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EDITORS' INTRODUCTION

The Publication of Issue 1 of Volume 13 of the Northeastern University Law Review (NULR) comes at one of the most challenging times for our country and for the globe. Before we can share the success and growth of the NULR, we would be remiss not to recognize first the many hardships posed by the COVID-19 pandemic, especially on those with marginalized identities who have been disproportionately affected. It would also be wrong not to acknowledge that, coupled with the challenges of the pandemic, Black people continue to face significant racial discrimination and racial terror, including the recent murders of Breonna Taylor, Ahmaud Arbery, George Floyd, and so many others.

Given that the print publication timeline for Issue 1 of Volume 13 began prior to the pandemic and the reignition and large-scale growth of the Black Lives Matter movement, this issue does not include articles concerning the many legal implications of these events. However, the NULR believes that legal scholarship can and should promote social justice and is intentionally seeking articles for Issue 2 that focus on these issues. Issue 1 does, however, maintain NULR's historic trend of publishing articles related to the public interest and social justice.

This issue includes articles that highlight weaknesses in the law revealed by the Mueller Report and the impeachment of President Trump; challenge the effectiveness of federal and state statutes regarding sex trafficking; propose alternatives to dual class share structures; explore Oliver Wendell Holmes's theory of contract law; recommend additional measures beyond transparency and accountability to build into intelligent platforms; and analyze the myriad ways litigation can promote—or impede—public health. This issue includes four articles presented as part of the Northeastern Center for Health Policy and Law Symposium, *Public Health Litigation: Possibilities and Pitfalls*, held in April 2020. The publication of these particular articles is in great part due to our ongoing and successful collaboration with the Northeastern Center for Health Policy and Law. We are also proud that three of Issue 1's articles were written by Northeastern University School of Law affiliates: Professor Deborah Ramirez and law students Greer Clem, Emma Coreno, and Daniel Wells.

Meanwhile, the NULR's online branches, Extra Legal and the Forum, have been producing timely scholarship on a broad range of current issues and have placed particular focus on publishing pieces related to racial justice. Though Extra Legal and the Forum are still in their early years, we are excited to share that there has been an increase in

articles published through these two platforms and that these articles are authored by a range of individuals such as legal scholars, practitioners, law students, and graduate students.

During this publication cycle, Extra Legal published two articles. The first, titled *Challenging the Narrative: Challenges to ICWA and the Implications for Tribal Sovereignty*, was authored by NULR's Editor-in-Chief, Hannah Taylor. Hannah's article explores the ways the courts have analyzed recent challenges to the Indian Child Welfare Act (ICWA), arguing, first, that they have shown a disdain for tribal sovereignty unwarranted by the law and, second, that upholding ICWA is a legal and moral imperative and a necessary step in upholding tribal sovereignty.

The second, *A Call for Reform: What Amy Cooper's 911 Call Reveals About the "Excited Utterance" Exception*, authored by New Jersey public defender Jessica Frisina, examines how the excited utterance exception to the hearsay rule could have been used in the Amy Cooper incident to lead to a false conviction of the true victim, Christian Cooper. Given the inherent vulnerabilities, and potential abuses, of the excited utterance exception, Frisina calls for reform and provides the legal community with a compelling recommendation of what that reform should look like.

NULR's other online platform, the Forum, has been extremely busy since the start of this publication cycle and has already published more than a dozen articles. These articles span a range of topics from the impact of COVID-19 on sexual and reproductive health to the erasure of Black women's experiences with state violence to the ability to change law through changing the idea of what is reasonable. The NULR is particularly proud to have published a piece authored by an individual currently incarcerated in the Massachusetts Department of Corrections (DOC), in which he challenges DOC administrators to act with the understanding that Black lives matter.

We also would like to celebrate the fact that this year is the first time in the NULR's history that the publication elected two persons of color, Andrew Farrington and Hannah Taylor, to serve as the Editors-in-Chief of the NULR. Both Andrew and Hannah are committed to creating a more diverse, equitable, and inclusive NULR and, with the support of the entire Editorial Board, are happy to announce the creation of the Diversity, Equity, and Inclusion Committee. This committee, consisting of more than thirty NULR Editors, has been leading the charge in planning and executing initiatives to increase NULR membership of individuals who hold historically marginalized identities, ensure a welcoming, safe, and equitable environment for those members, increase the publication of diverse authors, and increase

the publication of articles that focus on issues related to racial justice. With the understanding that this work will need to continue long into the future, the Committee has been made a permanent feature of the NULR. We are delighted that Professors Victoria McCoy Dunkley and Hemanth C. Gundavaram, for whose wisdom and experience we are extremely grateful, serve as the Committee's Faculty Advisors.

We want to end by extending our greatest appreciation to the various groups and individuals who have helped make Issue 1 possible. First, we would like to thank the NULR's Associate and Senior Editors for their tremendous efforts and excellent work product. To our 2L Editors, we would like to express that, through our conversations with you and your participation in various NULR initiatives so far, we are confident that the NULR will be in excellent hands for Volume 14. Second, we would like to thank our two Faculty Advisors, Professor Kara Swanson and Director Sharon Persons, whose guidance and support has been invaluable. Lastly, we would like to thank Dean James Hackney and the entire faculty and staff of Northeastern University School of Law for their continued support of the NULR and our mission.

Editorial Board
Northeastern University Law Review

FORTIFYING THE RULE OF LAW: FILLING THE GAPS REVEALED BY THE MUELLER REPORT AND IMPEACHMENT PROCEEDINGS

*By Deborah Ramirez and Greer Clem**

* Deborah Ramirez is a professor of law at Northeastern University School of Law. Greer Clem is a candidate for Juris Doctor at Northeastern University School of Law. Special thanks to contributors: Emily Kaiser, Claudia Morera, Alicia Chouinard, Amanda Gordon, Janki Viroja, Patrick Reynolds, Jacob Kelly, Matheus Dos Reis, and Jessica Bresler. In particular, thank you to Dylan O'Sullivan, our editor at the Northeastern University Law Review, for his tireless assistance. Special thanks also to Judge Richard Stearns and Judge Nancy Gertner for their invaluable feedback.

DEDICATION

For Ralph Gants, a tireless advocate for justice and a fierce protector of the rule of law. His moral compass and legal brilliance were essential to this paper. May his legacy be an inspiration for all those on the quest for justice.

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INTRODUCTION

The separation of powers—the hallmark of our governmental structure—was intended by the Founding Fathers to protect the Rule of Law[1] by ensuring that governmental power is shared among three equal branches of government, thereby restricting the unaccountable exercise of government power. Each of the three branches of the United States government is granted authority to perform specific functions,[2] as well as additional powers "to protect itself [from other branches' encroachment] and to police the other departments."[3] In other words, the Founding Fathers envisioned the separation of powers to be a "separation of functions" and, simultaneously, a "balance of power."[4] Special Counsel Robert Mueller's Report on the Investigation Into Russian Interference in the 2016 Election (the "Mueller Report" or "Report") illuminates a dangerous imbalance in this system. The Mueller Report documents instances in which the Trump Administration attempted to obstruct Mueller's efforts.[5] Trump ultimately moved to hide the Special Counsel's full report from Congress via his executive authority.[6] Despite the obvious impropriety, the other branches failed to hold the executive accountable for these actions.

The release of the Mueller Report reveals fissures in our original separation of powers system that endanger the Rule of Law. It demonstrates how the existing infrastructure is inadequate to preserve the Rule of Law,

1 The Rule of Law is the principle that no man is above the law, and, in fact, all of society—"persons, institutions, and entities" alike—are bound to laws that are "[p]ublicly promulgated[, e]qually enforced[, i]ndependently adjudicated[, a]nd consistent with international human rights principles." *Overview – Rule of Law*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law. We capitalize Rule of Law to distinguish this democratic principle from an individual rule of law.

2 U.S. CONST. arts. I–III.

3 M. Elizabeth Magill, *The Real Separation in Separation of Powers*, 86 VA. L. REV. 1127, 1130 (2000).

4 *See id.*

5 1 ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, OFFICE OF SPECIAL COUNSEL, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 191 (Mar. 2019) [hereinafter MUELLER REPORT VOLUME I], https://www.justice.gov/storage/report.pdf; *Mueller Report Findings: Mueller Rejects Arguments That Trump Is Shielded From Obstruction Laws*, WASH. POST (Apr. 18, 2019), www.washingtonpost.com/politics/mueller-report-russia-investigation-findings/2019/04/18/b07f4310-56f9-11e9-814f-e2f46684196e_story.html#MANAFORTTWEET.

6 Rachael Bade et al., *Trump Asserts Executive Privilege Over Mueller Report; House Panel Holds Barr in Contempt*, WASH. POST(May 8, 2019), https://www.washingtonpost.com/politics/barr-to-trump-invoke-executive-privileged-over-redacted-mueller-materials/2019/05/07/51c52600-713e-11e9-b5ca-3d72a9fa8ff1_story.html.

especially in the face of our country's most lawless President to date. President Trump's multiple attempts to obstruct justice have shown a willingness to ignore and erode the traditional boundaries set by the separation of powers. Mueller's analysis reveals a system with minimal repercussions for abuses of executive authority, one that requires significant bolstering if it is to truly protect the Rule of Law.

In particular, the Mueller Report revealed the absence of timely judicial oversight of the executive branch, the repercussions of being unable to indict a sitting President, and the danger of a legal system which does not have an affirmative duty to report foreign interference into our elections. These three issues stand as both cause and consequence of the imbalance of power among the three branches of government. The executive branch has a seemingly unlimited amount of power that is not adequately policed by the remaining branches. As the Mueller Report reveals, the judicial branch is absent in its role policing presidential misconduct.[7] Between these two extremes is the legislative branch, which has attempted to hold the President accountable without the judiciary's enforcement mechanisms.[8] However, these attempts, too, have fallen short.[9]

This paper uses the Mueller Report, news reports, and other sources to identify weaknesses in our legal system laid bare by the Trump presidency and to propose additional infrastructure and architecture to protect the Rule of Law. We propose three solutions to fill these gaps: first, expedited judicial review where constitutional questions are concerned; second, tolling the statute of limitations to address the indictment of a sitting President; and third, creating an affirmative duty to report foreign interference in our electoral processes. These are initial proposals meant as catalysts for further discussion and rumination. We recognize that they may need to be revised or reconsidered. It is, however, the goal of this paper to begin to foster that discussion and to be a starting point for necessary change.

7 *See infra* Part I.

8 During the House's impeachment proceedings, critical executive branch witnesses repeatedly refused to comply with subpoenas for documents and testimony. Peter Baker, *The Impeachment Witnesses Not Heard*, N.Y. Times (Nov. 21, 2019), https://www.nytimes.com/2019/11/21/us/politics/impeachment-witnesses.html. Fearing a drawn-out process in the courts, House leadership chose to move forward without pursuing the matter in the courts. *Id.*

9 Despite serious abuses of power, the Senate failed to convict President Trump. Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. Times (Feb. 6, 2020), https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html.

I. Lessons from the Mueller Report

The Mueller Report's thorough examination of President Trump's campaign and early presidency reveals fundamental weaknesses within the Rule of Law. The Report examines the behavior of the Trump campaign leading up to the 2016 election, the aftermath of Trump's victory, and, ultimately, President Trump's attempts to use executive privilege to obstruct the Special Counsel's investigation. Most significantly, the Report reveals fissures within the existing legal safeguards that have allowed Trump and his administration to effectively ignore the Constitution and to flout the safeguards of the separation of powers.

In Part I, the Report finds that Russia engaged in significant election interference in the lead-up to the 2016 presidential election. It further reveals that the Trump campaign was aware of this interference, that the interference benefited the Trump campaign directly, and that the Campaign failed to report it to the FBI or any law enforcement agency.[10] Since Mueller found no evidence that Trump directly aided, assisted, helped, or counseled the Russians in their attempts to interfere with our election, Mueller found that there was insufficient evidence to charge Trump or his campaign staff with conspiracy.

In Part II, the Report chronicles ten attempts to interfere with the investigation. Mueller declines to opine on whether these attempts constituted obstruction of justice.[11] He provides two reasons: a Department of Justice (DOJ) policy against indicting a sitting President and the belief that doing so would unfairly put President Trump in the position of being accused of a crime but unable to defend himself in court. Instead, Volume II of the Report notes, "while this report does not conclude that the President committed a crime, it also does not exonerate him."[12] Finally, the Report declares that it provides facts, witness statements, and other evidence that could be used against President Trump if prosecutors pursued charges for attempted obstruction of justice once he has left office.[13] Though Mueller himself declined to pursue an obstruction of justice indictment, a letter written by former federal prosecutors declared that the acts of the President

10 Mueller Report Volume I, *supra* note 5, at 5.

11 *See generally* 2 Robert S. Mueller, III, U.S. Dep't of Justice, Office of Special Counsel, Report on the Investigation into Russian Interference in the 2016 Presidential Election (2019) [hereinafter Mueller Report Volume II], https://www.justice.gov/storage/report.pdf.

12 *Id.* at 182.

13 *Id.* at 1.

do indeed constitute obstruction of justice.[14] The letter states in part, "[t]he Mueller report describes several acts that satisfy all of the elements for an obstruction charge: conduct that obstructed or attempted to obstruct the truth-finding process, as to which the evidence of corrupt intent and connection to pending proceedings is overwhelming."[15]

What the Mueller Report laid bare was the fact that presidential misconduct, up until now, has been restrained, not by specific legal safeguards, but by traditions and customs. Perhaps more significantly, the Rule of Law has been protected in large part by the ethos, character, and understanding of prior presidents who shared the belief that there existed certain boundaries and restraints on their executive authority. This revelation speaks to the lawlessness of the Trump presidency. This lawlessness is unique in that it creates a new vision of executive authority that eviscerates the powers of Congress and the judiciary. In July, President Trump told a group at the Turning Point USA Teen Student Action Summit that the Mueller Report found "no collusion, no obstruction."[16] The President continued, "I have an Article II, where I have to [sic] the right to do whatever I want as president."[17] While it is not, in fact, true that the President is immune from legal or legislative restraints, the judicial and legislative branches of government have failed to sufficiently hold him accountable. The Mueller Report illuminates at least three gaps in the Rule of Law that must be filled in order to remedy this lack of legal accountability.

A. *Anemic Judicial Review Threatens the Judiciary's Relevance*

First, the Mueller Report highlights the judicial branch's ineffectiveness in the governmental arena. Mueller had the authority to subpoena President Trump to further his investigation of Russian involvement in the 2016 presidential election, yet he chose not to because such an endeavor would likely have caused "substantial delay . . . at a late stage [of] the investigation."[18] Instead, he relied on inadequate written answers.[19] Both investigative avenues were inadequate, but neither does

14 *Statement by Former Federal Prosecutors*, Medium (May 6, 2019), https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1.

15 *Id.*

16 Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'the Right to Do Whatever I Want'*, Wash. Post (July 23, 2019), https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/.

17 *Id.*

18 Mueller Report Volume II, *supra* note 11, at 13.

19 Robert S. Mueller, III, U.S. Dep't of Justice, Office of Special Counsel, Report

there seem to have been an adequate alternative.

With President Trump touting his infamous stonewalling approach to judicial issues,[20] there must be a mechanism by which to expedite judicial consideration of constitutional issues as they relate to special counsel investigations, interbranch relations, and executive oversight. In Section II.A of this paper, we propose a path for expedited judicial review by the Supreme Court. Without such a mechanism, the delays associated with constitutional litigation actually serve to strip the courts of their responsibility and authority to uphold the law and to act as an independent arbiter of it. An expedited review process would allow the courts to participate in Rule of Law controversies and fulfill their constitutional obligation to uphold the law, which is crucial to restoring the balance of powers and fortifying the Rule of Law.

B. *Inadequate Measures for Holding a President Criminally Liable Bolster an Authoritarian Executive*

Second, the insulation of the President from criminal indictment poses another threat to the Rule of Law. The danger this gap in legal accountability creates has become more apparent as an inflated executive branch has become increasingly authoritarian. President Trump's perspective on executive power "is not unlike that of Richard Nixon, who famously said, '[w]hen the president does it, that means it's not illegal.'"[21] Referencing President Trump's claim during the campaign that he "could stand in the middle of Fifth Avenue and shoot somebody . . . and [he] wouldn't lose any voters," the President's lawyers infamously asserted that even if he shot someone, he could not be prosecuted while in office.[22] Lurking behind these

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ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION app. C, at C-2 (2019) [hereinafter MUELLER REPORT app. C], https://www.justice.gov/storage/report.pdf.

20 In an interview with MSNBC, Harvard law professor Laurence Tribe cited the protracted litigation in New York to obtain President Trump's tax returns as evidence of Trump's intention to interfere with congressional oversight. Tribe describes Trump's pattern of behavior and his clinging to Article II as protection as "basically inviting the country to kick him out of office so that he can be held accountable to the law." *Laurence Tribe on Trump's Desperate Legal Filing and Whistleblower*, MSNBC: LAST WORD (Sept. 19, 2019), https://www.msnbc.com/the-last-word/watch/laurence-tribe-on-trump-s-desperate-legal-filing-and-whistleblower-69435461887.

21 Timothy Egan, Opinion, *If Donald Trump Does It, It's Not a Crime*, N.Y. TIMES (Sept. 27, 2019), https://www.nytimes.com/2019/09/27/opinion/trump-ukraine-call.html.

22 *Trump's Lawyer Argues President Can't Be Prosecuted for Shooting Someone on Fifth Avenue*, NBC N.Y. (Oct. 23, 2019), https://www.nbcnewyork.com/news/local/trump-fifth-avenue-shooting-no-prosecution/1994970/.

inflammatory statements is a legitimate gap undermining the Rule of Law: a sitting President may not be indicted for criminal conduct while in office.

As the Mueller Report illustrated, internal DOJ policy has shielded the President from legal accountability. In this paper, we propose tolling the statute of limitations to ensure that a sitting President can be prosecuted once they leave office. The DOJ would still retain the discretionary decision as to whether or not to bring charges against a sitting President, but the tolling would ensure that courts could hear the allegations once the President had left office. Under this proposal, a DOJ prosecutor beholden to the elected President is not the only means to hold them accountable.

C. *Lack of an Affirmative Duty to Report Foreign Campaign Interference Allows for Passive Acceptance of Support from Foreign Powers*

Third, Presidential accountability is not the only fissure in the Rule of Law architecture. The Mueller Report also revealed the need for greater accountability of candidates for elected office, presidential or otherwise. The Mueller Report broached this topic in its analysis of Russian interference in the 2016 presidential election.[23] The recent Ukraine investigation and subsequent impeachment proceedings have emphasized this issue's significance. These incidents demonstrate that foreign interference in our democratic process has occurred[24] and continues to be solicited.[25] Trump campaign officials knew of Russian plans to influence the election but failed to report them.[26]

In his testimony before Congress, Mueller warned that accepting assistance from foreign officials could become "a new normal."[27] Unless

23 *See* Mueller Report Volume I, *supra* note 5, at 182–83.

24 *See* Abigail Abrams, *Here's What We Know So Far About Russia's 2016 Meddling*, TIME (Apr. 18, 2019), https://time.com/5565991/russia-influence-2016-election/; *see also* Mueller Report Volume I, *supra* note 5, at 1, 9.

25 *See* Devlin Barrett et al., *Trump Offered Ukrainian President Justice Dept. Help in an Investigation of Biden, Memo Shows*, Wash. Post (Sept. 26, 2019), https://www.washingtonpost.com/national-security/transcript-of-trumps-call-with-ukrainian-president-shows-him-offering-us-assistance-for-biden-investigation/2019/09/25/16aa36ca-df0f-11e9-8dc8-498eabc129a0_story.html.

26 *See* Mueller Report Volume I, *supra* note 5, at 5–7; Chris Megerian, *Mueller Finds No Conspiracy, but Report Shows Trump Welcomed Russian Help*, L.A. Times (Apr. 18, 2019), https://www.latimes.com/politics/la-na-pol-mueller-report-trump-russia-collusion-20190418-story.html; Jo Becker et al., *Russian Dirt on Clinton? 'I Love It,' Donald Trump Jr. Said*, N.Y. Times (July 11, 2017), https://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html.

27 Nicholas Fandos, *What We Learned from Mueller's 7 Hours on Capitol Hill*, N.Y. Times (July 24, 2019), https://www.nytimes.com/2019/07/24/us/politics/mueller-testimony-

action is taken to squash the quiet approbation of such insidious conduct, we risk Mueller's prediction coming true. In order to protect our democracy from foreign interference, government employees and those involved in campaigns need to abide by an affirmative duty to report foreign interference in our elections. An affirmative duty to report would help maintain the integrity of American elections, preserve the separation of powers, and reinvigorate the Rule of Law.

The current President provides an example of the dangerous potential for presidential overreach left largely unimpeded by the current legal infrastructure. The Mueller Report did not result in concrete legal consequences, but it may, nonetheless, serve as an important warning of the widening fissures in our legal architecture. The rule of law has been weakened, and now it is incumbent upon all advocates of American democracy to actively address the gaps that have emerged. The three following proposals would help close these gaps, restoring important checks on presidential power.

takeaways.html.

II. Proposals for the Restoration and Fortification of the Rule of Law

A. *Proposal I: Expedited Judicial Review*

At its core, expedited judicial review is necessary to preserve the authority of the judicial branch of our three-branch system. As it exists today, judicial review is a slow and costly process, so much so that when the executive branch came under investigation by Mueller, he essentially chose to bypass the judicial branch altogether.[28] The judiciary is meant to act as an arbiter of the Rule of Law in such situations, providing investigators access to the facts, documents, and testimony to which the prosecutor is legally entitled and needs in order to ascertain the truth. The Mueller Report reveals the ways in which the judiciary fails to fulfill this role. In essence, the judiciary is rendered moot by its lack of accessibility, disarming it of its ability to act as a check on executive authority. It is, therefore, necessary to bolster the judicial branch via a process of expedited judicial review.

