).

3. Pub. L. 116-127 § 2202(a), 134 Stat. 186 (2020).

4. Pub. L. 116-159 § 4501(h), 134 Stat. 744 (2020).

5. *Nationwide Waiver to Allow the Seamless Summer Option through School Year 2021-2022*, U.S. DEP’T OF AGRIC. FOOD & NUTRITION PROGRAM, (Apr. 20, 2021) <https://www.fns.usda.gov/cn/child-nutrition-response-85> [hereinafter *Nationwide Waiver*] [<https://perma.cc/U8NC-33ZJ>].

6. 42 U.S.C. § 1761(a)(8).

7. *Nationwide Waiver*, *supra* note 5.

8. *Id.*

9. María Luisa Paúl, *A School District Opted Out of a Free Meals Program, Saying Students Could ‘Become Spoiled’*, WASH. POST, <https://www.washingtonpost.com/education/2021/08/27/waukesha-wisconsin-schools-reject-federal-program> (Oct. 25, 2021, 3:42 PM).

10. *Id.*

11. *Id.*

12. *Id.*

One of the School District's board members opposing the program, Karin Rajnicek, expressed that parents in Waukesha must understand that if they have children, they "should provide for them,[but] if [they cannot], there is help for them."¹³ However, she emphasized that parents may easily "get sucked into [the SSO program,] . . . become spoiled [by the program] and then . . . think [it is] . . . everyone else's problem to feed [their] children."¹⁴

Nevertheless, other members of the board observed students forgo "meals funded by the [NSLP]" before the pandemic because "they either did not qualify for free or reduced-price options" or "their parents did not submit" applications for the federal nutrition programs discussed above.¹⁵ Parents of Waukesha School District students noted that children avoid "awkward conversations" with their peers about participating in federal free and reduced meal programs under the School District's universal free meal program.¹⁶ Additionally, parents report that the ubiquitous free meal program benefits children "whose families do not qualify" or whose families are "deterred from" filing a federal nutrition program application because of stigma.¹⁷ Even "families who live paycheck-to-paycheck" but do not meet the income qualifications to participate in federal nutrition programs benefit because their children can automatically access free meals at school.¹⁸

This Note advances the position that school meals are an integral component of the educational process, and requiring families to pay for meals, encumbers the educational process within primary and secondary schools. Moreover, this Note asserts that states are obligated to provide subsidized school meals to *every student* attending publicly funded primary and secondary schools because "basic minimum education"¹⁹ requires that students obtain a functional level of literacy that allows them to participate in the American democracy effectively and is ultimately within the Fourteenth Amendment of the Constitution of the United States. Part I of this Note provides the historical context of the three clauses of the Fourteenth Amendment of the Constitution of the United States that impliedly provide basic minimum education as a fundamental right to students attending publicly funded primary and secondary schools: the Citizenship Clause, Due

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See discussion *infra* Sections II.B, II.C., II.D.3.

Process Clause, and Equal Protection Clause. Part II examines how the Supreme Court of the United States and United States federal courts reconcile the Fourteenth Amendment and states' obligation to provide a basic minimum education that affords students a functional literacy level. Part III discusses current federal nutrition programs that provide free and reduced-price meals to primary and secondary schools within the United States. Part IV analyzes empirical data measuring the positive impacts of state-administered universal free meal ("UFM") programs on student academic achievement. Part V articulates comprehensive legal theories that challenge states' continued failure to subsidize meals for public school students. Finally, Part VI concludes this Note by emphasizing that UFM programs assure primary and secondary school students may obtain a basic minimum education that provides a functional level of literacy and confer the capacity to participate in American democracy effectively.

I. A REVIEW OF THE FOURTEENTH AMENDMENT: CITIZENSHIP, DUE PROCESS, AND EQUAL PROTECTION

A. *Citizenship*

The first sentence of the Fourteenth Amendment of the Constitution of the United States, the Citizenship Clause, reads, "[a]ll persons born or naturalized in the United States, and subject to [its] jurisdiction . . . are citizens of the United States and . . . the [s]tate where[] they reside."²⁰ Before this Note advances its argument, it must define "national citizenship" within the discussion below.

1. Origins and Substantive Citizen Rights

Although the Thirteenth Amendment of the Constitution of the United States abolished enslavement and involuntary servitude within the nation and provided Congress the enforcement power to accomplish the recognition of these rights,²¹ the Thirteenth Amendment failed to cure two unresolved matters: the scope of congressional enacting power, and the degree of legal recognition for Black Americans.²² The Thirteenth Amendment provided no "protection" from the United States government, constraining Black Americans into a virtually disadvantageous position in society as pre-emancipation.²³

20. See U.S. CONST. amend XIV.

21. See U.S. CONST. amend XIII.

22. McKenna Kohlenberg, *Booked But Can't Read: "Functional Literacy," National Citizenship, and the New Face of Dred Scott in the Age of Mass Incarceration*, 44 N.Y.U. REV. L. & SOC. CHANGE 213, 249 (2020).

23. *Id.*

Thus, the drafters of the Fourteenth Amendment “intentionally created” the Amendment to resolve the unaddressed matters of the Thirteenth Amendment:²⁴ legally establishing Black Americans as people, a necessary response to the Supreme Court of the United States’ *Dred Scott v. Sandford* decision.²⁵ The Citizenship Clause of the Fourteenth Amendment explicitly granted citizenship to Black Americans as a birthright or natural right and guaranteed equal civil rights.²⁶

Quite that Black people residing in the defeated Confederate States of America would never be allowed to vote upon readmission into the United States,²⁷ the Republican Party within the non-secession (“Union”) states feared the passage of the Fourteenth Amendment could enhance the political power of the former Confederate States by increasing their representation in both the House of Representatives and the Electoral College.²⁸ Thus, Republicans executed “a fundamental change in the political order” akin to the First Constitutional Convention in Philadelphia: they proposed the Fourteenth Amendment and simultaneously refused to acknowledge the legitimacy of the former Confederate states, precluding the Confederate states from the ratification process.²⁹ The exclusion of Southern states “was a necessary political condition for the Republicans to gain the two-thirds vote required by Article Five for a constitutional amendment proposal from Congress.”³⁰

The Fourteenth Amendment ratification strategy enabled the Republicans to resolve Black citizenship ambiguity within the Thirteenth Amendment in four components.³¹ First, the Republicans drafted the Fourteenth Amendment to establish Black Americans as

24. *Id.*

25. See 60 U.S. 393, 406 (1856) (“The question arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced by the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endure him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts? The court think the affirmative of these propositions cannot be maintained. And if it cannot, [Dred Scott] could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United, and consequently, was not entitled to sue in its courts.”).

26. See U.S. CONST. amend. XIV, § 1; see also Kohlenberg, *supra* note 22, at 249-50.

27. PAUL BREST ET AL., *From Reconstruction to the New Deal: 1866-1934*, in *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 298 (7th ed. 2018) [hereinafter BREST].

28. Kohlenberg, *supra* note 22, at 249.

29. *Id.*

30. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L. J. 453, 503 (1989); U.S. CONST. art. V.

31. Kohlenberg, *supra* note 22, at 249.

people, which the *Dred Scott* decision made necessary.³² Second, the drafters intended the Fourteenth Amendment to explicitly grant citizenship to Black Americans as a birthright or natural right.³³ Third, the Republicans drafted the Fourteenth Amendment as “a guarantee of equal civil rights to Black Americans who constituted national citizens.”³⁴ When United States Senator of Michigan, Jacob Howard, introduced the Amendment to the Senate, he urged the chamber to recognize that the prosperity of the United States depends upon preventing “a race of pariahs, so circumstanced as to be obliged to bear the burdens of Government and to obey its laws without any participation in the enactment of the laws.”³⁵ The premise of “national citizenship” is the absence of encumbrances that deprive classes of legally free persons from participating in the American democratic government.

2. National Citizenship

The origin of the Citizenship Clause reveals four key insights about how the drafters conceptualized *national citizenship*. First, the drafters delineated a difference between having status as legally free people and national citizenship by expressly extending federal citizenship to Black Americans.³⁶ Although the Thirteenth Amendment recognized Black Americans as a class of non-enslaved people and non-involuntary servants, national citizenship, embedded in the Fourteenth Amendment, aggrandized the enfranchisement of Black Americans within the Thirteenth Amendment.³⁷ Second, the drafters elucidated this aggrandizement by noting that while a citizen of the United States is a person “born within the limits of the United States and subject to [its] laws,” national citizenship is married to the “guarantee of civil rights” and substantive citizenship rights that make “citizenship effective [for] legally free person[s].”³⁸ Third, inherent in constitutionally protected national citizenship is the equality of these meaningful rights because every American citizen has the “same substantive citizenship rights.”³⁹ The Clause eliminated “all class legislation” and the “injustice of subjecting one caste of persons to a code

32. *Id.* at 249-50.

33. *Id.* at 250.

34. *Id.*

35. Jacob Howard, Speech Introducing the Fourteenth Amendment (May 23, 1866), in BREST, *supra* note 27, at 339.

36. Kohlenberg, *supra* note 22, at 250.

37. *Id.*

38. *Id.*

39. *Id.*

not applicable to another,” still permissible under the Thirteenth Amendment.⁴⁰ Furthermore, fourth, these substantive rights of national citizenship serve as the mechanism to prevent the separation of legally free persons into disparately treated classes and provide free individuals the capacity to participate within American democracy.⁴¹

Accordingly, this Note understands national citizenship as the condition of an individual’s representation in and participation within American society. This status endows his equal rights and duties to those endowed to all other citizens.

B. Due Process

1. Due Process Clause

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States provides that states cannot “deprive any person of life, liberty, or property without due process of the law.”⁴² The Clause recognizes that particular interests are so substantial that no process is enough to allow the government to restrict them, at least absent a compelling state interest.⁴³

The most familiar of the “substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights,” which are “incorporated” into the Due Process Clause.⁴⁴ However, this is not the end of the Clause’s protections, which extend to other rights and liberties recognized by the Court to be fundamental. The Court’s jurisprudence prescribes circumspection when deciding whether an asserted right is fundamental.⁴⁵ Generally, the Court is “reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and openminded.”⁴⁶ However, this reluctance is not definitive of due process case law. Adjudication of substantive due process claims may call the Court to exercise “reasonable judgment” in interpreting the Constitution.⁴⁷ This task neither permits the Court to in-

40. *Id.*

41. *Id.*

42. See U.S. CONST. amend. XIV.

43. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846-47 (1992).

44. *Gary B. v. Whitmer*, 957 F.3d 616, 643 (6th Cir. 2019) (quoting *Casey*, 505 U.S. at 847), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem.).

45. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

46. *Id.*

47. *Casey*, 505 U.S. at 849.

validate state policy choices it disagrees with freely nor permits the Court to “shrink from . . . [its] office [duties].”⁴⁸

Faced with this tension, the Court developed a two-part analysis when determining whether an asserted right is fundamental. First, “the Due Process Clause specially protects th[e] fundamental rights and liberties which are, objectively, ‘deeply rooted in this [n]ation’s history and tradition.’”⁴⁹ The Court has applied a thorough approach to this historical analysis, tracing the evolution of an asserted right through or even beyond the country’s history.⁵⁰ Even if an iteration of a right possesses no substantial historical roots, this fact alone cannot foreclose recognition under the Due Process Clause.⁵¹ To curb the discretion of federal judges, litigants may “suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law upon the ratification of the Fourteenth Amendment.”⁵² However, this is inconsistent with the law.⁵³

Thus, the second component of its analysis requires that the Court determine whether the asserted right is “‘implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the asserted right] were sacrificed.’”⁵⁴ While the Court occasionally examines the first and second components of its analysis together,⁵⁵ the Court has made it clear that this historical inquiry may illuminate even newly recognized injustices that reveal a fundamental right.⁵⁶ The generations that wrote and ratified the Bill of Rights of the Constitution of the United States “did not presume to know the extent of freedom in all of its dimensions . . . so they entrusted the future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”⁵⁷ When new insight reveals discord between the Constitution’s central protections and a perceived legal stricture, courts must assess the asserted claim of liberty.⁵⁸

48. *Id.*

49. *Washington v. Glucksberg*, 521 U.S. 720, 720-21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

50. *E.g.*, *Glucksberg*, 521 U.S. at 710-19.

51. *Gary B.*, 957 F.3d at 643-44.

52. *Casey*, 505 U.S. at 847.

53. *Id.*; see also *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (“History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present” (internal citation omitted)).

54. *Glucksberg*, 521 U.S. at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

55. See, e.g., *Kerry v. Din*, 576 U.S. 86, 93 (2015) (plurality opinion).

56. See *Obergefell*, 576 U.S. at 664.

57. *Id.*

58. *Id.*

2. Compulsory School Attendance

Compulsory school attendance laws are a restraint on a minor's freedom of movement and thus implicate the core protections of the Due Process Clause.⁵⁹ Requiring individuals to sit in a building for several hours a day without a state providing a legitimate justification for the detention is a restraint that offends liberty.⁶⁰ Therefore, the constitutionality of compulsory school attendance rests on the state's interest in providing adequate education to children outweighing children's deprivation of liberty.

While never directly addressing the issue, the Supreme Court of the United States recognizes that the substantial governmental interest in educating its citizens generally gives the state the power to compel attendance at school.⁶¹ The Court's repeated dictum clarifies that in most cases, a state-provided education will justify the deprivation of liberty caused by compulsory school attendance.⁶² However, forcing students to attend a school where they are simply "warehoused and provided no education at all" runs afoul of the Due Process Clause's protections.⁶³ Such a deprivation bears no reasonable relationship to states' asserted purposes,⁶⁴ and in those instances, students' interest in liberty outweighs the deprivation.⁶⁵

Whether minors have a fundamental right to basic minimum education remains unanswered today because the Court has yet to provide a determinative answer.⁶⁶ Despite this ambiguity, the Supreme Court jurisprudence repeatedly discusses access to literacy, obtained through public education, and its extensive historical legacy so central to the American political and social systems that it is "implicit in the concept of ordered liberty."⁶⁷ The Supreme Court cases on education repeatedly discuss the historical importance of public education.⁶⁸ In *Meyer v. Nebraska*, the Court noted that "[t]he American people have

59. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80 (1991); *Youngberg v. Romero*, 457 U.S. 303, 316 (1982).

60. See, e.g., *Demore v. Kim*, 538 U.S. 510, 531-33 (2003) (Kennedy, J., concurring) (noting that the Due Process Clause prohibits arbitrary deprivations of liberty), *abrogated on other grounds* by *Jennings v. Rodriguez*, 583 U.S. ___, 138 S. Ct. 830 (2018).

61. E.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925).

62. *Gary B. v. Whitmer*, 957 F.3d 616, 640 (6th Cir. 2020).

63. *Gary B.*, 957 F.3d at 640.

64. *Foucha*, 504 U.S. at 79.

65. *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 279 (1990).

66. *Gary B.*, 947 F.3d at 642.

67. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 325-25 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969)).

68. *Gary B.*, 957 F.3d at 649.

always regarded education and acquisition of knowledge as matters of supreme importance," focusing on the Northwest Ordinance's 1787 prescription that "schools and the means of education shall forever be encouraged."⁶⁹ Similarly, in *Wisconsin v. Yoder*, the Court emphasized that Thomas Jefferson touted "the essential nature of education" in the earliest days of the recently established United States.⁷⁰ Similarly, in the 1986 case, *Papasan v. Allain*, the Court extensively discussed the history of public school land grants extending "back over 200 years" and predating the Constitution.⁷¹ By comprehending the extensive public education tradition that predates the founding of the United States, it is cogent to surmise that American citizens cannot effectively participate in democracy without literacy.⁷²

C. Equal Protection

1. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States prohibits states from "deny[ing] any person within its jurisdiction the equal protection of the laws."⁷³ When a state distributes benefits unequally, "the distinctions it makes are subject to scrutiny under the Equal Protection Clause."⁷⁴ A plaintiff making an equal protection claim must first show that the state treated him differently from other similarly situated persons and then that the differential treatment is unsupported by a sufficient governmental interest.⁷⁵ Most federal equal protection case law concerns the second part of the test, specifically how strong the government interest must be.⁷⁶ If the governmental policy discriminates based on race or another immutable characteristic within a protected class, the Court applies "strict scrutiny" and will uphold the policy only if it furthers a narrowly tailored "compelling state interest."⁷⁷ If the challenged government policy does not concern a protected class, the Court applies the extremely forgiving "rational basis" review, where it sustains the governmental policy if it "is rationally related to a legitimate state interest."⁷⁸ The challenger of the government policy has

69. *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

70. Gary B., 957 F.3d at 649 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

71. Gary B., 957 F.3d at 649 (quoting *Papasan v. Allain*, 438 U.S. 265, 268-69 (1986)).

72. Gary B., 957 F.3d 653.

73. U.S. CONST. amend. XIV.

74. *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

75. *E.g., id.* at 439-440.

76. *See, e.g., Gary B.*, 957 F.3d at 634.

77. *Id.*

78. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

the burden to “negate every conceivable basis” that might support it because the Court presumes the challenged policy is constitutional.⁷⁹

2. Discriminatory Intent

An Equal Protection Clause violation based on race does not require a plaintiff to demonstrate that the challenged action rested solely on racially discriminatory purposes.⁸⁰ Rarely may legislative and administrative bodies operating under a broad mandate employ decisions motivated by a single concern or a “primary purpose.”⁸¹ Because of the bodies’ “competing considerations,” courts refrain from “reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.”⁸² However, racial discrimination is an unconstitutional consideration.⁸³ When there is evidence that an invidious, racially discriminatory purpose is a “motivating factor in the [statute or regulation,] this judicial deference” is unavailable to the legislative or administrative body absent a demonstration of compelling state interests in the endurance of the statute or regulation.⁸⁴

Determining whether an invidious discriminatory purpose was a motivating factor for the statute or regulation demands a court perform a “sensitive inquiry,” where direct and circumstantial evidence may reveal the verity.⁸⁵ When determining whether a challenged statute or regulation is motivated by racial discrimination, courts may examine: (1) the action disproportionately impacts an individual racial group; (2) the historical background of the statute or regulations, particularly if it “reveals a series of official actions” taken to further discriminatory purposes; (3) the specific sequence of events leading up to the challenged statute or regulation; and (4) the legislative or administrative history.⁸⁶ However, courts may identify additional authorities when determining whether a statute or regulation motivated racially discriminatory intent.⁸⁷

79. *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

80. *See, e.g., Washington v. Davis*, 426 U.S. 229, 244 (1976).

81. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (holding that local authorities’ refusal to change a tract of land (purchased by a nonprofit real estate developer) from a single-family to a multi-family classification was not racially discriminatory because the primary motivation to maintain the prevailing zoning plan was to protect property values and the integrity of the locality’s zoning plan).

82. *Id.*

83. *Id.*

84. *Id.* at 265-66.

85. *Id.* at 266.

86. *Id.*

87. *Id.* at 269.

II. CONTEMPORARY SUPREME COURT OF THE UNITED STATES JURISPRUDENCE OF THE FUNDAMENTAL RIGHT TO BASIC MINIMUM EDUCATION

While no general right to education exists, the Supreme Court of the United States has specifically distinguished and left unaddressed “whether a minimally adequate education is a fundamental right.”⁸⁸ Nonetheless, the Court recognizes that education is critical to maintaining our civic institutions; therefore, denying public education to a discrete or disadvantaged group of students must further a substantial state interest.⁸⁹ Thus, there remains the opportunity for the Court to recognize minimally adequate education as a fundamental right under the Fourteenth Amendment. As demonstrated by the cases below, the Court has repeatedly framed literacy as a fundamental component of American democracy. While examining these federal education cases, this Note posits that access to a minimally adequate education is an implied fundamental right embedded within the Fourteenth Amendment of the Constitution of the United States, and states must implement universal free meal programs (“UFMs”) because academic achievement requires consistent access to nutritional meals.

A. *Brown v. Board of Education*

Brown v. Board of Education is consequential in assessing whether any aspect of education amounts to a fundamental right. *Brown* examined whether racially segregated schools inherently violated the Equal Protection Clause of the Fourteenth Amendment.⁹⁰ Here, the Supreme Court of the United States found that “in the field of public education[,] the doctrine of ‘separate but equal’ has no place.”⁹¹ Within the equal protection discussion, the court noted the critical importance of education:

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education . . . demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training[.] . . . [I]n helping him to adjust normally to his environment. . . . [I]t is doubtful that any child may . . . succeed in life if he is denied the opportunity of an education. Such an oppor-

88. *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

89. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

90. *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

91. *Id.* at 495.

tunity, where the *state has undertaken to provide it*, is a right which must be made *available on equal terms*.⁹²

While grasping this reasoning, it is imperative to inquire why, although the Court recognized “education [a]s perhaps the most important function of state and local governments” and “required in the performance of our most basic public responsibilities,”⁹³ it did not view education as “implicit in the concept of ordered liberty or otherwise fundamental to our social order.”⁹⁴ *Brown* may not have identified education as a fundamental right; nevertheless, the decision shaped the reasoning behind literacy as a necessity for children to develop into productive participants in American democracy.

B. San Antonio Independent School District v. Rodriguez

Eighteen years after *Brown*, the public education equity discussion returned to the Supreme Court in *San Antonio Independent School District v. Rodriguez*.⁹⁵ In *Rodriguez*, Mexican-American parents representing their children and similarly situated students challenged the constitutionality of Texas’s public school finance system, arguing that differences in funding across school districts denied them equal protection of the law.⁹⁶ The Texas “dual approach” school finance system required local school districts and the state to contribute to school funding.⁹⁷ However, local funding—through property taxes—rapidly outpaced what was provided by Texas, meaning variations in property values led to substantial disparities in available funds for schools.⁹⁸

In assessing whether education was a fundamental right, the Court, referencing *Brown*, emphasized America’s “historic dedication to public education” and agreed that “the grave significance of education both to the individual and to [American] society cannot be doubted.”⁹⁹ Nonetheless, the Court held that “[i]t is not the province of th[e] Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”¹⁰⁰ Moreover, the “key

92. *Id.* at 493 (emphasis added).

93. *Id.*

94. *Washington v. Glucksberg*, 521 U.S. 720, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

95. 411 U.S. 1, 4 (1973).

96. *Id.* 4-6.

97. *Id.* at 6-7.

98. *Id.* at 7-15. During litigation, Texas conceded that the system cannot survive strict scrutiny, so if the uneven funding infringed on a constitutional right, the Court was required to invalidate the system. *Id.* at 16-17.

99. *Id.* at 29-30 (internal quotations omitted).

100. *Id.* at 33.

to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing . . . [nor] is it . . . found by weighing whether education is as important to the right to travel."¹⁰¹ Instead, "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."¹⁰² Education, the Court noted, "is not among the rights afforded explicit protection under the Federal Constitution."¹⁰³ Further, the Court posited that there was no "basis for saying [education] is implicitly . . . protected."¹⁰⁴ Indeed, the Court understood "the undisputed importance of education will not alone cause th[e] Court to depart from the usual standard for reviewing a [s]tate's societal and economic legislation."¹⁰⁵ While the Court contended that "[e]ven if [the Court] conceded that *some identifiable quantum* of education is a constitutionally protected prerequisite to some meaningful exercise of either right, [the Court had] no indication that the present levels of educational expenditures in Texas provide an education that falls short."¹⁰⁶ The Court has yet to determine whether there is a fundamental right to education, including an identifiable quantum of education constitutionally protected.

C. Plyler v. Doe

In *Plyler v. Doe*, "undocumented school-age children" residing in Texas sued to challenge policies that denied state-level funding and charged tuition for students "who could not establish" that they legally resided in the United States."¹⁰⁷ *Plyler* presented two questions before the Court: first, whether these policies violated the Equal Protection Clause, and second, what level of scrutiny applies to that analysis.¹⁰⁸ While answering these inquiries by examining the interaction between education and the Constitution, the Court reaffirmed the holding in *Rodriguez* and noted the heightened significance of education and the particular constitutional considerations that follows:

Public education is not a "right" granted to individuals by the Constitution. [However,] neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institu-

101. *Id.*

102. *Id.*

103. *Id.* at 35.

104. *Id.*

105. *Id.*

106. *Id.* at 36-37 (emphasis added).

107. 457 U.S. 202, 205-06 (1982).

108. *Id.* at 216-18.

tions, and the lasting impact of its deprivation of the life of the child, mark the distinction. . . . We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government,” and as the primary vehicle for transmitting “the values on which society rests.” . . . In sum, education has a fundamental role in maintaining the fabric of our society. [The Court] cannot ignore the significant social costs borne by our nation when [states deny] select groups . . . the means to absorb the values and skills upon which our social order rests.¹⁰⁹

The Court found that the Texas policy violated the Equal Protection Clause based on this reasoning.¹¹⁰ Ultimately, the Court asserted that the denial of “basic education”—in the context of literacy—negatively impacts undocumented children and society; therefore, any assessment of rationality must account for these costs.¹¹¹ Accounting for these costs, the Court then found that beyond “the pivotal role of education in sustaining [the American] political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement [based on] individual merit.”¹¹²

Here, the Court noted that “by depriving the children of any disfavored group of education, [society] foreclose[s how] . . . that group might raise the level of esteem in which . . . the majority [hold it].”¹¹³ Further, “education prepares individuals to be self-reliant and self-sufficient participants in society,”¹¹⁴ while “illiteracy is an enduring disability.”¹¹⁵ Moreover, “illiteracy handicap[s] the individual deprived of a basic education . . . every day of his life.” Ultimately, this “inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education within” the Equal Protection Clause framework.¹¹⁶

109. *Id.* at 221 (some alterations in original) (citations omitted) (first quoting *School Dist. v. Schempp*, 347 U.S. 203 (1963) (Brennan, J., concurring); and then quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)).

110. *Id.* at 223-30.

111. *Id.* at 223-24.

112. *Id.* at 221-22.

113. *Id.* at 222.

114. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

115. *Plyler* 457 U.S. at 222.

116. *Id.*

D. Gary B. v. Whitmer

In *Gary B. v. Whitmer*, Black American students attending public schools in Detroit alleged that the State of Michigan deprived them of their fundamental right to a minimum essential education under the Due Process Clause and Equal Protection Clause.¹¹⁷

In 1999, Michigan adopted Public Act 10, which replaced the Detroit Public School (“DPS”) elected school board and superintendent with a seven-member reform board.¹¹⁸ The reform board consisted of six members appointed by the Mayor of Detroit and (at least five years after passage) either the state superintendent of public administration or her designee.¹¹⁹ The board required unanimous consent to appoint the school district’s chief executive officer (“CEO”), which the plaintiffs alleged provided Michigan an “effective veto power over the selection of the CEO as well as every other decision.”¹²⁰ Although, in 2006, control of DPS returned to the locally elected school board due to a Detroit voter referendum, the change was short-lived.¹²¹ In December 2008, former Governor of Michigan, Jennifer Granholm, declared a fiscal emergency and appointed an “Emergency Fiscal Manager for DPS.”¹²² This emergency manager shared power with the locally elected school board[,] but in doing so, the manager “exercised authority” over financial decision-making and some educational decisions.¹²³ In 2011, this power-sharing arrangement ended because Michigan significantly expanded the authority of its emergency manager and effectively gave the manager complete control over DPS, empowering the manager to “[e]xercise solely for and on behalf of the school district, all . . . authority described by law to the school board and superintendent.”¹²⁴ While a state-appointed transition manager controlled DPS, the state also created a new school district, the Detroit Public Schools Community District (“DPSCD”), to run Detroit’s schools while keeping DPS in charge of reducing its debt.¹²⁵

117. *Gary B. v. Whitmer*, 957 F.3d 616, 621 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

118. *Gary B.*, 957 F.3d at 622; 1999 Mich. Pub. Acts 10.

119. *Gary B.*, 957 F.3d at 622; 1999 Mich. Pub. Acts 10, § 372(2).

120. *Gary B.*, 957 F.3d at 622.

121. *Id.*

122. *Id.*

123. *Id.* at 622-23.

124. *Id.* at 623; Mich. Comp. Laws § 141.1554(f); *see also* *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 350-51 (discussing the history and various versions of Michigan’s emergency-manager laws).

125. *Gary B.*, 957 F.3d at 623.

1. Conditions Alleged in Detroit Schools

The complaint asserted that the DPS and DPSCD maintained decrepit and unsafe facilities that failed to “satisfy minimal state health and safety standards.”¹²⁶ In fact, “the City of Detroit admitted during the 2015-2016 academic year[,] . . . *none* of the school district’s buildings . . . compli[ed] with city health and safety codes,” and that many of the plaintiffs’ schools were not in compliance at the time of the complaint’s filing.¹²⁷ Within these facilities, “[c]lassroom temperatures regularly exceed[ed ninety] degrees [Fahrenheit] during both the summer and winter due to malfunctioning furnaces.”¹²⁸ During winters, temperatures were “frequently so cold that students and their teachers [could] see their breath and must wear layers of winter . . . clothing [indoors].”¹²⁹ Moreover, “[m]ice, cockroaches, and other vermin regularly inhabit[ed]” Detroit classrooms, requiring many teachers to “clean up rodent feces before students arrive.”¹³⁰ Despite these efforts, hallways and classrooms regularly “smell[ed] of dead vermin and black mold,” and students and teachers frequently encountered mice, mice droppings, rats, bed bugs[,] and cockroaches.”¹³¹ In addition to the vermin, the drinking water in the plaintiffs’ schools was “hot, contaminated and undrinkable.”¹³² The bathrooms were filthy and unkempt; sinks d[id] not work; [and] toilet stalls lack[ed] doors and toilet paper.¹³³ Ceiling tiles and plaster regularly fell during class time, pipes or roofs often leaked, and broken windows were consistently covered with cardboard.¹³⁴ Due to overcrowding within Detroit classrooms, classes contained “as many as fifty students in a single classroom and insufficient desks and chairs, requiring students to stand or sit on the floor.” Even when students had chairs, “classes [were] often so full that desks are crammed wall-to-wall, with no rooms for aisles.”¹³⁵

126. *Gary B.* 957 F.3d at 625-26.

127. *Id.* at 626 (emphasis supplied).