In order to effectively conduct his investigation into whether the Trump campaign had worked with Russia to meddle in American elections, Mueller needed President Trump's testimony. Though he recognized that he had the authority to subpoena Trump, Mueller decided not to do so, saying that the process would have substantially delayed the investigation.[29] Mueller explained the rationale behind this decision involved "weigh[ing] the costs of potentially lengthy constitutional litigation, with resulting delay in finishing [the] investigation, against the anticipated benefits for [the] investigation and report."[30] Mueller's theory was that Trump would have challenged the subpoena all the way to the Supreme Court, delaying the investigation by months, if not years, due to the pace of judicial review.[31] Consequently, the investigation proceeded without Trump's oral testimony, with Trump declining invitations for in-person interviews. The Appendix to the Report notes:

> We received the President's written responses in late November 2018. In December 2018, we informed counsel of the insufficiency of those responses in several respects. We noted, among other things, that the President stated on more than 30 occasions that

28 Mueller Report Volume II, *supra* note 12, at 13.

29 *Id.*

30 Mueller Report app. C, *supra* note 19, at C-2.

31 *See* David Willman, *Mueller Decided Not to Subpoena Trump to Avoid a Lengthy Court Fight*, L.A. Times (Apr. 18, 2019), https://www.latimes.com/politics/la-na-mueller-subpoena-20190417-story.html.

> he "does not 'recall' or 'remember' or have an 'independent recollection'" of information called for by the questions. Other answers were "incomplete or imprecise." The written responses, we informed counsel, "demonstrate the inadequacy of the written format, as we have had no opportunity to ask follow-up questions that would ensure complete answers and potentially refresh your client's recollection or clarify the extent or nature of his lack of recollection. We again requested an in-person interview, limited to certain topics, advising the President's counsel that "[t]his is the President's opportunity to voluntarily provide us with information for us to evaluate in the context of all of the evidence we have gathered." The President declined.[32]

The lack of a timely judicial resolution of subpoenas presents a weakness in the current Rule of Law. When the time it takes to obtain a judicial resolution actively detracts from an investigation, justice is delayed, denied, or both. The delay allows relevant details of the subject of the investigation to remain concealed from the investigative efforts, actively hindering investigative abilities. Additionally, the complex and time-consuming processes the courts have in place prevent them from weighing in on important constitutional issues, rendering them voiceless.

In contrast, Elie Mystal's article for *The Nation* argues that Mueller himself obstructed his own investigation by failing to subpoena Trump.[33] The article posits that, despite the delays, Mueller should have subpoenaed Trump because there was no way of accurately predicting how Trump would have acted.[34] However, this argument fails to take into account the extent of delays inherent in the judicial system. By the time the subpoena issue traveled from the district court to the circuit court, and from there to the Supreme Court, the judicial stalling would have taken so long as to impede the process of the entire investigation.[35]

By failing to secure Trump's testimony under oath, the best evidence regarding intent to obstruct justice was not obtained. Much of the information that only President Trump could provide remains unknown. As a result, Mueller's investigation remains unfinished and the Rule of Law continues to erode. Expedited judicial review would provide future oversight

32 MUELLER REPORT app. C, *supra* note 19, at C-1–C-2 (internal citations omitted).

33 Elie Mystal, *Robert Mueller Obstructed His Own Investigation as Much as Donald Trump*, NATION (Apr. 18, 2019), https://www.thenation.com/article/mueller-report-obstruction-trump/.

34 *Id.*

35 *See* Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html.

investigations with the means to compel the production of critical evidence and allow the courts to exert necessary balancing power between our three branches.

Existing Special Counsel regulations do not contemplate expedited judicial review.[36] For a long-lasting solution to this problem, the Special Counsel authorizing regulations should be amended to ensure an independent judiciary is able to weigh investigation issues in a timely and meaningful manner. After factual findings have been completed by the trial courts, appeals should go straight to the Supreme Court for a final resolution on the matter. As such, 28 C.F.R. § 600, which delineates the general powers of the Special Counsel, should be amended to include the following:

> The Special Counsel may request an expedited judicial review of any matter arising during the course of his or her investigation. The review process must include a trial level fact-finding procedure and then a direct appeal to the Supreme Court of the United States for a final resolution on the issue.

Including this provision would prevent legal stalling, enable proper fact-finding, strengthen the role of the judicial branch as a check on executive authority, and restore the Court's role in resolving constitutional questions.

The need for expedited judicial review, however, goes beyond merely the role of the Special Counsel; expedited review of questions of constitutional significance must also be made available to both houses of Congress. This is not to say that any question remotely constitutional in nature should be granted expedited judicial review. Questions submitted for such a procedure should be related to the Rule of Law in that they address interbranch authority, executive oversight, or separation of powers, in addition to the role of the Special Counsel. While this paper in large part addresses unlawful executive overreach, the expedited judicial review process should also be made available to answer constitutional questions pertaining to the Executive; this solution is not meant to exclude that branch of our government but rather to restore the role of the judiciary in outlining constitutional limits. These issues within the Rule of Law speak so fundamentally to the construction of the Constitution as to warrant interpretation by none other than the nation's highest court.

The Massachusetts Constitution provides the framework for a partial solution to the issue of expedited judicial review. It allows the legislative branches as well as the executive to report important questions of law directly to the Massachusetts Supreme Judicial Court.[37] When directly asked

36 *See* 28 C.F.R. § 600 (2019).

37 Mass. Const. pt. II, ch. III, art. II ("Each branch of the legislature, as well as the

to give advisory opinions, the justices of the Massachusetts Supreme Judicial Court answer "as individuals in their capacity as constitutional advisors of the other departments of government."[38] In this way, the judicial branch is enabled to act as arbiters of constitutional authority, interpreting the rights of each branch of the state's government and acting as the rightful authority on questions of constitutional power. While the Massachusetts Constitution is silent as to the speed with which the court responds, the court usually seeks to do so within a few months.[39] This provision could serve as a template for a federal analogue.

Of course, the Massachusetts direct review process was accomplished via constitutional amendment. While one solution would be to amend the federal constitution in a similar fashion, this solution is impractical. However, without a constitutional amendment, direct review by the U.S. Supreme Court would extend beyond the Court's jurisdiction as an appellate court.[40] Article III of the Constitution further limits Supreme Court review to "cases and controversies," prohibiting the Court from granting pure advisory opinions.[41] Thus, federal, legislatively enacted, expedited judicial review would be limited to appellate review of live cases or controversies and would not allow the hearing of pure advisory opinions as the Massachusetts Constitution allows. While the scope of a federal analogue would be more limited than the Massachusetts approach, it could still provide for expedited judicial review of a live controversy between a President and a special counsel or Congress regarding the scope of oversight authority.

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governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.").

38 Op. of the Justices to the Senate and the House of Representatives, 167 N.E.2d 745, 750 (1960) (citing Commonwealth v. Welosky, 177 N.E. 656, 658 (1931)).

39 *See, e.g.*, Op. of the Justices to the House of Representatives, 363 N.E.2d 652, 288 (Mass. 2015) (noting that the question was submitted to the Supreme Judicial Court by the legislature on May 22, 2015 and an answer was provided on June 15, 2015); *see also* Op. of the Justices to the Senate, 363 N.E.2d 652, 654 (Mass. 1977) (noting that the question was submitted to the Supreme Judicial Court on March 11, 1977 and an answer was provided on May 31, 1977).

40 In *Marbury v. Madison*, 5 U.S. 137, 173–76, 178 (1803), the Supreme Court established judicial review in declaring Section 13 of the Judiciary Act of 1789 in conflict with the Constitution because it attempted to expand the situations in which the Supreme Court had original jurisdiction. The matter brought before the Court in *Marbury* should have been brought before it on appeal. As such, even though the Court found that Marbury had a right, that Madison violated said right, and that there was an adequate remedy, the remedy was not one that the Supreme Court could provide by virtue of the Constitution. The Court's role was solidified as one of appellate adjudication, not that of a trial court.

41 Muskrat v. United States, 219 U.S. 346, 356 (1911).

Past instances of expedited judicial review lay the groundwork for our proposed approach. The Pentagon Papers cases were heard before the Supreme Court less than a week after Nixon's Department of Justice advised the *New York Times* and *Washington Post* to cease publication of the Pentagon Papers.[42] The Supreme Court granted certiorari and heard immediate arguments to decide whether the Nixon Administration was unduly restricting the papers' First Amendment rights, ultimately deciding it was.[43] This instance serves as an important reminder that the judicial branch exists, in part, to check unauthorized executive power. When the executive branch acts in violation of the Constitution, the Court needs the ability to curtail this behavior with expediency. Public servants and attorneys, Special Counsel or not, need the ability to access the expedited process and obtain a timeline for adjudication at the beginning of the case.

At the time of this writing, we are witnessing a continuing erosion of judicial authority under the Trump presidency. For example, high ranking Administration officials like former National Security Advisor John Bolton and former White House Counsel Don McGahn have refused to answer congressional subpoenas regarding the impeachment investigation and President Trump's behavior towards Ukraine.[44] The President himself has stonewalled Congress, refusing to comply with subpoenas or to turn over documents and necessary information, thus preventing full congressional oversight.[45] Professor Laurence Tribe of Harvard Law School recently noted the importance of the House flexing its investigative authority:

> When the House opens an impeachment inquiry, it wields extraordinary constitutional powers and serves as the ultimate check on a rogue president. It can therefore overcome virtually any executive branch privilege or immunity. Otherwise, the president could commit high Crimes and Misdemeanors and defeat accountability by simply defying all efforts to discover his

42 Steven Robertson, *New York Times Co. v. United States (1971)*, Free Speech Ctr.: First Amend. Encyclopedia, https://www.mtsu.edu/first-amendment/article/505/new-york-times-co-v-united-states (last visited Aug. 17, 2020); *see* N.Y. Times Co. v. United States, 403 U.S. 713, 743 (1971).

43 Robertson, *supra* note 42.

44 Peter Baker, *Ruling Will Not Lead John Bolton to Testify Soon, Lawyer Says*, N.Y. Times (Nov. 26, 2019), https://www.nytimes.com/2019/11/26/us/politics/bolton-testimony.html.

45 *See* Seung Min Kim & Rachael Bade, *Trump's Defiance of Oversight Presents New Challenges to Congress's Ability to Rein in the Executive Branch*, Wash. Post (Oct. 7, 2019), https://www.washingtonpost.com/politics/trumps-defiance-of-oversight-presents-new-challenge-to-congresss-ability-to-rein-in-the-executive-branch/2019/10/06/59fb7cc0-e6c3-11e9-a331-2df12d56a80b_story.html.

wrongdoing.[46]

This is in essence what Trump has attempted to do thus far. While this is constitutionally indefensible, Professor Tribe has "[p]oint[ed] to the protracted litigation that is still underway to obtain the President's tax returns" as "constitutionally indefensible."[47] He argued that, if past is prologue, "using the courts [to] enforce subpoenas [would] only [have] lengthen[ed] the process of impeachment unnecessarily."[48] Therefore, Tribe advocated an immediate vote on impeachment.[49]

Tribe's position is reinforced by the result in recent litigation over the House Judiciary Committee's April 2019 subpoena of former White House Counsel Donald McGahn.[50] McGahn was subpoenaed to testify about potential obstruction of justice by President Trump but refused to comply and did not appear before the Committee.[51] McGahn received the subpoena in April 2019, and the District Court ruled in favor of enforcement of the House subpoena on November 25, 2019.[52] However, at the time of this writing, the case is still being litigated in the U.S. Court of Appeals.[53]This

46 Laurence H. Tribe, *If the House Is Going to Impeach Trump, It Better Have a Plan*, BOS. GLOBE (Sept. 30, 2019), https://www.bostonglobe.com/opinion/2019/09/30/house-going-impeach-trump-better-have-plan/dvZz0I3oWobrQs0g0jimfO/story.html.

47 Jerry Lambe, *Harvard Law Professor: Trump Administration's Stonewalling Is 'Constitutionally Indefensible,'* LAW & CRIME (Oct. 9, 2019), https://lawandcrime.com/high-profile/harvard-law-professor-trump-administrations-stonewalling-is-constitutionally-indefensible/.

48 *Id.*

49 *Id.*

50 Alison Durkee, *"Presidents Are not Kings": Federal Judge Destroys Trump's "Absolute Immunity" Defense Against Impeachment*, VANITY FAIR (Nov. 26, 2019), https://www.vanityfair.com/news/2019/11/mcgahn-testify-subpoena-absolute-immunity-ruling.

51 Elliot Setzer, *House Submits En Banc Brief in House Subpoena Case*, LAWFARE (Apr. 16, 2020), https://www.lawfareblog.com/house-submits-en-banc-brief-mcgahn-subpoena-case.

52 Recognizing the separation of powers implications, the district court found in favor of the House's subpoena authority. Comm. on Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 215 (D.D.C. 2019), *rev'd*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted sub nom.* U.S. House of Representatives vs. Mnuchi, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), and *aff'd en banc in part, remanded in part sub nom.* Comm. on Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020), *rev'd by panel and remanded for dismissal*, No. 19-5331, 2020 WL 5104869 (D.C. Cir. Aug. 31, 2020). The district court recognized that "when a duly authorized committee of Congress issues a valid subpoena to a current or former executive branch official, and thereafter, a federal court determines that the subpoenaed official does, as a matter of law, have a duty to respond notwithstanding any contrary order of the President, the venerated constitutional principles that animate the structure of our government and undergird our most vital democratic institutions are preserved." *Id.*

53 The case has undergone extensive litigation in the D.C. Circuit. A three-judge panel originally reversed the district court and dismissed the case on Article III standing

timeline reinforces our position that there exists a desperate need for an expedited review process at the beginning of a case in which parties can request an expedited track and be given an estimated timeline.

Expedited review has been made available in the past when the imposition of a time restriction would impede the functions of the federal government. In *Department of Commerce v. New York*, the Supreme Court reviewed Secretary Wilbur Ross's decision to add a citizenship question to the United States Census.[54] After the District Court enjoined the Secretary from reinstating the citizenship question, "[t]he Government appealed to the Second Circuit, but also filed a petition for writ of certiorari before judgment, asking [the Supreme] Court to review the District Court's decision directly because the case involved an issue of imperative public importance, and the census questionnaire needed to be finalized for printing."[55] The Court granted the petition pursuant to 28 U.S.C. §2101(e) and reviewed the case directly.[56] The statute provides: "An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."[57] Writs of certiorari under §2101(e) have been granted sparingly as the Court has limited acceptance under this provision to certain exceptional circumstances. These exceptional circumstances are set forth in Supreme Court Rule 11 which instructs that certiorari "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."[58] Notably, one case which was accepted under the purview of 28 U.S.C. §2101(e) was *United States v. Nixon*, in which the Court unanimously held that Nixon was not entitled to absolute, unqualified immunity in the

grounds. *McGahn*, 951 F.3d at 531. The court sitting *en banc* reversed the panel, finding Article III standing but remanding to the panel for a decision on whether the House had a cause of action to bring suit. *McGahn*, 968 F.3d at 788. On remand, the panel again dismissed the case, finding that the House lacked a cause of action. *McGahn*, No. 19-5331, 2020 WL 5104869 (D.C. Cir. Aug. 31, 2020). It is likely the House will appeal to the full bench of the D.C. Circuit yet again. Elliot Setzer, *D.C. Circuit Panel Rules Against House in McGahn Case*, Lawfare (Aug. 31, 2020), https://www.lawfareblog.com/dc-circuit-panel-rules-against-house-mcgahn-case. For an in-depth discussion of this circuitous appellate litigation see *The Lawfare Podcast: A Busy Week at the DC Circuit*, Lawfare (Sept. 4, 2020), https://www.lawfareblog.com/lawfare-podcast-busy-week-dc-circuit.

54 Dep't of Commerce v. New York, 139 S. Ct. 2551, 2562–63 (2019).

55 *Id.* at 2565.

56 Petition for a Writ of Certiorari Before Judgment at 2, 13, Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019) (No. 18-966), 2019 WL 338906, at *2, *13.

57 28 U.S.C. § 2101(e) (2018).

58 Sup. Ct. R. 11.

Watergate investigation and thus had to comply with a subpoena requesting Watergate tapes and documents.[59] The information at issue in *United States v. Nixon* was the subject of a subpoena issued by the Special Prosecutor.[60] The contrast between this example and the challenges outlined in the Mueller Report illustrate the need for expedited Supreme Court review when an investigation into the President requires the speedy answer of constitutional questions.

Our proposed solution is thus not revolutionary. As demonstrated above, the Court has acted in this way before in times of constitutional crisis or when an expedited timeline mandated immediate action. There is precedent for an expedited review process that does not involve amending the Constitution or expanding the jurisdiction of the Supreme Court. The certiorari before judgment process as it exists currently provides the foundation for our solution. We propose creating a procedural rule for issues of constitutional significance, a rule of civil procedure in which a special counsel, the legislative branch, or the executive branch could request an expedited review for important legal questions. Our proposal is thus more apt to address the issues underscored by the Mueller Report; the certiorari before judgment process is infrequently utilized: with rare exception it has only been granted at the executive branch's request, and it contains no timeline for review.[61] Our proposal sets forth an expedited timeline and is available to all three branches in addition to special counsels. The proposed solution moves beyond the demands of mere exigency and instead addresses more wide-ranging constitutional issues that may only be addressed by the Supreme Court.

We therefore propose a process that would build off the certiorari before judgment process utilized in *Department of Commerce*, skipping circuit court appellate review and moving directly to the Supreme Court. This process would utilize the Court's jurisdiction pursuant to 28 U.S.C. § 2101(e) and would create a preset, expedited timeline and provide for a panel to review this particular kind of case. At the beginning of the case, a panel of three district court judges[62] would determine whether or not

59 United States v. Nixon, 418 U.S. 683, 690, 707 (1974).

60 *Id.* at 687–90.

61 *See* Kevin Russell, *Overview of the Supreme Court's Cert. Before Judgment Practice*, SCOTUSBLOG (Feb. 9, 2011), https://www.scotusblog.com/2011/02/overview-of-supreme-court%E2%80%99s-cert-before-judgment-practice/.

62 Single justice panels for issues of expedited judicial review would leave too much discretion to the judge and would encourage corruptness and judge-shopping. The three-judge district court panel stems from *Ex Parte Young*, in which a single federal district court judge was able to enjoin enforcement of an unconstitutional state law. *See Ex parte* Young, 209 U.S. 123 (1908). Congress moved these cases to a three-judge

the proposed question merits expedited judicial review. The three-judge panel is integral to reducing single-judge bias and creating a more equitable appellate procedure. Historically, three-judge panels have been tasked with such responsibilities when certain sensitive constitutional challenges are brought in federal court.[63] If the issue is deemed worthy by the panel, then the case would proceed to a federal district court judge for adjudication. The judge would convene the parties, hold a series of hearings, and provide everyone with a timetable for expediting the case. Once the case is decided by the district court judge, the parties could apply for certiorari, utilizing the procedures set forth in § 2101(e), to have the case directly reviewed by the United States Supreme Court. The Supreme Court then has the power and authority to both review the three-judge panel's determination that this is an important legal issue meriting expedited review and to accept or deny the petition for certiorari. If accepted, the Court would review the district court's opinion and provide the parties with a tentative timeline for its decision-making process. After an opportunity for briefing and arguments, the Court would issue its own opinion. If not accepted, the case would return to the circuit level for traditional appellate review.

This solution enables the Court to be active arbiters of constitutional questions of interbranch overreach, a role which no other institution is meant to have. The determination of when the executive branch is acting unlawfully or what powers were delegated to Congress must fall to the judiciary if we are to preserve the separation of powers. Under this proposed

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panel to prevent direct control by a single judge; the resulting legislation was 28 U.S.C. § 2284 (2018), which provides, "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." However:

> Congress also may provide that cases under particular federal legislation must be heard by three-judge courts; examples include the Bipartisan Campaign Finance Reform Act of 2002, the Communications Decency Act of 1997, and the Voting Rights Act. Judgments of three-judge district courts are immediately and mandatorily reviewable by the Supreme Court, without having to pass through the courts of appeals.

Howard M. Wasserman, *Argument Preview: Is a Three-Judge Court "Not Required" When a Pleading Fails to State a Claim?*, SCOTUSblog (Oct. 19, 2015), https://www.scotusblog.com/2015/10/argument-preview-is-a-three-judge-court-not-required-when-a-pleading-fails-to-state-a-claim/. We posit that issues of constitutional significance, including interbranch authority, separation of powers, rule of law, and special counsel investigations should be afforded the three-judge panel rule as well.

63 *See, e.g.*, 28 U.S.C. § 2284 (2018) (providing for three-judge panel review for constitutional challenges to the apportionment of congressional districts or apportionment of state legislative bodies).

solution, even at the district court level a petitioner could request expedited review and a tentative timeline. This would provide the petitioner with a meaningful assessment of how long the case would take to be adjudicated.

The unavailability of expedited review to Mueller sends a clear message: if we are to restore and fortify the Rule of Law, we must create a clear process that allows the courts to participate in Rule of Law controversies and fulfill their constitutional obligation to uphold the law. The lack of effective judicial oversight played out during the Special Counsel's investigation and continued to loom during the House impeachment investigation. Without an effective ability to appeal constitutional questions directly to their elected arbiters, unlawful executive branches will continue to go unchecked. Expedited judicial review would provide litigants with a more effective means of resolving these questions, allowing the courts to fulfill their proper constitutional role.

B. *Proposal II: Indicting a Sitting President*

Longstanding DOJ policy preventing the indictment of a sitting President undermines presidential accountability under the law. Defenders of the policy argue that indictment could distract and harass a President, intruding on the President's Article II executive authority.[64] The Mueller Report reflects the weaknesses of this policy and highlights its flaws. A President cannot be allowed unimpeded control of a federal investigation into his own actions merely by citing Article II authority. The DOJ policy, drafted by unelected executive branch lawyers without the endorsement of Congress or the courts, must therefore be supplemented so as to provide protection for the Rule of Law. Ideally, the legislature would revise the law via federal statute to ensure that a President may be prosecuted for criminal acts, if not during his or her sitting term, once it is completed.

The Mueller Report discussed the Office of Legal Counsel's (OLC) contention that "the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions" in violation of "the constitutional separation of powers."[65] This position, which Mueller

64 A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 222, 241 (2000), http://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf; John P. Carlin, *Sitting Presidents Can't Be Prosecuted. Probably.*, WASH. POST (June 8, 2017), http://www.washingtonpost.com/posteverything/wp/2017/06/08/sitting-presidents-cant-be-prosecuted-probably.

65 MUELLER REPORT VOLUME II, *supra* note 11, at 1 (quoting A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222, 241).

viewed as binding,[66] stems from the findings of two memorandums published by unelected executive branch lawyers—first, in a 1973 memo written in response to the Watergate scandal and, second, in a 2000 memo following President Clinton's impeachment.[67] These memorandums served as the basis for subsequent OLC opinions adopting the non-indictment policy.[68]

As the Mueller Report recognized, "[OLC] issued an opinion finding that, 'the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions' in violation of 'the constitutional separation of powers.'"[69] This policy may sometimes permanently prevent presidential prosecution because the applicable statute of limitations (five years for most federal offenses) would have run by the time the President leaves office. By extension, a judge would be hard-pressed to toll the statute of limitations when the prosecutors could have pursued criminal proceedings but chose not to because of a DOJ policy.[70] The policy, therefore, has two major inherent flaws. The first is that it unequivocally places the President of the United States above the law. A less obvious, but equally concerning issue is that the policy insulating the head of the executive branch from accountability was written by unelected executive branch lawyers. Those offering support for the OLC's position contend that there are other methods of policing presidential conduct, namely impeachment.[71]

The impeachment process is the most notable check on lawless conduct of the President—the ultimate "check" on the executive branch.

66 The issue of whether these memos are binding has been contested. "Jack Goldsmith and Marty Lederman take the view that they 'almost certainly' are. The *New York Times*, by contrast, has twice indicated that the issue may not be so clear cut." Andrew Crespo, *Is Mueller Bound by OLC's Memos on Presidential Immunity?*, Lawfare (July 25, 2017), https://www.lawfareblog.com/mueller-bound-olcs-memos-presidential-immunity. However, Mueller treated the DOJ rules as binding. *See* Ramsey Touchberry, *OLC Opinion Explained: Why Robert Mueller Couldn't Indict Trump Despite 10 Obstructions*, Newsweek (July 24, 2019), https://www.newsweek.com/olc-opinion-mueller-doj-memo-indict-trump-sitting-president-1450896 ("Charging the president with a crime was . . . not an option we could consider . . . .").

67 Touchberry, *supra* note 66.

68 Walter Dellinger, *Indicting a President is Not Foreclosed: The Complex History*, Lawfare (June 18, 2018), http://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history.

69 Mueller Report Volume II, *supra* note 11, at 1 (quoting A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222, 260).

70 Jordan S. Rubin, *Statute of Limitations, DOJ May Prevent Trump Ever Being Charged*, Bloomberg News (Apr. 29, 2019), https://news.bloomberglaw.com/us-law-week/trump-2020-win-could-run-out-clock-on-obstruction.

71 *See* Brief for Petitioners at 44–45, Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020) (No. 19-715), 2020 WL 528039, at *44–45.

The impeachment provisions of the Constitution grant Congress the power to remove a President for "Treason, Bribery, or other high Crimes and Misdemeanors."[72] The impeachment power was granted to Congress for two primary reasons. First, impeachment addresses "specific 'abuse[s] or violation[s] of some public trust,'" issues which are political in nature.[73] These issues were considered beyond the scope of a trial court's competency because they did not fall "within the sphere of ordinary jurisprudence [and impeachment proceedings] are directed to different objects."[74] Allowing Congress to handle impeachment proceedings was intended to keep the judicial route available to punish the same impeachable offense by trial at common law.[75] Second, because Congress was designed with the American populous in mind,[76] the responsibility of Congress to impeach the President is supposed to be reflective of the best interests of the nation. Thus, when the House formally charges the President with an impeachable offense and a trial occurs in the Senate, the governmental powers return to an equilibrium to the benefit of the country. However, to date, no President has been removed from office by impeachment and conviction.

Since impeachment has not proven to be an effective route to policing lawless conduct by Presidents,[77] the DOJ should reexamine whether a firm stance against indicting a sitting President is reasonable and in the best interests of the nation. The policy advanced in its memorandums and

72 U.S. CONST. art. I, §§ 2, 3; *id.* art. II, § 4.

73 *See* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 14 (1989) (quoting THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed. 1961)).

74 *Id.*

75 *See id.*

76 *See id.* at 15–16 ("The delegates saw the Senate as composed of well-educated, wealthy, virtuous citizens who would be sure to have the Nation's welfare at heart. The delegates viewed the House as more subject to factions and more prone to hasty and intemperate action than the Senate. The Senate was structured to counterbalance the bad tendencies of the House and, when acting alone, to carefully deliberate the most important political questions.").

77 Before President Trump's impeachment by the House, "[o]nly two presidents [had] been impeached — Andrew Johnson in 1868 and Bill Clinton in 1998 — and both were ultimately acquitted [by the Senate] and completed their terms in office. Richard M. Nixon resigned in 1974 to avoid being impeached." Charlie Savage, *How the Impeachment Process Works*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/us/politics/impeachment-trump-explained.html. President Nixon's resignation is the only exception to the inability of impeachment to force a President out of office. While he was never formally impeached, impending impeachment instigated President Nixon's resignation. *The Nixon Impeachment Proceedings*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-2/section-4/the-nixon-impeachment-proceedings (last visited Sept. 14, 2020).

adopted by the OLC insulates a sitting President from accountability for criminal conduct. Mueller's application of OLC policy made this point clear.[78] Despite identifying numerous instances where President Trump may have attempted to interfere with the investigation, Mueller ultimately provided no definitive conclusion as to whether President Trump obstructed justice.[79] Mueller notes his reasoning for this decision in the report, stating "that a federal criminal accusation against a sitting President would place burdens on the President's capacity to govern and potentially preempt constitutional processes for addressing presidential misconduct."[80] This loophole highlights chasms within our justice system.

The Mueller Report underscores a concern for the judiciary's ability (or lack thereof) to hold a sitting President accountable for their actions. Noting the limits of the OLC policy, Mueller emphasized the point that, while the OLC's policy inhibits indictment during the President's tenure, a President does not have immunity once his term ends.[81] Mueller reiterated OLC's position that, while a President may not be prosecuted while in office, a criminal investigation during his term is permissible.[82] Such an investigation could, in theory, prove fruitful in the event that prosecution is pursued post-presidency.[83] However, Mueller does not address the related statute of limitations issue; the statute of limitations for obstruction of justice and for most federal offenses is five years.[84] If an investigated President is re-elected, the statute of limitations may have run by the time the President is out of office.

The statute of limitations provides a strong defense to presidential misconduct committed during a President's time in office. A defense attorney could persuasively argue that the statute of limitations protects the President from prosecution since the DOJ had the power and authority to prosecute. If the decision not to prosecute rested on the OLC's internal policy alone, the defense could argue that the DOJ had followed an internal policy of prosecutorial discretion. Tolling of the limitations period is unlikely since the prosecutors arguably could have moved forward in light of the fact that

78 *See* Mueller Report Volume II, *supra* note 11, at 1.

79 *Id.*

80 *Id.* While unable to reach a judgment due to considerations of fairness and upholding the structure of government, the report emphasizes that if they "had confidence after a thorough investigation of the facts that the President *clearly did not commit obstruction* of justice, [they] would so state." *Id.* at 2 (emphasis added).

81 *Id.* at 1.

82 *Id.*

83 *See id.* at 2.

84 18 U.S.C. § 3282 (2018).

no federal law or court ruling prohibited prosecution.[85] Tolling here would undermine the statute of limitations in all cases where prosecutors choose not to indict because of internal policies. Thus, the President can forever be immunized from criminal prosecution.

This gap in the Rule of Law has continued to present itself throughout the Trump presidency. President Trump's apparent attempt to bribe or extort the President of Ukraine by withholding aid precipitated another controversy,[86] yet he was not prosecuted criminally and the statute of limitations providing opportunity for prosecution may run if he is re-elected.[87] This issue arose once again in a recent court hearing when Trump's attorney argued that the President could not be investigated or prosecuted as long as he is in the White House, even if he were to shoot someone in the middle of Fifth Avenue.[88] This directly violates the bedrock principle of the Rule of Law that no person is above the law.

The costs and consequences of this gap in the Rule of Law is of significant concern. The President's counsel asserts that, as a constitutional matter, the President does not "obstruct justice by exercising his constitutional authority" over the executive branch's own Department of Justice investigations.[89] President Trump and his attorneys may feel emboldened to make such assertions since Mueller declined to bring charges against him. The dangerous precedent this sets is obvious: if an unlawful President believes they cannot be prosecuted while in office, and if statutes of limitations are allowed to run, that essentially gives them carte blanche to commit crimes while in office.

While the Special Counsel does concede that the Constitution grants the President broad discretion over obstruction of justice investigations under the Article II power of prosecutorial discretion, the Special Counsel is also quick to provide a limit to such authority.[90] The investigation introduces the idea that Article I congressional power could be the limiting factor.[91] Under Article I, Congress can "enact laws that protect congressional proceedings, federal investigations, the courts, and grand juries against corrupt efforts

85 Rubin, *supra* note 70.

86 Bess Levin, *Rudy Giuliani Freely Admits to Key Aspect of Ukraine Extortion Plot*, VANITY FAIR: LEVIN REPORT (Dec. 17, 2019), https://www.vanityfair.com/news/2019/12/rudy-giuliani-donald-trump-impeachment-marie-yovanovitch.

87 *See* 18 U.S.C. § 3282.

88 *Trump's Lawyer Argues President Can't Be Prosecuted for Shooting Someone on Fifth Avenue*, *supra* note 22.

89 MUELLER REPORT VOLUME II, *supra* note 11, at 159.

90 *Id.* at 168–69.

91 *Id.*

to undermine their functions."[92] These enactments are aimed to protect against anyone that might undermine such functions, even if that person is the President of the United States.[93] It is for this reason that impeachment is built into the Constitution of the United States.[94] However, to date, "no U.S. president has ever been removed from office through impeachment."[95] Consequently, a criminal could remain in the White House and never be prosecuted for their crimes.

It is imperative that these chasms found in the Rule of Law are accounted for and remedied. While solutions are not limited, one in particular is aimed at addressing the institutional root problem: the DOJ needs to examine its one-sided policy that a sitting president cannot be indicted because they cannot be prosecuted while in office. While the DOJ should retain its discretion about whether and when to prosecute a President while they are in office, we should turn to the legislature to revise the law, especially as it pertains to the statute of limitations that seemingly provides a sitting President with immunity from prosecution. A federal statute should be enacted to provide that, if a President is accused of committing crimes during their tenure, and if the DOJ chooses not to prosecute while the President is in office, the statute of limitations for such crimes shall be tolled until they leave office. This solution would ensure that a sitting President would, if appropriate, eventually be held liable for criminal conduct committed during their presidency, thus preserving the Rule of Law.

C. *Proposal III: Duty to Report Foreign Interference*

During the 2016 Presidential Election, then-candidate Trump was favored by the Russian government and benefited from Russia's multiple efforts to influence the election. Though Trump campaign officials were aware of this foreign interference, they had no duty to report the illegal hacking of candidate Hillary Clinton's emails or meetings between Trump campaign members and Russian officials. These events raised issues of conspiracy and campaign finance law, but these lesser potential charges do not directly address the fundamental concern—foreign interference in an

92 *Id.* at 168.

93 *Id.* at 176; *see* Watkins v. United States, 354 U.S. 178, 187 (1957) (acknowledging Congress' power to "probe[] into departments of the Federal Government to expose corruption, inefficiency, or waste").

94 Neil J. Kinkopf & Keith E. Whittington, *Common Interpretation, Article II, Section 4,* Nat'l Const. Ctr., https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/349.

95 *See* Mueller Report Volume II, *supra* note 11, at 1.

American election. Without a duty for campaign officials to report foreign interference, the integrity of the United States democratic system can be compromised by foreign actors without consequence. This section proposes legislation to require campaign officials to report attempts to influence American elections.

In his farewell address, President George Washington emphasized the importance of national security and safeguarding the founding principle of the Rule of Law, noting that the two biggest threats to American democracy were monarchical behavior and foreign interference.[96] He stressed the importance of unity of the people and respecting the laws and form of government as ways of preserving the country's vitality:

> Respect for [the Country's] authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. . . .
>
> . . . .
>
> . . . The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism. . . . The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern . . . . [L]et there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.[97]

He also emphasized that insulating the country from foreign interference is essential to maintaining the independence that America was founded on:

> [N]othing is more essential than that permanent, inveterate antipathies against particular nations and passionate attachments for others should be excluded and that in place of them just and amicable feelings towards all should be cultivated. The nation which indulges towards another an habitual hatred or an habitual fondness is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead [the nation] astray from its duty and its interest. . . .
>
> . . . .

96 *See generally* George Washington, Washington's Farewell Address (1796), *reprinted in* FEATURED SENATE PUBLICATIONS, S. PUB. NO. 115-5 (2017), https://www.govinfo.gov/content/pkg/GPO-CPUB-115spub5/pdf/GPO-CPUB-115spub5.pdf.

97 *Id.* at 10–16.

> The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations, to have with them as little *political* connection as possible.[98]

Unfortunately, the import of President Washington's words has faded. Until now, the Founding Fathers' original infrastructure—the separation of powers—has held significance for those who have sat in the Oval Office. But what recourse is there when foreign interference is condoned by the executive office? The Trump administration has illuminated the need to address this very issue.

The Mueller Report outlined several instances of contact between Russian officials and President Trump's campaign which underscore the need to create an affirmative duty to report foreign interference in American elections. Trump campaign staff were informed of Russian efforts to publicly share damaging information about candidate Clinton in an effort to aid the Trump campaign.[99] Mueller investigated whether the Trump campaign violated campaign finance or conspiracy laws in their interactions with Russian linked individuals, ultimately concluding that the evidence was not sufficient to charge Trump or his campaign staff under either law, signaling a gap in our legal system.[100]

In 2016, the Russian government committed itself to helping Trump's campaign secure the presidency.[101] Russia's Internet Research Agency ("IRA") carried out a social media outreach program with the intention of sowing political and social dissonance in the United States.[102] Later, the IRA effort "evolved from a generalized program designed . . . to undermine the electoral system, to a targeted operation that by early 2016 favored candidate Trump and disparaged candidate Clinton."[103] The Mueller Report outlines several instances in which Russian officials informed Trump's campaign staffers of Russia's efforts to influence the outcome of the 2016 election.[104] Although Trump campaign officials were aware of Russia's attempts to interfere with the election and influence American voters to support Trump, they were not subject to a duty to report that foreign interference or contact.[105]

98 *Id.* at 18–19, 21.
99 Mueller Report Volume I, *supra* note 5, at 5–7.
100 *See id.* at 174, 191–98.
101 *Id.* at 5.
102 *Id.* at 4.
103 *Id.*
104 *Id.* at 5–7, 66.
105 Eric Swalwell, *Reporting Foreign Meddling in Elections Shouldn't Be Optional*, Atlantic (June 7, 2018), https://www.theatlantic.com/ideas/archive/2018/06/reporting-foreign-meddling-in-elections-shouldnt-be-optional/561767/.

The Trump campaign's understanding of Russian interference was described by Michael Cohen in his testimony before Congress on February 27, 2019.[106] Cohen recounted how Roger Stone, a Trump friend and advisor, told Mr. Trump that WikiLeaks founder Julian Assange planned to release a "massive dump of emails that would damage Hillary Clinton's campaign."[107] According to Cohen, Trump responded, "[w]ouldn't that be great."[108] During Stone's trial, prosecutors revealed the role he played in coordinating efforts with WikiLeaks to release damaging information about the opposition at strategic moments during the campaign.[109] According to Cohen, Trump knew that WikiLeaks would publish Hillary Clinton's emails.[110] Numerous Trump campaign officials knew that Russian state actors had "dirt" on candidate Clinton and desired to use it in an effort to aid the Trump campaign.[111] Instead of reacting with alarm, Trump campaign officials welcomed the foreign assistance.[112]

On June 9, 2016, Jared Kushner, Paul Manafort, and Donald Trump, Jr. met at Trump Tower with a group of individuals with ties to the Russian government and intelligence services where the parties discussed Russia's findings that were potentially damaging to the Clinton Campaign.[113] The meeting attendees also discussed U.S. sanctions imposed on Russia. Trump, Jr. suggested the sanctions would be reviewed if and when Donald Trump became President.[114] None of this information was reported to the FBI nor were Trump or his campaign officials obligated to inform the authorities of this foreign interference. These extensive contacts between Russian officials and operatives and the Trump campaign illustrate the need for new legal

106 Michael Tackett, *Five Takeaways from Cohen's Testimony to Congress*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/us/politics/cohen-testimony.html.

107 *Id.*

108 *Id.*

109 *See* Spencer S. Hsu et al., *Roger Stone Guilty on All Counts of Lying to Congress, Witness Tampering*, WASH. POST (Nov. 15, 2019), https://www.washingtonpost.com/local/public-safety/roger-stone-jury-weighs-evidence-and-a-defense-move-to-make-case-about-mueller/2019/11/15/554fff5a-06ff-11ea-8292-c46ee8cb3dce_story.html.

110 Tackett, *supra* note 106.

111 MUELLER REPORT VOLUME I, *supra* note 5, at 66, 81; Swalwell, *supra* note 105.

112 MUELLER REPORT VOLUME I, *supra* note 5, at 81; Swalwell, *supra* note 105 ("Instead of reacting with concern or alarm that a foreign power was trying to manipulate a United States election, Trump, Jr. said he would 'love' to get his hands on [information that would be damaging to the Clinton Campaign].").

113 *See* MUELLER REPORT VOLUME I, *supra* note 5, at 116–20; Mark Mazzetti, *G.O.P.-Led Senate Panel Details Ties Between 2016 Trump Campaign and Russia*, N.Y. TIMES (Aug. 18, 2020), https://www.nytimes.com/2020/08/18/us/politics/senate-intelligence-russian-interference-report.html.

114 *Id.* at 118.

safeguards.

The lack of legal consequences imposed on Trump campaign officials emboldened further attempts at interference. Later, as Trump faced impeachment inquiries surrounding his extortion of the President of Ukraine, President Trump demonstrated his willingness to exploit this gap in the law. In relation to the Ukrainian incident, prosecutors focused only on whether Trump had violated any campaign laws, determining that he had not and thus declining to investigate further.[115] Notably, by limiting its inquiry to this question, the DOJ did not determine that no crime had been committed. However, the DOJ's investigative trends set a disconcerting precedent, suggesting that the President had a hand on the scales of justice. The DOJ's decision to open a criminal investigation into how the original Russian investigation began,[116] action that suggests an attempt to dissuade future investigations of foreign influence, further emphasize this point.[117] This issue must be addressed.

With the Ukrainian incident, Trump was, again, hoping to benefit from foreign intelligence designed to undermine his electoral opponent, this time Vice President Joe Biden.[118] Significantly, if there were a legal duty to report attempts to solicit foreign interference in our elections, many of the people who knew about the President's bribery scheme would have been required to report it or face criminal sanctions. However, without a change in the law, it is clear that there is insufficient incentive for candidates and campaign officials to report attempted interference, giving those willing to

115 Barrett et al., *supra* note 25 ("Prosecutors reviewed the rough transcript and . . . declined to investigate, concluding that the president had not violated campaign laws.").

116 *See* Julia Ainsley & Phil Helsel, *Justice Department Review of Russia Probe Turns into Criminal Investigation*, NBC News (Oct. 24, 2019), https://www.nbcnews.com/politics/justice-department/justice-department-review-origins-russia-probe-turns-criminal-investigation-n1071731.

117 *See id.* ("That the administrative review into the origins of the Mueller probe has turned into a criminal investigation could raise alarms that Trump is using the Justice Department to go after his perceived enemies, the Times reported."); *see also* Ryan Lucas & Phillip Ewing, *Democrats Say White House Is Interfering as Russia Review Becomes a Criminal Case* (Oct. 25, 2019) ("'If the Department of Justice may be used as a tool of political retribution or to help the president with a political narrative for the next election, the rule of law will suffer new and irreparable damage,' [Reps. Jerry Nadler of New York and Adam Schiff of California] said."), https://www.npr.org/2019/10/25/773358670/doj-review-of-russia-probe-now-is-criminal-case-dems-charge-wh-interference.

118 Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019); Laurence Arnold & Billy House, *What You Need to Know About Trump, Ukraine and Impeachment*, Wash. Post (Dec. 18, 2019), https://www.washingtonpost.com/business/heres-the-story-on-trump-ukraine-and-impeachment-quicktake/2019/12/13/0b9e554a-1ddf-11ea-977a-15a6710ed6da_story.html.

exploit this gap in the law free reign to knowingly benefit from illegal activity so long as they do not actively participate in the actions themselves.

The Mueller Report made clear that the current legal guardrails are inadequate to prevent this type of behavior. Under 18 U.S.C. § 371, conspiracy to commit offense or to defraud the United States, a conspiracy must be "willful," meaning, the government must have proof of the defendant's willing participation and agreement to commit an act.[119] There is no evidence that President Trump had any involvement beyond mere awareness of Russian interference. Further, there is no law requiring campaign employees to report any criminal—or non-criminal—attempts by foreign governments to interfere with elections. Trump campaign officials knew that the Russian government was attempting to interfere in the election and knew or should have known that the emails hacked from the Clinton campaign were obtained illegally.[120] With no duty to report, the actions of Trump campaign officials were difficult to punish and to prevent from happening again.

Lacking adequate evidence to support prosecution under a criminal statute, Mueller's investigation focused on whether the Trump campaign violated campaign finance laws.[121] The Report's focus on potential campaign finance violations underscored that, despite benefitting from Russia's criminal behavior, the campaign was not criminally implicated by Russia's hacking.[122] Here again, the lack of direct involvement in the Russian interference shielded Trump and his campaign from legal sanction.

Campaign finance law prohibits campaigns from receiving "thing[s] of value" from foreign entities.[123] "Thing of value" is a term of art meant to be broadly interpreted.[124] While damaging information regarding opposing parties would likely be considered a "thing of value," the government lacked sufficient evidence to show that Trump campaign officials had general knowledge that their conduct was unlawful, a necessary element of the offense.[125] As such, despite receiving something of value from Russia's

119 *See, e.g.*, United States v. Tucker, 376 F.3d 236, 238 (4th Cir. 2004) (identifying an agreement to commit an offense and willing participation by the defendant as two necessary elements of a conviction under § 371); United States v. Dolt, 27 F.3d 235, 238 (6th Cir. 1994) ("Conspiracy involves an agreement willfully formed between two or more persons to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy.").

120 *See* Mazzetti, *supra* note 113.

121 *See* MUELLER REPORT VOLUME I, *supra* note 5, at 183–91.

122 Mazzetti, *supra* note 113.

123 52 U.S.C. §§ 30121(a)(1)(A), (a)(2) (2018).