128. *Id.*

129. *Id.* These temperatures required school closings or early dismissals. *Id.* For example, during the 2016-2017 school year, the room temperature in a classroom in a Detroit school facility that lacked air-conditioning “grew so extreme that multiple students fainted, both students and teachers got sick and [vomited], and multiple teachers developed rashes.” *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

2. Educational Outcomes in Detroit Schools

Detroit schools “lack the books and materials needed to . . . provide literacy” because many classes lack appropriate textbooks.¹³⁶ Even when provided, these textbooks are often long out of date, torn and beyond repair, or marked up and unreadable.¹³⁷ Further, there were so few copies that students shared a single book among four or more students during class and could not take them home after school, meaning their teachers could not assign meaningful homework, and in several cases, the schools’ libraries were inaccessible or without additional books available.¹³⁸

The school conditions discussed above led to abysmal educational outcomes, supporting the claim that “their schools cannot provide access to literacy.”¹³⁹ DPS achievement data revealed proficiency rates “hover near zero in nearly all subject areas,” demonstrating significant underperformance compared to Michigan educational standards.¹⁴⁰ Contrary to the 46.0% of third-graders statewide that scored “proficient or above” in Michigan’s standardized English assessment, third-graders produced “proficient or above” scores at rates as low as 4.2% to 9.2% in Detroit elementary schools.¹⁴¹ Detroit high schools produced similar results. Although 49.2% of eleventh graders scored proficient in English statewide, eleventh graders’ proficiency rates remained as low as 1.8% within Detroit high schools.¹⁴² Accordingly, the data demonstrates significantly reduced literacy skills, including the inability to: sound out letters, write proper paragraphs, formulate complete sentences, and possess a complex vocabulary.¹⁴³

3. A Fundamental Right to a Basic Minimum Education

The plaintiffs alleged that the abject failure of Detroit public schools to deliver adequate access to literacy makes it nearly impossible for young people to attain the level of literacy necessary to func-

136. *Id.*

137. *Id.*

138. *Id.* Beyond books, the plaintiffs claimed that their classrooms lacked other basic school supplies such as pens, pencils, and paper. *Id.* Teachers attempted to make up for this shortfall by spending substantial amounts out of pocket or by requesting donations online. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* While literacy was the crux of the plaintiffs’ complaint, they noted that the failure of their schools is uniform across “nearly all subject areas.” *Id.* at 628. Plaintiffs assert that because academic curriculum “assumes a level of literacy that the [Detroit public school students] do not attain,” they are unable to learn Michigan-mandated content in all other subject areas. *Id.*

tion—much less thrive—in a democratic society.¹⁴⁴ The United States Court of Appeals for the Sixth Circuit agreed, reasoning that the Constitution “provides a fundamental right to a basic minimum education [through a substantive due process framework].”¹⁴⁵ However, the Court of Appeals narrowly defined this right in its opinion.¹⁴⁶ It did not guarantee a quality education commensurate with what most expect in today’s America but rather only guaranteed “the education needed to provide access to skills . . . essential for the basic exercise of fundamental rights and liberties, [and] most importantly[,] participation in our political system.”¹⁴⁷ Moreover, although the Sixth Circuit contended that it cannot prescribe a specific educational outcome, such as literacy or proficiency rates, “these measures may provide some useful evidence [as to] whether the state is . . . providing a basic minimum education.”¹⁴⁸ Alone, these rates are insufficient evidence because a court cannot guarantee that educational opportunities translate to student performance, but “the requirement to provide a basic minimum education means the state must ensure that students [obtain] at least a rudimentary educational infrastructure, such that it is plausible to attain literacy within that system.”¹⁴⁹

III. FEDERAL EFFORTS TOWARDS FREE ACCESS TO MEALS WITHIN PUBLICLY FUNDED PRIMARY AND SECONDARY SCHOOLS

The vast differences in state educational provisions—especially the manner that state constitutions mandate the scope of public school funding—have sweeping consequences for the laws and regulations that impact public schools and, in turn, spur deep funding dissimilarities in districts between and within states.¹⁵⁰ However, state courts do not have jurisdiction to address interstate school financial disparities because these courts only possess personal jurisdiction within their state borders.¹⁵¹ Therefore, even if a state court were to eliminate disparities between school districts within its state borders, “large disparities across states would remain.”¹⁵² In the context of public education meal programs, Congress exerts indirect control over public education

144. *See id.*

145. *Id.* at 642.

146. *Id.* at 659.

147. *Id.*

148. *Id.* at 659-660.

149. *Id.* at 660.

150. Kohlenberg, *supra* note 22, at 243.

151. *Id.*

152. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L. J.* 330, 332 (2006).

by asserting its constitutional spending authority: local and state school boards must often comply with federal education laws in exchange for federal funding.¹⁵³ This spending includes federally funded school nutrition programs, discussed below.

A. National School Lunch Program and School Breakfast Program

The National School Lunch Program (“NSLP”)¹⁵⁴ began in 1946 as part of the Richard B. Russell National School Lunch Act (“NSLA”).¹⁵⁵ Congress passed the NSLA “[t]o [assist] the States in the establishment, maintenance, operation, and expansion of school lunch programs.”¹⁵⁶ In 2019, the NSLP operated in nearly 100,000 public schools, non-profit private schools, and residential child care institutions, providing free or reduced-price lunches to 29.6 million children each day, costing \$14.2 billion annually.¹⁵⁷ In 2020, the NSLP participation declined to 22.6 million children a day, and total expenditures on the program decreased to \$10.4 billion.¹⁵⁸ These declines stem from disruptions in the program’s operations in the second half of 2020 due to the coronavirus (COVID-19) pandemic, which forced the closure of many schools and childcare institutions in March 2020.¹⁵⁹

The School Breakfast Program (“SBP”) began in 1966 as part of the Child Nutrition Act (“CNA”),¹⁶⁰ a two-year pilot project designed to provide categorical grants to assist schools that served breakfasts to “nutritionally needy” children.¹⁶¹ While the term was undefined, the original legislation stipulated that in selecting schools for participation, state educational agencies must give “first consideration to schools drawing attendance” from areas of “poor economic condi-

153. Kohlenberg, *supra* note 22, at 244.

154. The National School Lunch Program (“NSLP”) is a federally assisted meal program operating in public and nonprofit private schools and residential childcare institutions. THE NATIONAL SCHOOL LUNCH PROGRAM, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., THE NATIONAL SCHOOL LUNCH PROGRAM (Mar. 19, 2019) <https://fns-prod.azureedge.net/sites/default/files/resource-files/NSLPFactSheet.pdf> (Mar. 19, 2019) [<https://perma.cc/P48R-22RX>] [hereinafter NSLP FACT SHEET].

155. Pub. L. No. 79-396, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C. §§ 1751-1759j (2018)).

156. 42 U.S.C. § 1751 (2018).

157. *The National School Lunch Program*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. (Sept. 7, 2021) <https://www.ers.usda.gov/topics/food-nutrition-assistance/child-nutrition-programs/national-school-lunch-program.aspx> (Sept. 7, 2021) [<https://perma.cc/GX96-P3QZ>].

158. *Id.*

159. *Id.*

160. 42 U.S.C. § 1773 (2018).

161. *School Breakfast Program History*, U.S. DEP’T OF AGRIC. FOOD & NUTRITION PROGRAM <https://www.fns.usda.gov/sbp/program-history> (July 23, 2013) [<https://perma.cc/TB5G-UZH7>].

tions” and “schools in which a substantial portion of the children enrolled must travel long distances daily.”¹⁶² After subsequent reauthorizations, in 1971, Congress directed that priority consideration for SBP must also include “schools in which there is a special need for improving the nutrition and dietary practices of children of working mothers and children from low[-]income families.”¹⁶³ In 1975, the program received permanent authorization.¹⁶⁴

B. Community Eligibility Provision

In 1962, Congress amended the NSLA to provide alternative provisions to the requirement for annual determinations of eligibility for free and reduced-price school meals and daily meal counts by type.¹⁶⁵ Under this provision, federal regulations construe three Community Eligibility Provisions (“CEPs”).¹⁶⁶ Provision 1 reduces the application burdens by allowing schools where at least 80% of students enrolled in the school or district are eligible for free or reduced-price meals to certify eligible children for free meals for two consecutive school years.¹⁶⁷ Schools continue to take daily meal counts, and the number of meals served to children by type for calculating federal reimbursement claims.¹⁶⁸ Provision 2 requires schools to serve meals to participating children at no charge but reduces application burdens to one every four years and simplifies meal counting and claiming procedures by allowing a school to receive federal meal reimbursement funds based on claim percentages.¹⁶⁹ Furthermore, Provision 3 requires that the schools serve meals to participating children at no charge but reduces application burdens and meal counting and claiming procedures by allowing a school to receive a comparable level of federal cash and commodity assistance as the school received the previous year of the free and reduced eligibility determinations.¹⁷⁰ Additionally, eligibility determinations adjust for enrollment, inflation, and

162. 42 U.S.C. § 1773(c); Pub. L. No. 92–32, § 3, 85 Stat. 85 (substituting “‘assist such schools’ in financing the cost” for ‘reimburse such schools for the cost’ and provided for preference of schools for improvement of nutrition and dietary practices of children of working mothers and from low-income families.”).

163. *Id.*

164. THE SCHOOL BREAKFAST PROGRAM, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., THE NATIONAL SCHOOL LUNCH PROGRAM <https://fns-prod.azureedge.net/sites/default/files/resource-files/SBPfactsheet.pdf> (Nov. 17, 2017) [<https://perma.cc/QC4Y-BAEH>].

165. 42 U.S.C. § 1759a § 11(a)(1) (2018); Pub. L. 87–823 § 6, 76 Stat. 946 (1962).

166. 7 C.F.R. § 245 (2022).

167. *See id.* § 245.9(a).

168. *See id.* § 245.9(a)(3).

169. *See id.* § 245.9(b).

170. *See id.* § 245.9(d).

school operation days for up to four years, and a four-year extension to the provision is possible when schools meet certain conditions.¹⁷¹

C. Summer Food Service Program

Congress established the Summer Food Services Program (“SFSP”) in 1968 through an amendment to the NSLA.¹⁷² The purpose of SFSP is to reimburse “providers who serve free healthy meals to children and teens in low-income areas during the summer months when school is not in session.”¹⁷³ Akin to the NSLP and SBP, state agencies administer the SFSP, and “[s]chools, local government agencies . . . and other non-profit community organizations” manage the foodservice program.¹⁷⁴ Under the amendment, school food authorities may provide “summer or school vacation food services” through the Seamless Summer Option (“SSO”).¹⁷⁵

On March 18, 2020, during the COVID-19 pandemic, Congress passed the Families First Coronavirus Response Act (“FFCRA”), allowing the FNS to subsidize all school meals provided by the NSLP and SBP “at [a] free rate over the course of [five] school days” until September 30, 2020.¹⁷⁶ On October 1, 2020, Congress extended the subsidy of the NSLP and SBP until September 30, 2021, when it passed the Continuing Appropriations Act 2021 and Others Extension Act.¹⁷⁷ Under these authorities, on April 20, 2021, the FNS published a policy memorandum articulating the establishment of a waiver to allow the SSO to operate when schools are open during the “regular school year, through June 30, 2022.”¹⁷⁸

171. *See id.* § 245.

172. Pub. L. No. 90-302, 82 Stat. 117 (1968) (codified as amended at 42 U.S.C. § 1761 (2018)).

173. HOW TO PARTICIPATE IN SUMMER MEALS, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., THE NATIONAL SCHOOL LUNCH PROGRAM (Mar. 30, 2019) <https://fns-prod.azureedge.net/sites/default/files/resource-files/SFSP-Fact-Sheet.pdf> (Mar. 30, 2019) [<https://perma.cc/Z4QC-4LMZ>] [hereinafter SFSP FACT SHEET].

174. *Id.*

175. 42 U.S.C. § 1761(a)(8).

176. Pub. L. 116-127 § 2202(a), 134 Stat. 186 (2020).

177. Pub. L. 116-159 § 4501(h), 134 Stat. 744 (2020).

178. *Nationwide Waiver*, *supra* note 5. Schools may not “access electronic systems typically used to determine [student] eligibility” for NSLP and SBP meals during the waiver period and collect payment when served outside the cafeteria. *Id.* Moreover, FNS mandated schools deprioritize spending time confirming each student’s enrollment and eligibility status” and providing “school service professionals greater flexibility to distribute meals” to children. *Id.*

IV. STUDENT ACCESS TO SUBSIDIZED MEALS IN SCHOOLS ADVANCE EDUCATIONAL ATTAINMENT

A. *Low-Income, Limited Nutritional Value, and Brain Development*

Approximately 40% of children live in poverty.¹⁷⁹ Poverty predisposes a child to developmental delays, low cognitive and achievement test performance, and behavioral and emotional disorders.¹⁸⁰ Socio-economic status controls a child's educational attainment, health, and psychological well-being in adulthood.¹⁸¹ Indeed, several families well above the federal poverty level may lack the resources to meet their children's needs.¹⁸²

Brain development is complex and ongoing throughout childhood and adolescence.¹⁸³ The prefrontal cortex, which controls cognitive self-regulation and executive function, develops rapidly during a child's first two years of life, between ages seven and nine, and again in the middle teenage years, with continual growth into the third decade of life.¹⁸⁴ Further, the amygdala, which controls the processing of emotions, and the hippocampus, which controls memory and helps coordinate the stress response, increase in volume until approximately thirty years of life.¹⁸⁵ Generally, the human brain's sensitivity to environmental stimuli, positive or negative, is heightened during periods of rapid brain development, and changes in the brain induced by environmental stimuli are broadly termed "plasticity."¹⁸⁶ Plasticity is most significant during sensitive periods of rapid brain development.¹⁸⁷

Inadequate access to proper nutrition reduces and may ultimately inhibit brain development and learning comprehension capabilities.¹⁸⁸ Material nutritional deprivations and stress are environmental mediators of a child's socioeconomic and brain development relationship.¹⁸⁹ Particularly, micronutrient deficiencies such as "vitamin B12, folate, retinoic acid, omega-3, fatty acids, zinc, and iron" may adversely impact the regulating genes that guide brain development and

179. Sara B. Johnson et al., *State of the Art Review: Poverty and Brain Development*, *PEDIATRICS*, Apr. 2016, at 1, 1.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 5.

189. *Id.*

regulate neuroplasticity.¹⁹⁰ Notably, iron deficiency in early childhood is associated with poor academic performance, cognitive, emotional, attention difficulty, and educational attainment.¹⁹¹ However, these deficiencies may be prevented or treated with supplementation.¹⁹² The effectiveness of supplementation varies by nutrient, level of deficiency, and age of the child at the time of the deficiency and supplementation but may nonetheless amount to substantial improvements in a child's cognition.¹⁹³

B. Empirical Studies of Universal Free Meals

Below is a discussion of two empirical studies measuring the impact of universal free meal programs on mathematics and reading test scores. These two empirical studies demonstrate the critical function nutritious school meal programs serve for education by providing food to ensure that children are not distracted by hunger in class, effectively reducing food insecurity, improving student health and well-being, and enhancing learning. Note that "standard deviation" describes the distribution of scores within a sample population.¹⁹⁴ Hypothetically, if the standard deviation for an exam is approximately *fifteen points*, and *thirty points* are approximately two standard deviations, then if a test taker scores two standard deviations below the average scores of a sample population, he scored approximately *thirty points* below the average test score.

1. New York

An empirical study in the *Journal of Policy Analysis and Management* published in 2019 details how extending free school lunches to all New York City public middle schools positively impacted school performance.¹⁹⁵ The New York City Department of Education ("NYCDOE"), the largest school district in the United States, enrolls over 1.1 million students annually in over 1,500 public schools, including 200,000 students in middle school grades.¹⁹⁶ The empirical study focused on middle school students for three reasons. First, middle school students are more likely than elementary school students to make autonomous decisions about lunch participation each day and

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Hall v. Florida*, 572 U.S. 701, 711 (1986).

195. Amy Ellen Schwartz & Micah W. Rothbart, *Let Them Eat Lunch: The Impact of Universal Free Meals on Student Performance*, 39 J. POL'Y ANALYSIS & MGMT. 376, 376 (2019).

196. *Id.* at 382

are, therefore, price sensitive.¹⁹⁷ Second, New York City expanded UFM to all middle schools as part of a broader effort to address the difficulties that middle-school-aged children may encounter as developing adults.¹⁹⁸ Furthermore third, the study gathered data using point of service (“POS”) tracking systems, widely available in New York City public middle schools.¹⁹⁹

Ninety percent of New York City middle school students were eligible for free or reduced-price lunch in at least one year between 2001 and 2013.²⁰⁰ During this period, Hispanics represented 40% of the student population, Blacks represented 28%, and Asians represented 17%.²⁰¹ Ultimately, the study restricted its sample to students that attended a universal free meal program (“UFM”) at some point between 2010 and 2013 because of “data availability and the stability of meal prices” in New York City.²⁰² Student data included sociodemographic characteristics such as gender, race and ethnicity, primary language spoken at home, English proficiency, birth country, certified eligibility for free or reduced-price lunch, participation in special education, attendance, and scores on English language arts (“ELA”) and mathematics exams between third grade and eighth grade.²⁰³

Critical to this study were the more than 400 NYCDOE public schools that implemented UFM under Provision 2.²⁰⁴ NYCDOE re-

197. *Id.* at 377. *See, e.g., price sensitive*, CAMBRIDGE BUSINESS ENGLISH DICTIONARY (1st ed. 2011) (“[U]sed to describe a customer who is influenced by the price of a product[.]”).

198. Schwartz & Rothbart, *supra* note 195, at 377. Although this study does not directly address particular difficulties middle-school children face, these children are particularly at risk for anxiety, depression, and suicide. *See* Arianna Prothero, *Teen Suicide Rates Rising Sharply, Federal Data Shows*, ED. WEEKLY (Oct. 17, 2019) <https://www.edweek.org/leadership/teen-suicides-rising-sharply-federal-data-show/2019/10> (discussing suicide rates for teens between the ages of fifteen and nineteen increased by 76% between 2007 and 2017). Although it is presently unclear why “mental health issues are increasing among children and youth,” research has explored a number of explanations, including the rise of smartphone and social media use, and the prevalence of bullying. *Id.*

199. *Id.*

200. *Id.* at 386.

201. *Id.*

202. *Id.* at 384.

203. *Id.* Every student record included a “unique student identifier” allowing the researchers to follow individual students over time. *Id.* The study excluded students in full-time special education settings and those with less than two years of test score data to facilitate an estimation of the student “fixed effect models.” *Id.* Fixed effect models ensures that “students with only one single observation” would not contribute to the empirical study’s long term UFM participation estimations.

204. Schwartz & Rothbart, *supra* note 195, at 384. *See* 7 C.F.R. §245.9(f) (2022) (“[T]he community eligibility provision [(“CEP”)] is an alternative reimbursement option for eligible high poverty local educational agencies. . . . A local education agency may elect this provision for all of its schools. . . . Participating local educational agencies must offer free breakfasts and lunches for the length of their CEP cycle, not to exceed four successive years, to all children attending participating schools and receive meal reimbursements based on claiming percent-

quires schools to operate under standard regulations and procedures, including standardized meal menus across the district, reducing the potential for bias due to changes in the nutritional value of school meals, concurrent with the adoption of UFM.²⁰⁵

The student sample totaled 155,466 students in grades six through eight.²⁰⁶ Moreover, student data included participation measurements in school breakfast and lunch by obtaining student-transaction-level data.²⁰⁷ The authors measured school lunch participation (“SLP”) as the number of lunch transactions divided by the number of school days in the year.²⁰⁸ School breakfast participation (“SBP”) is defined similarly.²⁰⁹ The mean school SLP rate was 62.2%, and the SBP rate was 11.3%.²¹⁰ Here, a “time-invariant measure of poverty, *Poor*, takes a value of one if a student is certified as eligible for free or reduced-price lunch in any year between 2001 and 2013, and zero, if otherwise.”²¹¹ *Poor* is defined as a “more inclusive measure of [an] economic disadvantage than contemporaneous certified eligibility and is protective against potential under-reporting of individual eligibility for school meals subsidies among UFM students.”²¹² Further, the remainder of students are *Nonpoor*, defined as individuals “never observed to be eligible for free and reduced-price lunch during this period.”²¹³ *Poor* and *Nonpoor* are “mutually exclusive.”²¹⁴

The results were revealing. Students attending a UFM school increased school lunch participation by 5.395% for *Poor* students and 10.974% for *Nonpoor* students, “relatively large compared to their lunch participation rate” of 63.960% for *Poor* students and 45.550% for *Nonpoor* students.²¹⁵ Further, UFM increased mathematics and reading scores for students in grades six through eight by 0.036 and

ages.”). See 7 C.F.R. § 245.9(b) (Provision 2 is a program where “[a] local educational agency may certify children for free and reduced[-]price meals for up to [four] consecutive school years in the school which serve meals at no additional charge to all enrolled children[.]”). See also, § 249 (f)(3)(i) (“local educational agency . . . must have an identified student percentage at least 40 percent . . . participating in [CEP.]”).

205. Schwartz & Rothbart, *supra* note 195, at 384. See 7 C.F.R. § 245.5(a) (requiring state education agencies and the Food and Nutrition Service Regional Office (“FNSRO”), administrators of the National School Lunch Program (“NSLP”) and School Breakfast Program (“SBP”) with respect to nonprofits nonprofit private schools, stipulate that eligibility criteria includes providing all students “the same meals [and] milk”).

206. *Id.* at 387.

207. *Id.*

208. *Id.* at 387.

209. *Id.*

210. *Id.*

211. *Id.* at 385.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 393.

0.030 standard deviations, respectively.²¹⁶ These results are similar to the sample results for *Poor* and *Nonpoor* students. UFM increased reading and mathematics scores by 0.027 and 0.032 standard deviations for *Poor* students and 0.059 and 0.083 standard deviations for *Nonpoor* students.²¹⁷

Ultimately, the results demonstrate that participation in school meal programs increases performance in mathematics and reading for *Poor* and *Nonpoor* students. A one percentage point increase in SLP increases mathematics scores by 0.008 standard deviations for *Poor* students and 0.006 for *Nonpoor* students.²¹⁸ Similarly, a one percentage point increase in SLP increases reading scores by 0.007 standard deviations for *Poor* students and 0.006 standard deviations for *Nonpoor* students.²¹⁹ While UFM has a more significant effect on participation for *Nonpoor* students than *Poor* students, increasing SLP for all students improves test scores for *all* students.²²⁰

2. South Carolina

In 2020, the *Economics of Education Review* published an empirical study that analyzed the effect of the Community Eligibility Provision (“CEP”), the federal UFM program, on public elementary and middle school students’ academic performance and attendance in the State of South Carolina²²¹ between 2014 and 2016.²²² The authors’ empirical study builds on the NYCDOE study discussed in the previous section,²²³ including analyzing standardized English Language Acquisition (“ELA”) and mathematics test scores in schools one year before CEP implementation and two years after the implementation.²²⁴

There are several noticeable differences between the two studies. First, the sample student data, obtained from the South Carolina De-

216. *Id.*

217. *Id.*

218. *Id.* at 394. The results suggest mathematics scores will rise by 8% of a standard deviation if school lunch participation increases by one lunch every two weeks for *Poor* students and 6% of a standard deviation if school lunch participation increases by one lunch every two weeks for *Nonpoor* students. *Id.* Reading scores will increase by 7% of a standard deviation if school lunch participation increases by one lunch every two weeks for *Poor* students, and 6% of a standard deviation if school lunch participation increases by one lunch every two weeks for *Nonpoor* students. *Id.*

219. *Id.*

220. *Id.*

221. John Gordanier et. al., *Free Lunch for All! The Effect of the Community Eligibility Provision on Academic Outcomes*, 77 ECON. EDUC. REV., Aug. 2020, at 1.

222. *Id.* at 8.

223. *Id.* at 2.

224. *Id.* at 4.

partment of Education ("SCDOE") and the South Carolina Department of Social Services ("SCDSS"),²²⁵ represents the entire state, including substantial rural populations.²²⁶ Second, the student data includes information on whether the household where the student resides is a recipient of Supplemental Nutrition Assistance Program ("SNAP")²²⁷ and Temporary Aid for Needy Families ("TANF")²²⁸ funds.²²⁹ Third, unlike the 90% of s NYCDOE students eligible for free or reduced school meals, the SCDOE student data sample contains economically heterogeneous schools.²³⁰ Fourth, the SCDOE school sample data included schools not fully funded by CEP. Fifth, while the NYCDOE study focused on middle school students, this study examined both middle school and elementary school students.²³¹ Ultimately, the study included 332,761 students in 780 schools across South Carolina, of which 73% of the schools were elementary schools.²³²

The empirical study observed differences in the "racial composition of students between the schools that participate in CEP and those that either chose not to participate or were" ineligible.²³³ Schools participating in CEP were more likely to be Black and from rural areas.²³⁴ Further, students at CEP schools were more likely to be from TANF or SNAP households.²³⁵

The results of this study were revealing. The authors observed a significant increase in mathematics test scores in CEP elementary

225. *Id.*

226. *Id.* at 3.

227. 7 U.S.C. § 2011 *et seq.* (2018).

228. In 1996, the United States Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (codified as 42 U.S.C. § 601 *et seq.*), which replaced the Aid to American Families with Dependent Children ("AFDC"), established by Title IV-A of the Social Security Act of 1935, 42 U.S.C. §§ 601-617, "to assist states in providing aid to needy children and their families," *Pennsylvania, Dep't of Pub. Welfare v. Sebelius*, 674 F.3d 139, 143 (3d. Cir. 2012), with the Temporary Assistance for Needy Families ("TANF") program.

229. Gordanier et al., *supra* note 221, at 3.

230. *Id.* Additionally, the study collected "school-level characteristics that may affect students' academic performance from annual school report cards . . . and Common Core Data from the National Center for Education Statistics." *Id.* at 4. These characteristics include "total enrollment, the share of teachers with advanced degrees, the student-teacher ratio in core subjects, average teacher salary, the share of students with disabilities, and whether the school is a charter school, magnet school, or some other type of "non-traditional" public school. *Id.* The authors excluded non-traditional public schools from their analysis. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* In 2016, Black students accounted for 63.4% of the student body in CEP schools while Black students accounted for 60.4% the student body in non-CEP schools. *Id.* In the same year, 83.5% of rural schools participated in CEP, while 35% of non-rural schools participated in CEP. *Id.*

235. *Id.*

schools by 0.061 standard deviations.²³⁶ CEP middle schools realized a positive yet insignificant increase in mathematics test scores by 0.015 standard deviations.²³⁷ Similarly, elementary and middle schools that adopted CEP realized a positive yet insignificant increase in reading test scores by 0.011 and 0.012 standard deviations.²³⁸ Nonetheless, the study observed that elementary students who qualified for free lunch before CEP and lived in non-SNAP or TANF households increased their mathematics and reading scores by 0.157 and 0.132 standard deviations; correspondingly, middle school students that qualified for CEP before CEP realized mathematics and reading test scores increased by 0.030 standard deviations and 0.028 standard deviations, respectively.²³⁹

Notwithstanding, rural and urban schools presented mixed findings. While rural elementary schools increased their math and reading scores by 0.074 standard deviations and 0.027 standard deviations, respectively, rural middle schools recognized insignificant increases in test scores.²⁴⁰ Additionally, the authors observed that urban elementary schools increased mathematics scores by 0.030 standard deviations and decreased reading scores by 0.015 standard deviations.²⁴¹ Nevertheless, urban middle schools gradually increased mathematics and reading scores by 0.032 and 0.041 standard deviations.²⁴²

On average, South Carolina's UFM program substantially improved test scores for poor elementary and middle schools students.²⁴³ Students eligible for free or reduced meals in schools with the "least poverty" benefit from UFM programs because they avoid the stigma associated with unpaid balances.²⁴⁴ Moreover, in schools not fully funded for CEP, some students' educational outcomes decline, suggesting that UFM programs may worsen risks associated with UFM when the State fails to subsidize the programs fully.²⁴⁵

236. *Id.* at 8.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 32.

241. *Id.*

242. *Id.*

243. *Id.* at 15.

244. *Id.*

245. *Id.*

V. SUBSIDIZED SCHOOL MEALS ARE CONSEQUENTIAL TO
ENSURING STATES PROVIDE ALL STUDENTS WITH A
BASIC MINIMUM EDUCATION

Although a right to basic minimum education is not an enumerated fundamental right within the Constitution, the Supreme Court of the United States jurisprudence postulates that literacy is a fundamental requisite for effective participation in American democracy.²⁴⁶ Determination of whether a right is fundamental does not follow a consistent formula.²⁴⁷ There are various methods the Court uses to identify fundamental rights.²⁴⁸ These rights must be significant, central to the concept of ordered liberty and implicitly guaranteed by the Constitution, implied from either the structure of government or the Constitution's structure, and serve as protection from government action that shocks the conscience and provides necessary access to governmental process.²⁴⁹ Finally, Supreme Court jurisprudence must discretely identify these rights.²⁵⁰ The discussion below demonstrates how access to literacy is implicitly required to preserve national citizenship rights, due process protections, and equal protection enumerated in the Fourteenth Amendment of the Constitution.

A. *National Citizenship Requires Literacy*

This Note asserts that access to functional literacy is a component of national citizenship because illiteracy precludes individuals from meaningful and effective participation in American democracy. Functional literacy is the minimum level of education that citizens need to access meaningful national citizenship through representation and participation in the American democratic process.²⁵¹ In *Rodriguez v. San Antonio Independent School District*, the Supreme Court of the United States recognized that there may be "some identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise of [other rights]."²⁵² Perhaps functional literacy is the *identifiable quantum of education* outlined in *Rodriguez*.

246. See *infra* Part II.

247. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting) ("Due Process has not been reduced to any formula; its content cannot be determined by reference to any code."); see also *Griswold v. Connecticut*, 318 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgement).

248. Robert C. Farrell, *An Excess Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 216 (2007).

249. *Id.*

250. *Id.*

251. See *infra* Section I.A.

252. 411 U.S. 1, 36 (1973).

Access to functional literacy is a substantive right of national citizenship demonstrated by the Court's recognition that there *may* be a judicially ascertained *identifiable quantum of education* in *Rodriguez* and its valuation of literacy in *Brown v. Board of Education* and *Plyler v. Doe*.²⁵³ Although the plaintiffs in "*Rodriguez* and progeny" do not identify this valuation, "the Court's discussion of the rights that functional literacy permits and encompasses in *Brown* and *Plyler* compels the interpretation" that a basic level of literacy conforms to the proffered "identifiable quantum" standard.²⁵⁴ The *Brown* Court described education as "required in the performance of our most basic public responsibilities . . . [and constituted] the very foundation of good citizenship."²⁵⁵ The *Plyler* Court deemed illiteracy a lifelong "handicap" that bars individuals from "be[ing] self-reliant and self-sufficient participants in society."²⁵⁶ Moreover, the *Plyler* Court further distinguished literacy from education by defining illiteracy as a "stigma" forever borne by the illiterate.²⁵⁷ The *Plyler* Court recognized that the plaintiffs faced the deprivation of a "basic education" because of their membership in a "discrete class . . . of children not accountable for their disabling status" for whom "[t]he stigma of illiteracy will mark them for the rest of their lives."²⁵⁸ Ultimately, "[b]y denying these children a basic education, [the Court] den[ies] them the ability to live within the structure of [American] civic institutions, and foreclose any realistic possibility that they will contribute [to] even the smallest way to [national] progress."²⁵⁹

B. Immersed within the Due Process Clause is the Fundamental Right of a Basic Minimum Education

Although the Constitution does not enumerate access to literacy as a fundamental right, a litigant challenging their primary or secondary school's failure to provide a universal free meal ("UFM") program may demonstrate that literacy is an implied fundamental right applying a substantive due process analysis.²⁶⁰ As discussed above, the Supreme Court has not definitively affirmed basic education as a fundamental right; thus, this substantive due process analysis initially requires a judicial determination of whether access to a minimally

253. See discussion *infra* Sections III.A, III.B., III.C.

254. Kohlenberg, *supra* note 22, at 254.

255. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

256. *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

257. *Id.* at 223.

258. *Id.* 202, 22.

259. *Id.* at 223.

260. See U.S. CONST. amend. XIV; see *infra* Section II.B.

adequate education, encompassing literacy, has a longstanding presence in American history and tradition.²⁶¹ Subsequently, the substantive due process analysis requires determining whether literacy is “‘implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the asserted right] were sacrificed.’”²⁶²

1. Literacy is a Component of American History and Tradition

Access to literacy is a fundamental right because it is deeply reflected in American history and tradition, as repeatedly emphasized in Supreme Court precedent.²⁶³ Discerning history and tradition, “guide and discipline [the substantive due process] inquiry[,] but do not set its outer bound[s].”²⁶⁴ Education, particularly access to literacy, was viewed as a key to political power.²⁶⁵ Before the American Civil War, enslavers and segregationists withheld access to literacy, weaponizing this deprivation of education to prevent Black people from obtaining the political power necessary to achieve liberty and equity.²⁶⁶ Further, “this history is one of evolution rather than [a] paradigm shift.”²⁶⁷ Slave codes of the antebellum South transformed into separate-but-unequal education policies that persisted into the present.²⁶⁸

The antebellum Southern states widely criminalized the education of enslaved Black people²⁶⁹ due to a desire to “prevent escapes or rebellion.”²⁷⁰ These laws forbade any person from teaching enslaved people to read or write and prohibited any person from using language in any public discourse from the “bar, bench, stage, . . . pulpit, or any other place, . . . private conversation, . . . [and] making use of any sign or actions [tending] to produce discontent among the free colored population.”²⁷¹ Additionally, slave codes sought to prohibit the insubordination of enslaved people and punished those that were “knowingly instrumental in bringing into [a] state any paper, book or

261. *Id.* at 649.

262. *Washington v. Glucksberg*, 521 U.S. at 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

263. See *Gary B. v. Whitmer*, 957 F.3d 616, 649 (6th Cir. 2019) *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem.).

264. *Obergefell v. Hodges*, 576 U.S. 644, 645 (2015).

265. *Gary B.*, 957 F.3d at 650.

266. *Id.*

267. *Id.*

268. *Id.*

269. See, e.g., *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 387-388 (1978) (Marshall, J., concurring in part and dissenting in part); *South Carolina v. Katzenbach*, 383 U.S. 301, 311 n.10 (1966).

270. *Gary B.*, 957 F.3d at 650.

271. Cf. *Frederick Douglass Bicentennial Commission Act*, Pub. L. No. 115-77, § 2(3), 131 Stat. 1251 (2017) (“Douglass continued to teach himself to read and write and taught other slaves to read despite risks including death.”).

pamphlet.”²⁷² A violation of the slave code was punishable by imprisonment or death.²⁷³

Scholars, including Professor Derek Black, posit that the complete understanding of the ratification of the Fourteenth Amendment during the Reconstruction era following the American Civil War reveals how “securing public education for all was [a component] of the original intent underlying the Amendment.”²⁷⁴ The immediate aftermath of the Civil War presented many challenges, particularly ensuring the full participation of the newly emancipated Blacks and poor whites in American democracy.²⁷⁵ Thus, the non-seceding (“Union”) states required the former Confederate States of America (“secessionist”) Southern states to meet the terms Congress stipulated in the Reconstruction Act (“the Act”) of 1867,²⁷⁶ including the ratification of the Fourteenth Amendment.²⁷⁷ Three pieces of evidence support the conclusion that education was a component of the Fourteenth Amendment. First, the Act’s legislative history reveals that as a condition of readmission to the United States, Congress expected the former Confederate states to guarantee access to education within rewritten constitutions.²⁷⁸ Congress considered and nearly included explicit language to that effect in the Act, but it proved unnecessary because both the Act and Article Four of the Constitution of the United States required states to adopt “republican forms of government.”²⁷⁹ These contingencies meant that secessionist states were required to present their rewritten constitutions and present them to Congress for approval.²⁸⁰ Congressional members assumed that education was inherent in a republic form of education.²⁸¹ Second, by 1870, every Southern state that had gone through the Reconstruction

272. *Id.*

273. *Id.*

274. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 741 (2018).

275. *Id.* at 782.

276. See Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429; see CONG. GLOBE, 40th Cong., 1st Sess. 165-170 (1867) (indicating a vote of twenty yeas and twenty nays on the question of whether to explicitly condition readmission of Southern states on their “establish[ing] and sustain[ing] a system of public schools open to all, without distinction of race or color”).

277. Black, *supra* note 274 at 742.

278. *Id.* at 742.

279. *Id.* The “Guarantee Clause” requires the “United States shall guarantee every State in this Union a Republican Form of government.” U.S. CONST. art. IV § 4.

280. See Reconstruction Act of 1867, ch. 153, §5, 14 Stat. 428, 429.

281. Black, *supra* note 274, at 742; see CONG. GLOBE, 40th Cong., 1st Sess. 169 (1867 (statement of Sen. Cole) (urging adoption of the educational amendment, see *supra* 276 and accompanying text, based in part on “the difficulties that result in a republican Government from the want of education”); cf., e.g., Steven G Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 461 (2014) (noting that education clauses in the Louisiana and South Carolina state constitutions prohibiting segregation in public schools “un-

era made the education requirement explicit in its constitution.²⁸² Furthermore, third, in 1868, when Mississippi, Texas, and Virginia had yet to write their constitutions,²⁸³ Congress passed legislation explicitly conditioning their readmission on the equal provision of education to their citizens within their constitutions.²⁸⁴

Concurrent to the ratification of the Fourteenth Amendment was the extrajudicial violence of the Reconstruction era.²⁸⁵ During this period, the Ku Klux Klan violently targeted Black parents who sent their children to schools and their children's schoolteachers.²⁸⁶ Although the federal government responded to this violence with "civil rights legislation and prosecutions," the Reconstruction era heralded legislation and policy efforts designed to limit the education of African Americans.²⁸⁷ Further, the Supreme Court failed to enjoin these blatantly discriminatory policies. For example, in *Cunningham v. Board of Education*, the Court declined to intervene when a local school board closed a preexisting Black high school "and used the funds . . . to assist in maintaining a high school for white children without providing a similar school for [Black] children."²⁸⁸ Furthermore, while the *Brown v. Board of Education* Court held "[s]eparate, but equal facilities are inherently unequal,"²⁸⁹ segregation and unequal treatment in schools persisted long after the 1954 decision.²⁹⁰

Access to literacy is a prerequisite to political power, and a correlation existed between full unabridged citizens entitled to self-govern-

doubtedly reflect[] the pressure brought to bear on those states by the Reconstruction Congress, which imposed stern conditions").

282. Black, *supra* note 274, at 743.

283. *Id.* at 744; see MARY BETH NORTON ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 416 map 14.1 (brief 10th ed. 2015) (providing the dates of readmission for each Southern state). Georgia had also yet to be readmitted as of July 1868, see *id.*, but it had already enacted a new constitution providing for education, see GA. CONST. of 1868 art. VI, § 1. Georgia's readmission was slowed on other grounds; after passing its 1868 constitution, the state had expelled all newly elected Black representatives from public office. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 230-31 (1995).

284. Black, *supra* note 274, at 744; Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (providing that Texas would be admitted to the Union so long as its constitution "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the [state] constitution"); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 67 (same for Mississippi); Act. of Jan 26, 1870, 16 Stat. 62, 63 (same for Virginia).

285. Gary B. v. Whitmer, 957 F.3d 616, 651 (2020).

286. GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 97 (2007).

287. Gary B., 957 F.3d at 651. See Katzenbach, 383 U.S. at 310-13, 311 n.10 (noting that Southern states "rapidly instituted racial segregation in their public schools" following the Civil War and discussing the interplay between these efforts to restrict literacy and efforts to restrict the vote).

288. 175 U.S. 528, 544 (1899).

289. 347 U.S. 483, 495 (1954).

290. Gary B., 957 F.3d at 651.

ance and access to basic education by the state.²⁹¹ When faced with exclusion from public education, putative students rely on courts for relief.²⁹² These grave injustices led to substantial litigation devoted to addressing these exclusions, revealing the undeniable value assigned to literacy: students must obtain education for a chance at political and economic opportunity.²⁹³

2. Literacy is Implicit in the Concept of Ordered Liberty

Beyond examining history, a court must assess whether an asserted right is “implicit in the concept of ordered liberty.”²⁹⁴ A federal court is required to “exercise reasoned judgment in identifying interests of the person so fundamental that the [s]tate must accord them its respect.”²⁹⁵

“Illiteracy is an enduring disability,” and the “inability to read and write will handicap the [student] deprived of a basic education . . . every day of his life.”²⁹⁶ A basic minimum education, which plausibly provides access to literacy, is fundamental because it is necessary for even the most limited participation in American democracy.²⁹⁷ The Supreme Court has recognized that basic literacy is foundational in our political process and society.²⁹⁸ In *Wisconsin v. Yoder*, the Supreme Court noted that “some degree [of education] is necessary to prepare citizens to participate effectively and intelligently in [the] open political system [in order to] preserve freedom and independence.”²⁹⁹ *Rodriguez* rejected a general right to education because no public school student is guaranteed the *most* effective or intelligent political participation.³⁰⁰ However, according to *Gary B.*, the degree of education a litigant must assert in federal court is “access to basic literacy” necessary for essentially *any* political participation.³⁰¹

While the Court in *Rodriguez* said that “the importance of a service performed by the [s]tate does not determine whether [a right] fundamental,”³⁰² this principle stretches past its breaking point when

291. *Id.* at 652.

292. *Id.*

293. *Id.*

294. Glucksberg, 651 U.S. at 721.

295. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

296. *Plyler*, 457 U.S. 457 U.S. 202, 222 (1982). See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“indicating the right to right “to acquire useful knowledge” was protected by the Due Process Clause”).

297. *Gary B.*, 957 F.3d at 652.

298. *Id.*

299. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

300. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1972).

301. *Gary B.*, 957 F.3d at 652.

302. *Rodriguez*, 411 U.S. at 30.

the contested right is essential for exercising clear fundamental rights, such as voting and the meaningful exercise of political freedom because these rights are premised on reading and comprehending written thoughts. Access to literacy “is required in the performance of [the] most basic public responsibilities,”³⁰³ including obeying road signs backed by the force of law. Access to literacy also “draws meaning from related rights,” further indicating that it must be protected.³⁰⁴

Education, the “great equalizer,” ensures that regardless of a child’s birth circumstances, a minimum education provides the opportunity to succeed simply based on his innate abilities.³⁰⁵ Denying basic education that provides functional literacy imposes a disability on a child and is contrary to the “basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”³⁰⁶ Ultimately, “[p]roviding a basic minimum education is necessary to prevent such an arbitrary denial and essential to [the American] concept of ordered liberty.”³⁰⁷

C. *Access to Literacy is an Equal Protection Issue*

Most educational inequality and unfairness challenges uniformly fail under the Constitution of the United States because the level of scrutiny is rational basis.³⁰⁸ The Supreme Court of the United States does not recognize education as a fundamental right; therefore, it does not require courts to review educational laws and policies under a strict scrutiny examination. Additionally, although state constitutional claims succeed in most instances, the only question in state cases is the final education outcome—adequacy and equity—obscuring educational gerrymandering or state funding formulas that “advantage privileged suburban school districts and disadvantage low-income and minority school districts.”³⁰⁹ States’ primary motives are often to favor these elite suburban schools and communities, lower taxes for the wealthy, avoid their constitutional duty in education, and stop spending what they incorrectly consider to be wasted money on low-income students.³¹⁰ Establishing minimally adequate education as a fundamental right may require courts to review an Equal Protection Clause

303. *Id.*

304. *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015).

305. *Gary B.*, 957 U.S. at 654.

306. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

307. *Gary B.*, 957 U.S. at 655.

308. Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1441 (2019).

309. *Id.* at 1392, 1441.

310. *Id.* at 1392.

action challenging a state educational law or policy alleged to be racially discriminatory and discriminatory facially neutral state education policies.

1. A Legitimate Government Interest Does Not Support Unsubsidized School Meals

Several states have an affirmative obligation under their constitutions to provide education.³¹¹ This affirmative obligation alters how rational basis applies to education because it requires the state to provide education in its communities.³¹² Under many state constitutions, education must meet some qualitative standard, and in this context,³¹³ rational basis review may require the state to “pay more to remedy the unequal burden imposed on students.”³¹⁴ It is not enough that a state refrains from singling out groups from the education system;³¹⁵ states must avoid unequal access to education.³¹⁶

Suppose if the Supreme Court of the United States reviews access to literacy as a fundamental right, the applicable standard of review for state education policies will then be strict scrutiny. Under this doctrine, if the Court treats nutrition as an essential component of education, states could only opt out of universal free meal (“UFM”) programs, and the state must demonstrate that it narrowly tailors its laws to achieve a compelling interest.³¹⁷ A state’s failure to administer UFM programs within its schools is not a narrowly tailored governmental policy because the adverse consequences are sweeping. UFM programs within primary and secondary schools positively improve academic performance for low-income and non-low-income students; a state’s failure to administer these programs ultimately abates basic minimum education.³¹⁸ Moreover, ensuring that poor children do not benefit from UFM because of a state’s desire to prevent dependency

311. See, e.g., ALASKA CONST. art. VII, § 1 (“The legislature shall by general law establish and maintain a system of public schools open to all children of the State.”). See COLO. CONST. art. IX, § 2 (“The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state.”). See NEV. CONST. art. 11, § 2 (“The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district.”).

312. William E. Thor, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989).

313. See, e.g., FLA. CONST. art. IX § 1; *Campaign for Fiscal Equity Inc. v. State*, 861 N.E.2d 50, 53 (N.Y. 2006); *Leonard v. State*, 488 S.E.2d, 254 (N.C. 1997).

314. Black, *supra* note 308, at 1451.

315. See *Sheff v. O’Neill*, 678 A.2d 1267, 1285 (Conn. 1996).

316. See *Abbott v. Burke*, 710 A.2d 450, 485 (N.J. 1998) (recognizing the state has an affirmative duty to address educational deficiencies).

317. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 395 (1992).

318. *Infra* Part III.

will most likely fail as a “compelling state interest” because the Court “has emphasized that intentionally targeting groups for disadvantage simply because the state does not like them is illegitimate, even if the target group is not a suspect class.”³¹⁹ States lack a legitimate justification for not providing all students with free access to meals, an essential component of education, therefore subverting their state constitutional duties regarding education and violating the Equal Protection Clause of the Fourteenth Amendment.³²⁰

2. Discriminatory Intent Underlies Many State Education Funding Schemes

Plaintiffs may turn to *Village of Arlington Heights v. Metropolitan Housing Development Corporation* when challenging a statute or regulation motivated by racial discrimination.³²¹ As discussed in Part II of this Note, a federal court may examine: (1) the action disproportionately impacts an individual racial group; (2) the historical background of the statute or regulations, particularly if it “reveals a series of official actions” taken to further discriminatory purposes; (3) the specific sequence of events leading up to the challenged statute or regulation; and (4) the legislative or administrative history.³²² However, courts may identify other authorities when determining whether a statute or regulations motivated racially discriminatory intent.³²³ Purported cost savings and educational improvements—purported justifications provided in *Plyler v. Doe*—were “window-dressing for the state’s motive to burden undocumented immigrants.”³²⁴ Whether educational or some other context, the type of goal was one Texas could not pursue, and Texas policy’s incidental effect of producing otherwise legitimate costs savings could not save the policy.³²⁵

A litigant who brings an equal protection complaint may advance any of the four *Arlington Heights* factors under the Equal Protection Clause. First, a litigant may demonstrate their school district’s unambiguous abhorrence towards low-income students by unveiling the requirement that students pay for nutritious meals needed for learning while withdrawing from federally subsidized meal programs, are “ille-

319. Black, *supra* note 308, at 1392. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (If “the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

320. Black, *supra* note 308 at 1442.

321. 429 U.S. 252, 266.

322. *Id.*

323. *Id.* at 269.

324. Black, *supra* note 308, at 1450; see *Plyler v. Doe*, 457 U.S. 202, 228 (1982).

325. Black, *supra* note 308 at 1450.

gitimate government goal, even if the group is not a class that otherwise warrants heightened scrutiny.”³²⁶ Second, a litigant may advance that absent some other obvious explanations, legislation, and practices that rely on a unique characteristic, such as income level, to create distinctions between low-income and non-low-income students are inherently suspect because such unusual state activity suggests an illicit motive to create an in-group and out-group.³²⁷ Third, a litigant may postulate that while traditional animus may motivate state action to signal out a group, the absence of animus does not mean that the state action is constitutional.³²⁸ Requiring students to undergo cumbersome and unnecessary administrative tasks to access free or reduced-price meals are policy decisions that appear facially innocuous and nondiscriminatory. However, these state policy decisions constructively single out low-income students by requiring them to pay for the necessary nutritional meals their families struggle to afford when the state’s capacity to opt into federal UFM programs may abate these financial burdens, embarrassment, and cognitive deficits deprivations these students face absent UFM programs. A state may need a legitimate basis for its action other than deliberately inconveniencing low-income students.³²⁹ Moreover, fourth, a litigant may urge a federal court to “pull the curtain back” to examine a state’s policy for charging for meals and its adverse consequences such as nutritional deprivation and low academic outcomes.³³⁰

VI. COMBATTING THE CHALLENGES TO BASIC MINIMUM EDUCATION

A. *Defining Basic Minimum Education as a “New” Fundamental Right is Proper*

One may argue that extending the substantive due process by recognizing *new* rights as fundamental removes these rights and disrupts the political process.³³¹ Further, it is commonly held in federal courts that since the political branches may more effectively address general social wrongs, courts should not intervene in recognizing calcified and inflexible constitutional rights.³³² Nonetheless, participation in the American political system requires literacy. The assurance of literacy

326. *Id.* at 1447.

327. *Id.*

328. *Id.* at 1147-48.

329. *Id.* at 1148.

330. *Id.*; see *infra* Part IV.

331. Gary B. v. Whitmer, 957 F.3d at 616, 655 (6th Cir. 2020).

332. *Id.*

among *all* children is undeniably obtained through access to free meals while attending school. As shown in *Gary B. v. Whitmer*, the complaining students and families of students without access to literacy are vulnerable groups facing disadvantages seeking political recourse.³³³ However, their lack of literacy prevents them from obtaining a basic minimum education through the normal political process.³³⁴ The *Gary B.* court notes that this paradox provides increased justification for heightened scrutiny and recognizing the right as fundamental.³³⁵ Heightened scrutiny is warranted when a class is saddled with a disability or relegated to a position of political powerlessness.³³⁶ Local or state school board decisions to withdraw from the Seamless Summer Program ("SSO") saddle children with a disability and may consequently secure their position of political powerlessness because they have a diminished ability to obtain literacy.³³⁷ These students' access to literacy may easily be compromised, thus putting them in a position of political powerlessness that commands special protection.

B. Although the Constitution is a Charter of Negative Rights, Not Positive Rights, the Right to Literacy is a Fundamental Right

Additionally, it may be touted that the Fourteenth Amendment, which speaks to the deprivation or denial of due process and equal protection, does not provide positive, affirmative rights. Tethered to this advancement, the Due Process Clause and the Equal Protection Clause state what the government cannot do, not what it *must* do; therefore, requiring states to guarantee access to literacy would usurp the tenants of the Amendment.³³⁸

However, as *Gary B. v. Whitmer* asserts, "access to marriage was so uniformly provided by states and expected by the people as a right, it took on a fundamental character under the Due Process Clause, even though the performance of marriage is an affirmative act by the state . . . [and] [t]he same can be said for education."³³⁹ Additionally, the Court's jurisprudence has left open the possibility of the right to

333. *Id.*

334. *Id.* at 655-56.

335. *Id.* at 656.

336. *San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 28 (1973).

337. See Paül, *supra* note 9 (discussing the Waukesha School District's failure to opt into the SSO program that would have effectively made school meals free to all students in its schools). See *Nationwide Waiver*, *supra* note 5.

338. *Gary B.*, 957 F.3d at 656.

339. 957 F.3d at 657.

basic minimum education, negating the argument that its recognition is impossible given its affirmative nature.³⁴⁰

Universal, state-provided public primary and secondary education was ubiquitous when the Fourteenth Amendment was ratified and remained a basic expectation within every jurisdiction of the United States.³⁴¹ This expectation directs states towards “occupy[ing] the field of education . . . [resulting in public education as] the only practical source of learning for the vast majority of [primary and secondary] students.”³⁴² No other area of daily life is “so directly controlled by the state” than public education.³⁴³ Further, with state control must come state responsibility, mainly because “some minimal education—enough to provide access to literacy—is a prerequisite to a citizen’s participation in [the American] political process.”³⁴⁴ The fruit of education, literacy, assumes a fundamental role within contemporary American society. Regardless of racial identity or income level, literacy is the expected outcome of all primary and secondary education institutions. Moreover, attainable literacy requires universal free meal (“UFM”) programs that guarantee access to vital nutrients for students to meaningfully develop the ability to sound out letters; write proper paragraphs; formulate complete sentences; and possess a complex vocabulary.³⁴⁵

CONCLUSION

A basic minimum education that provides primary and secondary students functional literacy is vital to the endurance of American democracy. Furthermore, functional literacy requires consistent nutritional nourishment. The meaning of effective participation in American democracy, whether states possess a federal constitutional duty to deliver education to children, and how courts can compel equitable remedies are issues that remain unaddressed by the Supreme Court of the United States. Moreover, the Court has yet to address whether the Citizenship Clause, Due Process Clause, and the Equal Protection Clause of the Fourteenth Amendment encompass the fundamental right to a minimally adequate education that provides functional literacy to all primary and secondary students. Despite these

340. *Id.* Notably, in *Papasan v. Allain*, 478 U.S. 265 (1985), the Court took pains to distinguish and reserve a decision on whether a minimally adequate education is a fundamental right. *Id.* at 287.

341. Gary B., 957 F.3d at 658. *See infra* Section I.B.2.

342. *Id.*

343. *Id.*

344. *Id.*

345. Gary B., 957 F.3d at 626.

uncertainties, the Court's precedent cogently outlines the longstanding importance of functional literacy as a requisite to the complete exercising of national citizenship, preserving liberty, and the state obligation to ensure all citizens possess equal opportunities to succeed within American society. Moreover, although the federal government has implemented nutritional programs that allow students to access free meals that support state efforts to ensure functional literacy for all primary and secondary students, the non-compulsory nature of these programs neither ensures uniform and consistent access to free meals nor necessitates states obligation to ensure free access to meals. As empirical research demonstrates that nutrition is a necessary component of learning, we must ask ourselves: how can a public school not charge a student for a textbook, but charge him for breakfast and lunch, when both are equally necessary for his education?

Bulk of the Blame: Using the Legacy of Lynching to Protect Transgender People

REMINGTON A. DANIEL

The “trans panic defense” roots itself within the transphobic concept that transgender women actively pretend and masquerade as “real” women. It asserts that, when a transgender woman is murdered due to her assailant learning of her assigned birth gender, her deceit reasonably provoked the murderer into losing self-control. For over a century and a half, assailants have used a victim’s identity and perceived societal threat as a justification for violence enacted against them. These justifications not only manifest in the trans panic defense, but also in the further perpetuation of hate crimes against the transgender community and marginalized communities at large. This Note uses lynching in response to allegations of rape in the late nineteenth century as a blueprint to examine how to best address violence against transgender people and the “trans panic defense.” Moreover, this Note analyzes the past century of state and federal civil rights legislation before proposing that legislators must ban the trans panic defense in every state and the federal government must mandate the reporting of hate crime statistics to more effectively protect transgender individuals. Finally, this Note provides guidance on how to get these measures signed into law.

**Bulk of the Blame:
Using the Legacy of Lynching to
Protect Transgender People**

REMINGTON A. DANIEL*

INTRODUCTION	243
I. THE HISTORY OF VIOLENCE	244
A. <i>The Warning to All Negroes</i>	244
1. Suffragists	247
2. Southern Lawmakers	249
B. <i>A Highly Provoking Act</i>	251
II. THE LEGISLATION	260
A. <i>Dyer Anti-Lynching Act</i>	261
B. <i>Emmett Till Anti-Lynching Act</i>	263
C. <i>Virginia House Bill 2132</i>	264
D. <i>The Equality Act Of 2021</i>	265
E. <i>Comparisons</i>	267
III. THE SOLUTIONS	268
A. <i>Trans Panic Defense Ban</i>	268
B. <i>Federally Mandated Reporting</i>	269
IV. TO GET IT PASSED	270
A. <i>State vs. Federal</i>	271
B. <i>Public Opinion</i>	272
C. <i>The Senate Graveyard</i>	272
CONCLUSION	273

* Thank you to Professor Lisa Crooms-Robinson, my advisor for this article, for providing excellent direction, suggestions, and comments throughout the duration of drafting this article. Additionally, thank you to the entire *Howard Human and Civil Rights Law Review* at Howard University School of Law for creating a uniquely scholarly space to cultivate civil rights scholarship and working hard to edit this piece for publication. Finally, thank you to all of my colleagues for the emotional support they have provided throughout this process.

INTRODUCTION

When considering “lynching,” one may immediately think of murder by hanging; however, the actual definition of lynching encompasses much more. Reconstruction Era and early twentieth century scholars use the term “lynching” to include hanging and being shot, burned, beat to death, and many other forms of mutilation and torture.¹ The most crucial aspect of a “lynching” is its extrajudicial nature, committed outside of the influence of the law and in response to a social infraction. Lynchings are crimes of anger and fury spurred by that perceived societal threat, whether to the community at large or one specific person.

The murder of transgender people, specifically transgender women of color, is yet another form of lynching. When killed for the simple social infraction of being transgender, this community is punished for daring to exist. When assailants murder transgender women and justify such violence on the transgender women “deceiving” them into believing they were cisgender, many states provide the assailants the ability to use this alleged deception as a legitimate defense in court that may bring a lesser voluntary manslaughter sentence. This turns a murder motivated by bigotry, homophobia, and transphobia into an “objectively reasonable” lynching.² This justification harkens back to the late nineteenth and early twentieth century lynchings of Black men for the accused rape of white women. On its face, the lynchings were justified through objectively reasonable anger at a societal threat or trickery. In actuality, the lynchings were motivated by bigotry.

This Note uses lynching in response to allegations of rape in the late nineteenth century as a blueprint to examine how to best address violence against transgender people and the “trans panic defense.”³ It argues that legislators must ban the trans panic defense in every state and the federal government must mandate the reporting of hate crime statutes to protect transgender people from hate crimes more effectively. Part I begins by going through the history of lynching as a tool for punishing marginalized communities for a perceived societal threat and then discusses the statistics accompanying this history. Part II discusses the legislation enacted throughout the past century and why it has failed its intended purpose of protecting these marginalized

1. TRICHITA M. CHESTNUT, *LYNCING: IDA B. WELLS-BARNETT AND THE OUTRAGE OVER THE FRAZIER BAKER MURDER* 21 (2008).

2. See CAL. PENAL CODE § 192 (f)(1) (2020).

3. See *infra* Section I.B.1.

communities. Part III argues that future legislation must ban the trans panic defense and federally mandate the reporting of these hate crimes. Finally, Part IV provides a path towards enacting this legislation, a feat that has yet to be accomplished.

I. THE HISTORY OF VIOLENCE

A. *The Warning to All Negroes*

Daniel Edwards lived near Selma, Alabama, where he worked for a family of farmers.⁴ At some point, Edwards and the daughter of the head of the house formed a relationship. The relationship continued for over a year but eventually led to “the disgrace of the girl;” when a child was born, the girl’s mother revealed to the public that Edwards was the father.⁵

Police immediately apprehended Edwards, locking him in prison, where he stayed only briefly.⁶ No trial, conviction, or sentencing, occurred before a mob of approximately one hundred residents of the town snatched him from the jail.⁷ The mob then proceeded to hang Edwards from a tree and shoot at his corpse until “his body [was] riddled with bullets.”⁸ A later record of the lynching noted a sheet of paper stuck to his back, which read: “Warning to all Negroes that are too intimate with white girls. This the [sic] work of one hundred best citizens of the South Side.”⁹

In her novel *The Red Record*, investigative journalist Ida B. Wells-Barnett discusses how the sheet of paper suggests that “[t]here can be no doubt” that those of the mob knew of Edwards and the daughter’s consensual relationship.¹⁰ Nonetheless, the consensual nature of the relationship was immaterial to the “one hundred best citizens.” The dispatchers still listed the reason behind Edwards’ lynching as rape.¹¹

Data counts Edwards among the 19% of Black men who mobs lynched for the listed crime of “rape” between 1889 and 1918.¹² Out of the 2,622 Black men murdered by lynching during the thirty-year year,

4. IDA B. WELLS-BARNETT, *THE SELECTED WORKS OF IDA B. WELLS-BARNETT* 138, 208-09 (1991).

5. *Id.*

6. *See id.*

7. *See id.*

8. *Id.*

9. *Id.* at 210.