124 MUELLER REPORT VOLUME I, *supra* note 5, at 186.

125 *Id.* at 187–88.

hacking efforts, Trump campaign officials were not prosecuted for campaign finance violations.[126]

In his testimony before Congress, Mueller warned that accepting assistance from foreign officials could become "a new normal."[127] President Trump has indicated that he would be willing to accept help from foreign officials in his 2020 re-election campaign[128] and there is currently very little incentive for him not to. On June 12, 2019, President Trump told ABC News that "he would listen if a foreign government approached him with damaging information about a political rival."[129] President Trump's apparent pressure campaign directed at Ukrainian officials suggests he may be willing to do more than just listen. Unless this gap in the law is addressed, an increase in hacking and social media manipulations may indeed become the new normal.

This problem is not a novel one; there is a history of foreign governments attempting to influence U.S. elections. In 1960, a Democratic presidential contender, Adlai Stevenson, was approached by Mikhail A. Menshikov, the then-Soviet ambassador to the United States. Ambassador Menshikov told Stevenson that Russian officials, including Soviet Prime Minster Nikita Khrushchev, supported his candidacy for President and hoped to provide assistance should he choose to run in the 1960 election.[130] Stevenson, who had already decided not to run, responded to Menshikov's offer by saying he "was not a candidate for the nomination and . . . [that] even if [he] was a candidate [he] could not accept the assistance proffered."[131] Stevenson dictated a memorandum capturing his exchange with Menshikov, in which Stevenson notes that he told Menshikov: "I considered the offer of such assistance highly improper, indiscreet and dangerous to all concerned."[132]

In 2000, then Vice President Al Gore was preparing for a debate against candidate George W. Bush, with the assistance of Congressman

126 The Mueller Report also cited difficulties establishing the value of the Russian assistance provided as a further reason to decline prosecution of Trump campaign officials for criminal campaign finance violations. *Id.* at 188.

127 Fandos, *supra* note 27.

128 Kevin Liptak, *Trump Says He Would Accept Dirt on Political Rivals from Foreign Governments*, CNN: CNN Pol. (June 13, 2019), https://www.cnn.com/2019/06/12/politics/donald-trump-abc-political-dirt-foreign-country-rivals/index.html.

129 *Id.*

130 John Barlow Martin, *An Immodest Proposal: Nikita to Adlai*, Am. Heritage (Aug. 1977), https://www.americanheritage.com/immodest-proposal-nikita-adlai.

131 *Id.*

132 *Id.*

Tom Downey.[133] Congressman Downey "received an envelope containing a briefing book and a videotape," the contents of which seemed to be candidate Bush's debate preparation materials.[134] Congressman Downey promptly turned over the materials to the FBI and recused himself from Gore's debate prep team.[135] Candidates running for President owe it to the American public to respect the country's tenets of democracy while conducting their campaigns. Although Stevenson and Gore were not legally obligated to report these potentially criminal offers of aid, they did so. Norms, not laws, compelled their behavior. Conversely, President Trump has demonstrated a lack of respect for democratic norms, indicating that what were once campaign norms and ethos now need to be codified into law. A duty to report foreign election interference can revive this practice and begin to restore the democratic integrity of our election system.[136]

The evident gap in the rule of law—the absence of a duty to report foreign interference in our elections—can be remedied through legislation. To address this issue, Congressman Eric Swalwell and Senator Richard Blumenthal introduced The Duty to Report Act, which reads, in part:

> The Duty to Report Act would impose a legal duty on federal campaigns, candidates, and PACs to report offers of assistance from foreign nationals, including material, non-public information, to the Federal Election Commission (FEC) and the Federal Bureau of Investigation (FBI). The legislation would also require disclosure of all meetings between candidates or campaign officials and agents of foreign governments, other than those held in a candidate's official capacity as an elected representative.[137]

This legislation would mark a major shift in election laws, holding both candidates and campaign employees accountable to report foreign interactions with the election system.

The Foreign Influence Reporting in Elections Act (FIRE Act), an amendment to the Federal Election Campaign Act (FEC Act) of 1971,

133 Carter Eskew, *What Donald Trump Jr. Should Have Learned From the 2000 Gore Campaign's Hot Potato*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/blogs/post-partisan/wp/2017/07/13/what-donald-trump-jr-should-have-learned-from-the-2000-gore-campaigns-hot-potato/.

134 *Id.*

135 *Id.*

136 *See* Swalwell, *supra* note 105.

137 Press Release, Eric Sallwell, Congressman, U.S. House of Representatives, Swalwell and Blumenthal Introduce Legislation to Protect Elections from Foreign Interference (Apr. 30, 2019), https://swalwell.house.gov/media-center/press-releases/swalwell-and-blumenthal-introduce-legislation-protect-elections-foreign.

would impose even greater reporting requirements and sanctions.[138] It requires a campaign to notify their respective committee (the Democratic National Committee or Republican National Committee, in the case of the major parties), the Federal Election Commission, and the Federal Bureau of Investigation of any offer made by a foreign national to assist the campaign via services, financial resources, or informational resources.[139] Individuals associated with the campaign that knowingly and willfully fail to comply would be fined up to $500,000, imprisoned for not more than 5 years, or both.[140] Those who knowingly or willfully destroy materials related to foreign contact would be subject to the same penalties, except that the fine could be as much as $1,000,000.[141]

The FIRE Act is laudable and thorough, but its reference to the definition of "foreign nationals" from the FEC Act may be underinclusive. The FEC Act defines foreign nationals to include foreign governments, foreign political parties, and all foreign citizens except those holding dual U.S. citizenship or permanent residents of the United States.[142] This definition would seem not to include companies that offer political analysis and global research for campaigns.[143] Due to the international scope of many companies, consulting firms, and businesses, this isn't a surprising exclusion. However, distinguishing dealings between firms and their contractors can be a difficult task and is worthy of greater discussion by Congress before utilizing this definition for further legislation. Moreover, in light of the recent impeachment hearings, we suggest that the reporting requirements be triggered by any offer or solicitation of foreign interference in our elections, regardless of acceptance or encouragement by the recipient. Aside from this consideration, the FIRE Act seems well-reasoned and prudent in light of the foreign influence issues discussed.

A legal obligation to report attempted assistance by foreign actors should be enshrined in our laws in order to ensure that only the will of the American people is expressed in our elections. While the Constitution does not mandate candidates and their staff to do so, history displays an understanding that attempts by foreign powers to influence elections

138 Foreign Influence Reporting in Elections Act, S. 1562, 116th Cong. § 2(a) (2019).

139 *Id.*

140 *Id.* § 4.

141 *Id.*

142 *Foreign Nationals*, Fed. Election Comm'n (June 23, 2007), https://www.fec.gov/updates/foreign-nationals/.

143 *See, e.g.*, James Doubek, *Conservative Website Initially Hired Firm That Later Produced Trump Dossier*, NPR (Oct. 28, 2017), https://www.npr.org/sections/thetwo-way/2017/10/28/560544607/conservative-website-initially-hired-firm-that-later-produced-trump-dossier.

challenge the integrity of the United States electoral system. Allowing such interference is antithetical to the nation's principles and poses an existential threat to the continued functioning and legitimacy of our democracy. As previously mentioned, members of both chambers of Congress have introduced bills to address these problems.

The reality that these bills will not pass before the 2020 election cannot be ignored; at time of writing we are mere weeks away from the next presidential election. Leading up to the 2020 election, Senate Majority Leader Mitch McConnell categorized legislative attempts to strengthen the integrity of elections as premature.[144] McConnell had previously voiced concerns about the validity of U.S. intelligence conclusions that the Russian government had interfered in the U.S. presidential election in 2016, in direct conflict with the findings of the Mueller Report.[145] Senator McConnell has historically opposed federal involvement in election security, arguing that election matters should be left up to the states.[146] Given the make-up of Congress and the stagnated discussion of electoral security infrastructures, any viable and substantial legislative solution to this issue appears to hinge on the composition of Congress.

Given this partisan stalemate, Democrats' ability to pass significant election security measures depends, in part, on electoral outcomes in the Senate. Control of the Senate is uncertain,[147] but even if Democrats take control after the upcoming election, they would face the potential of a Republican filibuster of major election security legislation.[148] The political realities of federal election security legislation highlight the importance of ensuring other safeguards are in place. The onus is thus on state legislatures who are largely responsible for enacting and administering election law.[149] Many states are considering bills that would require presidential candidates

144 *See* Heather Caygle et al., *Dems Clash with Republicans over Election Security*, POLITICO (July 10, 2019), https://www.politico.com/story/2019/07/10/mcconnell-obama-russia-election-security-1405742.

145 While it has been reported that McConnell expressed doubts about Russian interference, he denies having done so. *Id.*

146 Editorial, *What Will It Take for Congress to Protect America's Elections?*, N.Y. TIMES (July 27, 2019), https://www.nytimes.com/2019/07/27/opinion/election-security-mueller-trumphtml?action=click&module=Well&pgtype=Homepage&section=Editorials.

147 *See* Carl Hulse, *Battle for Control of Senate Takes Shape as Both Parties Seek Firewall*, N.Y. TIMES (Mar. 1, 2020), https://www.nytimes.com/2020/03/01/us/senate-control-democrats-republicans.html.

148 Even if Democrats do take control of the Senate, it is highly unlikely they will win enough seats to control the 60 votes needed to break a Republican filibuster. *See id.*

149 *See Election Security: State Policies*, NAT'L CONF. ST. LEGISLATURES (Aug. 2, 2019), http://www.ncsl.org/research/elections-and-campaigns/election-security-state-policies.aspx.

to publish their tax returns.[150] These bills, in the majority of states where they have been proposed, would require that candidates release their tax returns in order to be put on the state's ballot.[151] This proposed legislation represents a movement calling for transparency and accountability in our elections.[152] If states decide to pursue analogous legislation imposing a duty on presidential candidates and their campaign officials to report foreign interference, pressure will build on Congress to follow suit.[153] State laws alone may provide significant benefits, but the goal is to enact federal legislation that redresses the issue.

The Mueller Report revealed that President Trump and his campaign officials knew about Russian meddling and benefited from it.[154] The Report, in explaining why Trump would not be indicted for accepting this help, painted a larger picture that highlighted gaps in our legal system. Mueller testified that Russia aims to meddle in the 2020 election, and that the United States electoral system is vulnerable to interference by foreign adversaries.[155] As such, the Rule of Law in the United States is under attack and needs to be fortified. Democracy was manipulated and invalidated through foreign interference in the 2016 election, and without additional

150 Dan Diorio, *A Taxing Presidential Issue*, *Trends in State Policy News*, Nat'l Conf. St. Legislatures (May 1, 2017), http://www.ncsl.org/bookstore/state-legislatures-magazine/trends-in-state-policy-news.aspx.

151 Donna Borak, *State Lawmakers Move to Require Tax Returns From Presidential Candidates — Including Trump*, CNN (Apr. 24, 2019), https://www.cnn.com/2019/04/24/politics/presidential-tax-returns-states-2020-trump/index.html.

152 *See* Dylan Lynch, *Some States Give Big 10-4 to Candidates Releasing 1040s*, Nat'l Conf. St. Legislatures: NCSL Blog (Apr. 16, 2019), https://www.ncsl.org/blog/2019/04/16/some-states-give-big-10-4-to-candidates-releasing-1040s.aspx.

153 Although there may be legal impediments to state laws requiring mandatory disclosure of tax returns, *see, e.g.*, Patterson v. Padilla, 451 P.3d 1171, 1191 (Cal. 2019) (striking down a California law requiring the public disclosure of tax returns as invalid under the California Constitution and the U.S. Constitution's Qualification Clause), the creation of a duty to report foreign interference is different for two reasons. First, the Elections Clause of the U.S. Constitution gives states the power to choose "[t]he Times, Places and Manner of holding Elections for Senators and Representatives[.]" U.S. Const. art. I, § 4; *see also* Karen L. Shanton, Cong. Research Serv., R45549, The State and Local Role in Election Administration 1 (2019) ("The administration of elections in the United States is highly decentralized. Elections are primarily administered by thousands of state and local systems rather than a single, unified national system."). Second, historically, states have had almost unfettered discretion to use their policing powers to determine what conduct or omissions constitute crimes under state law. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, J., concurring) ("This is essentially not a question of personal 'preferences,' but rather of the legislative authority of the State.").

154 Mueller Report Volume I, *supra* note 5, at 66.

155 *What Will It Take for Congress to Protect America's Elections?*, *supra* note 147.

safeguards, the past may become prologue. State and federal steps to protect against such attacks would be a step towards remedying this problem.

Conclusion

The Founding Fathers created the separation of powers to ensure that each branch would check the power of the others, thereby shaping the infrastructure of our Rule of Law.[156] Unfortunately, recent events have revealed fissures in the Rule of Law infrastructure that must be addressed in order to constrain unchecked executive branch overreach. The political tenure of President Trump has repeatedly challenged our existing system, from Russian interference in the 2016 presidential election and the attempted extortion of Ukraine to assertions that he is above the law and his categorization of his impeachment as a "hoax."[157] Though this paper focuses on the presidency of Donald Trump and uses the Mueller Report as a primary source, the issues identified and solutions proposed herein transcend the current presidency.

First, the judicial branch's costly and time-consuming procedures have weakened its authority, rendering it a disabled arbiter of separation of powers disputes. The diminished state of the judicial branch is especially problematic because its current structure and architecture leaves crucial constitutional questions regarding executive authority and separation of powers unanswered. The Mueller investigation highlighted how the lengthy judicial processes hampered the ability of the Special Counsel to uncover the truth and enforce the law. In particular, Mueller cited procedural lag as the reason for not subpoenaing the President, thus forcing Mueller to rely on inadequate written responses. Mueller was criticized for this strategic decision, but this choice is not reflective of his faults as Special Counsel; instead, his decision demonstrates how the current state of affairs is undermining the Rule of Law.

Without a strong judiciary appropriately interpreting constitutional powers, the three branches of government are unable to adequately check each other's power. To strengthen the judiciary's role policing the separation of powers, we suggest an expedited review process for issues involving the Rule of Law and the separation of powers. This proposal is promising, as it is modeled on a successful Massachusetts practice that allows the executive and legislature to submit constitutional questions directly to the state's highest court. Unlike Massachusetts, which has amended its constitution to include this procedure, we suggest that the Federal Rules of Civil Procedure be updated to allow cases including issues of similar constitutional significance

156 *See* The Federalist No. 51 (James Madison).

157 Elizabeth Thomas, *A Day After Being Impeached, Trump Calls House Vote a 'Phony Deal' and a 'Hoax,'* ABC News (Dec. 19, 2019), https://abcnews.go.com/Politics/day-impeached-trump-calls-house-vote-phony-deal/story?id=67829619.

(separation of powers, interbranch authority, the Rule of Law, and special counsel issues) to be placed on an expedited track for judicial review by the Supreme Court. This new federal rule would take the Massachusetts example a step farther by being available beyond the three branches. It would also differ because the United States Supreme Court's involvement with such questions is restricted to live cases or controversies, whereas the Massachusetts Supreme Judicial Court is permitted under the Massachusetts Constitution to publish advisory opinions. By creating a procedural rule that outlines an expedited review system, the procedure will allow the Supreme Court to answer important legal questions while remaining within existing constitutional constraints.

The existing criminal justice system is unable to restrain the lawless, criminal conduct of a sitting President. While impeachment is always an option for handling a lawless President, the remedy alone has proven to be insufficient.[158] The DOJ opinion stating that a sitting President cannot be indicted raises impediments to holding a President accountable for criminal activity. The DOJ opinion was written by unelected executive branch lawyers and, in many cases, completely insulates a sitting President from criminal prosecution. These rules may inadvertently prevent prosecution even after the President leaves office because they fail to address the statute of limitations. While prosecutors should determine *whether* to indict a sitting President for criminal conduct, the determination as to whether a sitting President *can* be prosecuted should be left to the courts. This is because the issue is a constitutional one about whether the DOJ's prosecution of a sitting President would unconstitutionally disable a duly elected President from exercising his Article II executive powers. While the DOJ has the power and authority to indict a sitting President while in office, the courts should ultimately determine whether or not such an indictment is valid. In order to ensure that the DOJ does not abuse their prosecutorial discretion, the statute of limitations should be tolled when the DOJ declines to prosecute. Tolling the statute of limitations would grant prosecutors the ability to bring these charges after a presidential term is complete, removing potential interference with Article II powers and sufficiently preventing presidents from acting as unchecked authorities.

Finally, the Mueller Report revealed a need for greater accountability during electoral campaigns, especially with respect to the involvement of foreign actors. We therefore suggest creating an affirmative duty to report foreign attempts to influence American elections. President Trump's

158 While President Trump's impeachment hearings are attracting tremendous media attention, it is important to remember that no president has ever been removed from office through the impeachment process. *See supra*, note 77 and accompanying text.

nonchalant reaction to potential foreign interference in the 2016 presidential election, and his evident willingness to welcome foreign manipulation of our democratic processes, reveals that action must be taken now to prevent such behavior from permeating presidential campaigns and becoming "a new normal."[159] As a means of fortifying the integrity of American democracy, we propose a legal duty to report foreign interference in American elections. Notably, this is a duty for all government officials, extending this responsibility beyond those directly involved in campaigns.

There are currently two legislative solutions pending in Congress, and regardless of their success, the issue can also be addressed at the state level. States can protect their elections from foreign interference by way of state criminal law. Attaching state criminal penalties to foreign interference matters can further protect our elections and maintain the integrity of the election process at multiple junctures. Regardless of whether the additional protection is provided at the federal level, created at the state level, or both, an affirmative duty to report foreign interference would help maintain the integrity of the American government and the Rule of Law.

The framing of the Constitution sets forth the separation of powers doctrine as a means of protecting the Rule of Law. Throughout our nation's history, there have been instances where this protection was insufficient, but never more so than now. We are being forced to face the shortcomings of the separation of powers doctrine and being tasked with the necessary challenge of fortifying the Rule of Law. The three problems identified, and solutions proposed, by this paper aim to further encourage legislators, academics, and reformers to pursue these avenues of research towards positive change. This paper includes a number of suggestions but cannot be the endpoint; "[e]ternal vigilance is the price of liberty."[160]

159 Fandos, *supra* note 27.

160 Fareed Zakaria, *Here's Why I Support the Impeachment Inquiry*, CNN (Oct. 11, 2019), https://www.cnn.com/videos/tv/2019/10/11/exp-gps-1013-fareeds-take.cnn.

SHAREHOLDER INEQUITY IN THE AGE OF BIG TECH: PUBLIC POLICY DANGERS OF DUAL-CLASS SHARE STRUCTURES AND THE CASE FOR CONGRESSIONAL ACTION

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INTRODUCTION

On July 24, 2019, the Federal Trade Commission (FTC) fined Facebook $5 billion and imposed significant requirements on its Board to increase its accountability and transparency.[1] The FTC, after a year-long investigation into the Cambridge Analytica data breach, found that Facebook had deceived its users about their ability to control the privacy of their personal information.[2] This fine not only underlined the corporate governance failings that created such major privacy violations, but also indirectly brought to the fore the inherent public policy dangers of Facebook's "dual-class" corporate share structure. This type of share structure, in which some of the company's shares hold much greater voting power than others, enables Mark Zuckerberg (Zuckerberg), Facebook's founder, CEO, and chairman, to enjoy total control over shareholder decisions, even though he owns just 14% of the company's shares.[3]

This Note aims to provide a new perspective on the wide-ranging debate around the appropriateness of dual-class share structures. It highlights the unaccountability of those who run dual-class companies and the societal dangers that result from the implementation of these structures, particularly within the "Big Tech" sector that has come to dominate our age. It argues that the only meaningful way of creating much-needed accountability at dual-class companies is for Congress to pass legislation giving the U.S. Securities and Exchange Commission (SEC) the power to mandate "one share, one vote" at all public companies.

Part I begins with an explanation of how dual-class share structures work and how they have proliferated in recent years, especially in technology initial public offerings (IPOs). It goes on to highlight the public policy risks posed by dual-class share structures within Big Tech in particular and why this Note focuses on that sector. It also provides examples of some of the societal dangers posed and concludes with an illustration of the impotence of ordinary shareholders who wish to address such dangers, even when in the majority.

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1 *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FED. TRADE COMM'N (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

2 Rob Davies & Dominic Rushe, *Facebook to Pay $5bn Fine as Regulator Settles Cambridge Analytica Complaint*, GUARDIAN (July 24, 2019), https://www.theguardian.com/technology/2019/jul/24/facebook-to-pay-5bn-fine-as-regulator-files-cambridge-analytica-complaint.

3 Facebook comprises almost 3 billion shares (Class A and Class B), of which Zuckerberg owns 410 million. Facebook Inc., Proxy Statement (Schedule 14-A) 40–41 (Apr. 12, 2019) [hereinafter Facebook Proxy Statement].

Part II provides an outline of the various arguments for and against dual-class share-structures, including why many believe that the risks posed by unaccountable power are neither mitigated nor outweighed by the lure of higher shareholder returns.

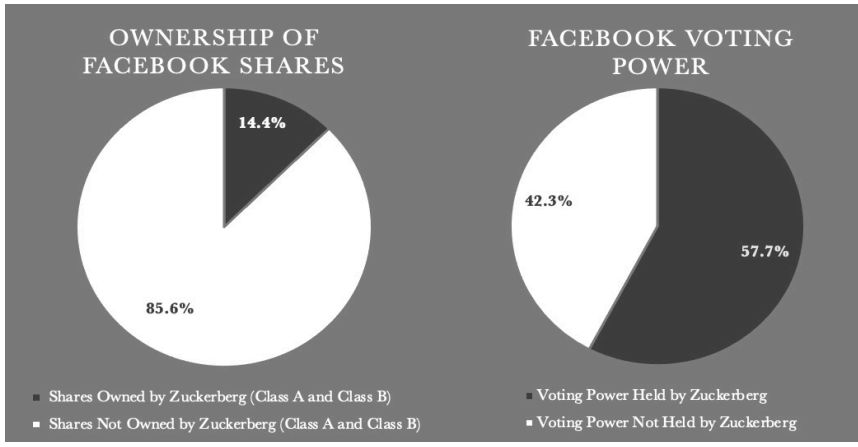
Part III comprises an analysis of a range of solutions proposed by scholars and industry experts to mitigate some of the harmful effects of dual-class structures. These often include "private ordering" solutions, which look to private actors instead of government to provide regulation. This Part explains why, even if they might address other important risks, each solution ultimately fails to protect societies from the dangers posed by unaccountable founder-controllers.

Finally, Part IV outlines why, in light of the unsuitability of each solution explored in Part III, the only meaningful and workable solution to this problem is congressional action. It explains how Congress has acted to address similar public policy dangers in the past and why it must do so now by empowering the SEC to prohibit the implementation of any new dual-class structures and to unwind those structures already in place.