10. *Id.*

11. *Id.*

12. NAACP, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918* 36 (1919).

477 died because of rape accusations.¹³ Comparatively, white people only had forty-six instances of lynching within the same time frame for the same crime, accounting for only 6.6% of the total number of white persons lynched.¹⁴ Moreover, during these thirty-years of terror, fifty black women and eleven white women were lynched.¹⁵

Published in April of 1919 by the National Association for the Advancement of Colored People ("NAACP"), *Thirty Years of Lynching in the United States, 1889-1918*, contains pages of similar statistics in various charts, graphs, and tables. Alongside these statistics are dozens of bulletins totaling to one hundred persons lynched—the bulletins of which are objective in describing the sheer violence perpetrated—and maps of the United States about this thirty-year snapshot into its history.¹⁶ The records compiled in this report are neither secret nor hidden; instead, the Tuskegee Institute, Chicago Tribune, the NAACP, and the NAACP's magazine *The Crisis* have compiled the records since 1885.¹⁷

Within the report and before the actual bulletins, is a summation and explanation concerning these bulletins' facts. Typically, the records' foreword contains an analysis of the distributions, a possible motive behind the decrease in lynchings, and a clarification about the potential "causes" listed. However, the report does include the following caveat:

Further, it may fairly be pointed out that in a number of cases where Negroes have been lynched for rape and "attacks upon white women," the alleged attacks rest upon no stronger evidence than "entering the room of a woman" or brushing against her. In such cases as these later the victims and their friends have often asserted that there was no intention on the part of the victim to attack a white woman or to commit rape.¹⁸

The statistics and anecdotes in *Thirty Years* come with no such commentary attached directly to the stories; instead, it simply takes time before the bulletins to present the reader with a conditional statement. For instance, *Thirty Years* provided the bulletin reprinted above so the reader may keep it in mind as they notice how many of the bulletins mention "rape" as the reason behind the lynching. It further specifies that the charges of rape never concern the rape of a Black

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 11-29.

17. *Id.* at 8.

18. *Id.* at 10.

woman; instead, the statistics likely tabulate only the “alleged rape and attacks upon white women.”¹⁹

While reading these accounts, keeping this in mind leads to the speculation of further caveats that may be at play within the dozens of bulletins. These additional caveats may be necessary for context but preserving the original objectivity of the accounts is also crucial. The dozens of separate bulletins typically follow the same template, with few variations, all having the following: (1) the state and year in which the incident occurred; (2) an objective description solely of the events that transpired; and (3) the source, whether it be from a newspaper or report. Another bulletin exemplifying the impartial reporting that *Thirty Years* employs: “A mob, formed near Liberty County, pursued through seven counties a Negro supposed to be Ed Claus, who had assaulted Susie Johnson, a young white woman, and lynched him, hanging him and shooting him full of holes. After he was lynched[,] it was found he was not Claus.”²⁰

Thirty Years’ records exist as snapshots and anecdotes, with some, like the one above, only being two sentences long. In 1919, such a record of these instances in one format was nearly unheard of, primarily because it also includes a further statistical analysis alongside these stories. One hundred years later, in United States Congress Representative Jerrold Nadler’s report to support the passing of the Emmett Till Antilynching Act,²¹ the Committee on the Judiciary considered *Thirty Years*’ as a “revelation of the causes of lynching and the circumstances under which the crimes occurred.”²² The report considered it a public record of the sheer amount of extrajudicial killings that occurred only within the thirty-year time frame.²³ Even though the NAACP published other reports regularly concerning lynching and other crimes against African-Americans, this Congressional was the most expansive set of data from the early twentieth century.²⁴

Moreover, *The Red Record* approaches similar data in a slightly different manner. Published in 1895, it predates *Thirty Years* by approximately twenty-three years and contains similar facts and anecdotes; however, its scope is much smaller.²⁵ Instead of thirty years of statistics, facts, and analysis, Wells-Barnett only examines 1893 and

19. *Id.*

20. *Id.* at 15.

21. H.R. 55, 117th Cong. (2022).

22. H.R. REP. NO. 116-267, at 3 (2019).

23. *See id.*

24. *Id.*

25. WELLS-BARNETT, *supra* note 4.

1894, a specific snapshot in the middle of the Jim Crow era.²⁶ Wells-Barnett's report includes the lynching record for 1893, the lynching record for 1894, and information and explanations concerning those statistics.²⁷

Furthermore, it places the statistics and information in a contemporary context, juxtaposing them with the racial climate of the early 1890s and current public opinion. Wells-Barnett's literature and the responses to her speeches provide an excellent insight into how influential figures within the late 1800s viewed the epidemic of lynchings within the country. From monumental suffragists to influential lawmakers, they all responded to Wells-Barnett's calls to address the murders with similar vitriol and denial.

1. Suffragists

Leaders of other movements and self-proclaimed advocates, despite the desire to move the country forward in favor of their ideas of justice, actively and purposefully perpetuated the myth that Black men are inherently dangerous and white women are naturally in danger. In the October 23, 1890, edition of *The New York Voice* newspaper, Frances E. Willard, the national president of Woman's Christian Temperance Union ("WCTU") and prominent women's suffragist, states of the "race problem":

Would-be demagogues lead the colored people to destruction. Half-drunken white roughs murder them at the polls, or intimidate them so that they do not vote. But the better class of people must not be blamed for this, and a more thoroughly American population than the Christian people of the South does not exist. . . . The problem on their hands is immeasurable. The colored race multiplies like the locusts of Egypt. The grog shop is its centre of power. The safety of woman, of childhood, of the home, is menaced in a thousand localities at this moment, so that men dare not go beyond the sight of their own roof-tree.²⁸

Willard begins by stating that she has "not an atom of race prejudice" and emphasizes Southern whites' compassion and exemplary status as an explanation their violence.²⁹ Despite being "the daughter of abolitionists," Willard cites a necessity to protect white women and children as a reason behind the issue of lynching in the

26. *Id.*

27. *Id.* at 200-208.

28. *The Race Problem: Miss Willard on the Political Puzzle of the South*, N.Y. VOICE, Oct. 23, 1890.

29. *Id.*

South.³⁰ Except for her acknowledgment that Black citizens are murdered and intimidated at the polls, she blames Black men for the violence they endure at the hand of white Southerners.³¹

However, additional vitriol surrounds that exception; to Willard, Black men were “alien illiterates.”³² They taint Southern ballot boxes with their limited worldview and lack self-restraint at saloons.³³ The temperance movement stalls were a result of the “great dark-faced mobs in the Southern localities,” and could be considered the movement’s greatest enemy.³⁴ In this light, even her statement concerning voter suppression takes a different connotation. If not for the Black man so boldly voting, perhaps murder and intimidation would not befall him despite his ineptitude. It is the Black man’s fault for his own murder.

This interview in *The New York Voice* was a prime example of how movements’ leaders “perpetuated” the myth of white woman fragility and the dangerous Black man. Movement leaders, such as Willard, that historians revere as examples of harnessing the power of petition and protest effectively fall short when Black people are involved. These leaders do not promote overall equality. Instead, they only seek to achieve equality for themselves by ignoring or stepping on the backs of other marginalized communities. To Wells-Barnett, Willard falls directly into this category.

In her biography *Crusade for Justice*, Wells-Barnett explained how Willard did not hesitate to repeat the stereotype of Black men being illiterate, dangerous, drunk rapists.³⁵ Willard plays into these stereotypes handed over by Southerners to “court white Southern women” for the sake of her push towards women’s suffrage.³⁶ According to Wells-Barnett, she sought to “gain favor with those who are hanging, shooting, and burning Negroes alive” by not only reinforcing the stereotypes but by condoning the lynching.³⁷ Even more explicitly, Willard promised the South that she would not say a word that “is not

30. *E.g.*, WELLS-BARNETT, *supra* note 4, at 201.

31. *Id.* at 202.

32. N.Y. VOICE, *supra* note 28.

33. *Id.*

34. *Id.*

35. IDA B. WELLS-BARNETT, *CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS*, SECOND EDITION, edited by Alfreda M. Duster, 129 (2020).

36. Monee Fields-White, *The Root: How Racism Tainted Women’s Suffrage*, NPR (March 25, 2011, 8:54 AM), <https://www.npr.org/2011/03/25/134849480/the-root-how-racism-tainted-womens-suffrage>.

37. WELLS-BARNETT, *supra* note 35, at 151.

loyal" to the South's methods of lynching and voter suppression if only to make sure they knew she stood on their side.³⁸

2. Southern Lawmakers

Southern lawmakers saw the lynching issue Wells-Barnett explained in her speeches and pamphlets as both complete non-issues *and* paradoxically false.³⁹ As Wells-Barnett explains, the "instances where the lynched Negro was the victim of a white woman's falsehood" did not go unnoticed by lawmakers.⁴⁰ Instead, they had acted pointedly obtuse, and they invariably suppressed the facts upon confrontation.⁴¹

In its July 30, 1894, edition, *The Sun* reported a speech Wells-Barnett gave in England to gain overseas support for the anti-lynching movement, where she received a great reception.⁴² Alongside the speech, *The Sun* transcribed the reactions to Wells-Barnett's rousing speeches in a section titled "What the South Thinks."⁴³ These reactions, comprised of "leading congressmen and editors of the South," illustrated the contemporary public opinion concerning the lynching of Black men in response to accusations of rape.⁴⁴

Charles F. Crisp, the then-Speaker of the United States House of Representatives and a former Georgia trial court judge, took particular offense to the "statements of Miss Ida B. Wells on the subject of lynchings in the South."⁴⁵ Her claims are mistaken, he asserts, because the white people of the South are not "as cold-blooded as she would have it appear;" on the contrary, they are "law-abiding citizens . . . [who] patiently wait for the law to take its course."⁴⁶ He then asserts that while the people of Georgia are law-abiding citizens, even they can be so outraged by "crimes against women and little girls."⁴⁷ In their passionate fury, they may be unable to wait for "even-handed justice to deal with the offender."⁴⁸ According to the report of his interview, he does not seem to address the alleged falsities of Wells-Barnett's speech. The focus seems to be entirely on the concept of

38. *Id.*

39. *Ida Wells Heard Here*, *SUN*, July 30, 1894, at 2.

40. WELLS-BARNETT, *supra* note 4, at 201.

41. *See Id.*

42. *SUN*, *supra* note 39.

43. *Id.*

44. *Id.*

45. *Id.*; CRISP, CHARLES FREDERICK, U.S. HOUSE OF REPRESENTATIVES HIST., ART & ARCHIVES, <https://history.house.gov/People/Detail/11592> (last visited April 4, 2022).

46. *Id.*

47. *Id.*

48. *Id.*

lynching in response to rape itself and moves with the assumption that each allegation *would be* proven true in a court of law if it had progressed to that stage.⁴⁹

Speaker Crisp's sentiments do not sit alone. The paradoxical combination of respect for the legal process and a passionate lack of restraint characterizes the South; painting it as both lawful and appropriately vengeful—the citizens respect the law but are passionate about the safety of their women and children.

Hernando Money, then a member of Mississippi's delegation to the United States House of Representatives, and future United States Senator from Mississippi, carried on this sentiment within *The New York Sun's* article.⁵⁰ Echoing Speaker Crisp, Representative Money emphasized the infrequency of lynching and the law-abiding nature of Mississippians and made sure to point out that the "feeling of resentment" for the crime of rape is not unique to the South.⁵¹ The difference lies in access to resources; while large cities have organized police forces at their disposal, smaller towns are not as lucky. Without continuously accessible officers to carry out the law, the citizens of these smaller towns may only rely on "Judge Lynch . . . to dispose of the criminal without delay."⁵² According to Representative Money, Mississippians use lynching as a resource to provide justice in instances where they cannot wait for scarce lawmen. When they do so, "they never make a mistake in their man."⁵³

Representative Money and others cited in the *The Sun's* publication do what Speaker Crisp did not: address the false allegation aspect of Wells-Barnett's speech. After once again stating that their constituents are law-abiding, the Southern lawmakers also stress that when white Southerners do lynch Black men, they do not err. Even when they recognized lynching as an extreme measure of accurately placed fury, the lawmakers "never knew of an instance where an innocent man was lynched."⁵⁴ The false allegations that Wells-Barnett spoke of

49. *Id.* *The Sun* further details one exact case that occurred while Speaker Crisp served on the Supreme Court of Georgia. In this case, a black man had been accused of and charged with assaulting a white woman. Even though a mob wanted to lynch him and threatened that they would do so the moment he was taken to the jail to await his sentence, Judge Crisp and the Sheriff prevented the mob from doing so. The man was then tried in a court of law, convicted for the assault, and hanged for the crime.

50. Money, *Hernando De Soto*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/M000854> (last visited April 4, 2022).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

do not exist; the lawful citizens of the South only lynch guilty men, even though the law has not proved that guilt.

These printed reactions erase the possibility of ignorance; instead, they emphasize the careful way in which Southern lawmakers sought to characterize lynching. To these Southern lawmakers, lynchings were rare and only done in response to the egregious crime of rape (committed by culpable Black men). Such a characterization sought to minimize any possible perception of a “lynching problem” by claiming that the occurrences were few and justified when they occurred. Wells-Barnett advocated for an unfounded call-to-action because in reality, the hundreds of lynched Black men that she and *Thirty Years* claim to exist did in fact, exist, and that the many innocent Black men accused of rape existed as well. This was the suppression of facts that *The Red Record* describes: falsehoods do not exist, and even when reputable newspapers like *The New York Tribune* publish them, the country routinely ignores them.⁵⁵ When their constituents act lawlessly, the Southern congressmen either turn a blind eye or defend their actions.

Much like the suffragist Frances Willard, these Southern lawmakers seek to encourage and justify the lynchings. To do so, they recognize the importance of emphasizing that white women and children are fragile and constantly in danger. They need protection, and when some entity harms them, they deserve justice in their honor. Lawmakers like Speaker Crisp and Representative Money emphasize the need for Southerners to protect these women so the extrajudicial killings of Black men could be rebranded as a form of justice and not rampant vigilantism and lawlessness. These lawmakers blame Black men for their own murders, only ever assuming the word of the white woman as truth.

B. A Highly Provoking Act

In Greeley, Colorado, everyone knew Angie Zapata; her community regarded her as vibrant, integral, and invaluable.⁵⁶ Her family adored her.⁵⁷ Even though her mother worried for her safety, Angie’s family supported their transgender daughter.⁵⁸ As she socially transitioned, this support at home became crucial.⁵⁹ Her sister recounted

55. See WELLS-BARNETT, *supra* note 4.

56. *The Angie Zapata Murder: Violence Against Transgender People Resource Kit*, GLAAD, <https://www.glaad.org/resourcekits/angiezapata> (last visited Mar. 27, 2022).

57. *Id.*

58. *Id.*

59. *Id.*

how Angie would “[come] home crying” because of the bullying by her classmates; they insulted her, called her slurs, and picked fights with her.⁶⁰ After transferring to a different high school did not work, Angie decided to drop out altogether.⁶¹ Through dropping out and then moving into her own apartment, her family still supported her.⁶²

Angie planned to move out to Denver to eventually become a cosmetologist.⁶³ Until then, her job was to babysit her nephew and four nieces.⁶⁴ All the while, she intended to save up money for her hormone therapy, attend counseling, and eventually undergo gender affirming surgery.⁶⁵

After moving to Greeley, Angie began speaking with a man she had met on the mobile networking site *MocoSpace*.⁶⁶ Over the next few weeks, she would exchange hundreds of emails and text messages with the man, with the two eventually deciding to meet in person in mid-July for a date.⁶⁷ On July 14, 2008, Angie picked up thirty-one-year-old Allen Ray Andrade for their date.⁶⁸

Following their date, Andrade spent the night at Angie’s apartment for two nights.⁶⁹ After the second night, Angie went to run errands. While she was gone, Andrade “[began] to grow suspicious of Angie’s gender after looking at the photographs” in her living room.⁷⁰ That night, July 16, 2008, he confronted her about it.⁷¹ When she refused to “prove” her gender, Andrade sexually assaulted her by grabbing her crotch.⁷² Once he realized Angie was transgender, he began “beating her with his fists until she fell down.”⁷³ Grabbing a fire extinguisher, he hit her twice in the head; believing her dead, he covered her with a blanket.⁷⁴ Andrade hit Angie in the head one more time after he heard her regain consciousness and struggle to get up, ultimately killing her after that final attack.⁷⁵ The following day, Angie’s

60. *Id.*

61. *Id.*

62. *Id.*

63. Melanie Asmar, *Who was Angie Zapata? Her Murderer’s Trial Didn’t Tell the Whole Story.*, WESTWORD (May 28, 2009, 4:00 AM), <https://www.westword.com/news/who-was-angie-zapata-her-murderers-trial-didnt-tell-the-whole-story-5103955>.

64. *Id.*

65. *Id.*

66. *Id.* See MOCO SPACE, <https://www.mocospace.com/login> (last visited Apr. 1, 2022).

67. *Id.*

68. Asmar, *supra* note 63.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

sisters discovered her body on the apartment's living room floor, covered in a bloody sheet.⁷⁶ Police arrested Andrade two weeks after the murder, after Andrade had stolen Angie's credit cards and car.⁷⁷

Angie Zapata's brutal murder did not occur in isolation. Instead, she represents a single statistic in what has become an epidemic within the transgender community. In 2008 alone, over seventeen transgender people were murdered in the United States, across the nation, in various communities.⁷⁸ The National Coalition of Anti-Violence Programs ("NCAVP") reported that, out of the 2,260 respondents to their survey, violence motivated by anti-transgender bias comprised 12% of the total incidents in 2008.⁷⁹

Crimes against transgender people have only risen in the past decade.⁸⁰ The only two years that saw a decrease in documented transgender homicides since 2010 from the previous year were 2013 and 2014.⁸¹ However, 2015 still saw almost double the number of homicides (twenty-three) from 2014 (twelve).⁸² The Human Rights Campaign ("HRC") noted in their report, *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2020*, that 2020 was the deadliest year to date for transgender people.⁸³ At the time of its publication on November 20, 2020, HRC stated that at least thirty-seven transgender people had "been killed in the U.S. since the beginning of 2020."⁸⁴ By the end of 2020, the number would increase to at least forty-four.⁸⁵

This impacts people of color, particularly Black transgender women, at an increased rate. Since 2013, at least 85% of transgender victims were people of color.⁸⁶ Furthermore, Black transgender women made up 66% of those victims.⁸⁷ In 2020 alone, twenty-two of the

76. *Id.*

77. *Id.*

78. TRANSGENDER EUROPE, REPORTED DEATHS OF 121 MURDERED TRANS PERSONS IN 2008 200 (2009).

79. NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE UNITED STATES 5 (2009).

80. Meredith Talusan, *Documenting Trans Homicides*, .MTC, (Dec. 8, 2016), <https://unerased.mtc.com/>

81. *Id.*

82. *Id.*

83. HUM. RTS. CAMPAIGN, FATAL VIOLENCE AGAINST THE TRANSGENDER AND GENDER NON-CONFORMING COMMUNITY IN 2020 1 (2020).

84. *Id.* at 2.

85. *Violence Against the Trans and Gender Non-Conforming Community in 2020*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020>.

86. HUM. RTS. CAMPAIGN, *supra* note 83, at 56.

87. *Id.*

thirty-seven known murders were of Black transgender women.⁸⁸ Many LGBTQ+ activist groups note that Black transgender women are some of the most targeted within the transgender community, leading to higher rates of suicide, discrimination, and victimization.⁸⁹

These statistics, while harrowing, are underestimates. Groups like the NCAVP and HRC typically use “at least” when stating their statistics because of the unreliability of the information they have.⁹⁰ Currently, transgender murders are “often reported inaccurately and insufficiently” due to how often transgender victims are misgendered and deadnamed upon death by family members to law enforcement and media.⁹¹ For instance, between 2013 and 2020, law enforcement and the press initially misgendered 74% of transgender people upon their death, with twenty-one of 2020’s thirty-seven victims being misgendered as well.⁹² The *deadnaming* of transgender victims leads to underreporting or inaccurate reporting because activist groups cannot correctly identify these victims as belonging to the transgender community. Given these discrepancies, “the chances that their [deaths] will be publicly accounted for diminish at every stage.”⁹³

The statistics still paint a harrowing picture—with the inconsistency in mind, even more so. Not only are transgender individuals victimized and murdered at an alarming rate, but the reports of those murders leave them unrecognized even in death. With many of those murdered having lived in poverty, getting a legal name change or transferring their funeral rights to someone who recognizes their gender status is nearly impossible. As LaLa Zannell, a Black trans woman and lead organizer for the New York City Anti-Violence Project (“AVP”), explains, the story to be told may instead be left to family members who have “rejected their children or deny that they’re trans . . . [and they] are the ones who get to decide how their child is going

88. *Id.*

89. *Id.* at 55; Parmenter et al. *An Exploration of LGBTQ+ Community Members’ Positive Perceptions of LGBTQ+ Culture*, 48 COUNS. PSYCHOL. 1016, 1017 (2020) (the acronym “LGBTQ+” stands for “lesbian, gay, bisexual, transgender, queer +” and encompasses a diverse community).

90. See, e.g., HUM. RTS. CAMPAIGN, *supra* note 83; NAT’L COALITION OF ANTI-VIOLENCE PROGRAMS, *supra* note 79.

91. To “misgender” someone is to refer to a person using the incorrect pronouns and terms; for example, referring to an individual who uses “she” and “her” pronouns with “he” and “him” pronouns. KC Clements, *What Does It Mean to Misgender Someone?*, HEALTHLINE, <https://www.healthline.com/health/transgender/misgendering> (Sept. 18, 2018). Further, to “deadname” someone is to refer to a transgender person using the name they used before they transitioned. KC Clements, *What is Deadnaming?*, HEALTHLINE, <https://www.healthline.com/health/transgender/deadnaming> (Sept. 18, 2018).

92. NAT’L COALITION OF ANTI-VIOLENCE PROGRAMS, *supra* note 78.

93. *Id.*

to be remembered and buried.”⁹⁴ Way before the focus turns towards the murder themselves, many transgender victims face erasure from their community and the statistics.

Even when reporting accurately recognizes fatalities as victims of anti-transgender bias, the persecution of those crimes faces many pitfalls. According to Meredith Talusan’s 2016 *Un erased: Counting Transgender Lives* report, for trans homicide cases between 2010 and 2015, 39% of them were either unsolved, led to no arrest, or both.⁹⁵ Between 2014 and 2019, of the 110 transgender women killed, only 42% of subsequent investigations resulted in arrests.⁹⁶ This percentage falls much lower than the 61% reported by the Federal Bureau of Investigation (“FBI”) across the general public.⁹⁷ Thus, many criminals are not held accountable. Further, LGBTQ+ activists have a more challenging time accurate pictures of who perpetuates the violence and why.

Convicting the murderers that the police actually apprehend presents further disparities. While “people who have killed drug dealers are given sentences of [twenty-five] years to life,” the murderer of a trans woman will get just fifteen years.⁹⁸ Commenting on this, Sergeant Jessica Hawkins, a transgender woman and the “LGBT liaison for the Metropolitan Police Department” (“MPD”) in Washington, D.C., stated that this discrepancy is “a big blow to the [transgender] community, because [it’s] telling the community, ‘Your life is not worth it.’”⁹⁹

Furthermore, these convictions are rarely pursued under hate crime laws, resulting in lower sentences. As of January 2021, only twenty-three states have gender identity specifically enumerated within their hate crime laws.¹⁰⁰ Despite almost half the states having these protections, Angie Zapata’s case in 2009, tried in Colorado—one of only eleven states with gender identity protections at the time—was the last time that a trans homicide has resulted in a hate crime conviction.¹⁰¹ In this case, Shannon Minter, a transgender attorney and the NCLR legal director, attributes this to “the prosecutors consistently affirming Zapata’s identity as a woman,” something that

94. Talusan, *supra* note 80.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/hate_crime_laws (last visited Apr. 1, 2022).

101. Talusan, *supra* note 80.

the defense counsel refused to do.¹⁰² This highlights another possible danger presented by the misgendering and deadnaming of transgender individuals. Minter further explains that prosecuting a hate crime is more difficult when the prosecutor themselves “does not demonstrate acceptance of a person’s identity.”¹⁰³ When the prosecutor does not respect the victim’s transgender identity, the offense is less likely to be considered a hate crime against transgender people.

This lack of respect for the victim’s identity extends to the defense used by the assailant. This is the crux of the trans panic defense. The trans panic defense roots itself within the transphobic concept that trans women actively pretend and masquerade as women. So, in *presenting* herself as a woman, the trans woman fools, tricks, and deceives her murderer, which provokes him into the resulting outrage once he discovers the *truth*. It asserts that the blame is on the trans woman for her deceit and “the discovery that the victim was biologically male provoked [the murderer] into a heat of passion causing him to lose self-control.”¹⁰⁴ This outrage, fury, and lack of self-control was the result of a reasonable provocation, and the “average heterosexual man in his shoes would have been equally upset.”¹⁰⁵

This outrage does not just come from the realization of being “deceived.” The trans panic defense’s inherent transphobia also folds into the gay panic defense.¹⁰⁶ The *gay panic defense*, from which the trans panic defense derives its name and base concept, started appearing in the late 1960s.¹⁰⁷ The gay panic defense claims that a gay man’s unwanted sexual advance provoked the (heterosexual male) defendant into extreme violence.¹⁰⁸ So, when the murderer “discovers” the trans woman he had sexual relations with is a man, he equates relating sexually with a trans woman to relating sexually with a man, which reflects homosexuality.¹⁰⁹ He does not view heterosexuality as simply the default; instead, heterosexuality is a staunch requirement for masculinity.¹¹⁰ Accordingly, the murderer would see the perceived homosexuality as a direct attack on his masculinity due to the deception.

Both the gay panic defense and trans panic defense stem from the defense of provocation. The defense states that a person is guilty of

102. *Id.*

103. *Id.*

104. Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L. J. 77, 85 (2014).

105. *Id.* at 114.

106. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 513 (2008).

107. *Id.* at 500.

108. *Id.*

109. Lee & Kwan, *supra* note 104, at 109.

110. *Id.*

voluntary manslaughter, not murder, if “he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person.”¹¹¹ It typically lessens more severe sentences because a provoked defendant is considered “less guilty than an unprovoked killer” if that provocation is reasonable given the circumstances.”¹¹² Panic defenses provides a “reasonable” explanation by both blaming the victim partially for their murder for daring to advance upon a heterosexual man and while also arguing that the resulting loss of control was an understandable and reasonable reaction.

Bradley Martin, the defense lawyer for Allen Ray Andrade for the murder of Angie Zapata, gives this exact defense. He claimed that this his case was not a hate crime related murder but rather a case about “deception and [his] reaction to that deception.”¹¹³ He does this while constantly dehumanizing, misgendering, and deadnaming Angie throughout the entire trial, continually reinforcing the transphobic concept that, despite Angie’s gender presentation, “*she* was actually a *he*.”¹¹⁴ This defense tactic furthers the deception angle: if Angie is actually a “he,” then to present herself as anything else would be deception and trickery. Angie had deceived Andrade, which was the source of his violent anger—not prejudice.

At every step of the trial, Andrade’s defense team wanted to keep as much blame as possible on Angie. Her deception and smile when Andrade learned she was transgender were “highly provoking [acts]” that caused Andrade to fly into a blinding rage.¹¹⁵ It was not Andrade’s homophobia, transphobia, or hatred of Angie’s “lifestyle,” but Angie’s actions that led to her own murder. The defense removed the hate crime aspect and attempts to lessen the charge even further through this defense, so Andrade would only have to face anywhere between eight to twenty-four years instead of a life sentence.¹¹⁶

However, despite the attempts to remove bigotry as a motivation, Andrade’s actions after the murder were hard to refute. The defense

111. GA. CODE § 16-5-2 (2017).

112. Lee & Kwan, at 100.

113. Ernest Luning, *Accused Killer of Transgender Woman Faces Additional Charges*, COLO. INDEP. (Dec. 31, 2008), <https://www.coloradoindependent.com/2008/12/31/accused-killer-of-transgendered-woman-faces-additional-charges>.

114. Throughout the entire case, Martin refers to Angie by her deadname and consistently referred to her as an “it,” much like Andrade does as well. Angie’s deadname will not be printed here out of respect. Monte Whaley, *Smile Called “Provoking Act” in Transgender Case*, DENVER POST, (Sept. 18, 2008, 2:42 PM), <https://www.denverpost.com/2008/09/18/smile-called-provoking-act-in-transgender-case> (emphasis added).

115. *Id.*

116. *Id.*

attempts to explain away Andrade's comments to his girlfriend that "gay things must die" as just jokes that he did not mean. When the prosecution presents further "jokes" that murdering Angie was not the same as "[killing] a straight, law-abiding citizen," the defense claims that these statements prove that Andrade thought the bias-motivate crime charge was a joke.¹¹⁷ At every turn, the defense tried to remove the possibility of bigotry and instead focused on the deception.

The defense did not successfully separate the two. On April 23, 2009, after merely two hours of deliberation, the jury convicted Andrade of first-degree murder and a bias-motivated crime.¹¹⁸ The conviction also broke new ground: it was the first time a state's hate crime statute resulted in a conviction for a transgender person's murder.¹¹⁹ Andrade's defense failed to establish the "heat of passion" doctrine necessary for the provocation defense, leaving Andrade with the sentence of life in prison without the possibility of parole—the mandatory sentence for a first-degree murder conviction.¹²⁰

The Gay, Lesbian, Bisexual, and Transgender Community Center of Colorado ("the Center") considered the conviction a landmark decision due to the standard it sets.¹²¹ By identifying a bias-motivated crime and outlawing it, Colorado's hate crime statute provided the groundwork for the prosecution to refute Andrade's trans panic defense. Through this statute, the prosecution could highlight the bias inherent in this case and keep the focus on the fact that Andrade murdered Angie for being a transgender woman, even though the defense employed the trans panic defense to do the opposite. Angie Zapata's case, while a horrific tragedy, proved how hate crime statutes might be necessary for combating the trans panic defense.

C. Comparisons

The lynching of Black men for the charge of rape or assault and the murder of transgender women under the guise of "trans panic" both have their roots in disgust at a perceived social slight. A white woman would *never* consensually have sex with a Black man; a

117. Luning, *supra* note 113.

118. Jim Spellman, *Transgender Murder, Hate Crime Conviction a First*, CNN (Apr. 23, 2009, 11:42 AM), <http://edition.cnn.com/2009/CRIME/04/22/transgender.slaying.trial>.

119. *Id.*

120. See Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 29-30 (2009). The "heat of passion" is an affirmative defense to murder where the defendant must demonstrate that he was provoked, and as a direct result of that provocation, lost self-control. He cannot have cooled off prior to the murder.

121. *Id.*

straight man would *never* consensually have sex with a transgender woman. Both justifications rely on the concept that Black men and transgender people “are innate predators or sexual deviants.”¹²² The acts of violence against these groups assume a lack of consent based purely on the victim’s identity. The lynchings are a punishment. The public is expected to see their murder as reasonable—or even justified—due to the unforgivable actions.

Lawyers, legislators, and representatives alike rely on this concept. Mobs lynched Black men accused of rape out of a respectful and righteous fury. Heterosexual men attack or kill transgender women because of the understandable blind rage when met with “deceit.” Speaker Crisp and Allen Ray Andrade’s lawyer both used the same tactic; they claim that the action itself may be illegal, but a reasonable person would have behaved similarly. The murderers use the heat of passion defense to justify their actions.