I. PUBLIC POLICY DANGERS CAUSED BY DUAL-CLASS SHARE STRUCTURES

Part I outlines why the age of Big Tech presents something of a "perfect storm" regarding the risks of allowing dual-class structures at public companies. It begins by outlining how dual-class structures work. It then goes on to outline what is meant by "Big Tech," how it has become a defining hallmark of the age, and some of the societal dangers attributed to it. Finally, it explains why dual-class share structures at any company, and especially within Big Tech, exacerbate these dangers by removing accountability from those who run dual-class companies.

First, dual-class share structures present an unusual balance of corporate power at the companies in which they are used. At most major public companies, a $5 billion fine from the FTC would likely result in swift action by shareholders, pressuring the board to implement sweeping changes and forcing culpable directors to fall on their swords. However, Facebook's dual-class structure means that regular investors own "Class A" shares that carry one vote per share, whereas Zuckerberg and a small group of insiders own "Class B" shares, which carry ten times the voting power of Class A shares.[4] This gives Zuckerberg a controlling stake of almost 60% of all votes, even though his economic exposure is to just 14% of the company's shares.[5]



Charts 1 and 2: Mark Zuckerberg's Proportional Ownership of Facebook Shares (Chart 1), Compared with Voting Power (Chart 2)[6]

4 *Id;* Emily Stewart, *Mark Zuckerberg is Essentially Untouchable at Facebook*, VOX (Dec. 19, 2018), https://www.vox.com/technology/2018/11/19/18099011/mark-zuckerberg-facebook-stock-nyt-wsj.

5 Facebook Proxy Statement, *supra* note 3, at 40–41.

6 *Id.*

The dual-class model was popularized in the 1980s as a defensive measure against hostile takeovers[7] but was in use decades earlier.[8] Since 2004, however, it has flourished. In 2005, only 1% of IPOs on U.S. exchanges comprised dual (or more) classes of stock, but by 2017 this figure was 19%.[9] In 2004, Google was one of the first major technology companies to employ the structure, and now it is almost de rigueur among technology startup and other "unicorn" (startups worth $1 billion) IPOs.[10] In the last ten years alone, Facebook, GoPro, Groupon, LinkedIn, Square, TripAdvisor, Yelp, Zillow, and Zynga have all gone public with dual-class share structures.[11] Snapchat's parent company, Snap Inc., appears to have presented something of a high water mark in 2017 by issuing only non-voting shares to its ordinary shareholders at IPO.[12] That particular structure gives regular Snap Inc. shareholders no voting rights whatsoever related to how the company is run, an approach no other company appears to have employed to date.[13] More recently, research by Professors Bebchuk and Kastiel has identified a subset of dual-class companies with "small-minority controllers," which can raise particular concerns because of the considerable governance costs and risks they present.[14]

Big Tech itself presents a strangely unique case in this day and age. Embodying perhaps one of the most extreme outcomes of modern-day capitalism, the sector comprises a small group of supremely rich and powerful companies that provide online services on which billions of people now depend. Yet their use of dual-class share structures means many of these influential tech companies are still controlled and directed by their entrepreneurial founders—normal people who just happened to have the vision, drive, and commitment to create and build companies that have quickly evolved into all-pervasive leviathans. References to the "age of Big

7 Tian Wen, Comment, *You Can't Sell Your Firm and Own it Too: Disallowing Dual-Class Stock Companies from Listing on the Securities Exchanges*, 162 U. Pa. L. Rev. 1495, 1496 (2014).

8 Benjamin J. Barocas, Comment, *The Corporate Practice of Gerrymandering the Voting Rights of Common Stockholders and the Case for Measured Reform*, 167 U. Pa. L. Rev. 497, 512 (2019).

9 Press Release, Council of Inst. Inv'rs, Investors Petition NYSE, NASDAQ to Curb Listings of IPO Dual-Class Share Companies (Oct. 24, 2018), https://www.prnewswire.com/news-releases/investors-petition-nyse-nasdaq-to-curb-listings-of-ipo-dual-class-share-companies-300737019.html.

10 Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 Colum. Bus. L. Rev. 852, 880 (2019).

11 *Id.* at 855.

12 Scott Hirst & Kobi Kastiel, C*orporate Governance by Index Exclusion*, 99 B.U. L. Rev. 1229, 1231, 1237 (2019).

13 Barocas, *supra* note 8, at 514.

14 Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 Geo. L.J. 1453, 1453 (2019).

Tech" are thus now part of common parlance.[15]

It is often said that with great power comes great responsibility. However, the level of responsibility, and indeed accountability, of many founder-controllers is negligible at best. As Professor Renee Jones points out, many prominent tech giants originally "based their business strateg[ies] on changing, skirting or even violating existing laws."[16] Thus, disrupting norms and walking the line are in these companies' nature and have contributed to their explosive growth. Yet now these same companies bestride the world and count their customers (whose personal data they relentlessly harvest) in the hundreds of millions.[17] In an environment such as this, one seemingly minor oversight or bad decision can quickly end up harming millions of citizens across entire countries.

The FTC's findings against Facebook are just one example of how such dangers can manifest. WhatsApp, owned by Facebook, has been implicated in allowing elaborate disinformation campaigns to proliferate on its platform, which are believed to have helped bring Jair Bolsonaro to power in Brazil.[18] There is evidence that Facebook was used to incite racial hatred that culminated in genocide in Myanmar.[19] Additionally, the U.S. Senate's Select Committee on Intelligence found that Russian operatives had weaponized social media to conduct information warfare upon U.S. citizens during the 2016 presidential election.[20] As British investigative journalist Carol Cadwalladr lamented in The Great Hack, "we literally can't have a free and fair election in this country, and we can't have it

15 *See generally, e.g.*, Editorial Board, *U.S. Department of Justice Must Make Antitrust Fit for the Age of Big Tech*, Fin. Times (July 28, 2019), https://www.ft.com/content/fca13e16-ae32-11e9-8030-530adfa879c2; Franklin Foer, *What Big Tech Wants Out of the Pandemic*, Atlantic (July/August 2020), https://www.theatlantic.com/magazine/archive/2020/07/big-tech-pandemic-power-grab/612238/; Sachin Nair, *The 'Revival' of Competition Law in the Age of Big Tech*, Law Society (Sept. 24, 2019), https://www.lawsociety.org.uk/news/blog/the-revival-of-competition-law-in-the-age-of-big-tech/.

16 Renee M. Jones, Essay, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online 165, 181 (2017).

17 For a detailed and comprehensive critique of the extent to which Big Tech harvests users' data, see Shoshana Zuboff, The Age of Surveillance Capitalism (2019).

18 Tai Nalon, *Did WhatsApp Help Bolsonaro Win the Brazilian Presidency?*, Wash. Post: WorldPost (Nov. 1, 2018), https://www.washingtonpost.com/news/theworldpost/wp/2018/11/01/whatsapp-2/.

19 Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar's Military*, N.Y. Times (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html.

20 Staff of S. Comm. on Intelligence, 116th Cong., Rep. on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election Vol. 2, at 3–4 (Comm. Print 2019), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf.

because of Facebook, because of the tech giants, who are still completely unaccountable."[21]

Although shareholders should by no means bear sole responsibility for holding the boards of these companies accountable, when they *can* act, they form an important line of defense. A recent example is the forced resignation of Uber's CEO and co-founder Travis Kalanick in 2017 over reports he presided over a toxic culture at the firm.[22] However, when dual-class share structures render shareholders impotent, this burden is borne more heavily by federal regulators. Furthermore, although Facebook's $5 billion fine was unprecedented in its size, the FTC was criticized for not having gone far enough.[23] The two Democrats on the five-member commission decried what they viewed as a missed opportunity to compel Facebook to change its corporate behavior, warning that the settlement imposed "no meaningful changes to the company's structure or financial incentives, which led to these violations."[24]

Facebook's shareholders have, in fact, already tried to effect change. At the company's 2019 annual general meeting (AGM), they set forth a litany of reasons as to why an independent member of the board, that is, someone other than Zuckerberg, should be appointed as chairman. Those reasons included: Russian meddling; Cambridge Analytica; national security; fake news; violence in developing countries; and racial profiling in advertisements.[25] Sixty-eight percent of public shareholders voted in support of the proposal, yet Zuckerberg overruled these with his high-voting shares.[26] Perhaps unsurprisingly, another shareholder proposal entitled "Give Each Share an Equal Vote," which garnered 83% of outside shareholders' votes, was also batted down.[27] Such is the inequity faced by dual-class shareholders in the age of Big Tech.

21 The Great Hack (Netflix 2019).

22 Mike Isaac, *Uber Founder Travis Kalanick Resigns as C.E.O.*, N.Y. Times (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html.

23 Kiran Stacey & Hannah Murphy, *Facebook to Pay $5bn to Resolve FTC Probe into Privacy Violations*, Fin. Times (July 24, 2019), https://www.ft.com/content/57b2e47c-ae0f-11e9-8030-530adfa879c2.

24 Davies & Rushe, *supra* note 2.

25 Facebook Proxy Statement, *supra* note 3, at 57.

26 Jake Kanter, *Facebook Investors Voted in Support of Proposals to Fire Mark Zuckerberg as Chairman, but Zuckerberg Still Holds Power*, Bus. Insider (June 4, 2019), https://www.inc.com/business-insider/facebook-investors-vote-in-support-fire-mark-zuckerberg-chairman.html?ref=todayheadlines.live.

27 *Id.*; Facebook Proxy Statement, *supra* note 3, at 55.

II. TRADITIONAL ARGUMENTS FOR AND AGAINST DUAL-CLASS SHARE STRUCTURES

An appraisal of the arguments for and against these structures is necessary in order to understand the potential solutions to the societal dangers posed by dual-class share structures. This part provides a brief, contextual summary before looking more closely at some of these arguments.

SEC Commissioner Robert Jackson succinctly summarized the arguments for and against dual-class share structures in 2018: "[o]n one hand, you have visionary founders who want to retain control while gaining access to our public markets. On the other, you have a structure that undermines accountability [where] management can outvote ordinary investors on virtually anything."[28] Andrew Hill of the Financial Times framed it more wryly: "[t]he advantage of a dual-class share structure is that it protects entrepreneurial management from the demands of ordinary shareholders. The disadvantage of a dual-class share structure is that it protects entrepreneurial management from the demands of shareholders."[29]

The vast majority of tech companies with dual-class structures have gone public within only the past ten to fifteen years, thus the impact of dual-class structures among modern companies, as well as its recent proliferation, have yet to be fully examined.[30] That is not to say, however, that the societal dangers posed by dual-class companies are any less impactful, nor that they should not be addressed. In terms of public policy risks, this Note suggests that the arguments *for* dual-class structures, which focus mainly on economic outcomes, are far outweighed by the public policy risks created by the unaccountability of founder-controllers, particularly within Big Tech.

A. *Arguments for Dual-Class Share Structures*

The main arguments in favor of dual-class share structures can be grouped as follows: (1) improved company performance; (2) long-term interests of the company; (3) potentially higher corporate tax payments; and (4) free-market policies.

The first argument for dual-class structures is that they enable

28 Robert J. Jackson, Jr., *Perpetual Dual-Class Stock: The Case Against Corporate Royalty*, SEC.GOV (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty.

29 Andrew Hill, *Enrolment Is Open for an MBA in Murdoch*, FIN. TIMES (July 19, 2011), https://www.ft.com/content/2fda9e8e-b176-11e0-9444-00144feab49a.

30 Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057, 1075 (2019).

improved company performance. Proponents believe that those who have the entrepreneurial flair, drive, and risk appetite to launch and grow successful companies are integral to those companies' ongoing success, meaning "such a talented controller [should] remain in control long after the IPO."[31] A recent study has indeed found that some companies with dual-class share structures have shown improved innovation output, particularly "the number of patent filings and the quality of innovations as measured by patent citations and exploratory innovations."[32] Another study has found that, "on average, public shareholders with an inferior vote may benefit from or not be harmed by a dual class structure in at least the first five years after the IPO."[33] However, the definition of harm in this context relates to shareholder returns, rather than the many social harms with which this Note is concerned.

Second, some argue that allowing entrepreneur-founders to retain control can protect companies from the short-term temptations of share-price-boosting takeover offers.[34] Information asymmetries can also mean these entrepreneurs want to protect information about their businesses that they do not wish to make public for competitive reasons.[35] Some further argue that many retail investors have little interest in learning in-depth about the company and may not vote wisely, or that passive shareholders, such as those in index funds, "may lack the financial incentives to vote intelligently because of their investment strategies."[36] These arguments thus mainly focus on longer-term control over companies and their information flows.

Third, some have suggested that dual-class companies are potentially less likely to avoid paying taxes.[37] One possible reason for this is that the economic exposure faced by founder-controllers is disproportionately lower

31 Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 Va. L. Rev. 585, 604 (2017) (arguing that "this superior-controller argument does not provide a good basis for the use of a perpetual dual-class structure").

32 Lindsay Baran, Arno Forst, & M. Tony Via, *Dual Class Share Structure and Innovation*, SSRN 40 (Dec. 8, 2019), https://ssrn.com/abstract=3183517.

33 Martijn Cremers, Beni Lauterbach, & Anete Pajuste, *The Life-Cycle of Dual Class Firm Valuation* 40 (European Corp. Gov't Inst., Working Paper No. 550, 2018), https://ssrn.com/abstract=3062895.

34 Fisch & Solomon, *supra* note 30, at 1069; *see also* Facebook Proxy Statement, *supra* note 3, at 56 ("This level of investment may not have been possible if our board of directors and CEO were focused on short-term success over . . . long-term interests.").

35 Fisch & Solomon, *supra* note 30, at 1069.

36 Dorothy Shapiro Lund, *The Case for Nonvoting Stock*, Wall St. J. (Sept. 5, 2017), https://www.wsj.com/articles/the-case-for-nonvoting-stock-1504653033.

37 *See* Sean T. McGuire, Dechun Wang, & Ryan J. Wilson, *Dual Class Ownership and Tax Avoidance*, 89 Accт. Rev. 1487, 1512 (2014).

than their voting power.[38] However, even if appropriate payment of taxes by dual-class companies is prevalent, the highly publicized tax-avoidance of prominent Big Tech companies in recent years[39] presents something of a paradox and suggests that the issue is far from clear-cut. For instance, a 2019 report by Fair Tax Mark suggested that, between 2010 and 2018, Facebook used legal tax avoidance strategies to pay just 10.2% of its profits in cash tax payments.[40]

Fourth, free-market policy arguments suggest that investors should have the right to invest in dual-class companies if they so wish, so long as they are sufficiently informed. A theory akin to "caveat emptor" is sometimes asserted, that is, investors know what they are getting into with dual-class companies. Therefore, they can hardly be said to be hoodwinked by such structures when companies are obligated to disclose them, in full, in the IPO prospectus.[41] In a similar vein, some argue that the doctrine of contractual freedom should allow parties to contract as they wish, including via dual-class structures.[42] However, although contractual freedom is, arguably, an important component of any capitalist society, that does not preclude the need for appropriate limits in order to serve and protect greater public policy interests.

B. *Arguments Against Dual-Class Share Structures*

Notwithstanding the above arguments in favor of dual-class structures, there are reasons why, in terms of corporate governance and accountability, dual-class share structures present significant problems. These can be grouped as follows: (1) immunity from accountability and reduced economic exposure; (2) management entrenchment; (3) reduced board independence; (4) curtailment of legitimate shareholder activism; and

38 See Charts 1 and 2, *supra*, for an example of the disparity between economic exposure and voting power.

39 Erik Sherman, *A New Report Claims Big Tech Companies Used Legal Loopholes to Avoid Over $100 Billion in Taxes. What Does That Mean for the Industry's Future?*, FORTUNE (Dec. 6, 2019), https://fortune.com/2019/12/06/big-tech-taxes-google-facebook-amazon-apple-netflix-microsoft/.

40 FAIR TAX MARK, LTD., THE SILICON SIX AND THEIR $100 BILLION GLOBAL TAX GAP 22 (2019), https://fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf.

41 *See* INVESTOR AS OWNER SUBCOMM., SEC. EXCH. COMM'N INVESTOR ADVISORY COMM., DUAL CLASS AND OTHER ENTRENCHING GOVERNANCE STRUCTURES IN PUBLIC COMPANIES 3–4 (2018), https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-on-dual-class-shares.pdf [hereinafter INVESTOR ADVISORY COMM.].

42 *See* Bebchuk & Kastiel, *supra* note 14, at 1461 (noting that this debate on contractual freedom in corporate law is longstanding).

(5) rebuttals to the free-market policy arguments outlined above.

First, dual-class structures allow founders to "have their cake and eat it too," at the expense of regular shareholders, who suffer both disenfranchisement and increased financial risk. Founder-controllers can extract vast amounts of cash from their company at IPO and retain control with significantly less financial exposure than that borne by regular shareholders.[43] Furthermore, if they make poor or harmful decisions, the economic impact on them is limited because of their relatively smaller economic stake, and thus the incentive to make good or non-harmful decisions is also limited. This risk is neatly illustrated by the impact of Facebook's $5 billion fine,[44] which was the result of the management decisions of Facebook's dual-class (high-voting) shareholders, but borne more heavily by the company's "low-voting" shareholders.[45] High-voting shareholders thus enjoy private benefits, while imposing disproportionate costs and risks not only on regular shareholders, but also on courts, regulators and governments.[46] The effects are especially pronounced where this equity disparity, or "wedge," is large or where it can increase over time without the further approval or consent of other shareholders.[47]

Second, this allure of power without commensurate accountability or economic risk can result in entrenchment, whereby management, regardless of their level of competence, can insulate themselves from corporate governance mechanisms such as challenges from non-controlling shareholders. This is how Rupert Murdoch and James Murdoch remained at the helm of News Corp after being associated with a criminal investigation into phone hacking at the company.[48] Despite substantial noncontrolling votes being cast in favor of their replacement on the board of directors, their own votes were enough to defeat the proposal.[49] As illustrated above, this is also how Mark Zuckerberg retains the roles of both CEO and Chairman of the Board despite Facebook's many high-profile failings.

Third, dual-class share structures can diminish board members' independence as well as their accountability to public shareholders. The election and removal of independent board members is one of the most

43 See Charts 1 and 2, *supra*, for an example of the disparity between economic exposure and voting power.

44 Fed. Trade Comm'n, *supra* note 1.

45 Due to the distribution of voting rights within Facebook, *see* Part I, *supra*, the financial exposure of "high-voting" shareholders to this fine, compared with their voting power, was 1/10 that of regular, "low-voting" shareholders.

46 Wen, *supra* note 7, at 1499.

47 McGuire et al., *supra* note 37, at 2, 5.

48 Wen, *supra* note 7, at 1501–02.

49 *Id.* at 1502.

significant issues on which shareholders are empowered to vote.[50] In turn, one of the key responsibilities of these independent directors is to hold management, including the CEO, to account on behalf of the shareholders.[51] Thus, these directors' vulnerability to removal by shareholders for problematic behavior or poor decision-making provides a valuable and powerful market check. However, when the CEO is the largest shareholder, that person essentially controls the board. And when board members can be hired or fired by that one person, those board members' fiduciary duties to act in the interests of all shareholders can become compromised.[52] Thus, by depriving public shareholders of a meaningful voice in how the company is run, dual-class share structures can reduce both board independence and management accountability.

Fourth, dual-class structures also pose a significant obstacle to shareholder activism. Shareholder activism can be defined as the use by investors of their shareholder rights to bring about changes, often social or environmental, at a publicly traded corporation.[53] Although the practice is often said to be used exploitatively for financial gain by activist hedge funds,[54] it also provides an important tool for society, via shareholders, to hold errant companies to account on specific matters of public policy. Shareholder activism has increased markedly in recent years and is now considered by some to be the accepted norm.[55] Professor Lisa Fairfax has found that many corporate officers and directors now accept that "shareholder activism, in the form of shareholder influence and engagement, is in the corporation's best interests."[56] Professor Marc I. Steinberg also suggests that "the shareholder proposal rule . . . should be recognized as a vintage asset—a Rule that has symbolized for 75 years that vibrant federal corporate governance at times is an appropriate vehicle for ameliorating state law shortcomings."[57] Dual-class

50 *What Is a Shareholder?*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/finance/shareholder/ (last visited June 16, 2020).

51 *Board Responsibilities*, CHARTERED FIN. ANALYST INST., https://www.cfainstitute.org/en/advocacy/issues/board-responsibilities (last visited June 16, 2020).

52 Charles M. Elson et al., *Dual-Class Stock: Governance at the Edge*, DIRECTORS & BOARDS, Third Quarter 2012, at 37, 38, https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/f/506/files/2012/10/Dual-Shares-Q3-20121.pdf.

53 James Chen, *Shareholder Activist*, INVESTOPEDIA, https://www.investopedia.com/terms/s/shareholderactivist.asp (last updated June 25, 2020).

54 *See* Lucian A. Bebchuk, Alon Brav, & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COL. L. REV. 1085, 1154 (2015) (arguing that such interventions do not harm the long-term interests of companies or their shareholders).

55 *See* Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1301 (2019).

56 *Id.* at 1306.

57 MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 190 (2018).

structures, however, diminish the voting power of ordinary shareholders on any matters put to a shareholder vote, including those designed to improve or protect corporate governance or public policy. These structures therefore, significantly hinder the effectiveness of this "vintage asset," stifling an important accountability mechanism that should enable shareholders to keep companies in check.

Finally, there are important counter-arguments to the "caveat emptor" argument outlined above. First, it is not only the investor who suffers if the company does harm. As Professor Charles Elson points out, "[i]t's the public who ends up suffering because the board no longer acts as an accountability mechanism and shareholders have no vote. . . . This cost is no longer simply absorbed by the investors, but also by society."[58] A second counterargument, propounded by Bebchuk and Kastiel, is that investors are not necessarily given all the information they need, even if all the regulatory boxes are ticked.[59] Citing the 2017 Snap IPO, the authors point out that, even though Snap disclosed the ownership interests of its cofounders, "it failed to disclose the minimum equity stake that its cofounders could own without relinquishing control."[60] Bebchuk and Kastiel calculate this figure to be as low as just 1.4% of equity for each cofounder.[61] Finally, the degree of choice that investors really have is also questionable, especially if they invest in index-linked funds, which are often deemed an appropriate investment vehicle for regular retail investors due to their breadth of scope and economies of scale.[62] Investors in these index-linked funds are necessarily compelled to hold shares in many dual-class companies because of their size and index listing. Therefore, if these investors wish to avoid investing in companies with dual-class structures, they cannot do so unless they choose not to invest in many index funds altogether.