Black men and transgender women face similar roadblocks towards protection. In both cases, on-ground activists are the only ones left to collect statistics. The responsibility falls on organizations such as the NAACP and GLAAD to record data concerning lynchings and murders. Funding, reach, and workforce limits these groups from being as effective as possible. Thus, while they do their best to gather as much data as possible, gaps in the statistics remain.¹²³

Ida B. Wells-Barnett, in *The Red Record*, suggests that Congress pass a resolution to actively investigate cases of suspected violence against “persons alleged to have been guilty of crimes punishable by due process of law.”¹²⁴ Current activists mirror this concept when discussing current federal efforts to gather statistics.¹²⁵ The government has vastly more resources to collect data if would actively do so. However, a passive approach that relies on the states to report their own data allows representatives to deny the existence of the crimes and thus underreport them.¹²⁶

Unfortunately, possible legislation cannot be signed into law easily. As with most human and civil rights legislation, prior attempts to further protections for marginalized communities faced heavy opposi-

122. Omar T. Russo, *How to Get Away With Murder: The “Gay Panic” Defense*, 35 *TOURO L. REV.* 811, 836 (2019).

123. See R. Grann Lloyd, *The States’ Rights Myth and Southern Opposition to Federal Anti-Lynching Legislation*, 1 *NEGRO EDUC. REV.* 78, 78 (1950).

124. WELLS-BARNETT, *supra* note 4, at 249-50.

125. Ken Schwencke, *Why America fails at Gathering Hate Crime Statistics*, *PROPUBLICA* (Dec. 4, 2017, 8:00 AM), <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics>.

126. *Id.*

tion in Congress.¹²⁷ The House of Representatives, while still presenting a bit of a challenge, hardly compares to the massive roadblock that is the Senate. The filibuster continues to be a favored tool of those who oppose civil rights legislation.¹²⁸ While the proponents of the Civil Rights Act of 1964 defeated it, similar pieces of legislation have not been as successful.¹²⁹

II. THE LEGISLATION

The history of violence against marginalized communities has plagued the country for centuries, noted by citizens and lawmakers alike. However, legislation to protect these communities only exists in very recent memory. Beginning in the twentieth century, the United States has attempted to pass and expand upon hate crime laws numerous times. While only a few of these attempts have made it into genuine law, these efforts continuously built upon themselves as the century progressed and the United States moved into the twenty-first century.

Title I of the Civil Rights Act of 1968 first codified hate crimes by making it unlawful to “willfully injure, intimidate, or interfere with any person” because of race, national origin, religion, or color.¹³⁰ However, at the time, this provision of the Civil Rights Act only protected these individuals from a few select activities, including jurors in state court, patrons of public accommodations, and applicants for private or state employment.¹³¹

These limitations of who was federally protected and when they were protected were expanded on by the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act.¹³² Named after two men murdered in 1998 due to their sexual orientation and race, the law expanded federal hate-crime laws to include sexual orientation, gender identity, and disability. Furthermore, it provides “funding and technical assistance to state, local, and tribal jurisdictions to help them to more effectively investigate and prosecute hate crimes.”¹³³

127. Susan Cornwell, *Explainer: What is the U.S. Senate Filibuster and Why is Everyone Talking About It?*, Reuters (Oct. 6, 2021, 6:17 AM), <https://www.reuters.com/world/us/what-is-us-senate-filibuster-why-is-everyone-talking-about-it-2021-10-06/>.

128. Lisa Desjardins, *The Debate Over Ending the Filibuster, Explained*, PBS (Jan. 17, 2022, 6:40 PM), <https://www.pbs.org/newshour/show/the-debate-over-ending-the-filibuster-explained>.

129. The Filibuster That Almost Killed the Civil Rights Act, CONS. CTR. (Apr. 11, 2016), <https://constitutioncenter.org/blog/the-filibuster-that-almost-killed-the-civil-rights-act>.

130. 18 U.S.C. § 245(b)(2) (2018).

131. 18 U.S.C. § 245(b)(2) (1968) (current version at 18 U.S.C. § 245 (2018)).

132. 18 U.S.C. § 249.

133. *Id.*

Before explaining and detailing the limitations of these current laws, the present history of anti-lynching and hate crime legislation must be explored. Examining laws proposed through the twentieth century and the past two years of the twenty-first century will lay the groundwork for the discussion. The sections below will discuss the Dyer Anti-Lynching Bill,¹³⁴ the Emmett Till Anti-Lynching Bill,¹³⁵ Equality Act of 2021-2022,¹³⁶ and Virginia's House Bill 2132,¹³⁷ and their overall inspiration, background, legislative history, and what they sought to criminalize.

A. *Dyer Anti-Lynching Act*

The Dyer Anti-Lynching Bill begins by defining what constitutes a mob or riot: "an assemblage comprised of three or more persons" that act outside of the law to murder an individual.¹³⁸ Then, it characterizes the crime in question:

[I]f any State or governmental subdivision thereof fails, neglects, or refuses to provide and maintain protection to the life of any person within its jurisdiction against a mob or riots assemblage, such State shall. . . be deemed to have denied to such person the equal protection of the laws of the State.¹³⁹

It focuses heavily on the responsibility states have towards individuals that may face mob violence. The bill explains these responsibilities and goes into detail about what counts as a "failure to protect" and what the punishments for these failures would be.¹⁴⁰ States or municipal officers with the power or authority in these jurisdictions are also discussed within the bill.¹⁴¹

The first part of the bill explains the duties states, and those acting on behalf of the state, have towards protecting prisoners from possible mob violence. It makes this failure a federal crime, punishable by "imprisonment for life or not less than five years."¹⁴² The bill recognizes that the officers already have that existing duty; this bill adds, however, that failing, neglecting, or refusing "to make all reasonable efforts" to pursue this duty is a felony offense.¹⁴³ The bill not only criminalizes failures to protect; it also criminalizes an officer's failure

134. H.R. 11279, 66th Cong. (1922).

135. H.R. 35, 116th Cong. (2019).

136. H.R. 5, 117th Cong. (2021).

137. H.B. 2132, 2021 Sess. (Va. 2021).

138. H.R. 11279, 66th Cong. (1922).

139. *Id.*

140. *Id.*

141. *Id.* at § 2.

142. *Id.*

143. *Id.*

to “make all reasonable efforts” to apprehend or prosecute those participating in mobs.¹⁴⁴ This is punishable “by imprisonment not exceeding five years or by a fine of not exceeding \$5,000.”¹⁴⁵

Counties are also implicated to be “jointly and severally liable” in the bill. It fines any county where their officers are charged with either of the above infractions—failure to protect or failure to apprehend the perpetrators—\$10,000, which the victim’s family may recover. If they had no family, “then to his dependent parents, if any; otherwise for the use of the United States.”¹⁴⁶

On April 18, 1918, the United States House Representative of Missouri, Leonidas C. Dyer, introduced the Dyer Anti-Lynching Act.¹⁴⁷ He asserted that lynching and the refusal to protect the lynchers violated the victims’ federal equal protection rights.¹⁴⁸ Spurred by mob and lynching violence in 1917 in St. Louis, where forty-seven people were killed, “including [thirty-eight] African-American men, women, and children,” Dyer saw the extreme need for a law that prosecutes the failure to protect the citizens from this violence *and* the failure to apprehend and try the perpetrators.¹⁴⁹

The bill remained in the Judiciary Committee during the Democratic-controlled Congress when it was introduced.¹⁵⁰ However, in 1919, the possibility of passing grew with the Republicans gaining majorities in both the House and Senate.¹⁵¹ It passed through the House on January 26, 1922, “by a vote of 231 to 119, with four Members voting ‘present’ and 74 others not voting.”¹⁵²

Unfortunately, the bill was doomed in the Senate. Despite the NAACP’s public campaigns that helped spurred it along in the House, the bill faced threats of a filibuster.¹⁵³ In fear of stalling all end-of-session business for the Senate of that year, the Senate Republican Conference decided to completely abandon the bill instead.¹⁵⁴

From the 1950s to the Emmett Till Anti-Lynching Act’s passage, this bill existed as a blueprint for legislation seeking to protect

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* The bill was introduced to the 65th Congress as H.R. 11279 (1918).

148. *Dyer Anti-Lynching Bill*, NAACP, <https://naacp.org/find-resources/history-explained/legislative-milestones/dyer-anti-lynching-bill> (last visited Mar. 27, 2022).

149. *Anti-Lynching Legislation Renewed*, U.S. HOUSE OF REPRESENTATIVES HIST., ART & ARCHIVES <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Anti-Lynching-Legislation> (last visited Mar. 27, 2022).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

marginalized groups—in this case, Black communities—from extrajudicial killings.¹⁵⁵ The next attempt at anti-lynching legislation, the 1934 Costigan-Wagner Bill, unfortunately befell the same fate as the Dyer Anti-Lynching Bill.¹⁵⁶ Despite the bill's failure, the bill sparked a national debate over the crime of lynching and its social ramifications.

B. *Emmett Till Anti-Lynching Act*

The Emmett Till Anti-Lynching Act, introduced into the House of Representatives Representative Bobby Rush of Illinois on January 3, 2019, seeks to “specify lynching as a hate crime act.”¹⁵⁷ It first lists the historical findings that Congress made concerning lynching in the twentieth century, which includes discussions of the Tuskegee Institute's reporting, community papers that advertised mob lynchings, and the brutality of the lynchings.¹⁵⁸ The act wishes to amend the United States Code to include a specific paragraph criminalizing lynching.¹⁵⁹

Emmett Till, the fourteen-year-old boy the bill is named after, would fall under the first and second categories. After learning that Emmett allegedly whistling at and flirting with a white woman, the woman's husband and her brother “beat [Emmett] nearly to death, gouged out his eye, shot him in the head and then threw his body, tied to the cotton-gin fan with barbed wire, into the river.”¹⁶⁰ While at the trial, the white woman claimed that Emmett had grabbed her and made inappropriate advances; in a later interview, she stated that Em-

155. *Id.*

156. The Costigan-Wagner Bill was a 1934 attempt at an anti-lynching bill. Due to President Roosevelt not wishing to alienate the white voters in the South, who were crucial to his election prospects, he chose to not speak in favor of the bill, ultimately never making it to the Senate floor. *Costigan-Wagner Bill*, NAACP, <https://naacp.org/find-resources/history-explained/legislative-milestones/costigan-wagner-bill> (last visited Apr. 4, 2022).

157. H.R. 35, 116th Cong. (2019).

158. H.R. REP. NO. 116-267, at 2 (2019). Representative Nadler, in his October 2019 report which accompanied the bill, categorized lynchings as typically falling into, “one or more of the following: (1) Lynchings that resulted from a wildly distorted fear of interracial sex; (2) lynchings in response to casual social transgressions; (3) lynchings based on allegations of serious violent crime; (4) public spectacle lynchings; (5) lynchings that escalated into large-scale violence targeting the entire African-American community; and (5) lynchings of sharecroppers, ministers, and community leaders who resisted mistreatment.”

159. *Id.* at § 3. (“Offenses Involving Lynching” is characterized as “[w]hoever, whether or not acting under the color of law, willfully, acting as part of any collection of people, assembled for the purpose and with the intention of committing an act of violence upon any person, causes death to any person, shall be imprisoned for any term of years or for life, fined under this title, or both.”). This act amends 18 U.S.C. § 249(a).

160. *The Death of Emmett Till*, HIST., <https://www.history.com/this-day-in-history/the-death-of-emmett-till> (Jan. 12, 2022).

mett “had never touched, threatened or harassed her,” thus recanting her testimony.¹⁶¹

After passing through the House of Representatives on February 26, 2020, the Senate received the bill the next day.¹⁶² The bill died on the Senate floor, not to be touched for the rest of 2020.¹⁶³ Nonetheless, the bill was reintroduced into the House during the 117th Congress as H.R. 55, where it sat in the Subcommittee on Crime, Terrorism, and Homeland Security for over a year—until February 28, 2022.¹⁶⁴ After progressing through the House of Representatives with only three “nays” and then through the Senate with unanimous consent, the Emmett Till Anti-Lynching Act finally became law when President Joe Biden signed the bill on March 30, 2022.¹⁶⁵

C. *Virginia House Bill 2132*

Virginia’s HB2132 both bans the gay and trans panic defense and sets a broader blanket for bigotry that can no longer justify homicide, assaults, or bodily wounding.¹⁶⁶ It states: “Another person’s actual or perceived sex, gender, gender identity, or sexual orientation is not in and of itself, or together with an oral solicitation . . . provocation negating or excluding malice as an element of murder.”¹⁶⁷

At one page, the act is short and to the point. It sets out which article, chapter, and title will be amended with the new ban and the exact language to be inserted.

Danica Roem, who in November 2017 became the first openly transgender person elected to serve in any American state legislature, authored the bill.¹⁶⁸ She faced bigotry, slurs, and transphobia throughout the election season, most of which came from her Republican opponent, Robert Marshall, who touted himself as Virginia’s “chief homophobe,” refused to debate Roem, and refused to use her correct pronouns.¹⁶⁹ Throughout the race, his campaign’s treatment of her rarely centered on policy—only ever on Roem’s identity.

161. *Id.*

162. The bill passed by a 410-4 vote. H.R. 25, 116th Cong. (2019).

163. *Id.*

164. H.R. 55, 117th Cong. (2022).

165. *Id.*

166. H.B. 2132, 2021 Sess. (Va. 2021).

167. *Id.* at 1(A).

168. Antonio Olivo, *Danica Roem of Virginia to be First Openly Transgender Person Elected, Seated in a U.S. Statehouse*, WASH. POST. (Nov. 8, 2017), https://www.washingtonpost.com/local/virginia-politics/danica-roem-will-be-vas-first-openly-transgender-elected-official-after-unseating-conservative-robert-g-marshall-in-house-race/2017/11/07/d534bdde-c0af-11e7-959c-fe2b598d8c00_story.html.

169. *Id.*

As a transgender woman in politics, Roem stood as an excellent visionary and author for a bill to protect expressions of sexual identities, gender presentation, and gender identities from bigotry.¹⁷⁰ What motivated her to introduce the bill in January 2021 was a letter from a fifteen-year-old LGBTQ+ constituent. In learning of this teenager's fear of being attacked for his identity, Roem recognized the same fear in him that she had when learning of Matthew Shephard and Gwen Araujo's murders.¹⁷¹ Her own identity and the identities of others who had been discriminated against served as her motivation.

The bill passed through the Virginia House and Senate in late February and passed on March 9, 2021.¹⁷² After being signed into law on March 31, 2021, by Virginia Governor Ralph Northam, the bill made Virginia the twelfth state to ban the gay and trans panic defense from the courtroom.¹⁷³ Roem sees the bill as the beginning of the movement. She explains how having openly-LGBTQ+ representatives in the legislature helps bills like HB2132 get passed and makes sure that LGBTQ+ constitutions feel they have representation in powerful places.¹⁷⁴

D. *The Equality Act Of 2021*

The main goal of the federal bill H.R. 5, also known as the "Equality Act of 2021," is to expand the scope of protections for marginalized communities. When listing its findings and purpose, the section covers the discrimination faced by LGBTQ+ people and women, who: "[C]ommonly experience discrimination in securing access to public accommodations—including restaurants, senior centers, stores, places of or establishments that provide entertainment, health care facilities, shelters, government offices, youth service providers including adoption and foster care providers, and transportation."¹⁷⁵

Such discrimination "prevents the full participation of LGBTQ people in society and disrupts the free flower of commerce" and is

170. Jo Yurcaba, *Virginia Becomes 12th State to Ban Gay/Trans Panic Defense*, NBC NEWS (Apr. 2, 2021, 5:13 PM), <https://www.nbcnews.com/feature/nbc-out/virginia-becomes-12th-state-ban-gay-trans-panic-defense-n1262933>.

171. Gwen Araujo was a seventeen-year-old transgender woman who, on October 4, 2000, was assaulted and strangled to death. Roem explains that she remembers when she saw news coverage of the murder and investigation. Malaika Fraley, *Gwen Araujo Murder 14 Years Later: Transgender Teen's Killers Face Parole*, SANTA CRUZ SENTINEL (Oct. 14, 2016, 12:00 AM), <https://www.santacruzsentinel.com/2016/10/14/gwen-araujo-murder-14-years-later-transgender-teens-killers-face-parole>.

172. H.B. 2132, 2021 Sess. (Va. 2021).

173. Yurcaba, *supra* note 170.

174. *Id.*

175. H.R. 5, 117th Cong. (2021).

often perpetuated in programs and services funded by the federal government.¹⁷⁶ The Equality Act to remedy this discrimination and protect these communities from further discrimination.

To do so, the brunt of the bill seeks to amend current laws, titles, and acts to include mentions of sex, sexual identity, and gender identity. For instance, it would amend section 201 of the Civil Rights Act of 1964 by expanding the protected classes to include sexual orientation and gender identity and expanding the scope of establishments or situations through which these protections extend.¹⁷⁷ It does the same to section 703, “Unlawful Employment Practices,” and section 717, “Employment by Federal Government.”¹⁷⁸ It would also amend the Fair Housing Act, the Equal Credit Opportunity Act, and the Religious Freedom Restoration Act of 1993.¹⁷⁹ In amending these laws, the act would protect LGBTQ+ people from discrimination in federally funded programs. This ranges from adoption to carceral institutions, both of which currently have an epidemic of LGBTQ+ discrimination.¹⁸⁰

The Equality Act of 2021 owes its origins to the 1974 act of the same name. Two United States House of Representatives from New York, Bella Abzug and Ed Koch, introduced the Equality Act of 1974 on the heels of the Civil Rights Act of 1964, making it the first national proposed legislation that would protect gays and lesbians from discrimination.¹⁸¹ Where the 1974 Act falls short, and what the Equality Act of 2021 improves upon, is the inclusion of transgender people, gender expression, and different gender identities.

After dying in committee five times between 2015 and 2019, the 117th Congress tried again.¹⁸² United States House of Representative from Rhode Island, David Cicilline, reintroduced the bill on February 18, 2021, which passed through the House in less than a week.¹⁸³ At the beginning of March 2021, the Senate officially received the bill.¹⁸⁴

176. *Id.* at § 2

177. *Id.* at § 2(a), 2(b).

178. *Id.* at § 7.

179. *Id.*

180. See Jo Yurcaba, *N.J. Will House Transgender Inmates by Gender Identity After Lawsuit*, NBC NEWS (June 30, 2021, 4:30 AM), <https://www.nbcnews.com/nbc-out/out-news/nj-will-house-transgender-inmates-gender-identity-lawsuit-rcna1295>; Tucker Higgins, *Supreme Court Sides with Catholic Adoption Agency That Refuses to Work with LGBT Couples*, CNBC (June 17, 2021, 10:26 AM), <https://www.cnn.com/2021/06/17/supreme-court-sides-with-catholic-adoption-agency-that-refuses-to-work-with-lgbt-couples.html>.

181. H.R. 14752, 93rd Cong. (1974).

182. H.R. 5, 117th Cong. (2021).

183. *Id.*

184. *Id.*

Now sponsored by Senator Jeff Merkley of Oregon, the bill awaits debate within the Senate's Judiciary Committee.¹⁸⁵

E. Comparisons

Since Representative Dyer first introduced the Dyer Anti-Lynching Bill, public opinion concerning crimes motivated by racism and transphobia has changed drastically. The press has publicized the murders of Black people at the hands of the police and self-proclaimed vigilantes onto the world stage. The plight of transgender people, specifically transgender women, has not seen such publicity; however, their plight grows in visibility each year. Despite this heightened visibility, both avenues of discriminatory violence face similar pitfalls in the legislation necessary to combat said violence. Past and current federal legislation lacks the strength required to bring about the change and accountability our country needs. Further, even if this legislation possessed the necessary power, being passed into law presents further almost unsurmountable challenges. Legislators must also amend the specific methods they use to pass legislation as well.

Because the hate crime statistics are self-reported, many agencies have no proper incentive to participate. Many choose "not to participate in the FBI's hate crime program at all."¹⁸⁶ When these agencies do report to the FBI, the statistics given do not paint an accurate picture. With only 15,000 out of almost 18,000 police agencies reporting, around 88% of them report no hate crimes whatsoever. This is hard to believe; some of these agencies are in states that the Human Rights Campaign ("HRC") categorize as a "High Priority to Achieve Basic Equality," meaning these states pass anti-LGBTQ+ legislation, lack non-discrimination protections, or a lack hate crime protections.¹⁸⁷ So, it is much more likely that they simply do not investigate hate crimes or erroneously fail to report these altercations as hate crimes.

Addressing these issues properly is only half the problem; no matter how excellent legislation is on paper, it serves little legislative purpose unless it passes into law. The process of writing, proposing, then passing through two chambers of Congress constitutes many roadblocks. However, most hate crime legislation—whether to protect racial minorities, LGBTQ+ groups, or other protected classes—faces one specific roadblock: inevitable death in the Senate. The Dyer Anti-Lynching Bill died in the Senate after the Southern Democrats filibustered.

185. *Id.*

186. Schwencke, *supra* note 125.

187. *State Equality Index*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/state-equality-index> (last visited Mar. 20, 2022).

tered it three times.¹⁸⁸ At the same time, the Emmett Till Anti-Lynching Act and the Equality Act has faced death within Senate committees multiple times before their re-introduction in 2020 and 2021, respectively. While the Emmett Till Anti-Lynching Act finally succeeded in passing through Congress and onto the President's desk, the Equality act still awaits the same threat of a filibuster once more.¹⁸⁹

III. THE SOLUTIONS

This Part discusses two legislative goals. First, it examines the need to ban the trans panic defense and why banning it—as opposed to simply strongly litigating against it—is crucial for protecting transgender rights and justice. Then it explains the necessity for federal legislation that mandates the reporting of LGBTQ+ hate crimes.

A. *Trans Panic Defense Ban*

Allen Ray Andrade did not successfully employ the trans panic defense during his trial for the murder of Angie Zapata.¹⁹⁰ As stated previously, LGBTQ+ rights groups consider this trial and conviction a success—the prosecution soundly defeated the trans panic defense and secured a hate crime conviction.

This case shows that the trans panic defense *can* be successfully litigated against with proper strategy and advocacy. However, the victory came with costs; Andrade's lawyer still perpetuated harmful rhetoric in the name of the law. When an assailant employs the trans panic defense, these hateful and bigoted stereotypes will enter the courtroom. Simply waiting to defeat the trans panic defense when the defense brings it up in court, instead of banning it from ever being used, still gives bigoted rhetoric a platform—and a chance—to be successful. To effectively reject the defense and transphobia from the legal system, the trans panic defense must be banned—not just litigated against.

It is unlikely that any education or advocacy by the prosecution will change these jurors' minds.¹⁹¹ Individuals who may perpetuate bigotry should not be given a chance to reflect that bigotry within the

188. NAACP, *supra* note 148.

189. Kate Sullivan & Maegan Vazquez, *Biden Signs Bill making Lynching a Federal Hate Crime into Law*, CNN (Mar. 30, 2022, 12:57 AM), <https://www.cnn.com/2022/03/29/politics/biden-emmett-till-antilynching-act/index.html>.

190. See *infra* Section I.B.

191. Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1455 (2020).

courtroom. By using the courtroom to argue that a transgender woman's status as transgender qualifies as *legally adequate provocation*, the defense lawyer moves the topic of the trial from the murderer to the murdered. The transgender individual's gender identity and the bias surrounding it become the center of attention.¹⁹² It shifts the blame of the crime and the *focus* of the crime, essentially putting the victim on trial when they have no way to defend or represent themselves.

A ban on the trans panic defense would make sure murderers remain fully liable for their actions and are unable to receive a lesser sentence in their state court simply because of their own transphobic bigotry. At the time of this Note, only fifteen states and the District of Columbia "[prohibit] the use of legal defenses claiming the victim's sexual or gender identity contributed to the defendant's actions."¹⁹³ Of these, legislators passed eight of the bans within the past legislative session; the rest are less than a decade old.

As such, these statutes are relatively new legislative concepts. Legislators in these states may use the legislation of other states as blueprints for their own unique bans. For instance, California provides an example of model language to amend their heat of passion standard effectively:

For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from *the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation*, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.¹⁹⁴

Including language such as this will redefine the heat of passion doctrine appropriately.

B. Federally Mandated Reporting

When the NAACP published *Thirty Years* in 1919, no other comprehensive record of lynching statistics existed within the United States.¹⁹⁵ While the NAACP made sure to keep its tabulations to those which could be "given credence by a recognized newspaper,"

192. Russo, *supra* note 122, at 836.

193. MOVEMENT ADVANCEMENT PROJECT, *supra* note 100.

194. CAL. PENAL CODE § 192(f)(1) (2020) (emphasis added).

195. See NAACP *supra* note 12.

gaps within the data persisted.¹⁹⁶ Every instance of lynching could not reasonably be cataloged; however, if special interest groups like the NAACP or the HRC want specific, targeted hate crime statistics such as *Thirty Years*, they currently must collect this data themselves. Lack of funds, reach, and other resources pose as barriers to collecting accurate and complete data. Yet, these groups have no other option if they want to analyze the causes of these crimes.

The federal government, which has more resources than these non-profit special interest groups, can be a valuable source for data collection if it requires state governments and agencies to report hate crimes. When reporting of hate crimes to the FBI is voluntary, the results are incomplete, insufficient, and do not accurately reflect violence against trans women in this country. By making the collecting, reporting, and maintaining of hate crime statistics mandatory, special interest groups, legislators, and their constituents can have a much more accurate record of the bias-motivated violence within their community.

Accurate hate crime statistics are crucial for combating bias-motivated violence. Detailed data would allow crime-prevention and victim assistance entities to better target their resources and forces in the geographical locations that need it most. Targeted attention means regional communities that face more hate crimes—such as larger cities and rural areas—receive more resources.¹⁹⁷

Additionally, accurate data can provide a check on hate crime prevention efforts in any given community. When legislatures pass laws criminalizing certain hateful conduct, accurate hate crime statistics can show the effectiveness of these measures and expose which regions may not be following the law correctly. This allows state and federal legislatures to respond quickly and efficiently to amend ineffective and outdated laws and statutes. Groups like the NAACP and HRC can also check their statistics against the federal records or incorporate the national data into their own records and reports.

IV. TO GET IT PASSED

Crafting the perfect piece of civil rights legislation will mean very little if it does not get passed into law. Throughout the twentieth century, human and civil rights legislation has had a challenging time get-

196. NAACP, *supra* note 12, at 6.

197. Sara Clarke, *FBI: California, New York Report Highest Numbers of Hate Crimes*, U.S. NEWS (Nov. 17, 2020, 3:35 PM), <https://www.usnews.com/news/best-states/articles/2020-11-17/fbi-report-california-new-york-report-highest-numbers-of-hate-crimes>.

ting to the United States Senate; however, getting *through* the Senate always proves immensely more complicated.¹⁹⁸ After advocates draft cutting-edge legislation, what factors should legislators consider so the bill gets enacted into law? By examining the failings of previous legislation, legislators may have much better luck in passing future bills.

A. *State vs. Federal*

Trans panic defense bans have been successful in state legislatures. Legislatures in states such as Virginia pass these bans with less difficulty than there would be at the federal level due to the personalized appeals possible at the state level. The careful crafting of state legislation allows for more intimate advocacy on the part of state legislators, lobbyists, and grassroots activists. These advocates would be able to focus solely on their state's specific unique traits.

For instance, the approach for crafting anti-trans panic defense legislation in Massachusetts will be much different from Mississippi's.¹⁹⁹ The vastly different issues and demographics need specialized attention—the kind that only local advocates and legislators will provide. A state approach for the ban also makes the most sense logistically. States have different requirements for their heat of passion defense; the trans panic defense ban would need to be narrowly tailored to appropriately amend the specific statute within the state's laws concerning manslaughter, homicide, and murder.²⁰⁰ Word choice and structure would also need to be considered.

The mandated reporting of hate crime statistics, however, would work best as federal legislation. As stated previously, police precincts currently vastly underreport hate crimes, their causes, and the assailants because no law mandates this reporting. To ensure comprehensive data which allows both the government and special interest groups to analyze possible legislation and mitigation strategies, states must be uniform in their data collection. Further, the collection of data also relies on funding and resources. The federal government is

198. For instance, the Civil Rights Act of 1957 was met with great opposition by Southern Democrats in the Senate, who sought to kill it on the Senate floor. Further, the then Democratic Senate Majority Leader and future President of the United States, Lyndon B. Johnson, spearheaded the effort to completely weaken the act. *The Civil Rights Act of 1957*, U.S. HOUSE OF REPRESENTATIVES HIST., ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1951-2000/The-Civil-Rights-Act-of-1957/> (last visited Apr. 4, 2022).

199. MOVEMENT ADVANCEMENT PROJECT, *supra* note 100.

200. Compare GA. CODE § 16-5-2(a) (2020) with MT. CODE § 45-5-103 (1997) (While Georgia's heat of passion doctrine specifies a "sudden, violent, and irresistible passion," Montana's heat of passion doctrine uses the phrase "extreme mental or emotional stress.").

much better equipped to allocate funds for the general collection of hate crime data than state governments.

B. Public Opinion

While representation in state and federal legislature is crucial, marginalized communities will not be able to obtain all the support themselves. Public opinion, which legislators can influence, remains a critical part of the overall legislative process and the fight for transgender protections. As members of state and federal governments, legislators sit in a powerful position to advocate for legislation, drive essential conversations, and influence public opinion.

Hate crime legislation, especially legislation intending to protect transgender individuals, needs this influence to be successful. Public, highly visible advocacy shows citizens that these policymakers care about the topic at hand. Much like how an administration's pedaling of transphobic rhetoric increases the rate of crimes against transgender people, positive and supportive advocacy can have the opposite effect.²⁰¹

Public support and public opinion work in multiple ways. First, when legislators express open support for a piece of legislation, the press listens—through their megaphone, information about the bill itself reaches further ears. With more public knowledge comes more public support. When the public supports the legislation, they put pressure on legislators to further focus on the bill and on legislators who have yet to support it. In this way, public support by legislators and society's general opinion affects one another in equal parts.

C. The Senate Graveyard

*"The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action."*²⁰²

Since its inception, senators in the minority have used the filibuster to obstruct unwanted legislation. While some championed the filibuster as an invaluable method of "tempering the power of political majorities," civil rights policymakers and legislators have seen it as a weapon for Senate minorities to stall social progress.²⁰³ From the de-

201. *The Discrimination Administration*, NAT. CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/the-discrimination-administration> (last visited Apr. 4, 2022).

202. *The Idea of the Senate*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/idea-of-the-senate.htm> (last visited Mar. 27, 2022).