58 *See* Eve Tahmincioglu, *The Pros and Cons of the Dual-Class Stock Structure: Two Corporate Governance Experts Battle It Out*, Directors & Boards (Aug. 30, 2018), https://www.directorsandboards.com/news/pros-cons-dual-class-stock-structure-two-corporate-governance-experts-battle-it-out.

59 *See* Bebchuk & Kastiel, *supra* note 14, at 1503.

60 *Id.* at 1456, 1503.

61 *Id.* at 1503.

62 *See* Julie Young, *Market Index*, Investopedia, https://www.investopedia.com/terms/m/marketindex.asp (last visited June 16, 2020) (explaining index-linked funds).

III. DEFICIENCIES OF ALTERNATIVE SOLUTIONS

In light of the many issues posed by dual-class share structures, a wide range of solutions has been proposed. These include, inter alia: action by the SEC; restrictions imposed by stock exchanges and index providers; pressure from institutional investors; inclusion of sunset provisions; enhanced disclosure and monitoring; limiting the power of high-voting shares; guaranteed board representation; and the mandating of equal voting rights in certain, specific contexts. However, when examined through a public policy lens, not one of these solutions, nor any combination of them, addresses the fundamental public policy dangers created when companies, especially those in Big Tech, are allowed to use dual-class structures.

A. *Securities and Exchange Commission*

One option that might seem appropriate is for the federal regulator, the SEC, to implement restrictions. However, this door was closed in 1990 when the United States Court of Appeals for the D.C. Circuit ruled that such restrictions are beyond the boundaries of the SEC's regulatory powers.[63] Thus, although in recent years the SEC's Investor Advisory Committee has recommended changing certain aspects of dual-class corporate governance,[64] as long as the D.C. Circuit's 1990 decision stands, the regulator's hands are essentially tied. Congress can change this by granting the SEC greater powers.

The SEC's problems in controlling dual-class share structures began in 1988 when it implemented Rule 19c-4[65] banning U.S. stock exchanges from allowing companies to list with dual-class share structures. The regulator subsequently failed to defend this rule in a challenge brought by the Business Roundtable in 1990.[66] The D.C. Circuit held that the SEC had stepped "beyond [the] control of voting procedure and into the distribution of voting power," and that such a step was not permitted under the Securities Exchange Act.[67]

However, more recently, Steinberg has suggested that since the Sarbanes-Oxley and Dodd-Frank Acts were enacted in 2002 and 2010,

63 *See* Bus. Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990).

64 INVESTOR ADVISORY COMM., *supra* note 41, at 3–4; *see also* Bebchuk & Kastiel, *supra* note 14, at 1501 (advocating that the SEC follow their committee's advice).

65 17 C.F.R. § 240.19c-4 (1990).

66 *Bus. Roundtable*, 906 F.2d at 416–17.

67 *Id.* at 411.

respectively,[68] a wider interpretation of the SEC's responsibility in regulating corporate governance may be warranted.[69] Steinberg notes that "[w]hile the SEC is not itself creating . . . new stock exchange standards, it is 'encouraging' the exchanges to propose these standards and then subsequently approving them for implementation."[70] He goes on to argue that, "[w]ith this regimen now in place, corporate governance today is increasingly within the purview of federal law."[71] A natural extension of Steinberg's logic would be that the stage is already set for new legislation to broaden the SEC's powers where warranted.

The SEC, for its part, has remained vocal on the issue. The SEC's Investor Advisory Committee, established as a result of the Dodd-Frank Act, conducted a study on "Dual Class and Other Entrenching Governance Structures in Public Companies" and concluded that greater disclosure and monitoring would better protect investors from the risks posed by dual class companies.[72] Following this study, SEC Commissioner Robert Jackson called for listing standards to require sunset clauses for all dual-class stock.[73] More recently, the SEC's Investor Advocate, Rick Fleming, has championed more action by investors, regulators, and exchanges.[74]

However, despite these recommendations, *Business Roundtable v. SEC* means that the SEC remains fundamentally unable to prohibit dual-class structures. Unless, or until, a new challenge is brought to the D.C. Circuit's decision, the regulator is left with only a narrow scope of powers with which it can limit the harmful effects of dual-class structures. The only way of meaningfully expanding these powers is via statute.

B. *Stock Exchanges*

Stock exchanges present another solution if, for instance, they choose to delist dual-class companies from their exchanges. Indeed, as the court noted in *Business Roundtable v. SEC*, "an *exchange* may delist an issuer and thus in some sense 'enforce' its listing standards."[75] However, despite

68 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7201); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301).

69 Steinberg, *supra* note 57, at 230.

70 *Id.* at 230–31.

71 *Id.* at 231.

72 Investor Advisory Comm., *supra* note 41, at 6–9.

73 Jackson, *supra* note 28.

74 Rick Fleming, *Dual-Class Shares: A Recipe for Disaster*, SEC.gov (Oct. 15, 2019), https://www.sec.gov/news/speech/fleming-dual-class-shares-recipe-disaster.

75 *Bus. Roundtable*, 905 F.2d at 414 (emphasis added).

encouragement from investor bodies and the SEC, the exchanges have been slow to take up this opportunity. The main reason for this reluctance is likely a lack of incentivization, with too much at stake in terms of lost business if companies choose instead to list on foreign exchanges.

Various investor bodies, including the Chartered Financial Analyst Institute (CFA Institute),[76] the Council of Institutional Investors (CII),[77] and the International Corporate Governance Network (ICGN),[78] have called for the stock exchanges to take up the gauntlet of greater self-regulation. In late 2018, the CII called on both the New York Stock Exchange (NYSE) and NASDAQ to prohibit dual-class structures or, at least, impose seven-year sunsets.[79] The SEC's Rick Fleming, speaking in his personal capacity, has made similar overtures: "[stock exchanges] have an important role to play as guardians of market integrity, and the weakening of corporate governance in publicly-traded companies is not a hidden hazard, but one that stares us right in the face."[80] Fleming has acknowledged the competing interests that the exchanges face but has urged them to "step up and reassert their role as self-regulatory organizations."[81]

However, the exchanges themselves, mindful of the risk of losing major clients, have remained largely muted. NASDAQ's president has pledged to review listing standards to make sure they protect investors,[82] but there has been little in the way of overt action. Furthermore, viewing the issue from a global perspective, professors Hirst and Kastiel highlight the difficulty in gaining any form of consensus among the International Organization of Securities Commissions, as well the non-binding nature any such agreement would likely encompass.[83]

Ultimately, with the U.S. offering one of the world's more relaxed

76 MARY LEUNG & ROCKY TUNG, CFA INST., DUAL-CLASS SHARES: THE GOOD, THE BAD, AND THE UGLY 8–9 (2018), https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx.

77 *Dual-Class Stock*, COUNCIL INSTITUTIONAL INV'RS, https://www.cii.org/dualclass_stock (last visited Mar. 24, 2020) (identifying letters sent to NASDAQ and NYSE on Oct. 24, 2018).

78 Email from Kerrie Waring, Chief Exec. Editor, ICGN, to Elizabeth King, Chief Regulatory Officer, NYSE (Nov. 7, 2018), (available at https://www.icgn.org/sites/default/files/24.%20ICGN%20Letter%20to%20NYSE%20Re%20Dual%20Class%20 Share%20Structures_0.pdf).

79 *See Dual-Class Stock, supra* note 77.

80 Fleming, *supra* note 74.

81 *Id.*

82 Hazel Bradford, *Investors Intensify Fight Against Dual-Class Shares*, (Apr. 1, 2019, 1:00 AM), https://www.pionline.com/article/20190401/PRINT/190409984/investors-intensify-fight-against-dual-class-shares.

83 Hirst & Kastiel, *supra* note 12, at 1275.

regulatory environments for dual-class IPOs, it is difficult to see why its exchanges would close the door on such a lucrative source of revenue without compulsion. As Kurt Schacht of the CFA Institute opines, "[this situation] prevails due to the commercial interests of the exchanges and entrepreneurial managers that want your money but not your input as a shareholder."[84]

C. *Index Providers*

One sector that *has* acted recently in restricting dual-class structures is the major index providers.[85] In the months following Snap's controversial 2017 IPO, FTSE Russell and S&P Dow Jones, two of the best-known index providers, announced restrictions or weighting changes for companies with multiple share classes that wished to list (prospectively) on some of their most famous indexes.[86] Actions such as this can act as a powerful incentive for companies to opt for equal-voting instead of dual-class share structures. However, the impact of such restrictions is also unclear as their voluntary nature makes them potentially vulnerable to reversal in the future. Nevertheless, these restrictions do represent a step forward in curtailing dual-class share structures, even if their influence and permanence is, as yet, unquantified.

Inclusion of a company's stock in a major index is widely agreed to have a positive impact on that stock's value.[87] "Joining the Standard & Poor's 500[,] an index of the nation's biggest and most popular stocks[,] has long been an important mark of validation" signaling "that a company has ascended to corporate America's elite" and typically boosting its share price by about 5%.[88] Index funds are also required to buy indexed stocks in line with their proportional representation on that index.[89] Therefore, barring a stock from an index can have implications that will reduce demand for it and thus reduce its price.

However, the restrictions that FTSE Russell and S&P Dow Jones

84 Bradford, *supra* note 82.

85 Indexes can be broadly defined as groups or "hypothetical portfolios" of investment holdings that represent a segment of the market, for instance the largest stocks by market capitalization within a particular sector of the market. Young, *supra* note 62.

86 Hirst & Kastiel, *supra* note 12, at 1232.

87 *See* Investor Advisory Comm., *supra* note 41, at 2–3.

88 Ethan Varian & Paresh Dave, *S&P 500 Will Exclude Snap Because Its Stock Gives New Shareholders No Power*, L.A. Times (Aug. 1, 2017), http://www.latimes.com/business/hollywood/la-fi-snap-sp-20170801-story.html.

89 James Chen, *Guide to Index Fund Investing*, Investopedia (May 23, 2020), https://www.investopedia.com/terms/i/indexfund.asp.

have adopted are of their own volition and thus lack any guaranteed permanence. Indeed, stock exchanges in both Singapore and Hong Kong have recently begun allowing dual-class IPOs,[90] prompting fears of a "race to the bottom" in terms of corporate governance standards, which could seep into other international securities markets.[91] If such a scenario were to develop, U.S. indexes might find themselves under pressure to relax their restrictions and encourage dual-class companies to remain in the U.S.

Some argue that the ease with which certain index restrictions can be circumvented makes this an inferior solution when compared with state laws or federal regulations.[92] Others suggest that the prospective nature of index exclusions means they are unlikely to have any meaningful impact on dual-class structures for some time.[93] Limited evidence does suggest that the index providers' actions may have already reduced the use of dual-class in recent IPOs and might also have resulted in an up-tick in "sunset" provision usage.[94] However, the same commentators are careful to point out that the index providers here represent "reluctant regulators" rather than "new sheriffs" and that it is currently too early for any meaningful assessment of the impact of such restrictions.[95]

Therefore, because of the absence of any guaranteed permanence surrounding index exclusions, and because their impact may prove to be limited, the restrictions imposed by these "reluctant regulators" provide a welcome but limited line of defense in countering the public policy dangers of dual-class structures.

D. *Institutional Investors*

Institutional investors, such as insurance companies, pensions, and mutual funds, control vast swathes of publicly traded stock and thus present another group of actors with the power to effect change.[96] However, although some industry bodies and fund manager groups do advocate for equal voting rights, the sector's overall approach is fragmented, and the main objective

90 Benjamin Robertson & Andrea Tan, *Asia Embraces Dual-Class Shares, and Investor Activists Smolder*, BLOOMBERG (Aug. 7, 2018) https://www.bloomberg.com/news/articles/2018-08-07/asia-embraces-dual-class-shares-and-investor-activists-smoulder.

91 *See* LEUNG & TUNG, *supra* note 76, at 2–3.

92 Barocas, *supra* note 8, at 535.

93 Hirst & Kastiel, *supra* note 12, at 1264.

94 *Id.* at 1237–38.

95 *Id.*

96 *See* James Chen, *Institutional Investor*, INVESTOPEDIA, https://www.investopedia.com/terms/i/institutionalinvestor.asp (last updated Mar. 20, 2020) (providing an explanation of institutional investors).

of most institutional investors is to secure high financial returns for their investors. Thus, wherever dual-class companies produce strong financial returns, institutional investors are less likely to be sufficiently incentivized to pressure founder-controllers into converting from dual-class to equal voting structures.

The power and influence of institutional investors has grown considerably in recent decades. From 1900 to 1945, institutional investors managed approximately 5% of all outstanding stock in the U.S.,[97] yet by 2010 they beneficially owned two-thirds.[98] Mutual funds alone hold approximately a quarter of the stock of publicly traded companies in the U.S. and thus "have the power to be a significant force in the governance of large U.S. corporations."[99] That is, if they choose to exercise this power.

Hirst and Kastiel have suggested that, if a broad group of these investors were to adopt common strategies, and refused to invest in companies that did agree to certain constraints, the significant pools of investment at stake could dissuade founders from adopting dual-class structures.[100] In fact, a groundswell already exists. The CII has, for some time, been clear in its calls for curbs on dual-class structures.[101] Investors such as the California Public Employees' Retirement System (CalPERS) have similarly campaigned for years for their removal.[102] Many large mutual fund managers, such as State Street and Blackrock, are also strong, vocal proponents of equal rights for shareholders.[103] However, the continued popularity of dual-class structures means the actual impact of this vocal support is, as yet, inconclusive.

Concurrently, whereas institutional investors might have previously moved investments away from companies with dual-class stock, evidence suggests that they are now more likely to engage directly with that

97 Steinberg, *supra* note 57, at 159.

98 *Id.*

99 Barocas, *supra* note 8, at 506 (citing Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 Colum. L. Rev. 863, 886 (2013)).

100 Hirst & Kastiel, *supra* note 12, at 1277.

101 *Dual-Class Stock*, *supra* note 77.

102 *See* Shanny Basar, *Calpers Sets Sights on Dual-Class Stock Structures*, Wall St. J. (Aug. 20, 2012), https://www.wsj.com/articles/SB10000872396390443855804577601271252759472.

103 Elzio Barreto & Sumeet Chatterjee, *BlackRock Pitches for Shareholder Protection as Asia Bourses Weigh Dual-Class Listings*, Reuters (Sept. 26, 2017), https://www.reuters.com/article/us-summit-regulation-blackrock/blackrock-pitches-for-shareholder-protection-as-asia-bourses-weigh-dual-class-listings-idUSKCN1C10KD; Madison Marriage, *State Street Asks SEC to Block Non-Voting Shares*, Fin. Times (June 18, 2017), https://www.ft.com/content/9595e5c4-51db-11e7-bfb8-997009366969.

company to effect change.[104] For instance, following Facebook's 2019 AGM, fund managers who had proposed some of the changes to the company's board voiced concern over Mark Zuckerberg's unilateral power to reject such proposals.[105] Jonas Kron, Senior Vice President of Trillium Asset Management, remarked that "[t]his outpouring of support for the independent board chair proposal springs from a deep well of concern about governance at Facebook. Concentrating so much power in one person—any person—is unwise."[106] Kron made a point of stating, "[w]e look forward to speaking with the board about how it can make the transition to an independent board chair now that so many investors have voted in favor of the proposal."[107]

As welcome as such interventions might be to opponents of dual-class structures, many institutional investors face an inherent conflict of interest: for most, the overriding goal remains making money for their own investors.[108] The debate regarding the relationship between strong corporate governance and profitability is wide-ranging and beyond the scope of this Note. However, if the focus of most institutional investors is primarily on shareholder returns, and if Big Tech companies continue to post the huge profits for which they are famous, there would appear to be little incentive for many institutional investors to lobby for change. This is, perhaps, borne out by the fact that the "Big Three" firms (Blackrock, Vanguard and State Street) still side with management in more than 90% of shareholder votes.[109] Therefore, caution should be exercised not to place too great a reliance on institutional investors to provide a move towards "one share, one vote" in the foreseeable future.

E. *"Sunset" Clauses*

Many argue that dual-class share structures should include sunset clauses (sunsets).[110] Sunsets allow a founder-controller to retain control of the company in the years following an IPO but require conversion of all

104 Wen, *supra* note 7, at 1504.

105 *As Antitrust Concerns Grow, Facebook Encounters Renewed Pressure from Investors over Governance Problems*, OPENMIC (June 4, 2019), https://www.openmic.org/news/2019/6/4/antitrust-concerns-fb-governance-problems.

106 *Id.*

107 *Id.*

108 *See* Chen, *supra* note 96.

109 Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 316–17 (2017).

110 *See generally, e.g.*, Winden, *supra* note 10; Fisch & Solomon, *supra* note 30.

shares to "one share, one vote" at a later date.[111] This can be required after either a set period of time, for example, seven years, or the occurrence of a specific type of event, such as the death or incapacity of the founder or the transfer of high-voting shares to another party.[112] However, although these clauses may present some form of compromise (and have been implemented by some technology companies),[113] they fail to address the main public policy issues posed by dual-class shares, particularly in Big Tech, because they allow founder-controllers to remain unaccountable to shareholders until the clauses' terms are invoked.

A common argument in favor of sunsets is that they represent a pragmatic compromise that allows the founder to retain control of the company in the short-term, while protecting investors from the risks posed by perpetual control, such as inefficiency or a divergence of interests between founder and investors. In essence, they allow a visionary founder, for a limited time, to navigate the sometimes choppy, post-IPO waters without fear of the company being sold to a larger rival at an attractive mark-up. Some clauses also include the option for investors (on a "one share, one vote" basis) to extend a time-based sunset if they so wish.[114] The CII has endorsed sunsets since 2016, "if necessary to achieve alignment over a reasonable period of time,"[115] and the approach is also endorsed in the 2018 Commonsense Principles of Corporate Governance.[116]

Although, overall, most dual-class companies do not have a sunset provision,[117] the approach is becoming increasingly popular.[118] Fitbit, Groupon, Kayak and Yelp all included time-based sunset clauses at the time of their IPOs,[119] and Google, Groupon, LinkedIn, and Zynga all adopted event-based sunsets.[120] Yelp, in fact, also adopted a dilution-based sunset, a type of event-based sunset that would trigger once the founder's economic stake dropped below 10%.[121] Invocation of this clause in 2016 actually

111 *Dual-Class Stock*, *supra* note 77.
112 Winden, *supra* note 10, at 869.
113 Barocas, *supra* note 8, at 529.
114 Fisch & Solomon, *supra* note 30, at 1084.
115 *Dual-Class Stock*, *supra* note 77.
116 *Commonsense Principles 2.0*, CommonsensePrinciples.org 7, https://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf (last visited Sept. 7, 2020).
117 Bebchuk & Kastiel, *supra* note 14, at 1504.
118 *See* Fisch & Solomon, *supra* note 30, at 1080 (citing Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 Colum. Bus. L. Rev. 852, 950–51 (2019)).
119 Barocas, *supra* note 8, at 529.
120 *Id.*
121 Fisch & Solomon, *supra* note 30, at 1087.

resulted in Yelp converting from a dual-class to an equal voting structure.[122]

Yet despite its appeal and popularity, one can find inherent weaknesses in the sunset model when analyzed through a public policy lens. First, sunsets tend to be arbitrary in nature, especially when time-based.[123] For instance, how is a company or its investors to determine what the optimal period of years is before conversion should occur? This applies both in terms of shareholder return and accountability for social harm. It is hard to see how or why a founder-controller's unaccountability suddenly poses any less of a risk once an arbitrary seven-year mark is reached. Second, time-based sunsets have the potential to create perverse incentives; if a founder is nearing the expiration of their controlling tenure, that founder might be tempted to take actions that serve their own interests rather than those of the company before their enhanced voting powers expire. Third, where shareholders *are* offered the chance to extend a sunset period, they can face their own conflict of interests between the value of obtaining control and the potential investment value of extending the dual-class structure for a longer time, [124] especially if company performance is strong. Finally, where dilution-based clauses are employed, the specified threshold can often be too low to prevent the risks posed by small-minority shareholders, who need only hold a small equity stake to maintain control.[125]

Ultimately, none of the public policy dangers posed by dual-class share structures, particularly within Big Tech, would be properly addressed by sunset provisions. Indeed, sunsets actually present something of a distraction by creating the illusion that imposing a time-based restriction in some way excuses the suppression of shareholders' voting rights.

F. *Enhanced Disclosure and Monitoring*

Because the SEC is unable to ban dual-class structures per se,[126] it has instead focused on improving access to information for investors.[127] The regulator has long sought to ensure that investors receive detailed information.[128] It has also been outspoken in its concerns over dual-class

122 *Id.*

123 *Id.* at 1081.

124 *Id.* at 1085.

125 Bebchuk & Kastiel, *supra* note 14, at 1504–05.

126 Bus. Roundtable v. SEC, 905 F.2d 406, 416–417 (D.C. Cir. 1990) (holding that the Securities Exchange Act does not empower the SEC to prevent exchanges from listing dual-class share structures).

127 *See* INVESTOR ADVISORY COMM., *supra* note 41, at 6–7.

128 *Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment: Hearing Before the Subcomm. on Inv'r Prot., Entrepreneurship, and Capital Mkts. of the House Fin. Serv. Comm.*,

share structures specifically.[129] In particular, the SEC has argued for greater monitoring and a stronger definition of "common stock."[130] However, in spite of the benefits these measures would bring to investors, they do not address the fundamental lack of accountability caused by dual-class structures.

Improving access to information has long been a major objective of the SEC, fitting squarely within its overall aim of protecting investors. Both the Securities Act of 1933 and the Securities Exchange Act of 1934 (which created the SEC) were enacted primarily with the purpose of ensuring investors were provided with an appropriate level of information when buying or selling shares and when deciding how to vote.[131]

The SEC has also been vocal regarding dual-class share structures. Its Investor Advisory Committee has recommended, in particular, that investors should be informed of the risks relating to a company's wedge,[132] which companies are not currently compelled to disclose.[133] Other dual-class-related risks that companies might be compelled to disclose include: types of conflicts that have given rise to disputes in the past;[134] risks of non-inclusion on certain indexes;[135] and other more general risks on which reporting currently varies from one company to the next.[136] Snap, incidentally, was praised by the SEC for the level of disclosure it provided ahead of its otherwise controversial 2017 IPO.[137]

The SEC Investor Advisory Committee also recommends that greater monitoring should be conducted on shareholder disputes arising from non-traditional governance structures and that "common stock," that is, stock with only one vote per share, should be defined more specifically.[138] Such disclosures, the Investor Advisory Committee argues, are "crucial to the functioning of a market economy" because they will "reduce the information asymmetry between corporate insiders and current and potential investors

116th Cong. 1 (Sept. 11, 2019) (written statement of Renee M. Jones, Professor of Law and Associate Dean for Academic Affairs, Boston College Law School), https://docs.house.gov/meetings/BA/BA16/20190911/109907/HHRG-116-BA16-Wstate-JonesR-20190911.pdf.

129 *See* Investor Advisory Comm., *supra* note 41, at 2.

130 *Id.* at 7.

131 *See* Jones, *supra* note 128, at 2.

132 *See* Investor Advisory Comm., *supra* note 41, at 2; *see also* Part II, *supra* (describing the "wedge" as the difference between voting control and economic interests of shareholders).

133 Investor Advisory Comm., *supra* note 41, at 4.

134 *See id.* at 5.

135 *See id.* at 2–3, 6.

136 *Id.* at 3.

137 *Id.*

138 *Id.* at 7.

and creditors."[139]

However, although each of these arguments is entirely in keeping with the SEC's primary mission of investor protection, each fails to address the principle issue of lack of founder-controller accountability to those same investors within dual-class companies. Greater disclosure will, of course, serve to inform investors better. It could also, as the Investor Advisory Committee suggests, "facilitate the efficient allocation of resources, capital market development, market liquidity, and . . . reduce firms' cost of capital."[140] However, it will not fundamentally change the fact that dual-class share structures allow founder-controllers to avoid accountability to their shareholders, regardless of the level of social harm or risk the company might cause.

G. *Limiting the Power of High-Voting Shares*

Another option, discussed by Bebchuk and Kastiel, is to place a ceiling on the voting power held by higher-voting classes of shares.[141] This approach would also force a controlling shareholder to retain a higher minimum percentage of the company's equity capital, thus limiting the wedge.[142] However, although this would increase the voting power of public and institutional shareholders, it does not remove the inequity inherent in allowing one class of shares to hold greater voting power than another.

Bebchuk and Kastiel have shown that when owning shares "with ten times the voting power of ordinary shares, a founder need only retain 9.1% of equity to maintain full control" of a company.[143] They warn that public officials and institutional investors concerned about the governance costs of "small-minority controllers" should pay close attention to the high/low vote ratios used by all dual-class companies,[144] and suggest that regulations or exchange-listing standards could limit the maximum multiple to as low as five times or even three times that of regular shares.[145] This approach, already used in parts of Europe,[146] would help increase the economic exposure of founder-controllers, who would need to hold more shares in order to maintain voting control, and would, concurrently, increase the

139 *Id.*
140 *Id.*
141 Bebchuk & Kastiel, *supra* note 14, at 1505.
142 *See id.*
143 *Id.* at 1478.
144 *Id.* at 1505.
145 *Id.*
146 *Id.*

voting power of public and institutional shareholders.

However, this option would still not give equal voting rights to all shareholders. It simply means regular shareholders would be *less* handicapped when voting on important board matters such as the election of directors. Furthermore, although this approach does reduce the wedge, it still leaves founder-controllers at a lower level of economic exposure than ordinary shareholders. For instance, if high-voting shares are limited to three times voting power, ordinary shareholders will still face three times the economic exposure of high-voting shareholders. Thus, although this approach reduces some of the harmful effects of dual-class share structures, it does not address them fully. It, therefore, presents an insufficient solution for holding founder-controllers properly accountable.

H. *Guaranteed Board Representation*

Guaranteed board representation is sometimes mooted as a solution, whereby a guaranteed proportion of directors are chosen exclusively by low-voting shareholders, who would naturally expect them to act principally in their interests. As Benjamin Barocas has explained, citing the example of Beasley Broadcast Group, Inc., this measure compels founder-controllers to maintain a higher equity stake in the company if they want to maintain control, and gives low-voting shareholders a dissenting voice on the board if decisions are made that adversely affect them or other stakeholders.[147] However, it is unclear how effective this option would be in increasing accountability, as that would depend on both the number of board seats guaranteed and the level of influence those seats would carry.

One outcome of guaranteed board representation is that it would effectively increase the equity stake that the founder-controller must hold to maintain majority control.[148] This is because they would not have voting control over those board seats reserved only for low-voting shareholders. This necessity to hold more equity would therefore go some way toward addressing the wedge.

However, the effectiveness of this approach would, of course, depend on the percentage of board seats reserved for low-voting shareholders. It is, presumably, unlikely that this percentage would reach that of a majority because that would significantly diminish the voting power of high-voting shares. Yet even in the minority, these board members could at least register their dissent if the board chose to act against the wishes or interests of low-

147 Barocas, *supra* note 8, at 530–31.
148 *Id.* at 531.

vote shareholders.

The influence of directors representing low-voting shareholders could, in fact, reach veto power if any board decisions required unanimous assent. Of course, that would depend on which, if any, board decisions were covered by such a mandate. Where a founder-controller has implemented a dual-class structure specifically to maintain voting control over a company, it is unlikely that they would diminish that control by then choosing for board decisions to require unanimous assent.

Ultimately, it is unclear how far this option would go in curtailing the harmful societal effects of managerial or strategic decisions made by controlling founders. To be truly effective, its implementation would require either a meaningfully high level of board representation for low-voting shareholders, or a wide range of board matters requiring unanimous agreement to pass a vote. Neither scenario is likely because each would require a significant twisting of governance norms and each would also largely defeat the purpose of installing a dual-class setup in the first place.

I. *Mandating Equal Voting Rights in Specific Contexts*

Finally, equal voting, or "one share, one vote," could be mandated in certain, specific contexts, such as when shareholders are voting on whether to sell the company.[149] However, this option would only partially limit the harmful effects of dual-class share structures overall. Additionally, it would not address the accountability issues posed by dual-class structures unless equal voting rights were extended to a broad range of contexts, which would effectively negate the point of using a dual-class structure altogether.

Under this option, the founder-controller would still hold the power to decide on managerial and strategic matters but would be denied this power in wider matters of shareholder interests. One example is when a company is up for sale and where the visionary founder's unique vision or skills are less relevant and thus offer less justification for dual-class voting.[150] In such circumstances the main objective changes from protecting or maintaining the corporate enterprise to selling it to the highest bidder.[151] A similar situation might be where a controlling shareholder could divert value from public investors.[152]

Mandatory equal voting measures have been introduced in several countries in cases where a certain type of transaction could present a

149 *See id.* at 540 (arguing for equal voting rights in specific contexts).
150 *Id.* at 540–41.
151 *Id.*
152 Bebchuk & Kastiel, *supra* note 14, at 1509.

conflict.[153] Bebchuk and Kastiel cite the example of Switzerland, where equal voting applies at times when a special audit or liability action is being considered. Conceivably, therefore, there is space for introducing similar mandatory equal voting measures in the United States.

However, although mandating equal voting rights in specific contexts like these does meet the goal of "one share, one vote," it *only* does so in those contexts. Its effectiveness in holding high-voting shareholders accountable thus depends entirely on the nature and scope of where it applies. Furthermore, situations like the example given above, when a company is up for sale, would do nothing to increase founder-controller accountability. The only way that this approach would properly address the public policy risks of dual-class share structures is if equal voting rights were mandated across a broad range of voting matters. However, in such instances, the subsequent reduction in control held by the founder-controller would likely negate the purpose of implementing a dual-class structure in the first place. It is difficult, therefore, to see company founders adopting such a model at IPO.

153 *Id.*

IV. CONGRESSIONAL ACTION: THE ONLY MEANINGFUL SOLUTION

The only meaningful way of holding leaders of dual-class corporations accountable to their shareholders is for Congress to empower the SEC to prohibit the implementation of dual-class structures and to unwind those structures already in place.[154] Congressional action is needed because not one of the alternative solutions discussed above in Part III fully addresses the public policy issues implicated by dual-class structures. Congress has shown in the past that it will act when systemic deficiencies in investment structures endanger society.[155] The D.C. Circuit even left the door open to congressional action in 1990, when it ruled that the SEC was not, at that time, empowered to ban dual-class share structures.[156] Congress has the power to act, and it should do so.

When viewed through a public policy lens, none of the potential solutions explored in Part III, nor any combination of them, comprehensively addresses the dangers posed by dual-class structures, particularly within Big Tech.[157] Without new powers from Congress, the decision in *Business Roundtable v. SEC* renders the SEC powerless to act. The stock exchanges are conflicted by competing commercial interests. The exclusionary efforts of the index providers will achieve only limited impact. Institutional investors are hamstrung by their need to produce high shareholder returns. Sunset provisions fail to address the public policy issues faced. Enhanced disclosure and monitoring, while important, solves a different problem. Limiting the power of high-voting shares falls short of addressing the fundamental inequality of dual-class structures. And measures such as guaranteeing higher board representation for low-voting shares, or equal voting in specific contexts, will yield only limited success unless the guarantees are set so high as to render them impractical.

When faced with public policy dangers in the past, Congress has acted. The Securities Act of 1933 and the Securities Exchange Act of 1934 were both direct responses to the 1929 stock market crash.[158] More

154 Any unwinding of existing dual-class share structures should be carried out via an equitable and considered process, acknowledging the fact that their establishment was legitimate under the rules in place at the time.

155 *See generally, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

156 Bus. Roundtable v. SEC, 905 F.2d 406, 407–11 (D.C. Cir. 1990) ("Neither the wisdom of the requirement, nor of its being imposed at the federal level, is here in question.").

157 *See* Part III, *supra*.

158 *See* Paul S. Atkins, *Speech by SEC Commissioner: Remarks Before the Securities Traders Association*, SEC.GOV (Oct. 7, 2004), https://www.sec.gov/news/speech/spch100704psa.htm.

recently, the Sarbanes-Oxley and Dodd-Frank Acts sought to address major corporate frauds and the 2008 financial crisis, respectively.[159] However, despite the much-needed protections that these statutes provide, they do not address the new dangers posed by dual-class share structures in the age of Big Tech. As Steinberg has noted, when discussing the broader need for continued evolution of federal protection, "significant gaps remain that should be filled[,] [and] measures . . . should be implemented on the federal level to enhance corporate governance standards."[160]

It is hard to envisage substantially negative outcomes from such a solution, other than for power-hungry founder-controllers. One result might be a decline in the number of IPOs, particularly among unicorn tech companies. However, it is the prerogative of company founders to keep their businesses private should they wish. In such instances, they retain complete control, but they forgo certain benefits that come with an IPO, such as increased profile and vast extraction of cash. They don't get to have their cake and eat it too. Another outcome might be that founders choose overseas stock exchanges for future IPOs. In 2018, exchanges in both Hong Kong and Singapore amended their listing rules to allow dual-class IPOs,[161] and there have been calls for the London Stock Exchange to do the same.[162] However, despite these calls, the London Stock Exchange's rejection of dual-class structures has hardly dented its popularity and reputation; it still "rivals the New York Stock Exchange . . . in terms of market capitalization, trade volume, access to capital, and trade liquidity."[163] The United States should embrace this opportunity to enhance its corporate governance standards.

In delivering the court's opinion in *Business Roundtable* in 1990, Judge Williams made a point of stating that "[n]either the wisdom of the requirement [for prohibiting dual-class share structures], *nor of its being imposed at the federal level*, is here in question."[164] At the time, in 1990, both social media and Big Tech were yet to be conceived, as was the manner in

159 116 Stat. 745; 124 Stat. 1376.

160 Steinberg, *supra* note 57, at 284.

161 *Singapore Details Rules for Offering Dual-Class Shares, Follows Hong Kong*, Reuters (June 20, 2018), https://www.reuters.com/article/sgx-regulation/singapore-details-rules-for-offering-dual-class-shares-follows-hong-kong-idUSL4N1TS3E3.

162 *See* Editorial Board, *Why Dual-Class Shares Deserve Consideration*, Fin. Times (Nov. 11, 2019), https://www.ft.com/content/6f576e60-0231-11ea-be59-e49b2a136b8d; Claire Keast-Butler, *Why the UK Should Rethink its Restrictive Rules on Dual-Class Shares*, City A.M. (July 27, 2020), https://www.cityam.com/why-the-uk-should-rethink-its-restrictive-rules-on-dual-class-shares/.

163 James Chen, *London Stock Exchange (LSE)*, Investopedia (May 8, 2020), https://www.investopedia.com/terms/l/lse.asp.

164 Bus. Roundtable v. SEC, 905 F.2d 406, 407 (D.C. Cir. 1990) (emphasis added).

which they would come to dominate how societies now interact. Today, in this age of Big Tech, the need for prohibition of dual-class share structures is greater than ever, and its imposition at the federal level is required to give the SEC the power to restore equity to voting rights across the board.

Conclusion

When the wide-ranging debate around the appropriateness of dual-class share structures is framed in the context of societal harm, the unaccountability of those who run dual-class companies, particularly within Big Tech, is thrown into sharp relief. The only meaningful and reliable way of holding such leaders accountable is congressional action, empowering the SEC to prohibit the implementation of dual-class structures and enable the efficient and effective wind-down of those structures already in place.

The influence and power that Big Tech companies now wield mean their founder-controllers rank among the world's most powerful actors. Yet the unaccountability they enjoy under dual-class structures means they remain free to pursue strategies and ideologies with which the majority of their shareholders may fundamentally disagree. Faced with the ever-growing dangers this presents, Congress must act to prohibit dual-class share structures in order to protect the voting rights of ordinary shareholders and, vicariously, the human rights of global societies.

Analysis of other potential solutions to this problem, when viewed through a public policy lens, shows why none are suitable for addressing the dangers faced. The SEC is powerless to act with meaningful force in the absence of new powers. The stock exchanges are conflicted by competing commercial interests. The index providers have acted, but their impact will likely be limited. Institutional investors are conflicted by the need to produce high shareholder returns. Sunset provisions fail to address the public policy issues faced. Enhanced disclosure and monitoring solve a different problem. Limiting the power of high-voting shares falls short of addressing the fundamental inequality of dual-class structures. Finally, measures such as guaranteed higher board representation, or equal voting in specific contexts, are likely impractical or unworkable to achieve the aims sought.

The only meaningful way of holding Big Tech leaders accountable to their shareholders is for Congress to empower the SEC to prohibit the implementation of dual-class structures and unwind those structures already in place. Congress has acted to address public policy risks in the past, via the Securities and Securities Exchange Acts in the 1930s, and more recently via the Sarbanes-Oxley and Dodd-Frank Acts in the 2000s. Now it should empower the SEC to inject accountability into the boards of dual-class Big Tech companies and to protect societies from the grave dangers posed by unaccountable power.

OLIVER WENDELL HOLMES'S THEORY OF CONTRACT LAW AT THE MASSACHUSETTS SUPREME JUDICIAL COURT

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INTRODUCTION

Oliver Wendell Holmes, Jr., is credited with "brilliantly reformulating" Christopher Columbus Langdell's idea of a general theory of contract law, providing the "broad philosophical outline" for what has since become known as classical contract law.[1] He did this in his 1881 book *The Common Law*,[2] referred to as "the most important book on law ever written by an American,"[3] and written while he was still a practicing lawyer.[4] His series of lectures on contracts have been described as "astonishing,"[5] the main themes of which were an emphasis on the parties' overt acts rather than their undisclosed intentions,[6] adoption of a bargain theory of consideration and rejection of the benefit-detriment theory,[7] and a restrictive approach to damages.[8]

Holmes hoped that his arguments in *The Common Law* would influence the bench and the bar, and thereby influence the development of the common law.[9] And after a brief time as a professor at Harvard Law

1 GRANT GILMORE, THE DEATH OF CONTRACT 15, 23 (Ronald K. L. Collins ed., 2d ed. 1995). Gilmore credited Samuel Williston with piecing together classical contract law's details. *Id.* at 15. *See also* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1193 (1998) ("Gilmore attributed the essential shape of classical contract law to three Harvard law professors: Langdell, Holmes and Williston. By 1880, the first two members of Gilmore's triumvirate of classical architects were already busily sketching the outlines of what would become the generally accepted structure of American contract law.").

2 OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

3 Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 214 (1964); *see also* E. Donald Elliot, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 116 (1984) (referring to *The Common Law* as "the most celebrated American law book of that (and perhaps of all) time."); THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 271 (Roger K. Newman, ed., 2009) [hereinafter YALE BIOGRAPHICAL DICTIONARY] ("[I]t is one of the greatest works of jurisprudence in the English language. It is by far the most important work of scholarship by a practicing lawyer.").

4 YALE BIOGRAPHICAL DICTIONARY, *supra* note 3, at 271.

5 GILMORE, *supra* note 1, at 6.

6 *See* HOLMES, *supra* note 2, at 240 ("[T]he making of a contract does not depend on the state of the parties' minds, it depends on their overt acts."); *id.* at 242 ("The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."); *see also* Mark DeWolfe Howe, *Introduction* to HOLMES, *supra* note 2, at xxi [hereinafter Howe *Introduction*] ("The ultimate task which Holmes the jurist set Holmes the historian was to follow the evolution of common law doctrine towards its destined goal of externality.").

7 GILMORE, *supra* note 1, at 20–23.

8 *Id.* at 54.

9 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES, VOLUME II: THE PROVING

School,[10] Holmes became an associate justice on the Massachusetts Supreme Judicial Court,[11] serving as a justice on that court from 1882 to 1902,[12] thus giving him an opportunity to directly implement his theory of contract law.[13]

This Article analyzes the extent to which Holmes's theory of contract law, as set forth in *The Common Law*, can be found in his opinions as a judge on the Massachusetts court. Part I provides a background of Holmes through his writing of *The Common Law* and his appointment to the Supreme Judicial Court, including a discussion of his theory of contract law as set forth in *The Common Law*. Part II provides an analysis of his contracts opinions on the Massachusetts court, specifically those involving the objective theory of contract, the bargain theory of consideration, and damages, and the extent to which his theory of contract law can be found in those opinions. The Article ends with a brief conclusion.

Years, 1870–1882, at 246 (reprt. 2014).

10 Spanning from September to December 1882, Holmes's tenure at Harvard was very brief indeed. *See* Neil Duxbury, Patterns of American Jurisprudence 33 (1995).

11 Yale Biographical Dictionary, *supra* note 3, at 272.

12 Duxbury, *supra* note 10, at 33. In 1899, Holmes was appointed chief justice. Yale Biographical Dictionary, *supra* note 3, at 272. In 1902 he was appointed to the United States Supreme Court. *Id.*

13 *See* Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 Va. L. Rev. 975, 976 (1977) ("Since at least 1878 . . . Holmes had thought that a judicial position would give him the opportunity to shape American law directly through adjudication.").

I. BACKGROUND

Holmes was born in 1841 in Boston.[14] He graduated from Harvard College in 1861 and fought in the Civil War as a commissioned officer.[15] After the war, he attended Harvard Law School, graduating in 1866,[16] and then joined a small Boston law firm.[17] In the 1870s, he edited the *American Law Review* and published a series of articles in the journal.[18] He also edited the twelfth edition of Kent's *Commentaries on American Law*, which included updating the footnotes to Kent's treatment of contracts.[19] His work on the *Commentaries* led him to admire the common law[20] but, at the same time, become bothered by its disorder.[21]

Holmes was not alone in his distress of the common law's disordered state. Scholars of Holmes's generation viewed it as important to discover the common law's basic, governing principles,[22] and they set out to find an ordered scheme for the common law that would also be philosophically satisfactory.[23] Holmes joined in the exploration, setting out to give the common law a rational and scientific ordering.[24]

Initially, Holmes focused on classifying legal subjects from their most general concepts to their most specific propositions and exceptions, rather than focusing on what would later become the principal theme of *The Common Law*[25]—the idea that the law had moved away from early notions of equating liability with fault. As early as 1872, however, he showed flashes of that later theme. In an 1872 article in the *American Law Review*, he sought to distinguish civil liability from the breach of a legal duty, arguing that

14 YALE BIOGRAPHICAL DICTIONARY, *supra* note 3, at 271.
15 *See id.*
16 *Id.*
17 *Id.*
18 Elliot, *supra* note 3, at 116.
19 *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 607–763 (Oliver Wendell Holmes, Jr., ed., Boston, Little, Brown, & Co., 12th ed. 1873) (1826); Elliot, *supra* note 3, at 116.
20 *See* Howe *Introduction*, *supra* note 6, at xvii.
21 *Id.* at xii–iv.
22 *Id.* at xiv.
23 *Id.* at xv; *see also* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 223 (1990) ("Once the formulary system crumbled, judges found it necessary to dwell on principles as a means of retaining the order in the common law previously provided by the forms of action.").
24 Howe *Introduction*, *supra* note 6, at xvi.
25 Note, *The Arrangement of the Law—Privity*, 7 AM. L. REV. 46, 47 n.2 (1872) (authored by Holmes but published without attribution); *see also* Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123, 1123 n.7 (1975) ("Holmes's earliest legal articles deal with the division of the law into the proper categories.").

the word *duty* "imports the existence of an absolute wish on the part of the power imposing it to bring about a certain course of conduct, and to prevent the contrary," whereas civil liability often flowed from conduct that the law intended to allow at a certain price, such as a tax on a certain course of conduct.[26] Holmes wrote that "[l]iability to pay the fair price or value of an enjoyment, or to be compelled to restore or give up property belonging to another, is not a penalty; and this is the extent of the ordinary liability to a civil action at common law."[27] Holmes, although not ever focusing on the law of contracts in these early writings, did write in this article that this "is perhaps the fact with regard to some contracts, to pay money, for instance," and that "it is hard to say that there is a duty in strictness, and the rule is inserted in law books for the empirical reason . . . that it is applied by the courts and must therefore be known by professional men."[28] Thus, as early as 1872, Holmes was taking the position that there is not, in a strict sense, a "duty" to perform a contract, but merely a duty to pay damages in the event of nonperformance.

In the late 1870s, Holmes's emphasis in his writings shifted "from analytic classification to philosophical synthesis."[29] By 1880, Holmes had apparently come to believe that his initial efforts to devise a scientific and logical classification of the law had been a mistake.[30] In fact, in a review of the second edition of Christopher Columbus Langdell's contracts casebook, Holmes criticized Langdell's efforts to reconcile decisions that the opinions' authors had meant to be irreconcilable:

> Decisions are reconciled which those who gave them meant to be opposed, and drawn together by subtle lines which never were dreamed of before Mr. Langdell wrote. It may be said without exaggeration that there cannot be found in the legal literature of this country, such a *tour de force* of patient and profound intellect working out original theory through a mass of detail, and evolving consistency out of what seemed a chaos of conflicting atoms. But in this word "consistency" we touch what some of us at least must deem the weak point in Mr. Langdell's habit of mind. Mr. Langdell's ideal in the law, the end of all striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is, perhaps,

26 Felix Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 Harv. L. Rev. 717, 790–91 (1931) (reprinting Holmes's article *The Law Magazine and Review*, 6 Am. L. Rev. 593 (1872)).