203. *About Filibuster and Cloture: Historical Overview*, SENATE (last visited Mar. 27, 2022), <https://www.senate.gov/about/powers-procedures/filibusters-cloture/overview.htm>.

feat of the Dyer Anti-Lynching Bill to the feared demise of the Equality Act of 2021, the filibuster has turned the Senate “into a graveyard for civil rights legislation.”²⁰⁴

Why is the filibuster so challenging to overcome?²⁰⁵ Cloture, the process to end the filibuster, currently requires the approval of sixty Senators. So, even if a party has a 51-49 majority, unless they can convince nine more Senators to invoke cloture alongside them, a bill may still stall and die on the Senate floor. Cloture was initially a tool to mitigate the obstructive filibuster and those who employed it; now, it fails in that duty.

Senators must in the filibuster for future civil rights legislation. Currently, Democrats have majorities in both houses of Congress along with the White House. This is vital for an end to the filibuster; however, genuinely admitting the harm of the filibuster to civil rights legislation may arguably be even more vital. Otherwise, voting rights, equality legislation, and reporting mandates, remain at the mercy of the Senate minority, usually Southern senators. These Southern senators, who typically oppose and obstruct progressive legislation, become controllers of legislative progress. It matters little how popular the legislation may be with the country; if the filibuster remains, a minority controls the majority.

CONCLUSION

Whether explicitly or not, assailants have used a victim’s identity as justification for violence for centuries. Hate crimes, motivated by bigotry, only increase if not adequately criminalized. The solutions proposed in this Note will take an immense amount of support and advocacy to accomplish. However, they would be highly impactful; transgender individuals would not be blamed for their own murders while human and civil rights groups would have more reliable and thorough data at their disposal. The benefits would carry on for years to come. Of course, these steps are only the beginning. Activists and legislators will need to continue to combat the epidemic of transgender murders with further legislation and nationwide education. Hopefully, by learning from the failings and successes of past civil rights legislation, advocates can not only draft more powerful bills that include these measures but also know how to get those bills signed into law.

204. Nancy Beck Young, *History Reveals That Getting Rid of Filibuster is Only Option*, WASH. POST (Mar. 12, 2021), <https://www.washingtonpost.com/outlook/2021/03/12/history-reveals-that-getting-rid-filibuster-is-only-option>.

205. Cornwell, *supra* note 127.

The Cruelty is the Point: ¹ Why America's Prisons Should be Abolished

MAYA LOWE

Prisons and jails in the United States, are by design cruel. These facilities, supported by the larger prison-industrial complex, deprive people of their liberty, isolate people from their loved ones, and create toxic environments that worsen mental and physical health. During the coronavirus (COVID-19) pandemic, the cruelty was especially obvious: cases of and deaths from the disease were under reported, incarcerated people lacked access to PPE, and remained unprioritized for the vaccine. Further, the recourse available to incarcerated people alleging constitutional violations is limited and largely ineffective. Due to the significant harms from the pandemic and lack of recourse, the case for prison abolition—which activists and academics have made for decades—is renewed. The criminal legal system, and American society generally, in the interest of human rights must consider prison abolition a practical and reasonable alternative.

1. This title is a direct reference to journalist Adam Serwer's latest book, *THE CRUELTY IS THE POINT: THE PAST, PRESENT, AND FUTURE OF TRUMP'S AMERICA* (2021).

The Cruelty is the Point: Why America's Prisons Should be Abolished

MAYA LOWE*

INTRODUCTION	277
I. HISTORY OF PRISONS IN AMERICA AND SIGNIFICANT LEGAL CHALLENGES	278
A. <i>The Prison Industrial Complex</i>	278
B. <i>Detrimental/Harmful Prison Conditions</i>	281
1. Mental and Physical Health of Incarcerated People	281
2. History of Pandemics in Prisons	283
II. LEGAL STANDARDS FOR CHALLENGING PRISON CONDITIONS AND THE IMPLICATIONS	284
A. <i>Eighth Amendment Litigation</i>	285
1. <i>Estelle v. Gamble</i>	285
2. <i>Rhodes v. Chapman and Whitley v. Albers</i>	286
3. <i>Wilson v. Seiter</i>	287
4. <i>Helling v. McKinney</i>	287
5. <i>Farmer v. Brennan</i>	288
6. <i>Barnes v. Ahlman</i>	288
B. <i>Compassionate Release Motions</i>	289
C. <i>American with Disabilities Act Violations</i>	291
III. DECARCERATION AND THE LARGER PRISON ABOLITION FRAMEWORK	293
IV. THE CARCERAL STATE DURING THE COVID-19 PANDEMIC	296
A. <i>The COVID-19 Pandemic: The Novel Coronavirus</i> ..	296
B. <i>The Vaccine and Variants</i>	297
C. <i>The Pandemic in Prisons</i>	299
V. COMPARING FINLAND'S CARCERAL POLICIES TO AMERICAN CARCERAL POLICIES	305
VI. [RE]CONSIDERING PRISON ABOLITION	307
CONCLUSION	310

* B.A., B.S., University of Florida; J.D., Howard University School of Law. I sincerely thank Professor Sha-Shana Crichton for her support and guidance as my faculty advisor as I developed this Note; my colleague and friend Elorm Sallah for his encouragement, patience, and excellent feedback from the beginning to the end of this process; and lastly my mother, Carmen DeMoya, who has supported me throughout my law school career. Any errors are my own.

"We take prisons for granted but are often afraid to face the realities they produce."²

—Angela Y. Davis, Distinguished Professor Emerita,
University of California, Santa Cruz

INTRODUCTION

On June 23, 2012, Darren Rainey, an incarcerated person³ at Dade Correctional Institution located in Florida City, Florida,⁴ was found dead in the shower.⁵ The "Case Summary Report" for Rainey's death simply states, "Officer Clarke performed a security check and found Inmate Rainey [redacted] on the floor of the shower over the drain."⁶ Other incarcerated people alleged that prison guards had locked Rainey in a shower stall, set the water temperature to boiling, and turned it on.⁷ Rainey died trapped in a boiling shower for two hours.⁸

Seven years earlier, as Hurricane Katrina approached the city of New Orleans, people incarcerated in Orleans Parish Prison were subjected to similarly callous treatment by city officials.⁹ New Orleans Mayor Ray Nagin ordered a mandatory evacuation for the city in anticipation of the devastation Katrina would level.¹⁰ However, Sheriff Marlin Gusman refused to release or relocate incarcerated people.¹¹ As a result, hundreds of people were trapped inside the jail long after guards and other correctional staff had fled to safety.¹² The incarcer-

2. ANGELA DAVIS, *ARE PRISONS OBSOLETE?* 15 (2003).

3. I refer to people in jails or prisons using the more courteous term, "incarcerated people" rather than "inmates" or "convicts."

4. *Dade Correctional Institution*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/ci/463.html> (last visited Feb. 11, 2022).

5. See Matt Ferner, *Autopsy Photos of Inmate Allegedly 'Boiled' to Death Raise Questions About State's Report*, HUFFPOST (Aug. 4, 2017, 12:54 PM), https://www.huffpost.com/entry/darren-rainey-miami-dade-shower-death-autopsy-photos_n_5983f3f7e4b041356beedb5?ncid=tweetInkushpmg00000067. While the Miami-Dade State Attorney "cleared guards of any wrongdoing" an independent forensic examiner found that Rainey's injuries were consistent with him being trapped in a scalding shower rather than a natural product of decomposition like the Miami-Dade medical examiner suggested. *Id.*

6. OFF. OF INSPECTOR GEN., FLA. DEP'T OF CORR., CASE NO. 12-4-3441, 3-4 (2012).

7. See Ferner, *supra* note 5. It should be noted that while the official report cited at *supra* note 4 cleared the guards of any wrongdoing, independent reporting and an independent autopsy found that Rainey's injuries were consistent with what Rainey's fellow incarcerated people had alleged.

8. *Id.*

9. See Michael Patrick Welch, *Hurricane Katrina Was a Nightmare for Inmates in New Orleans*, VICE (Aug. 29, 2105, 1:56 AM), <https://www.vice.com/en/article/5gjdxdn/hurricane-katrina-was-a-nightmare-for-inmates-in-new-orleans-829>.

10. See *id.*

11. See *id.*

12. See *id.*

ated individuals were left in toxic, chest-high water for days before being rescued.¹³

These selected accounts—reflecting cruelty and indifference towards incarcerated people—are not isolated instances of violence. Rather, these accounts reflect the cruelty inherent to the carceral system, cruelty which over two million people are subjected to every day.

Part I of this Note examines the history of prisons in the United States and significant legal challenges stemming from prison conditions. Part II discusses judicial and statutory challenges to abhorrent prison conditions. Part III examines the activist goals of decarceration and prison abolition in response to the carceral state and state responses to decarceration. Part IV illustrates the poor mismanagement of prisons and jails during the COVID-19 pandemic. Part V provides an international comparison to Finland, a country that has significantly reduced its incarcerated population in the past fifty years. Lastly, Part VI revisits the principle of prison abolition and make the case for its application within the United States. Ultimately, this Note makes two interrelated assertions. First, prisons and jails—demonstrated throughout history and as exemplified during the coronavirus (COVID-19) pandemic—are inimical to American society. Second, the continued existence of prisons and jails are both unjustified and unnecessary.

I. HISTORY OF PRISONS IN AMERICA AND SIGNIFICANT LEGAL CHALLENGES

A. *The Prison Industrial Complex*

Prisons in America started as two separate institutions: jails and workhouses.¹⁴ Jails were an approximation of modern prisons wherein people—classified as debtors, religious and political offenders, and criminals—were detained.¹⁵ On the other hand, workhouses solely addressed and oppressed the indigent, were not used to detain people convicted of a crime.¹⁶ These institutions, supplemented by Quaker philosophy, replaced corporal punishment by “combining the [jail] and the workhouse.”¹⁷ As a result, imprisonment was used for those

13. See *Prison Conditions and Prisoner Abuse After Katrina*, AMER. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/prison-conditions-and-prisoner-abuse-after-katrina> (last visited Mar. 28, 2022).

14. See Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 35, 36 (1921).

15. See *id.* at 36.

16. See *id.* at 36-37.

17. *Id.* at 37.

convicted of crimes and the imprisoned people were tasked with hard labor.¹⁸ “A century later . . . the principle that imprisonment at hard labor should be in cellular separation [was added], and thus created a modern prison system.”¹⁹

After the Civil War, there was a dramatic shift in the demographics and functions of prisons. In 1865, the Thirteenth Amendment outlawed formal slavery and involuntary servitude, “except as punishment for crime” in the United States.²⁰ Although Black people could no longer be classified as slaves, “former slave states”²¹ enacted laws to maintain control of the labor source they had just lost.²² These laws were known as the Black Codes,²³ and largely circumscribed criminality to Black people.²⁴ Therefore, the Black Codes provided a legitimate and legal basis to force Black people into the newly-created convict leasing system and continue the practice of exploiting Black bodies for profit.²⁵ Convict leasing relied on the pre-existing prison system.²⁶

Often, the *convict leasing system* was a more horrific iteration of slavery. Unlike slave masters, the managers of the leased convicted individuals did not have any incentive to keep people they viewed as property healthy, or even alive.²⁷ If a leased convicted individual was too injured to work or died, the managers could ask for a replacement convicted individual.²⁸ Convict leasing maintained the subjugation of Black people as lesser-class citizens,²⁹ while transmuting the prison system from holding cells filled primarily with white people to a full-fledged industry crowded with Black people.³⁰ This prison industry rate of growth in the United States grew steadily throughout most of

18. *See id.*

19. *Id.*

20. U.S. CONST. amend. XIII, § 1.

21. *See* DAVIS, *supra* note 2, at 28.

22. *See id.* at 34.

23. *See, e.g.*, Chapter 4, § 1 of Mississippi Black Codes, enacted in 1866 (“Any freedman, free negro or mulatto, committing riots, routs, affrays, trespasses, malicious mischief, cruel treatment to animals, seditious speeches, insulting gestures, language, or acts . . . exercising the function of a minister of the Gospel without a license from some regularly organized church.”).

24. *See* DAVIS, *supra* note 2, at 28.

25. Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC, (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177>.

26. *Id.*

27. Brent Staples, *A Fate Worse Than Slavery, Unearthed in Sugar Land*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/opinion/sugar-land-texas-graves-slavery.html>.

28. *Id.*

29. Bennis, *supra* note 25.

30. *Id.*

the nineteenth and twentieth centuries,³¹ hovering around 200,000 people.³²

However, in the 1970s, the prison industry changed dramatically, and the prison population greatly increased as a result of former President Nixon's self-proclaimed War on Drugs.³³ "The incarceration rate in 1997 was 445 [incarcerated people] per 100,000 U.S. residents, more than four times the stable rate that had prevailed for the fifty years preceding 1973."³⁴ Nixon and his successors' cruel policies that followed this "war" harshly sentenced many people for drug possession and drug use,³⁵ rather than receiving drug treatment, or addressing deeper systemic issues,³⁶ people were given prison sentences.³⁷ These punitive practices created the "prison-industrial complex." The prison-industrial complex is defined as, "a set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need."³⁸ Since the 1970s, the prison-industrial complex has grown such that approximately \$182 billion is spent annually maintaining it,³⁹ and approximately 700 of every

31. Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC, <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669> (last visited Mar. 28, 2022).

32. *U.S. and Federal Prison Population, 1925-2019*, THE SENT'G PROJECT, <https://www.sentencingproject.org/wp-content/uploads/2021/06/US-prison-pop-1925-2019-1.png> (last visited Mar. 28, 2022).

33. *Id.*

34. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1986*, 26 CRIME & JUST. 17, 18 (1999).

35. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1302, 101 Stat. 3207-16 (amending 21 U.S.C. § 801 note (1970)); see also Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372; see also EQUAL Act, H.R. 1693, 117th Cong. (2021). The 1986 Act equated 5 kilograms (5000 grams) of cocaine powder and to 50 grams of crack cocaine for sentencing purposes, creating a 100 to 1 sentencing disparity. A mandatory minimum sentence of ten years (or twenty years to life, if death or serious bodily injury resulted) was triggered whether the person charged with the offense had 5,000 grams of cocaine or a mere 50 grams of crack cocaine. This disparity resulted in disproportionately long and harsh sentences for Black Americans. The disparity was reduced to 18:1 in 2010, and in September 2021, the United States House of Representatives passed a bill to completely remove sentencing disparities. As of the date of this writing, the bill is in the Senate.

36. See, e.g., Bob Lord, *Inequality in America: Far Beyond Extreme*, COMMON DREAMS (Oct. 13, 2020), <https://www.commondreams.org/views/2020/10/13/inequality-america-far-beyond-extreme>; *Race and the Drug War*, DRUG POL'Y ALLIANCE, <https://drugpolicy.org/issues/race-and-drug-war> (last visited Apr. 5, 2022).

37. Schlosser, *supra* note 31.

38. *Id.* (The prison-industrial complex is "a confluence of special interests that has given prison construction in the United States a seemingly unstoppable momentum. It is composed of politicians, both liberal and conservative, who have used the fear of crime to gain votes; impoverished rural areas where prisons have become a cornerstone of economic development; private companies that regard the roughly \$35 billion [\$182 billion in the late 2010s] spent each year on corrections not as a burden on American taxpayers but as a lucrative market; and government officials whose fiefdoms have expanded along with the inmate population.").

39. See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

100,000 American residents are incarcerated.⁴⁰ While incarceration has harmful effects on all communities, regardless of race, there are undeniable racial disparities in incarceration rates.⁴¹ As scholar Michelle Alexander noted, over the past fifty years, “[t]he system of mass incarceration has grown, sprawled, and developed an appetite that . . . [consumes] people in communities of all colors.”⁴²

B. Detrimental/Harmful Prison Conditions

1. Mental and Physical Health of Incarcerated People

A prison sentence causes significant harm beyond depriving a person of their freedom. While incarcerated people tend to be less physically and mentally healthy than the general population as they enter prison facilities,⁴³ prisons themselves spread and worsen illness and disease.⁴⁴ Infectious diseases are significantly more prevalent among prison populations compared to the general population,⁴⁵ largely due to lack of testing,⁴⁶ treatment,⁴⁷ and prevention measures.⁴⁸ Moreover, prisons have high rates of mental illness⁴⁹—even discounting diagnoses that predated incarceration—namely due to prison conditions⁵⁰ and substandard case management.⁵¹

40. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

41. Bennis, *supra* note 25.

42. *13th* (Netflix 2016); *Contra* Rachel Kushner, *Is Prison Necessary?* Ruth Wilson Gilmore *Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> (“Another widely held misconception Gilmore points to is that prison is majority [B]lack. Not only is it a false and harmful stereotype to overassociate [sic] [B]lack people with prison, she argues, but by not acknowledging racial demographics and how they shift from one state to another, and over time, the scope and crisis of mass incarceration can’t be fully comprehended.”).

43. See e.g., John V. Jacobi, *Prison Health Public Health: Obligations and Opportunities*, 31 AM. J. L. MED. 447, 448 (2005).

44. See e.g., Jacobi *supra* note 43, at 448; *Impact of Incarceration on Health* in HEALTH AND INCARCERATION: A WORKSHOP SUMMARY 32 (Amy Smith ed., 2013).

45. James Hamblin, *Mass Incarceration is Making Infectious Diseases Worse*, ATLANTIC (July 18, 2016), <https://www.theatlantic.com/health/archive/2016/07/incarceration-and-infection/491321/> (listing HIV, Hepatitis C, and active tuberculosis as some of the more prevalent diseases in prisons).

46. See Andrew P. Wilper et al., *The Health and Health Care of U.S. Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 669 (2009).

47. *Incarceration and Health: A Family Medicine Perspective (Position Paper)*, AMER. ACADEMY OF FAMILY PHYSICIANS (Apr. 2017), <https://www.aafp.org/about/policies/all/incarceration.html>.

48. *Cf. id.* (discussing inadequate immunization services which can contribute to outbreaks within facilities).

49. Wilper et al., *supra* note 46, at 666.

50. See e.g., Jacobi *supra* note 43, at 447.

51. See, e.g., Wilper et al., *supra* note 46, at 666. Mental illness in the carceral state is beyond the scope of this paper, but the high prevalence does speak to the overall appalling conditions in prisons.

Prisons routinely fail to provide adequate health care services to those incarcerated.⁵² Critically, this failure is in direct violation of *Estelle v. Gamble*, discussed in Part II, where the Supreme Court of the United States held that the government is obligated “to provide medical care for those whom it is punishing by incarceration.”⁵³ There is substantial evidence that the health care offered within prisons is a colossal failure.⁵⁴ For example, in 2007, a judge placed the California prison system’s health care in federal receivership⁵⁵ due to the reprehensible healthcare the state provided its incarcerated people.⁵⁶ More recently, in March 2021, in *Lewis v. Cain*, Chief Judge Shelly Dick of the United States District Court for the Middle District of Louisiana found that the medical treatment at the Louisiana State Penitentiary at Angola (“LSP”) was unconstitutional under the Eighth Amendment.⁵⁷ Considering both the experiences of individual plaintiffs and the testimony of medical doctors, the court found, *inter alia*, “serious hygiene deficiencies in clinic spaces . . . physicians routinely fail[ing] to identify patient diseases . . . [and] physicians routinely fail[ing] to perform a meaningful physical examination.”⁵⁸

However, even when prisons have the resources to treat incarcerated people, they do not guarantee necessary healthcare. In many state and federal prisons, healthcare is privatized. These private providers “have aimed to reduce costs when operating within prison facilities and argue that [incarcerated people] are receiving adequate medical attention while saving taxpayer dollars. . . . Cost-cutting practices, however, have not mixed well with a prison population that is

52. See, e.g., Scott Burris, *Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291, 307 (1992).

53. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

54. See, e.g., Keri Blakinger, *Prisons Have a Health Care Issue – and It Starts at the Top*, *Critics Say*, THE MARSHALL PROJECT (July 1, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/07/01/prisons-have-a-health-care-issue-and-it-starts-at-the-top-critics-say> (describing widespread practice among state prisons to hire medical personnel whose medical licenses are compromised).

55. “When a local or state government proves unable or unwilling to improve a distressed public institution that has long defied federal law, a federal court can take the troubled entity out of the government’s hands and appoint a “receiver” — a nonpartisan expert — to assume direct control. . . .” Hernandez D. Stroud, *The Way Forward for Rikers Island: Receivership*, BRENNAN CTR. FOR JUST. (Jan. 4, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/way-for-ward-rikers-island-receivership#:~:text=when%20a%20local%20or%20state,with%20an%20eye%20towards%20reform>.

56. Wilper et al., *supra* note 46, at 666; see also Solomon Moore, *Using Muscle to Improve Health Care for Prisoners*, N.Y. TIMES (Aug. 27, 2007), <https://www.nytimes.com/2007/08/27/us/27prisons.html>.

57. *Lewis v. Cain*, No. 3:15-CV-318, 2021 WL 1219988, at *1 (M.D. La. Mar. 31, 2021).

58. *Id.* at *5.

increasingly in need of greater medical care and services.”⁵⁹ Thus, incarcerated people might not get the medications, examinations, or other care that they need in the name of saving money.⁶⁰ In some state prisons, there are significant wait times for the most basic treatment.⁶¹ And many states perversely require incarcerated people pay for every medical appointment they attend, disincentivizing medical care for those who cannot afford it.⁶²

The combination of the high prevalence of various illnesses and the poor healthcare provided in prisons is causing the death toll in state prisons to rise.⁶³ Thus, irrespective of the reason,⁶⁴ the poor healthcare provided in prisons is a complete policy failure. As the *Estelle* Court noted, “it is but just that the public be required to care for the [incarcerated person], who cannot by reason of the deprivation of his liberty, care for himself.”⁶⁵ Other implications of this poor treatment, especially with regards to the pandemic, will be explored more fully later in this Note.

2. History of Pandemics in Prisons

The coronavirus (COVID-19) pandemic is not the first global pandemic that has deeply impacted the United States. Due to the similarities both medically and in societal reactions, the Spanish Flu pandemic most closely parallels the current situation with COVID-19.⁶⁶ In 1918, the Spanish Flu was an unprecedented virus that ultimately resulted in approximately 675,000 deaths within the United States.⁶⁷ Many of the public health precautions implemented during the Span-

59. Alexander Casendino, *Convicts without Care: How the Privatization of Healthcare in the U.S. Prison System Fails to Protect Inmates' Health*, BERKELEY POL. REV. (Jan. 28, 2017), <https://bpr.berkeley.edu/2017/01/28/convicts-without-care-how-the-privatization-of-healthcare-in-the-u-s-prison-system-fails-to-protect-inmates-health>.

60. *Id.*

61. See Emily Widra, *Death in State Prisons Are on the Rise, New Data Shows. What Can Be Done?*, PRISON POL'Y INITIATIVE (Feb. 13, 2020), <https://www.prisonpolicy.org/blog/2020/02/13/prisondeaths> (“Older adults in federal prisons wait an average of 114 days to see needed medical specialists in cardiology and pulmonology.”).

62. See Michelle Pitcher, *Should Prisoners Have to Pay For Medical Care During a Pandemic?*, THE MARSHALL PROJECT (Nov. 2, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/11/02/should-prisoners-have-to-pay-for-medical-care-during-a-pandemic>; see also Tiana Herring, *Prisons Shouldn't Be Charging Medical Co-Pays—Especially During a Pandemic*, PRISON POL'Y INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/copay-survey>.

63. See Widra, *supra* note 61.

64. *Incarceration and Health: A Family Medicine Perspective (Position Paper)*, AM. ACAD. OF FAM. PHYSICIANS (Apr. 2017), <https://www.aafp.org/about/policies/all/incarceration.html>.

65. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (internal quotations omitted).

66. *Similarities and Differences Between Flu and COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm> (Jan. 18, 2022).

67. *1918 Pandemic (H1N1 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (Mar. 20, 2019).

ish Flu are precautions currently recommended by the Centers for Disease Control and Prevention (“CDC”) to fight the COVID-19 pandemic.⁶⁸ Notably, the Spanish Flu gravely affected the American prison population.⁶⁹ Dr. Leo Stanley, employed at the San Quentin State Prison in California, carefully documented the rapid and destructive spread of the Spanish Flu within the prison.⁷⁰ The San Quentin prison hospital was quickly overwhelmed with incarcerated individuals seeking medical attention.⁷¹ Like prisons today, San Quentin received transfers from other prisons.⁷² Incidentally, San Quentin experienced three waves of outbreaks in April, October, and November of 1918,⁷³ and all three outbreaks were attributed to incarcerated people who had been transferred from other prisons in California.⁷⁴ However, unlike the COVID-19 pandemic, there is no record of a concerted movement to release incarcerated individuals from prisons during the 1918 pandemic. Over 100 years have passed since prisons grappled with the virulent Spanish Flu, yet there were no significant precautions taken when COVID-19 began spreading throughout United States prisons.

II. LEGAL STANDARDS FOR CHALLENGING PRISON CONDITIONS AND THE IMPLICATIONS

Incarcerated people have several avenues of legal recourse, some of which have been expanded due to the COVID-19 pandemic. Among these avenues of legal recourse are: (1) the Eighth Amendment of the Constitution; (2) compassionate release; and (3) the American with Disabilities Act (“ADA”). There are additional avenues that incarcerated people might pursue, however, this section of the Note will only focus on the aforementioned options for recourse. Admittedly, any eligible incarcerated person can file under one of

68. Heather Harris, *Addressing the Outbreak in San Quentin: Lessons From 1918*, PUB. POL’Y INST. CAL. (July 16, 2020), <https://www.ppic.org/blog/addressing-the-outbreak-in-san-quentin-lessons-from-1918/#:~:text=second%2C%20today’s%20San%20Quentin%20outbreak,virus%20immediately%20prior%20to%20transfer>.

69. See e.g., L. L. Stanley, *Influenza at San Quentin Prison, California*, 34 PUB. HEALTH REPS. 996, 996 (1919); see also Jeffrey Alan John, *Prison History Repeats Itself When It Comes to Coronavirus*, DAYTON DAILY NEWS (Aug. 8, 2020), <https://www.daytondailynews.com/news/prison-history-repeats-itself-when-it-comes-to-coronavirus/ORZTUV2KEZHKFOL5VCTJ7HL62Y>.

70. See Stanley, *supra* note 69, at 996.

71. *Id.*

72. *Id.* at 996, 997, 1001.

73. *Id.* at 996.

74. *Id.* at 996, 997, 1001; 1918 Pandemic (H1N1 Virus), CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (Mar. 20, 2019).

these causes of actions. However, eligibility does not make the process easy. The incarcerated person, who is likely filing pro se, must understand the law and in many cases, exhaust the internal remedies a prison offers before proceeding to a court of law, an onerous task. Therefore, these avenues provide insufficient remedies, and a more radical solution is necessary.

A. Eighth Amendment Litigation

The Eighth Amendment of the Constitution states that “excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.”⁷⁵ The “cruel and unusual punishments” clause is frequently used by incarcerated people to protest either the conditions of the facility to which they are confined⁷⁶ or the sentence they received.⁷⁷ A series of cases, starting with *Estelle v. Gamble*, established and further defined the legal standard that must be met for incarcerated people to be granted relief. These cases will be briefly examined below to demonstrate this evolution.

1. *Estelle v. Gamble*

In *Estelle v. Gamble*, plaintiff J.W. Gamble who was incarcerated at a facility within the Texas Department of Corrections, suffered an injury while unloading a truck for the prison.⁷⁸ For approximately three months, Gamble frequently saw the prison’s medical staff who prescribed him various medications that failed to completely alleviate his pain.⁷⁹ Gamble was threatened by prison officials with further punishment if he did not return to his work detail within the prison.⁸⁰ Upon the Supreme Court’s review of the Texas Department of Corrections conduct, it held that it is “the government’s obligation to provide medical care for those whom it is punishing by incarceration. An [incarcerated person] must rely on prison authorities to treat his medical needs; if authorities fail to do so, those needs will not be met.”⁸¹ Critically, the Court recognized that pain, suffering, and potential death stemming from untreated ailments “constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”⁸²

75. U.S. CONST. amend. VIII (emphasis added).

76. *E.g.*, *Rhodes v. Chapman*, 452 U.S. 337, 339-340. (1981)

77. *E.g.*, *Furman v. Georgia*, 408 U.S. 238, 239-240 (1972).

78. *See Estelle v. Gamble*, 429 U.S. 97, 99 (1976).

79. *See id.* at 99-101, 102.

80. *See id.* at 101.

81. *Id.* at 103.

82. *Id.* at 103-04.

Accordingly, the Court determined that, "[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."⁸³ Using this standard, the Court determined that the doctors that had attended to Gamble had not violated the Eighth Amendment.⁸⁴ This standard would be further defined in subsequent cases, discussed below.

2. *Rhodes v. Chapman* and *Whitley v. Albers*

In 1981, five years after the *Estelle* decision, the Court examined the objective component of the Eighth Amendment standard in *Rhodes v. Chapman*.⁸⁵ In *Rhodes*, respondents Kelly Chapman and Richard Jaworski alleged that both of them being housed in the same cell—referred to as "double celling"—was "cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendment rights."⁸⁶ In considering this practice, the Court was examining the objective component of an Eighth Amendment claim because it assessed whether "the deprivation [was] sufficiently serious."⁸⁷ Ultimately, the Court held that double-celling was not violative of the incarcerated peoples' Eighth and Fourteenth Amendment rights because "there [was] no evidence that double celling . . . either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment."⁸⁸

Subsequently, the Court examined the subjective component of the Eighth Amendment standard in *Whitley v. Albers*.⁸⁹ In *Whitley*, the petitioner prison guards attempted to suppress a disruption at the prison and fired several "warning shots."⁹⁰ One of these shots hit the respondent, Gerald Albers, in the left knee, resulting in "severe damage to his left leg and mental and emotional distress" that provided the basis for Albers' Eighth Amendment claim.⁹¹ The Court found that in order to be violative of the Eighth Amendment, the challenged conduct "must involve more than ordinary lack of due care for the prisoner's interests or safety."⁹² Otherwise stated, officials must act

83. *Id.* at 106.

84. *Id.* at 108 (remanding the opinion to determine whether prison officials acted with "deliberate indifference").

85. 452 U.S. at 339-340.

86. *See id.* at 339.

87. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

88. *Rhodes*, 452 U.S. at 348.

89. *Wilson*, 501 U.S. at 298-99.

90. 475 U.S. 312, 316 (1986).

91. *Id.* at 317.

92. *Id.* at 319.

with “*obduracy and wantonness*, not inadvertence or error in good faith” in consideration of the conduct’s circumstances.⁹³ Consequently, the Court held that the respondent’s Eighth Amendment rights had not been violated.⁹⁴

3. *Wilson v. Seiter*

Five years after *Whitley*, in *Wilson v. Seiter*, the Court further examined the Eighth Amendment standard, focusing on the “prison official’s state of mind when it is claimed that the official has inflicted cruel and unusual punishment.”⁹⁵ In *Seiter*, petitioner Pearly L. Wilson, who was incarcerated at an Ohio state prison, alleged that “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates” were conditions of confinement that amounted to cruel and unusual punishment as prohibited under the Eighth and Fourteenth Amendments.⁹⁶ The Court held that the *Estelle* “deliberate indifference” standard was the appropriate standard for determining whether prison conditions were violative of the Eighth Amendment and remanded the case for the Court of Appeals to apply this standard.⁹⁷

4. *Helling v. McKinney*

The Court was once again asked to determine the scope of the Eighth Amendment in *Helling v. McKinney*.⁹⁸ In *Helling*, the Court decided the narrow question of “whether the health risk posed by involuntary exposure of [an incarcerated person] to environmental tobacco smoke” is violative of the Eighth Amendment.⁹⁹ Respondent William McKinney was incarcerated in the Nevada State Prison and was forced to share a cell with an incarcerated person “who smoked five packs of a cigarettes a day.”¹⁰⁰ McKinney alleged that the exposure was detrimental to his health and that it amounted to cruel and unusual punishment.¹⁰¹ In response to the petitioners’ argument that

93. *Id.* at 319-20 (emphasis added).

94. *See id.* at 326.

95. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

96. *Id.* at 296.

97. *See id.* at 306.

98. 509 U.S. 25, 27 (1993).

99. *Id.* at 27-28.

100. *Id.* at 28.

101. *See id.*

McKinney did not have a valid Eighth Amendment claim because he had not established a present injury, the Court stated:

[T]he Eighth Amendment protect[ion] against future harm to inmates is not a novel proposition. The Amendment . . . requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." It is "cruel and un-usual punishment to hold convicted criminals in unsafe conditions." It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the grounds that nothing yet had happened to them.¹⁰²

Accordingly, the Court held that McKinney had sufficiently stated a cause of action under the Eighth Amendment and should be afforded the opportunity to prove these allegations in the district court.¹⁰³

5. *Farmer v. Brennan*

Merely a year after *Helling*, resolving a circuit split,¹⁰⁴ the Court once more defined the scope of the deliberate indifference standard in *Farmer v. Brennan*.¹⁰⁵ Petitioner Dee Farmer, a trans woman,¹⁰⁶ alleged that prison officials had violated her Eighth Amendment rights when they failed to place her in segregated housing at the men's prison for her safety.¹⁰⁷ The lower courts had held that there had been no deliberate indifference because prison officials only had to protect against "inmate assaults" if "they had 'actual knowledge' of a potential danger."¹⁰⁸ The Court disagreed and held that a prison official could only "be found liable under the Eighth Amendment . . . [if] the official knows of and disregards an excessive risk to [an incarcerated person's] health or safety."¹⁰⁹

6. *Barnes v. Ahlman*

According to these Eighth Amendment cases, "conditions of confinement that [were] not formally" part of a person's sentence need to be proved through a subjective component and the standard for com-

102. *Id.* at 33 (internal citations omitted).

103. *See id.* at 35.

104. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

105. *See id.* at 829.

106. While Petitioner Dee Farmer was referred to as a "transsexual" who displayed "feminine characteristics" in the Court's opinion, I use the more courteous and appropriate label of "trans woman." Further, while the Court's opinion uses "he" and "him" pronouns for the petitioner, given the other facts describing the petitioner's appearance and behavior, I will use "she" and "her" pronouns. *See id.* at 829, 832.

107. *See id.* at 831.

108. *Id.*

109. *Id.* at 837.

plaints alleging “inhumane conditions of confinement . . . [is one of] ‘deliberate indifference.’”¹¹⁰ Additionally, as mentioned above, the Court recognized that the scope of the Eighth Amendment encompassed future injuries that were likely to result from the conditions of confinement.¹¹¹ However, the Supreme Court refuses to consider this standard—which could serve as a basis for relief if plaintiffs pleaded sufficient facts—in the midst of an unprecedented pandemic.

In *Barnes v. Ahlman*, where incarcerated individuals in the Orange County filed suit against the Sheriff of Orange County, California, to enforce COVID-19 pandemic safety measures, the Court did not intervene to protect incarcerated people confined in terrible conditions. Ultimately, the Court stayed the District Court’s injunction, which required that the Orange County Jail “implement certain safety measures to protect their [incarcerated people] during the unprecedented COVID-19 pandemic.”¹¹² By staying the injunction, the Supreme Court allowed the unsafe conditions at the Orange County Jail to continue, unfettered.¹¹³ Dissenting, Justice Sonya Sotomayor found that the Court had incorrectly applied the standard for granting a stay and unfortunately left “to its own devices a jail that . . . has failed to safeguard the health of the [incarcerated people] in its care.”¹¹⁴

B. Compassionate Release Motions

Compassionate release motions are another avenue for incarcerated individuals to pursue and have been used well before the pandemic. The motions in response to confinement in various contexts, not just state and federal prisons.¹¹⁵ However, due to the novelty of the pandemic, and the novelty in its use as an “extraordinary and compelling reason” for compassionate release, there is minimal precedent. Another obstacle is the overall inefficiency of the system. While section 603(b) of the First Step Act of 2018 amended the compassionate release process such that the incarcerated individual can “petition

110. See *Helling v. McKinney*, 509 U.S. 25, 29,30 (1993). See also *Valentine*, 956 F.3d at 801 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994) for the objective and subjective components of the deliberate indifference standard.).

111. See *Helling*, 509 U.S. at 33.

112. *Barnes v. Ahlman*, 591 U.S. ____; 140 S. Ct. 2620, 2620 (2020).

113. *Id.*

114. *Id.* (Sotomayor, J., dissenting).

115. See, e.g., *United States v. Ramos*, No. 18-CR-30009-FDS, 2020 WL 1478307, at *1 (D. Mass. Mar. 26, 2020) (granting a reconsideration of release on bail until trial); see also *United States v. Bush*, No. 19-cr-00151-RIY-MJD, 2020 WL 2512887, at *1 (S.D. Ind. May 15, 2020) (granting temporary release pending trial); see also *Hector G.M. v. Rodriguez*, No. 20-cv-6034, 2020 WL 2747827, at *1 (D.N.J. May 27, 2020) (considering motion filed by an immigrant held in the custody of Immigration and Customs Enforcement).

courts for relief directly, rather than leaving that power solely . . . [with] the [Federal Bureau of Prisons],”¹¹⁶ the process remains cumbersome. These motions do not travel directly from an incarcerated individual to the local courthouse. The warden of the federal prison where the individual is petitioning for compassionate release is the first line of review.¹¹⁷ If the warden does not respond to the petition within thirty days or the incarcerated individual “has fully exhausted all administrative rights to appeal a failure of [BOP] to bring a motion on the [incarcerated individual’s] behalf,” the individual can apply to the court for relief directly.¹¹⁸ No one dealing with both atrocious prison conditions and the ever-present threat of COVID-19 can (or should) be expected to also meet these administrative burdens. Therefore, compassionate release motions cannot be regarded as viable options for incarcerated people.

In the alternative, compassionate release motions are inadequate remedies because the Supreme Court has yet to rule on what constitutes a valid compassionate release motion, and which factors should guarantee release of incarcerated individuals. Without this controlling precedent from the Court, appellate and district courts must make their own determinations as to whether the incarcerated individual is eligible for release from prison. Thus far, in reviewing a compassionate release motion, a court will consider numerous factors including: (1) the applicant’s pre-existing conditions;¹¹⁹ (2) the applicant’s age at both the time of the original offense and at the time of the application; (3) the nature of the offense the applicant committed; and (4) the applicant’s behavior while they were incarcerated.¹²⁰ The published case law seems to suggest that certain judges are more sympathetic than others to compassionate release motions, and therefore more likely to grant them.¹²¹ The presiding judge is required to informally balance

116. Pub. L. 115-391 § 603(b) (2018). See Elizabeth A. Blackwood, *Compassionate Release*, 44 CHAMPION 51, 51 (2020).

117. Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoner Sought Compassionate Release. 98 Percent Were Denied*, THE MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied>.

118. *Id.*

119. See *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Nov. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html.

120. See 18 U.S.C. § 3553; see also U.S. SENT’G GUIDELINES § 1B1.13 (U.S. SENT’G COMM’N 2006).

121. See *United States v. Burrell*, No. 14-20306, 2020 WL 3498096, at *1 (E.D. Mich. June 29, 2020); *United States v. Tice*, No. 04-20038-02, 2020 WL 4734934, at *1 (E.D. Mich. Aug. 14, 2020); *United States v. Bibbs*, No. 12-20332-03, 2020 WL 3791532, at *1 (E.D. Mich. July 7,

these factors, and subsequently determine the likelihood that the incarcerated individual will recidivate. However, there is a complete lack of predictability in the outcome of these motions. Even within the same federal circuit, there is no consensus amongst the courts regarding the pre-existing condition, offense history, or age threshold that may ensue an incarcerated individual's release.¹²²

Current COVID-19 jurisprudence also failed to recognize that certain offenses, by their nature, are ineligible for compassionate release.¹²³ Based on decisions courts have made thus far, the two primary concerns are: (1) the specific facts of the offense, rather than the offense itself, and (2) whether the incarcerated individual has made the requisite showing for their medical conditions.¹²⁴ Both of these conditions preclude compassionate release motions from being an effective and consistent legal remedy for a large swath of the incarcerated population.

C. *American with Disabilities Act Violations*

Another legal remedy that incarcerated people have pursued in light of the pandemic is filing on the basis of the American with Disabilities Act ("ADA"). The nature of an ADA claim is that prison officials are discriminating against people with disabilities by not providing the necessary and "reasonable accommodations" the Centers for Disease Control and Prevention ("CDC") recommends due to the pandemic.¹²⁵ In making a claim for an ADA violation, the plaintiffs are required to assert that: (1) each plaintiff making the claim has a disability; (2) the defendants, in this context, prison officials, "denied plaintiffs 'the benefits of the services programs or activities of a [prison]';" and (3) the denial resulted from discrimination on the basis of disability.¹²⁶ The ADA defines a disability as, "(A) a physical or mental impairment that substantially limits one or more major life ac-

2020). All of these petitions were heard and denied by the Honorable Judge Thomas L. Ludington. *But see* *United States v. Camacho-Duque*, No. 18-80238-CR, 2020 WL 5951340, at *1 (S.D. Fla. Oct. 5, 2020); *United States v. Telson*, No. 16-80178-CR, 2020 WL 5742624, at *1 (S.D. Fla. Sept. 21, 2020); *United States v. Potts*, No. 06-80070-CR, 2020 WL 5540126, at *1 (S.D. Fla. Sept. 13, 2020). All of these petitions were heard and granted by the Honorable Judge Donald M. Middlebrooks.

122. *Compare* *United States v. Seshan*, No. 14 Cr. 620, 2020 WL 2215458, at *1 (S.D.N.Y. May 6, 2020) *with* *United States v. Echevarria*, No. 17-cr-44, No. 06-cr-269, 2020 WL 2113604, at *1 (D. Conn. May 4, 2020).

123. Fern L. Kletter, *COVID-19 Related Litigation: Effect of Pandemic on Release from Federal Custody*, 54 A.L.R. Fed. 3d Art. 1 (2020).

124. *Id.*

125. *Frazier v. Kelley*, 460 F. Supp. 3d 799, 842 (E.D. Ark. 2020).

126. *Id.* at 843.

tivities, (B) a record of such an impairment; or (C) being regarded as having such an impairment.”¹²⁷

In *Frazier v. Kelley*, the United States District Court for the Eastern District of Arkansas held that the plaintiffs, incarcerated individuals, were unlikely to succeed on the ADA violation claim because the prison officials’ failure to establish safety precautions for COVID-19 was not indicative of any accommodations being denied.¹²⁸ An ADA claim can also be dismissed if the court finds that the contested policies did not “have a significantly adverse . . . impact on the [plaintiff] as a result of his disabilities.”¹²⁹ These general standards have not been adjusted to account for the pandemic; like motions for compassionate release, the petitioner must still show how her disability places her at an increased risk to either get the virus or to face more severe symptoms upon contracting the virus.¹³⁰ Evidently, claims based on ADA violations have limited applicability in that they are only available to those with recognized and established disabilities.¹³¹ Therefore, filing ADA claims cannot be recommended as a broad, viable legal remedy for incarcerated individuals seeking relief from the pandemic. Once again, creating such narrow parameters for relief hardly helps the situation for people who are unable to follow the CDC guidelines or protect themselves in any significant way.

These legal avenues exist, and have been adjusted considering the pandemic, because government officials and administrators are cognizant that the carceral system is far from perfect. However, all of these legal remedies are time-consuming, limited, or completely inapplicable. Compassionate release, Eighth Amendment, and ADA violation motions all require that an incarcerated person exhaust all administrative remedies before petitioning the court for relief.¹³² However, both the pandemic and the poor healthcare given to incarcerated people does not sufficiently protect their lives. Rather, as discussed above, prisons often shorten the lives of incarcerated individuals. Regardless of the crimes that the people inside prison have committed, the vast

127. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3, 104 Stat. 329 (1990) (codified as amended at 42 U.S.C. § 12101).

128. 460 F. Supp. 3d at 844.

129. *Hurdle v. Comm’r Corrections*, No. CV205000647S, 2020 WL 5540600, at *5 (Conn. Super. Ct. Aug. 17, 2020).

130. *Id.*

131. See, e.g., *Frazier*, 460 F. Supp. 3d at 844-45.

132. *Blakinger & Neff*, *supra* note 117. See also Scott Burris, *Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291, 307 (1992) (“Courts are increasingly reluctant to interfere with prison management, even poor prison management, and the law is an increasingly poor tool for wringing decent treatment from prison systems.”).

majority were not given a death sentence at their sentencing hearing. Even life sentences, a sentence that approximately one in every seven incarcerated individuals serves,¹³³ should not destine a person to a shorter life. Without adequate legal recourses, society implicitly approves of sending people to remote locations¹³⁴ and abandoning them until they have *done their time*. The continued incarceration of people convicted of crimes who are subjected to deplorable conditions is, at best ignored, and at worst, justified by the notion that individuals convicted of crimes have done something terrible and deserve it. A more *radical* solution is necessary.

III. DECARCERATION AND THE LARGER PRISON ABOLITION FRAMEWORK

Incarceration,¹³⁵ and punishment in general, has been rationalized through several theories including, “rehabilitation, deterrence, and incapacitation.”¹³⁶ Proponents of prisons held that they were decreasing the danger in the community by: (1) improving the individual’s behavior while they were incarcerated, rehabilitation of the individual; (2) using the fear of punishment and incarceration to prevent the individual, specifically deterring the individual; (3) using the fear of punishment and incarceration to prevent society in general from committing crimes, generally deterring greater society; or (4) at least removing the dangerous individual and preventing them from committing other crimes against greater society, incapacitating the individual thereby protecting society.¹³⁷

Notably, none of these rationales pass muster. First, the rehabilitation rationalization fails because prisons fail to prevent further violence, and because “the primary functions of prisons are control and punishment.”¹³⁸ This is supported by the reality that, often, incarcerated individuals will not be paroled until they conform to the stan-

133. THE SENT’G PROJECT, NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (2021).

134. Tracy Huling, *Building A Prison Economy in Rural America* in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing how rural communities frequently depend on prisons to revitalize their economy).

135. See *Incarceration*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/incarceration?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Mar. 31, 2022) (defining incarceration as “confinement in a jail or prison; the act of imprisoning someone or the state of being imprisoned”).

136. Brie A. Williams et al., *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 ANNALS OF INTERNAL MED. 122, 122 (2011).

137. Blackburn et al., *supra* note 16, at 6-8.

138. FAY HONEY KNOPP ET AL., *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* 45 (1976).

dards set by the controlling body.¹³⁹ Second, both types of the deterrence rationalization fail because being incarcerated will likely encourage recidivism and many factors that motivate “criminal conduct” supersede the fear of getting caught.¹⁴⁰ Third, the incapacitation rationalization fails because very few of those who commit crimes are eventually caught and sentenced, and prisons themselves create and replicate aggressive situations, causing more harm.¹⁴¹

In response to these justifications and the prison-industrial complex writ large, scholars and activists have developed the prison abolition movement. The aspect of prison abolition movement that focuses solely on removing prisons from society has three stages: moratorium, decarceration, and excarceration.¹⁴² First, the moratorium stage focuses on preventing the building of new prisons.¹⁴³ Second, the decarceration stage focuses on securing the release of incarcerated individuals.¹⁴⁴ Third, excarceration aims to prevent any contact with the prison-industrial complex by supporting defunding of the police and funding of other areas.¹⁴⁵ The abolitionist movement is an amalgamation of many groups all focused on removing prisons as societal institutions.¹⁴⁶ Unsurprisingly, prison abolitionists do not concede any of the rationalizations used to justify the continued existence of prisons; to the contrary, they thoroughly refute all of them.¹⁴⁷ The larger prison abolitionist framework is centered around “a fundamental shift in power away from those in power” and enabling people to “build their own power for even bigger wins in the future.”¹⁴⁸

Thus, prison abolitionists are not simply calling for the closure of all prisons by a certain year, the goals of the movement are far broader. “[The] movement is . . . antiracist, anticapitalist [sic], antisexist, and antihomophobic. It calls for the abolition of the prison as the dominant mode of punishment but at the same time recognizes the need for genuine solidarity with the millions of . . . [people] who are behind bars.”¹⁴⁹ Prison abolitionists ask that we consider a world where funding and attention meant for carceral institutions be di-

139. *Id.* at 47.

140. *Id.* at 44-45.

141. *Id.* at 38.

142. John Washington, *What is Prison Abolition?*, NATION (July 31, 2013), <https://www.thenation.com/article/archive/what-is-prison-abolition>.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. KNOPP ET AL., *supra* note 138, at 38-47.

148. Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants' Rights Movement*, 68 UCLA L. REV. DISCOURSE 68, 71-72 (2020).

149. See DAVIS, *supra* note 2, at 103.

verted and reinvested in education; community programming; drug rehabilitation programs; and other institutions; and restructuring society such that prisons will be rendered de facto obsolete institutions.¹⁵⁰ Clearly, such a holistic reconstruction of American society requires a multistep, extended approach.¹⁵¹

Critics of prison abolition might suggest that the prison-industrial complex be *reformed* rather than *abolished*.¹⁵² However, prison reformation is not and will never be enough;¹⁵³ it prevents decarceration efforts from expanding and can make the system more harmful. For example, reform efforts for women's prisons have only increased the violence that women face with an emphasis on equal treatment for women, rather than a legitimate critique of prisons as an institution.¹⁵⁴ Proponents of reform celebrated President Joe Biden's Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities.¹⁵⁵ According to the Executive Order, the Department of Justice will not renew contracts with private prisons.¹⁵⁶ Ultimately, the cancellation did nothing to actually decrease the prison population.¹⁵⁷ Activists do recognize "non-reformist reforms" or actions that fail to reach the desired goal but make it more achievable.¹⁵⁸ However, anything short of a thorough reformation will result in disparate and harmful treatment of same communities, thereby circumventing actual change.

While every facet of the prison abolition movement is necessary to create this brave, new world, this Note is limited to an examination

150. See KNOPP ET AL., *supra* note 138, at 10 (defining the attrition model as "a social change model which gradually restrains/reduces the function of prisons in society").

151. MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 20 (2021) ("From bail reform to strategic electoral interventions and mutual aid, prison abolitionists are steadily at work in our communities, employing tactics of harm reduction, lobbying for and against legislation, defending the rights of [incarcerated people] in solidarity with those organizing for themselves on the inside, and working to forward a vision of social transformation.").

152. See, e.g., RAM SUBRAMANIAN ET AL., *A FEDERAL AGENDA FOR CRIMINAL JUSTICE: REFORM* 7 (2020).

153. KABA, *supra* note 151, at 95 ("[T]he PIC [prison industrial complex] itself is a product of various reforms over time, that even the prison itself was a reform. I reiterate to people all the time: *We cannot reform police. We cannot reform prisons. We cannot.*").

154. See DAVIS, *supra* note 2, at 74-75.

155. See Madeleine Carlisle, 'Much More Work to Be Done.' Advocates Call for More Action Against Private Prisons After Biden's 'First Step' Executive Order, *TIME* (Jan. 29, 2021, 3:32 PM), <https://time.com/5934213/private-prisons-ban-joe-biden>.

156. Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan. 26, 2021).

157. See Carlisle, *supra* note 153; see also Bill Keller & Eli Hager, *Everything You Think You Know About Mass Incarceration is Wrong*, *THE MARSHALL PROJECT* (Feb. 9, 2017, 5:45 PM), <https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong> (describing how for-profit prisons are a very small part of the larger mass incarceration problem).

158. See KABA, *supra* note 151, at 96.

of the decarceration movement and how it has been affected by the pandemic. This Note aims to bolster decarceration efforts—which have been promoted by many organizations prior to and during the pandemic¹⁵⁹—and ultimately support the primary tenet of the prison abolition movement: that prisons do not serve a valid function in society.¹⁶⁰

IV. THE CARCERAL STATE DURING THE COVID-19 PANDEMIC

A. *The COVID-19 Pandemic: The Novel Coronavirus*

In the second week of March 2020, the United States grew increasingly concerned about a coronavirus that was causing mass deaths and illness worldwide.¹⁶¹ On February 11, 2020, the World Health Organization (“WHO”) declared that this virus would officially be recognized as COVID-19.¹⁶² COVID-19 is the latest iteration of coronaviruses and is “transmitted . . . by respiratory droplets generated when people cough, sneeze, sing, talk, or breathe.”¹⁶³ The most dangerous aspect of COVID-19 is that a significant fraction of those who had the virus were asymptomatic,¹⁶⁴ thereby making unwitting transmission probable and increasing the danger of COVID-19.¹⁶⁵

The number of cases in the United States quickly increased exponentially,¹⁶⁶ starting a monumental societal shift.¹⁶⁷ On March 13,

159. See e.g., Meera Santhanam, *COVID-19 and The Case for Prison Abolition*, CHICAGO MAROON (July 29, 2020), <https://www.chicagomaroon.com/article/2020/7/29/covid-19-case-prison-abolition/>.

160. I wholeheartedly agree with the prison abolitionists’ argument that there are deep, systemic inequities in American society that contribute to involvement in the carceral system. Therefore, reducing the number of people in prison will not solve everything. However, publication limitations prevent the extensive exploration that these issues merit, within the this note.

161. See, e.g., Jamie Ducharme, *World Health Organization Declares COVID-19 a ‘Pandemic.’ Here’s What That Means*, TIME, (Mar. 11, 2020), <https://time.com/5791661/who-coronavirus-pandemic-declaration/>; Sandee LaMotte, *What is coronavirus and COVID-19? An explainer*, CNN (Mar. 31, 2020), <https://www.cnn.com/2020/03/31/health/what-is-coronavirus-covid-19-wellness/index.html>.

162. See Tedros Adhanom Ghebreyesus, *WHO Director-General’s Remarks at the Media Brief on 2019-nCoV on 11 February 2020* (Feb. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-media-briefing-on-2019-ncov-on-11-february-2020>.

163. *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html>.

164. See Katie Kerwin McCrimmon, *The Truth About COVID-19 and Asymptomatic Spread: It’s Common, So Wear a Mask and Avoid Large Gatherings*, UCHEALTH, <https://www.uchealth.org/today/the-truth-about-asymptomatic-spread-of-covid-19> (“[A]pproximately 20-to-30% [of] people infected with [COVID-19] remained asymptomatic.”).

165. *Id.*

166. *U.S. Coronavirus Cases and Deaths*, USA FACTS, <https://usafacts.org/visualizations/coronavirus-covid-19-spread-map> (Nov. 23, 2020).

2020, President Donald J. Trump declared a national emergency.¹⁶⁸ Across the nation, students from kindergarten to graduate school began receiving remote educations.¹⁶⁹ A new category of workers, known as “essential workers” emerged.¹⁷⁰ Due to the novelty of COVID-19, there were no guaranteed prevention measures, however the CDC recommended people social distance¹⁷¹ and self-quarantine¹⁷² to limit contact between infected individuals. A month later, on May 7, 2020, the CDC officially recommended that people use cloth face coverings or other types of masks to cover their mouths and noses when in public.¹⁷³ Many jurisdictions eventually enforced these recommendations.¹⁷⁴

B. The Vaccine and Variants

For several months, the country was at a standstill as the CDC’s recommendations remained unchanged. Scientists raced to develop and test vaccines. The wait ended on Monday, December 14, 2020, when hospitals and health departments in the United States started receiving the Pfizer-BioNTech vaccine.¹⁷⁵ Healthcare workers were

167. *Coronavirus Will Change the World Permanently. Here’s How.*, POLITICO MAG. (Mar. 19, 2020), <https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579>.

168. Whitley et al., *A Prisoner’s Dilemma: COVID-19 and Motions for Compassionate Release*, BAKER DONELSON (May 28, 2020), <https://www.bakerdonelson.com/webfiles/Bios/Prisoners%20dilemmaWestlaw.pdf>.

169. Dana Goldstein, *Coronavirus Is Shutting Schools. Is America Ready for Virtual Learning?*, N.Y. TIMES (Mar. 17, 2020) <https://www.nytimes.com/2020/03/13/us/virtual-learning-challenges.html>; see also Andrew Smalley, *Higher Education Responses to Coronavirus (COVID-19)*, NCSL (July 27, 2020), <https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx>.

170. *COVID-19: Essential Workers in the States*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 11, 2021), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx>.

171. Lisa Lockerd Maragakis, *Coronavirus, Social and Physical Distancing and Self-Quarantine*, JOHNS HOPKINS MED. (July 15, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine>.

172. *Id.*

173. *Id.*; See e.g., Christine Hauser, *The Mask Slackers of 1918*, N.Y. TIMES (Aug. 3, 2020) <https://www.nytimes.com/2020/08/03/us/mask-protests-1918.html>. Similarly, during the 1918 pandemic doctors strongly encouraged people to wear cloth masks over their faces.

174. E.g., *Mayor’s Order 2020-080: Wearing of Masks in the District of Columbia to Prevent the Spread of COVID-19*, CORONAVIRUS D.C., <https://coronavirus.dc.gov/maskorder> (last visited Mar. 31, 2022). On July 22, 2020, Mayor Bowser published a mask mandate requiring that people wear masks while in indoor spaces and outside spaces where “persons leaving their residences shall wear a mask when they are likely to come into contact with another person.” See also Derrick Lewis, *Miami Police Says They’re Still Enforcing the County Mask Mandate*, 6SOUTH-FLORIDA, (Oct. 1, 2020, 7:14 PM), <https://www.nbcmiami.com/news/local/miami-police-says-theyre-still-enforcing-the-county-mask-mandate/2300975/> (describing the enforcement of the mask mandate in Miami).

175. Peter Loftus & Melanie G. West, *First Covid-19 Vaccine Given to U.S. Public*, WALL ST. J. (Dec. 14, 2020, 11:17 PM), <https://www.wsj.com/articles/covid-19-vaccinations-in-the-u-s-slated-to-begin-monday-11607941806>.

prioritized for the vaccine due to their work with vulnerable populations.¹⁷⁶ After most healthcare workers received the vaccine, the elderly, and those that met state-specific criteria were eligible to receive the vaccine.¹⁷⁷ The Pfizer-BioNTech vaccine is administered in two doses, three weeks apart and has shown to be “95% effective at preventing symptomatic COVID-19.”¹⁷⁸ People within the United States could also receive the Moderna vaccine or Johnson & Johnson vaccine, depending on available supply and the vaccination site.¹⁷⁹ Vaccine rollout has been a joint federal and state effort, with the federal government providing vaccines at federal institutions and distributing them to the states. The states, the District of Columbia, federal territories, and Native American tribes were responsible for distributing vaccines in accordance with CDC guidelines.¹⁸⁰

In July 2021, the CDC began issuing guidance about the latest strain of COVID-19, the Delta variant, which is more contagious and caused a more severe illness than the original coronavirus strain discovered in December 2019.¹⁸¹ Unfortunately, even fully vaccinated people could transmit the Delta variant and infect others.¹⁸² Therefore, a vaccine was no longer as effective as originally intended. Due to a combination of the backlash to precautions,¹⁸³ slow vaccination in many states, and the Delta variant, death rates began rising again.¹⁸⁴ The rates of infection have also spiked within state prisons, but precise numbers are difficult to calculate because several states stopped up-

176. *Id.*

177. *Id.*

178. *Id.*

179. *Stay Up to Date with Your COVID-19 Vaccines*, CTFS. FOR DISEASE CONTROL & PREVENTION (Apr. 2, 2022), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvaccines%2Fdifferent-vaccines.html.

180. See CTFS. FOR DISEASE CONTROL & PREVENTION, COVID-19 VACCINATION PROGRAM INTERIM OPERATIONAL GUIDANCE JURISDICTION OPERATIONS 8 (2021), https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf.

181. *About Variants*, CTFS. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html#:~:text=given%20new%20evidence%20on%20the,schools%2C%20regardless%20of%20vaccination%20status>.

182. See *id.*

183. See, e.g., Vanessa Romo, *Florida is Blocking Money From 2 School Districts Over Mask Mandates, Defying a Judge*, NPR (Aug. 31, 2021, 8:48 PM), <https://www.npr.org/sections/back-to-school-live-updates/2021/08/31/1033067718/florida-schools-mask-mandates-desantis> (describing how Florida governor Ron DeSantis banned mask mandates in schools via executive order and is withholding funds from counties that do enforce it).

184. Ariana Eunjung Cha et al., *U.S. COVID Death Toll Hits 1,500 a Day Amid Delta Scourge*, WASH. POST (Sept. 3, 2021, 11:21 AM), <https://www.washingtonpost.com/health/2021/09/03/delta-deaths-us-fourth-wave>.

dating their data.¹⁸⁵ Later in December 2021, the first case of the Omicron variant was confirmed in the United States.¹⁸⁶ Unfortunately, this “variant spreads more easily than the original virus . . . and the Delta variant” indiscriminate of vaccination status.¹⁸⁷

C. *The Pandemic in Prisons*

Shortly after the CDC issued the social distancing recommendations, activists and lawyers identified another vulnerable population: people in jails and prisons.¹⁸⁸ Jails and prisons are notoriously overcrowded¹⁸⁹ and unsanitary¹⁹⁰, thus making social distancing an unlikely scenario, but the transmission distinctly probable.¹⁹¹ Due to asymptomatic COVID-19 transmission, it was likely that staff members or visitors could unknowingly introduce COVID-19 to prison facilities. At the end of March 2020, that possibility became a reality when one incarcerated individual tested positive for COVID-19 at a Brooklyn facility and two others tested positive at a Louisiana prison complex.¹⁹² COVID-19 had now developed the potential to ravage prisons as thoroughly as previous epidemics, leading organizations such as the National Association for Criminal Defense Lawyers (“NACDL”) to expeditiously file to get incarcerated individuals out of facilities.¹⁹³ The medical basis forming an “extraordinary and compelling reason” was expanded such that a terminal, or similarly serious, illness was no longer a prerequisite to apply for compassionate release.¹⁹⁴ Lawyers began arguing that because incarcerated individuals

185. Hope Johnson et al., *As the Delta Variant Causes New Outbreaks in Prisons, Now is the Time for More Transparency, Not Less*, UCLA L. COVID: BEHIND BARS DATA PROJECT (July 30, 2021), <https://uclacovidbehindbars.org/delta-data-transparency>.

186. *Omicron Variant: What You Need to Know*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html> (Mar. 29, 2022).

187. *Id.*

188. See Blackwood, *supra* note 116, at 52; See also Adam Sheppard, *The Pandemic's Effect on Criminal Law*, 34 CH. BAR ASS'N REC. 33, 33 (2020).

189. HUM. RTS. WATCH, PRISON CONDITIONS IN THE UNITED STATES 72 (1991).

190. Keri Blakinger and Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, THE MARSHALL PROJECT (Mar. 6, 2020), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>; see Sheppard, *supra* note 188, at 33.

191. See Whitley et al., *supra* note 168.

192. Sarah N. Lynch, *U.S. Prison Union Official Warns of Coronavirus Spread by Inmate Transfers from Outbreak Hotspots* (Mar. 23, 2020, 1:08 PM), <https://www.reuters.com/article/health-coronavirus-prisons/u-s-prison-union-official-warns-of-coronavirus-spread-by-inmate-transfers-from-outbreak-hotspots-idUSL1N2BG1B8>.

193. See Blackwood, *supra* note 116, at 51.

194. See Sheppard, *supra* note 188, at 33. See also Robin Waters, *Federal Compassionate Release in the Era of COVID-19: Practice Tips*, AMER. BAR ASSOC. (Dec. 11, 2020), <https://www.americanbar.org/groups/litigation/committees/criminal/articles/2020/winter2021-federal-compassionate-release-in-the-era-of-covid-19-practice-tips/>.

suffer from certain pre-existing conditions,¹⁹⁵ they were vulnerable and more susceptible to life-threatening complications from COVID-19.

State governments, responsible for distributing vaccines to state prisons,¹⁹⁶ developed vaccination plans that specified which vaccination phase incarcerated people would receive their vaccinations.¹⁹⁷ However, in many states, elected officials created vaccination plans which did not prioritize incarcerated people.¹⁹⁸ Justice Alison Y. Tuitt of the New York Supreme Court¹⁹⁹ held that excluding incarcerated people from vaccination plans while vaccinating correctional officers and others in government institutions, is “arbitrary and capricious and violates Equal Protection”²⁰⁰ under the Fourteenth Amendment of the United States Constitution and the New York State Constitution.²⁰¹ Accordingly, Justice Tuitt granted the Petitioners’ (two men incarcerated at Rikers Island facilities) preliminary injunction “mandating that [the New York Commissioner of Health and Governor Andrew Cuomo] offer Petitioners and all incarcerated individuals access to the vaccination.”²⁰² In her order, Justice Tuitt also cited a similar ruling from an Oregon federal court, which held that the state’s vaccination plan that excluded incarcerated peoples in jails and prisons was “defective.”²⁰³

195. See *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html (May 2, 2022) (An individual with any of the following conditions is “at [an] increased risk for severe illness from . . . COVID-19”: cancer, chronic kidney disease, chronic obstructive pulmonary disease (COPD), heart conditions, immunocompromised state (organ transplant), obesity, severe obesity, pregnancy, sickle cell disease, smoking, and type 2 diabetes. Further, an individual with any of the following conditions may be “at [an] increased risk for severe illness from . . . COVID-19”: asthma, cerebrovascular disease, cystic fibrosis, hypertension, immunocompromised state (other causes), neurologic conditions, liver disease, overweight, pulmonary fibrosis, thalassemia, type 1 diabetes.).

196. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 180, at 9-10.

197. *Id.* at 11. When vaccine distribution commenced, the CDC proposed that jurisdictions plan their distributions in three phases. Phase 1 was limited to critical populations (i.e., health-care personnel, essential workers, adults with high-risk conditions, and the elderly). Phase 2 was broader and included more of the general population. Phase 3 was meant to “ensure equitable vaccination” and determine how to approach communities with low vaccination rates.

198. Katie Rose Quandt, *Incarcerated People and Corrections Staff Should Be Prioritized in COVID-19 Vaccination Plans*, PRISON POL’Y INITIATIVE (Dec. 8, 2020), <https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans/>.

199. In the State of New York, “Supreme Courts” are trial-level courts within its judicial system.

200. *Holden v. Zucker*, No. 801592, 2021 WL 2395292, at *15 (N.Y. Sup. Ct. Mar. 29, 2021).

201. *Id.* at *2.

202. *Id.*

203. *Id.* at *11 (citing *Maney v. Brown*, No. 6:20-cv-00570-SB, 2021 WL 354384, at *30 (D. Or. Feb. 2, 2021)).

Other judges reacted to the COVID-19 related risks incarcerated people faced in prisons by ordering reductions in prison populations. For example, in the case of the San Quentin State Prison, the Court of Appeals of the First Appellate District explicitly stated that “the [San Quentin] Warden and [the California Department of Corrections and Rehabilitation] have acted with deliberate indifference and relief is warranted.”²⁰⁴

Underlying the appellate court’s ruling is the recognition that a majority of the San Quentin prison population had at least one of the risk factors associated with the virus,²⁰⁵ emphasizing that prisons not only target populations that are already vulnerable, but also that they make these same populations *more* vulnerable. Similarly, United States District Court for the Central District of California Judge Consuelo Marshall granted preliminary injunction filed by the American Civil Liberties Union (“ACLU”),²⁰⁶ alleging that in the midst of the pandemic, the Federal Bureau of Prisons (“BOP”) has shown “deliberate indifference” to the plight of individuals incarcerated in the Lompoc prison facilities in Southern California.²⁰⁷ These orders by the First Appellate District and the United States District Court for the Central District of California are distinct from the Eighth Amendment complaints described in Part III because they apply to the entire prison facility rather than just the specific plaintiffs that filed suit.

Importantly, San Quentin and Lompoc orders to reduce their prison population due to the pandemic are not anomalous. Across the country, United States District Court for the District of Connecticut Judge Michael P. Shea ordered the Warden of Federal Correctional Institution (“FCI”) Danbury, a BOP facility in Connecticut, to greatly increase their efforts to provide relief for incarcerated individuals because of Eighth Amendment concerns.²⁰⁸ Judge Shea explicitly ordered the warden to compile and file a list of incarcerated individuals who met the CDC criteria for being at an increased risk that also included additional information such as the individual’s sentencing court, and whether they had filed for compassionate release.²⁰⁹ Additionally, Judge Shea required that the warden provide the court with a

204. *In re Ivan Von Staich on Habeas Corpus* (currently under appellate review) at *2.

205. *Id.* at *22.

206. *Torres v. Milusnic*, 472 F. Supp.3d 713, 746 (C.D. Cal. 2020).

207. *Id.* at 739-40.

208. *See Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 453 (D. Conn. 2020) (holding that the Petitioner’s claim that “the Warden’s failure to make prompt, meaningful use of her home confinement and compassionate release authority constitutes deliberate indifference under the Eighth Amendment” is plausible and “likely to succeed on the merits”).

209. *See id.* at 454.

written explanation of people for whom they denied home confinement when they were included in initial list.²¹⁰

Concurrently, the federal government directly provided the BOP the vaccines for distribution in federal prisons.²¹¹ The BOP reports that since December 16, 2020, they have administered 271,446 doses of the vaccine.²¹² However, the rate of administration of the vaccine depends on the particular facility.²¹³ After several months of widely available vaccines, in February 2022, the BOP reported over 100 positive test results among incarcerated people and staff.²¹⁴ Further, from March 2020 to June 2021, 258 federal inmate deaths were attributed to COVID-19.²¹⁵ Adding the death toll in state prisons, at least 398,627 people tested positive for COVID-19, and that about 2,715 died because of COVID-19 reported by June 2021.²¹⁶

The number of cases released by the BOP and by state facilities are not representative primarily because not all facilities test thoroughly to detect COVID-19 and the BOP removed COVID cases and COVID-related deaths from their reports.²¹⁷ In response to the pandemic, the BOP adjusted their operations with visitors to maintain social distancing and prevent those with symptoms from meeting with an incarcerated individual.²¹⁸ However, these modified operations do not guarantee that incarcerated individuals will avoid exposure to COVID-19; for example, staff members still commute to and from prisons every day and risk exposure from other members in their household.²¹⁹ Further, these modified operations aggravate the economic toll of incarceration since incarcerated people (or their loved ones) must now pay for virtual visits or phone calls.²²⁰ This economic toll in turn exacerbates the psychological toll of prisons because fami-

210. *See id.* at 456.

211. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 179, at 25.

212. *COVID-19: Coronavirus*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Feb. 23, 2022).

213. *Id.*

214. *Id.*

215. *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (June 25, 2021) <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

216. *Id.*

217. *Id.*

218. *BOP Modified Operations*, FED. BUREAU OF PRISONS, https://www.bop.gov/coronavirus/covid19_status.jsp (Nov. 25, 2020).

219. *Id.*

220. *See* Lindsey Van Ness, *COVID Froze Prison Visits, Spotlighting High Cost of Phone Calls*, PEW CHARITABLE TRUSTS (Aug. 4, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/04/covid-froze-prison-visits-spotlighting-high-cost-of-phone-calls>. Some companies have coordinated with prisons and jails to make the phone calls between incarcerated people and their families free, but many facilities are still charging exorbitant rates.

lies who cannot afford to pay for the virtual visits or calls are further isolated from their loved ones who are incarcerated.²²¹

Prisons are not handling the spread of the pandemic any better than they have handled previous illnesses and diseases. In June 2020, most states were given failing grades for their poor efforts in curbing the spread of COVID-19 within prisons and jails.²²² In addition to not reducing prison and jail populations, even as late as August 2020, only fifteen states were requiring prison staff to wear masks while working.²²³ Further, the subpar hygienic conditions and lack of access to mental health services only worsened during the pandemic.²²⁴ Incarcerated people have been left with few options. Incarcerated people at Pickaway Correctional Institution in Ohio, attempted to “turn bed sheets into tents to separate themselves” since social distancing was not otherwise possible.²²⁵ Nevertheless, four in five incarcerated people were infected with COVID-19.²²⁶

Perhaps due to these appalling conditions, some state governments have implemented measures that provide relief in the wake of the pandemic. The governors of Pennsylvania and New Jersey responded to the demands of community organizers and signed orders that released some of the people incarcerated in their state’s facilities. First, on April 10, 2020, Pennsylvania Governor Tom Wolf signed an order announcing his intention to grant reprieve to individuals confined in state prisons who met the criteria he set forth to decrease the prison population, thereby making prisons less crowded and reducing the risk of infection.²²⁷ Governor Wolf’s criteria automatically ex-

221. See Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POL’Y INITIATIVE (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/.

222. EMILY WIDRA & DYLAN HAYRE, *FAILING GRADES: STATES’ RESPONSES TO COVID-19 IN JAILS & PRISONS 2* (2020).

223. Emily Widra & Tiana Herring, *Half of States Fail to Require Mask Use by Correctional Staff*, PRISON POL’Y INITIATIVE (Aug. 14, 2020), <https://www.prisonpolicy.org/blog/2020/08/14/masks-in-prisons>.

224. Daniel Moritz-Rabson, ‘A Living Hell’: Inside US Prisons During the COVID-19 Pandemic, AL JAZEERA (Feb. 26, 2021), <https://www.aljazeera.com/features/2021/2/26/a-living-hell-inside-us-prisons-during-the-covid-19-pandemic>.

225. Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html>.

226. See *id.*

227. See Governor Tom Wolf’s Executive Order from April 10, 2020 <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200410-GOV-DOC-reprieve-release-order-COVID-19.pdf>; J.D. Prose, *P.A. Legislators to Wolf: Give More Reprieves to Inmates Vulnerable to COVID-19. His Response.*, TIMES (Feb. 10, 2021, 5:01 AM), <https://www.timesonline.com/story/news/2021/02/10/pennsylvania-inmates-release-covid-19/4455476001/>. See also Samantha Melamed, *With 13,000 Infected, 100 Dead of COVID-19 in Pa. Prisons, Advocates Urge Faster Releases*, INQUIRER (Feb. 3, 2021), <https://www.inquirer.com/news/pennsylvania-prison-pandemic-coronavirus-parole-doc-20210203.html>. The terms of “being released on reprieve” are

cluded certain categories of offenses and gave priority to incarcerated people who were vulnerable.²²⁸ Further, in late October of 2020, Governor Phil Murphy of New Jersey signed an executive order effectively reducing the prison sentences of over 2,000 incarcerated individuals to prevent the spread of COVID-19.²²⁹ This order provided greater relief than an earlier order Governor Murphy signed in March 2020 which merely granted temporary release pending the end of the pandemic,²³⁰ but still has unfortunate limitations.²³¹ However, Governor Murphy's actions demonstrate that state officials are cognizant that prisons are particularly inadequate in such dangerous conditions.

On a larger scale, as noted above, the basis for federal compassionate release motions has been expanded, such that COVID-19 can serve as an "extraordinary and compelling reason" given that the additional requirements are met. While these orders have released vulnerable people from prison, they are hardly an adequate response to the pandemic considering that, "one in three [incarcerated people] in state prisons are known to have had the virus In federal facilities, at least 39[%] of [incarcerated people] are known to have been infected."²³² Rates in state facilities vary widely. For example, in Florida state prisons, one in five incarcerated people tested positive.²³³ By contrast, in Alabama one in thirteen incarcerated people tested positive.²³⁴ Moreover, 2,715 incarcerated individuals' deaths have been related to COVID-19.²³⁵ These staggering numbers reflect how easily COVID-19 can spread in prisons.

similar to those of being released on parole where the individual granted reprieve must meet certain criterion, must otherwise be eligible for release within the year, and cannot violate any of the terms set forth in their order. Additionally, Governor Wolf preemptively limited the scope of who was eligible for reprieve by excluding people convicted of certain categories of offenses. This order, combined with prior efforts, resulted in the reprieve of only 165 vulnerable individuals as of April 2021, an extremely low number considering that 100 people in Pennsylvania state prisons have died from the virus. Governor Wolf's reprieve order applied to incarcerated people who were vulnerable on the basis of age, pre-existing conditions, pregnancy, or another condition that placed them at an increased risk.

228. *Id.*

229. Wilson Wong, *More Than 2,000 New Jersey Inmates Released to Slow Spread of Coronavirus in Prisons*, NBC NEWS (Nov. 4, 2020), <https://www.nbcnews.com/news/us-news/more-2-000-new-jersey-inmates-released-slow-spread-coronavirus-n1246388>.

230. Tracey Tully, *1,000 Inmates Will Be Released from N.J. Jails to Curb Coronavirus Risk*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html>.

231. Wong, *supra* note 229. The order excludes those "serving time for murder or sexual assault, sex offenders and [incarcerated people] in federal prisons and county jails."

232. Burkhalter et al., *supra* note 225.

233. THE MARSHALL PROJECT, *supra* note 215.

234. *Id.*

235. *Id.*

Further, the threat of the pandemic and its effect on racial minorities cannot be ignored. As noted previously, Black people are incarcerated at much higher rates than their white counterparts.²³⁶ Thus, the spread of the pandemic in prisons around the country is only exacerbating the already-devastating effect that incarceration has on the Black community.²³⁷ The COVID-19 pandemic was an opportunity for prisons to treat incarcerated people with the same dignity and rights. During the COVID-19 pandemic, prisons could have treated incarcerated people with respect and dignity. Prisons could have provided the necessary personal protection equipment (“PPE”) and enforced CDC precautions to their best ability. Instead, prisons displayed how they consistently and disastrously fail to meet the needs of the people inside of them.

V. COMPARING FINLAND’S CARCERAL POLICIES TO AMERICAN CARCERAL POLICIES

In reimagining the carceral system as it currently exists in the United States, it is helpful to consider how other countries approach incarceration. Finland’s penal policies serve as a particularly apt comparison because Finland’s prison rates exceeded those of the United States in the mid-twentieth century,²³⁸ but presently, Finland’s rates are substantially lower than those in the United States.²³⁹ Contemporary Finnish social policy, broadly speaking, reflects goals of “non-discrimination and equality, services in health, wellbeing, and education financed by means of tax revenue, high social mobility, and an active civil society.”²⁴⁰ Prior to a realignment in penal policy, Finland’s incarceration rates were a consequence of “(1) a unique ‘cultural climate in which severity was not measured on the same scale used in other Nordic countries,’ (2) a rigid penal system characterized by high minimum penalties, and (3) severe sentencing practices for relatively common crimes”²⁴¹

236. *Id.*

237. *Id.*; see also Meera Santhanam, *COVID-19 and The Case For Prison Abolition*, CHICAGO MAROON (July 29, 2020), <https://www.chicagomaroon.com/article/2020/7/29/covid-19-case-prison-abolition/>.

238. See Douglas B. Weiss & Doris L. MacKenzie, *A Global Perspective on Incarceration: How an International Focus Can Help the United States Reconsider Its Incarceration Rates*, 5 VICTIMS & OFFENDERS 268, 270 (2010).

239. *Id.* at 269.

240. FINNISH GOV’T, FINLAND WILL BE A MORE EQUAL AND EQUITABLE COUNTRY WHERE EVERYONE IS VALUABLE AND WHERE TRUST IN OTHERS AND SOCIETY AUGMENTS 152 (2019), https://www.ncsl.org/Portals/1/Documents/educ/International_Ed_Study_Group_2020/Finland/10.Finland2019GovernmentPriorities%20.pdf.

241. Weiss and MacKenzie, *supra* note 238, at 275.

However, as stated above, current Finnish incarceration rates are relatively low, especially compared to the United States, and these low levels are not because of disproportionately low levels of crime or superior social welfare programs.²⁴² Rather, the differences in policies are a product of Finland's criminal justice policy makers consciously choosing to align "criminal justice policy" with "general social policy"²⁴³ starting in the late 1960s.²⁴⁴ These policy-makers emphasized that penal policy "should never be viewed as something separate from the fabric of society."²⁴⁵ In short, penal policy was conceptualized as "minimizing the suffering and social costs incurred by criminal activities and the measures used to combat it, and for sharing these costs fairly among the parties involved."²⁴⁶

Where prison is viewed as a normal sanction for people who have been convicted of offenses in the United States, "a general principle of [current] penal policy in Finland . . . is that imprisonment should be avoided as far as possible and used only as a last resort."²⁴⁷ Consequently, due to these stark differences in penal policy, prisons in the United States were in a relatively worse position at the start of the pandemic. Notedly, world leaders and their respective enforcement agencies have taken markedly different approaches to the pandemic.²⁴⁸ Some countries—due to over-crowding—released incarcerated people in the hopes of containing the spread of COVID-19.²⁴⁹ By contrast, the prison conditions in other countries worsened, and minimal prevention measures were taken by state governments and administrators.²⁵⁰ The United States has taken a middle ground approach. By October 28, 2020, approximately 170,000 people incarcerated in the United States had been released from jails and state

242. *Id.* at 271.

243. *Id.* at 275. "The best criminal justice policy came to be seen as good social policy."

244. Ikponwosa O. Ekunwe & Richard S. Jones, *Finnish Criminal Policy: From Hard Time to Gentle Justice*, 21 J. PRISONERS ON PRISONS 173, 177 (2012).

245. *Id.* at 177.

246. *Id.*

247. Weiss & MacKenzie, *supra* note 237, at 274.

248. See Richard W. Parker, *Why America's Response to the COVID-19 Pandemic Failed: Lessons from New Zealand's Success*, 73 ADMIN. L. REV. 77, 78 (2021).

249. See e.g. Bukola Adebayo, *Ethiopia Pardons More Than 4,000 Prisoners to Help Prevent Coronavirus Spread*, CNN (Mar. 27, 2020), <https://edition.cnn.com/2020/03/26/africa/ethiopia-pardons-4000-prisoners-over-coronavirus/index.html>; *Afghanistan to Release Up to 10,000 Prisoners to Slow Coronavirus Spread*, YAHOO! NEWS (Mar. 26, 2020), <https://news.yahoo.com/afghanistan-release-10-000-prisoners-slow-coronavirus-spread-211850224.html>; Dominic McGrath, *COVID-19: Temporary Release of 200 Prisoners Was 'Not an Easy Decision to Make'*, THE JOURNAL (Mar. 26, 2020), <https://www.thejournal.ie/prisoners-released-coronavirus-charlie-flanagan-5052634-Mar2020/>.

250. See, e.g., *Argentina: Managing Uncertainty*, PRISON INSIDER (Mar. 18, 2021), <https://www.prison-insider.com/en/articles/argentina-managing-uncertainty>.

prisons in “a crash effort to contain [COVID-19].”²⁵¹ Unfortunately, prisons are still over-crowded and the individuals inside are unable to safely socially distance, wear the necessary personal protective equipment, or maintain a sufficiently sanitized environment.²⁵²

The Finnish government, appreciating the pandemic-related dangers inherent to prisons, took significant penal precautions to reduce the prison population, thereby proactively preventing the spread of the virus.²⁵³ Accordingly, the Finnish Ministry of Justice issued a decree followed by a concomitant act in 2020.²⁵⁴ The act, which was broader than the original decree, “postpone[ed] the enforcement of all prison sentences and conversion sentences for unpaid fines.”²⁵⁵ Consequently, approximately 300 to 400 sentences were postponed.²⁵⁶ Due to this reduction, Finnish prisons were better positioned to observe the recommended pandemic protocol, including social distancing and quarantining.²⁵⁷

Because of the active and consistent incorporation of Finnish social policy, Finnish penal policy has broader consequences than simply punishing people who committed an offense. Ultimately, the objective of this comparison is to demonstrate that decarceration is achievable with concerted policy efforts. Further, adopting a decarceration framework influences long-term decisions regarding the treatment of incarcerated peoples, such that in the event of a global pandemic they were considered and afforded unique preventative measures.

VI. [RE]CONSIDERING PRISON ABOLITION

Decarceration could seem like nothing more than a leftist fantasy. People question how a society can function without prisons; what will be done with all the murderers and rapists; or how victims will get

251. See Linda So et.al, *America's Inmate Population Fell by 170,000 Amid COVID. Some See a Chance to Undo Mass Incarceration*, REUTERS (Oct. 28, 2020), <https://www.reuters.com/investigates/special-report/usa-jails-release/#:~:text=the%20population%20in%20America's%20big,fewer%20inmates%20in%20their%20custody>. See also Zolan Kanno-Youngs & Maura Turcotte, *Thousands of Prisoners Were Sent Home Because of COVID. They Don't Want to Go Back*, N.Y. TIMES (June 27, 2021), <https://www.nytimes.com/2021/06/27/us/politics/biden-prison-coronavirus.html>.

252. WIDRA & HAYRE, *supra* note 222, at 1.

253. *Prevention Measures in European Prisons Against COVID-19*, EUROPRIS, <https://www.europris.org/criminal-sanctions-agency-fi/>.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* But see, *Preparing for Coronavirus at the Criminal Sanctions Agency—Frequently Asked Questions (FAQ)*, RISE CRIM. SANCTIONS AGENCY, <https://www.rikosseuraamus.fi/en/index/topical/corona.html> (June 17, 2021) (explaining that people incarcerated in Finnish prisons have not been vaccinated at high rates, with the low rates being attributed to a limited availability).

justice without harsh punishment for illegal acts. However, activists and scholars inside and outside the carceral system, demand more searching analyses. Is a prison-centered society a functioning one? What conditions can be created so that murder and rape is not commonplace? Does punishment result in justice for victims and the families of victims or does it replicate violent conditions? The pandemic has unexpectedly resulted in legal, governmental recognition for a decarcerated state. Prisons—at the behest of judges and governors—released incarcerated people before they would have finished their sentences *because* prisons were failing to protect their lives.²⁵⁸ Stevie Wilson, incarcerated in a Pennsylvania prison, wrote: “[w]e are seeing decarceration. It took a pandemic for people to realize we can empty these prisons and jails and still achieve public safety. Prisons are never safe. Before, during, and after COVID-19, prisons are inherently violent and unsafe spaces.”²⁵⁹

In releasing thousands of people, the United States ran a pandemic-based experiment that has produced incredible results. While the rates of homicide have increased since the pandemic started, these increases are a result of two primary factors: “[F]irst, the pandemic has disproportionately affected vulnerable populations, placing at-risk individuals under additional physical, mental, emotional, and financial stress. Secondly, the pandemic has strained the institutions charged with responding to violent offenses including police agencies, courts, hospitals, emergency medical services, and community-based groups that productively engage at-risk individuals.”²⁶⁰ Moreover, there is primarily only anecdotal evidence for the notion that reductions in prison populations have caused an increase in violence.²⁶¹ Accordingly, the concern most people have about decarceration—that crime rates will drastically increase—is ill-founded. Instead, the research supports what abolitionists have always stated: without community-based support, crime will continue to be perpetrated.

The pandemic has resulted in immense death and destruction. 991,178 American residents have died from COVID-19-related complications.²⁶² Many small businesses experienced financial difficulties

258. See discussion *infra* at Section IV.B.

259. *Abolition & COVID-19 w/ Nicolás Cruz, Mohamed Shehk, Emmy Rakete, Ruth Wilson Gilmore*, RED NATION PODCAST, at 47:40 (June 5, 2020) (streamed on Spotify).

260. ROSENFELD ET AL., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: 2020 YEAR-END UPDATE 20 (2021).

261. *Id.* at 21.

262. CDC, COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited May 2, 2022).

and temporarily closed due to the pandemic.²⁶³ Additionally, even businesses that remained open, laid off employees in significant numbers.²⁶⁴ With all this tragedy, individually and communal, it is difficult to imagine life before and after the pandemic.

Nonetheless, there will be life after the pandemic. As vaccines were widely distributed during the 2021 spring and summer seasons, many businesses went back to their regular hours, students resumed in-person schooling, and a sense of normalcy started returning. This new normalcy does not have to include the continued incarceration of an appalling number of people, regardless of the purported crimes committed. It would be absurd to revert to and continue the use of these clearly outdated systems.

While prisons have existed for several centuries, their existence does not have to persist. Prison reform is assuredly insufficient to ameliorate the injustices and cruelties of an irredeemable prison system. We need look no further than the institutional response to the pandemic for proof. Aside from activist groups, there were no concerted efforts to ensure that the people confined to state and federal institutions had sufficient personal protection equipment (“PPE”). When vaccinations were available for various sects of the population, state governments purposely excluded those incarcerated in prison, even though correctional staff were eligible for vaccines. There was never any desire to help those who are incarcerated. It was as if incarcerated people deserved diminished protection against COVID-19. Notwithstanding how prisons responded to the pandemic, prisons are cruel and enact a cruelty that does not produce positive outcomes, instead making incarcerated individuals sicker, more violent, and more isolated from their families.²⁶⁵

Outside the carceral system, state and local governments urged their constituents to shop locally, order food from local restaurants, and support small businesses generally.²⁶⁶ There were also unprecedented non-government-sponsored mobilization efforts and community organizing.²⁶⁷ Many cities and smaller communities have

263. Alexander W. Bartik et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 PROC. NAT’L ACAD. SCI. U.S. 17656, 17661 (2020).

264. *Id.*

265. See discussion *infra* at Section I.B.

266. See, e.g., *State Encourages New Yorkers to Shop Locally on Small Business Saturday*, EMPIRE STATE DEVELOPMENT (Nov. 25, 2020), <https://esd.ny.gov/esd-media-center/press-releases/state-encourages-new-yorkers-shop-locally-small-business-saturday>.

267. See, e.g., Adam Serwer, *The Next Reconstruction*, ATLANTIC, Oct. 2020, at 38. “The nation erupted. According to some polls, more than 23 million people participated in anti-police-brutality protests, potentially making this the largest protest movement in American history.”

established mutual aid groups and tenants' unions.²⁶⁸ The pandemic made the collective stronger. These collective organizations are part and parcel of the vision that abolitionists have always promoted, but dire circumstances made them mandatory. Therefore, it *is* possible. It is possible to both decarcerate and release people back into their communities and create the organizations and structures necessary to prevent further reliance on these institutions. By investing the \$182 billion that is spent maintaining the carceral state in education, drug rehabilitation, and other necessary programs, prisons *could* become obsolete.²⁶⁹

The officials in the justice system are aware of its massive shortcomings. Justice Tuitt, Judges Marshall and Shea, and the First Appellate District in California, all recognized that state and federal governments in their management of prisons, and other carceral institutions, were violating the Equal Protection Clause and Eighth Amendment. Aside from citing blatant constitutional violations, the legal system reacted to the pandemic by releasing people (written off as dangerous and condemned) because of their pre-existing medical conditions' potential interactions with COVID-19. Otherwise stated, judges ordered the release of people who committed felonies because of medical, rather than penal concerns. A pre-pandemic event that would have caused in such widespread recognition of the deficiencies in the system is nearly inconceivable. However, COVID-19 and the institutional responses are just another illustration of how cruel the system is. A plethora of reasons to decarcerate and abolish prisons existed far before the pandemic.

CONCLUSION

For several decades in the twentieth century, prisons in the United States were nearly obsolete, with low numbers of incarcerated individuals.²⁷⁰ Since then, the prison population has exponentially increased and with it the cruelty with which incarcerated people are treated. The COVID-19 pandemic is but one example of this cruelty. Unlike schools, restaurants, and other institutions, the American prison system adapted in a reckless way by increasingly resorting to solitary confinement, providing limited personal protection equipment, and having poor vaccine access. These unconstitutional prison

268. See, e.g., Tyesha Maddox, *Can Mutual Aid Withstand Pandemic Fatigue*, BLOOMBERG CITY LAB (Apr. 16, 2021, 11:14 AM), <https://www.bloomberg.com/news/articles/2021-04-16/new-workers-need-mutual-aid-groups-more-than-ever>.

269. Wagner & Rabuy, *supra* note 39; DAVIS *supra* note 2, at 88.

270. See KABA, *supra* note 151, at 73.

conditions are far from unique to the pandemic; instead, they show exactly how maladaptive and abhorrent prisons are.

For years scholars, activists, and most importantly, incarcerated people, have called for the closure of prisons and have been ignored. “The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency.”²⁷¹ There is no question, that current prison conditions and the limited legal recourse available are in opposition to contemporary standards of decency, thereby requiring that the use of prisons in American society be reconsidered.

271. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