27 *Id.* at 791.

28 *Id.*

29 G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 Hofstra L. Rev. 633, 637 (1982).

30 Howe *Introduction*, *supra* note 6, at xxii.

> the greatest living theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together.[31]

But when Holmes looked at the current efforts at philosophical synthesis, he recoiled just the same. Many who sought the new order based the synthesis on Roman law, and for a time Holmes had given similar attention to it.[32] But before the end of the 1870s, Holmes became skeptical of importing Roman law into the common law, at least as Roman law had been interpreted by German jurists.[33] German interpretations of Roman law had it entangled with Kantianism and Hegelianism, and Holmes feared this influence on the common law.[34] He believed that those who sought to impose order on the common law accepted certain fallacies from Kant and Hegel, including that "no man may be looked upon as a means, but only as an end."[35] Holmes believed it was justifiable for persons to have a self-preference,[36] and he thus had a deep hostility to the Kantian metaphysics of morals.[37] And while the common law was experimental and inductive, Roman law, in contrast, was categorical and deductive."[38]

Holmes hoped to take material from his articles in the *American Law Review* and turn them into a book,[39] and he was given an opportunity that would incentivize him to do just that. He was asked to give the Lowell Lectures at the Lowell Institute in Boston, which would consist of twelve talks[40] in November and December 1880.[41] He accepted the offer and began work on what would become *The Common Law*,[42] setting out to provide a new

31 *Book Notices*, 14 AM. L. REV. 233, 233–34 (1880) (Oliver Wendell Holmes, Jr., anonymously reviewing C.C. LANGDELL, A SELECTION CASES ON THE LAW OF CONTRACTS WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (1879)). Holmes, in 1871, had been critical of Langdell's first edition of his casebook, though not to the extent he was in 1880. Holmes wrote: "It seems as if the desire to give the whole history of the doctrine has led to putting in some contradictory and unreasoned determinations which could have been spared." *Book Notices*, 5 AM. L. REV. 539, 540 (1871) (Oliver Wendell Holmes, Jr., anonymously reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (PART I) (1870)).

32 Howe *Introduction*, *supra* note 6, at xv.

33 *Id.*

34 *Id.*

35 *Id.* at xvi.

36 HOLMES, *supra* note 2, at 38.

37 Howe *Introduction*, *supra* note 6, at xxvi.

38 *Id.* at xvii.

39 SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 155 (1989).

40 NOVICK, *supra* note 39, at 157; Note, *supra* note 25, at 1123.

41 Note, *supra* note 25, at 1123.

42 NOVICK, *supra* note 39, at 157.

interpretation of the common law that might protect it from the influence of German metaphysics."[43]

Holmes believed that if the law should be based on policy rather than metaphysics, a legal jurist should seek to understand the historical roots of legal doctrines.[44] At the same time, however, Holmes's book would not be primarily a work in legal history.[45] Rather, he would use historical data to support his new interpretation of the common law.[46] In fact, Holmes wrote *The Common Law* to free the present generation from the past.[47] He believed that "the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong,"[48] and to him, "at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference."[49]

Holmes wrote his contracts lectures for the Lowell Lectures in the summer and autumn of 1880.[50] While his other lectures were, in part, based on five articles he wrote for the *American Law Review* between 1876 and 1880,[51] his contracts lectures were not revisions of earlier published essays.[52] When he started preparing for the lectures, he had written nothing on the subject of ordinary contracts.[53]

In the mid-nineteenth century, English law lacked any philosophy regarding the principle of contractual obligation, with the common law forms of action enforcing promises for a variety of reasons under the writs of covenant (promises under seal), debt (promises given as part of a quid pro quo), and assumpsit (promises on which the plaintiff detrimentally relied).[54] The latter two, known as informal contracts, could be tied together by the requirement that a promise be supported by "consideration," but the closest that doctrine could come to a general theory of contractual obligation was that a promise was legally binding if there was either a benefit to the promisor

43 Howe *Introduction*, *supra* note 6, at xix.
44 *Id.*
45 *Id.* at xx.
46 *Id.*
47 Friedrich Kessler et al., Contracts: Cases and Materials 50 (3d ed. 1986).
48 Holmes, *supra* note 2, at 36.
49 *Id.* at 38.
50 Howe, *supra* note 9, at 223; Elliot, *supra* note 3, at 116.
51 Duxbury, *supra* note 10, at 33.
52 Howe *Introduction*, *supra* note 6, at xx; *see also* Novick, *supra* note 39, at 157 (noting that when Holmes was invited to give the Lowell Lectures, "[o]n the subject of ordinary contracts he had done nothing").
53 Novick, *supra* note 39, at 157.
54 Howe, *supra* note 9, at 226.

or a detriment to the promisee.[55] In the Court of Equity, the Roman law concept of *causa* was often invoked for the legal enforceability of a promise.[56]

As the forms of action declined in significance and law and equity increasingly assimilated, English jurists felt the need for an ordering theory—a fundamental principle of contractual obligation.[57] Lacking such a theory under English law, they turned to, and accepted as universal, the theory of contract espoused by Friedrich Carl von Savigny, the German jurist and historian who had interpreted Roman law.[58] For example, Sir Frederick Pollock's 1876 treatise, *Principles of Contract*, and Sir William Anson's 1879 treatise, *Principles of the English Law of Contract and of Agency in Its Relation to Contract*, were heavily influenced by Savigny.[59] And Savigny had argued that one of the elements of a contract was "an agreement of their wills."[60] As one commentator has noted, "the will theory of contract had become the prevailing understanding of the law, perhaps as early as 1806, and had influenced the subsequent development of the common law. It had found a solid, scrupulous expositor in Pollock, whose treatise on the law of contract was historically and philosophically sophisticated."[61]

Similarly, the prevailing view of contract's historical evolution came from the English historian Sir Henry James Sumner Maine, who argued contract law had evolved from formal contracts based on a party's status to consensual contracts.[62] This stance was inapposite to Holmes's view that the law had gone the other way, evolving from subjective to objective standards.[63]

The will theory was also contrary to what Holmes believed was the true basis for all legal obligation—public policy.[64] And by public policy, Holmes meant the consequences to society of a particular legal rule—

55 *Id.*

56 *Id.*

57 *Id.* at 226–27.

58 *Id.* at 225–26.

59 *Id.* at 225. Kent had previously suggested that the English doctrine of consideration was derived from the Roman law of *causa*. *Id.* at 227.

60 *Id.* at 225.

61 Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1714 (2000). Whether a subjective theory of contract in fact prevailed at this time is a matter of contention. *Compare* GILMORE, *supra* note 1, at 39 ("Holmes and his successors substituted an 'objectivist' approach to the theory of contract for the 'subjectivist' approach which the courts had . . . been following."), *with* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000) (rejecting the argument that a subjective theory of contract prevailed prior to the late nineteenth century).

62 Kelley, *supra* note 61, at 1714.

63 *Id.*

64 *Id.* at 1695.

what was expedient for the community.[65] The will theory, with its focus on the subjective, diverted attention from what was the best rule for society. For example, if the organizing principles of the Anglo-American law of contracts were to follow the Hegelian mold, the law would be ignoring the realities of the marketplace.[66] Holmes later famously wrote:

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.[67]

Holmes wrote in *The Common Law* that "the making of a contract does not depend on the state of the parties' minds, it depends on their overt acts."[68] He further wrote that "[t]he law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals and judge parties by their conduct."[69] Holmes even handwrote in his own copy of his book that "[t]he whole doctrine of contract is formal & external."[70] As one commentator has noted, "[t]he subjective motives and the subjective intentions of the parties are thus banished from Holmes's theory."[71] Holmes's devotion to the objective theory was consistent with his

65 *Id.* at 1691, 1695.

66 Howe *Introduction*, *supra* note 6, at xvi.

67 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897).

68 Holmes, *supra* note 2, at 240. Later, while on the United States Supreme Court, Holmes did acknowledge, however, that breaching a contract was "wrong." *See* Bailey v. Alabama, 219 U.S. 219, 246 (Holmes, J., dissenting) ("Breach[ing] of a legal contract without excuse is wrong . . . and if a State adds to civil liability a criminal liability . . . it simply intensifies the legal motive for doing right . . . .").

69 Holmes, *supra* note 2, at 242.

70 *Id.* at 230 n.a; Gilmore, *supra* note 1, at 23 & 124 n.41.

71 Patrick J. Kelley, *Objective Interpretation and Objective Meaning in Holmes and Dickerson: Interpretive Practice and Interpretive Theory*, 1 Nev. L.J. 112, 116 (2001); *see also* Robert L. Birmingham, *Holmes on 'Peerless':* Raffles v. Wichelhaus *and the Objective Theory of Contract*, 47 U. Pitt. L. Rev. 183, 197 (1985) ("Holmes wanted contract to depend only on externals, to be independent of mental things."). Professors Kelley and Birmingham are skeptical, however, of whether Holmes's theory did, in fact, succeed in completely banishing the subjective. *See* Kelley, *supra*, at 116. ("Holmes's purportedly purely objective theory seems to be just a confused form of the 'objective evidence of

complaint about "leav[ing] all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of a jury,"[72] stating that "the sphere in which [a judge] is able to rule without taking [the jury's] opinion at all should be continually growing."[73]

Holmes reduced each of the elements of a contract to observable physical acts, eliminating almost all references to the parties' subjective intentions[74] and challenging Pollock's will theory of contract.[75] He even asserted that a contract was voidable only for failure of an express or implied-in-fact condition,[76] having in mind his desire to reject a subjective theory of contract.[77]

Holmes's devotion to the objective theory was particularly displayed with his treatment of the celebrated case of *Raffles v. Wichelhaus*, dealing with mutual mistake.[78] In *Raffles*, the court held that no contract formed when the parties agreed to the sale of cotton to be delivered on the ship *Peerless*, as there were two ships by that name leaving from the same port and each party meant a different ship.[79] Holmes argued that the true ground for the decision was not that the parties had each *meant* a different ship, "but that each *said* a different thing. The plaintiff offered one thing, the defendant expressed his assent to another."[80] If there was only one ship named *Peerless*, then a party who intended a different ship would be bound, but here there were two different things to which *Peerless* could refer.[81] Even here, however,

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internal states' will theory of contract formation," since "the relevant content of the communication, on Holmes's own theory, is what it says about the party's subjective intentions or subjective motives."); Birmingham, *supra*, at 197–98 ("Holmes' program to objectify contract law collapses to the extent reference depends on the intent to refer, and he might as well have talked immediately about what the parties meant."); *see also* P. S. ATIYAH, *Holmes and the Theory of Contract*, *in* ESSAYS ON CONTRACT 57, 67 (1986) (arguing that Holmes consistently prevaricated between an objective and subjective approach).

72 HOLMES, *supra* note 2, at 101.

73 *Id.* at 99.

74 Kelley, *supra* note 61, at 1727.

75 *Id.* at 1729.

76 *Id.* at 1730.

77 HOWE, *supra* note 9, at 246 n.60 (draft letter from Holmes to Harriman) ("I had this definitely in mind in what I said about void and voidable contracts in my Common Law . . . .").

78 Raffles v. Wichelhaus [1864] 159 Eng. Rep. 375; 2 H. & C. 906.

79 *Id.*

80 HOLMES, *supra* note 2, at 242 (emphasis added).

81 *Id.* In 1898, Holmes, in a letter to Pollock, wrote,

> [W]e don't care a damn for the meaning of the writer and . . . the only question is the meaning of the words but as words are not mathematic figures the question becomes what do those words mean in the mouth

Holmes did permit some inquiry into the subjective:

> So far from mistake having been the ground of decision, as mistake, its only bearing, as it seems to me, was to establish that neither party knew that he was understood by the other to use the word "Peerless" in the sense which the latter gave to it. In that event there would perhaps have been a binding contract, because, if a man uses a word to which he knows the other party attaches,

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> of the normal English speaker—our old friend the prudent man in a special garb—& therefore we let in evidence of circumstances. When we let in direct evidence of intent on the question of who or what is meant by a proper name, I still stick with my old explanation that by the *theory of speech* the proper name means only one person or thing though it may *idem sonans* with another proper name, & you let in intent not to find out what the speaker meant but what he said.

Letter from Oliver Wendell Holmes, Chief Justice, Mass. Supreme Judicial Court, to Sir Frederick Pollock (Dec. 9, 1898), *in* Holmes-Pollock Letters 89, 90 (Mark DeWolfe Howe ed., 1942). In 1899, Holmes published *The Theory of Legal Interpretation*, and wrote,

> By the theory of our language, while other words may mean different things, a proper name means one person or thing and no other. If language perfectly performed its function, as Bentham wanted to make it, it would point out the person or thing named in every case. But under our random system it sometimes happens that your name is *idem sonans* with mine, and it may be the same even in spelling. But it never means you or me indifferently. In theory of speech your name means you and my name means me, and the two names are different. They are different words. *Licet idem sit nomen, tamen diversum est propter diversitatem personæ*. In such a case we let in evidence of intention not to help out what theory recognizes as an uncertainty of speech, and to read what the writer meant into what he has tried but failed to say, but, recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he has said. It is on this ground that there is no contract when the proper name used by one party means one ship, and that used by the other means another. The mere difference of intent as such is immaterial. In the use of common names and words a plea of different meaning from that adopted by the court would be bad, but here the parties have said different things and never have expressed a contract. If the donor, instead of saying "Blackacre," had said "my gold watch" and had owned more than one, inasmuch as the words, though singular, purport to describe any such watch belonging to the speaker, I suppose that no evidence of intention would be admitted. But I dare say that evidence of circumstances sufficient to show that the normal speaker of English would have meant a particular watch by the same words would be let in.

Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 418–19 (1899) (citations omitted).

> and understands him to attach, a certain meaning, he may be held to that meaning, and not be allowed to give it any other.[82]

In addition to taking aim at the will theory of contract, Holmes took aim at the prevailing notion of consideration. The English jurists who followed Savigny's analysis viewed consideration as an Anglicized version of *causa*, and saw the parties' intentions to enter into a binding contract as the basis for contractual obligation; they had paid little attention to a bargain being a necessary element of contractual obligation.[83] Holmes believed that this ignored the basis for the English cases, a basis he believed was founded upon common business sense.[84] To Holmes, consideration was nothing more than a requirement that the parties have a bargained-for exchange.[85] He argued that this bargain theory showed, for example, why past consideration could not render a promise enforceable.[86]

To provide what he believed was a proper understanding of consideration, Holmes targeted the doctrine's prevailing definition, which was either a benefit to the promisor or a detriment to the promisee.[87] To prove that this definition could not be an accurate description of consideration, Holmes used a hypothetical based on the well-known case of *Coggs v. Bernard*.[88] The hypothetical involves a truckman who promises another man to carry a cask of brandy for him from Boston to Cambridge, either out of kindness or some other motive, in exchange for nothing more

82 HOLMES, *supra* note 2, at 242.

83 HOWE, *supra* note 9, at 240.

84 *Id.* at 241; *see also* HOLMES, *supra* note 2, at 215 (stating that the modern doctrine of consideration "has a foundation in good sense, or at least falls in with our common habits of thoughts").

85 *See* HOWE, *supra* note 9, at 241.

86 HOLMES, *supra* note 2, at 232.

87 *Id.* at 227. Whether Holmes's bargain theory of consideration was revolutionary is a matter of contention. *Compare* GILMORE, *supra* note 1, at 22 (referring to Holmes's bargain theory as "revolutionary doctrine"), *with* JOHN P. DAWSON, GIFTS AND PROMISES 197–98 (1980) ("[T]he concept of bargained-for exchange became an established feature of the English law of contract in the decades when English lawyers were first becoming aware that a law of contract existed. What happened about a century ago, when Holmes was 'inventing' bargain consideration, was that this central idea, which had been familiar in England for more than three hundred years, was overloaded with additional tasks for which it was wholly unsuited."); *id.* at 203 (stating that "the suggestion that bargain consideration was a 'revolutionary' invention by Justice Holmes which he first disclosed in 1881" is "more than somewhat surprising"). *See also* Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature,* 25 LAW & HIST. REV. 345, 369–70 (2007) (noting that the bargain theory of consideration can be traced to Christopher Columbus Langdell rather than Holmes).

88 Coggs v. Bernard [1703] 92 Eng. Rep. 107; 2 Ld. Raym. 909; HOLMES, *supra* note 2, at 227–29.

than the man's promise to deliver it to him.[89] Holmes argued that the older cases would hold there was no consideration because the delivery of the cask to the truckman was neither a benefit to the truckman nor a detriment to the other man.[90] The truckman (the promisor) did not benefit from the delivery to him because it would then mean he had to carry the goods, and the other man (the promisee) did not suffer a detriment from the delivery because it would mean he would have the goods carried for him.[91]

Holmes argued that this analysis did not withstand scrutiny, however.[92] He believed the attempt to explain the result with the benefit-detriment test did not work because it failed to recognize that, under that test, the detriment was to be determined at the point in time the consideration was provided.[93] Thus, the question was not whether the transaction, after being fully performed by both parties in the future, would prove to be an overall detriment to the promisee; it was whether, at the time the promisee provided the consideration, it was a detriment to the promisee. And when the other man delivered the cask to the truckman, delivery was a detriment to the other man in the strictest sense.[94] At the time of delivery, the other man had given up the privilege to not deliver the cask to the truckman, and at that point the benefit to him from the transaction was still in the future, as he had only received a promise of performance.[95] Thus, the benefit-detriment test would lead to the conclusion that the delivery of the cask was consideration for the promise to carry it, but such a result was contrary to the law.[96]

Holmes then set forth what he maintained was the proper rationale. He argued that whether a detriment to the promisee was consideration was based on whether the parties dealt with it on that footing.[97] For example, Holmes argued that a promise to pay a man money if he breaks his leg does not include consideration because breaking the leg was a condition to the payment, not consideration.[98]

Holmes provided examples of where he believed the court had applied the benefit-detriment test and come to the wrong result.[99] He first

89 Holmes, *supra* note 2, at 227–28.
90 *Id.* at 228.
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.* at 228–29.
95 *Id.* at 229.
96 *Id.* at 228.
97 *Id.* at 229.
98 *Id.* at 229 n.8.
99 *Id.* at 229–30 & nn.9–10.

cited *Shadwell v. Shadwell*,[100] in which the court held that an uncle's promise to his nephew, made upon learning of his nephew's engagement, to pay the nephew "150l. yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas" was binding, as both perhaps inducing a detriment by the nephew (the nephew proceeding with the marriage or otherwise relying on the expected funds) and a benefit to the uncle (his nephew getting married).[101] Holmes obviously agreed with the dissent, believing that the letter's language could not fairly be interpreted as the uncle making the promise to induce his nephew to go forward with the wedding.[102] Holmes was also critical of *Burr v. Wilcox*,[103] in which the Massachusetts Supreme Judicial Court held that there was consideration for a promise to pay taxes that were not otherwise owed if the taxing authority reassessed the amount based on the portion of land being used by the promisor.[104] He was also critical of *Thomas v. Thomas*,[105] in which the court held that a promise to pay just £1 rent per year for a house and a promise to keep the premises in repair was consideration even though,[106] according to Holmes, the parties had "expressly stated other matters as the consideration."[107] He considered these as examples of courts having an "anxiety to sustain agreements."[108]

Holmes then turned toward determining how it was to be decided if the parties dealt with a detriment as consideration. Here, Holmes sought to walk a fine line. Adhering to objectivity, he sought to downplay reliance on motive, yet at the same time rely on it to differentiate consideration from a gratuitous promise subject to a condition. For example, Holmes acknowledged that "it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration."[109]

To do so, Holmes noted that motive must be assessed objectively and not based on motive "in actual fact."[110] By using the word "conventional,"

100 *Id.* at 229–30 n.9.
101 Shadwell v. Shadwell [1860] 142 Eng. Rep. 62, 68; 9 C.B. (N.S.) 159, 173.
102 HOLMES, *supra* note 2, at 229–30.
103 *Id.* at 229–30 n.9.
104 Burr v. Wilcox, 95 Mass. (13 Allen) 269, 272–73 (1866).
105 *See* HOLMES, *supra* note 2, at 229–30 n.10.
106 Thomas v. Thomas [1842] 114 Eng. Rep. 330, 332; 2 Q.B. 850, 855–56.
107 HOLMES, *supra* note 2, at 230 n.10.
108 *Id.* at 230.
109 *Id.*
110 *Id. See also* HOWE, *supra* note 9, at 241–42 ("Did Holmes, by making the existence or nonexistence of a contract dependent upon the reciprocal aim of the parties, allow

he likely suggested that what was relevant was manifested motivation, not actual motivation.[111] To further avoid an analysis into the subjective, Holmes argued that a bargain motive need not be the prevailing or chief motive.[112] He saw danger in a contrary rule, as a man's promise to paint a picture might be primarily based on his desire for fame, but his promise would be supported by consideration if given in exchange for a promise to pay money.[113]

Holmes thus saw consideration as a matter of form, writing that, "[i]n one sense, everything is form which the law requires in order to make a promise binding over and above the mere expression of the promisor's will. Consideration is a form as much as a seal."[114] His argument that consideration is merely a type of form was support for his attack on the will theory of contract,[115] and Holmes contrasted "form" as a determinate of legal enforceability with "consent" as a determinate of legal enforceability.[116] By explaining consideration as merely a type of form (though one having foundation in good sense), he sought to move legal enforceability away from a notion of consent. Holmes made this clear in a letter written in 1896:

> I think that in enlightened theory, which we now are ready for, all contracts are formal, and that a tacit assumption to the contrary sometimes has led Mr. Langdell astray. I had this definitely in view in what I said . . . in my Common Law . . . I will add a word of argument. I do not mean merely that the consideration of the simple contract is as much a form as a seal, but that in the nature of a sound system of law (which deals mainly with externals) the

subjectivism, in the end, to control his theory of contract? I take it that he did not. Though the lecture on elements did not itself contain any very clear statement that courts should be less interested in ascertaining the actual inducing impulse behind each promise than in discovering what manifested spirit motivated the agreement, the last of the contract lectures made it quite clear that he saw the objective standard as no less controlling in the law of contract than it was in the law of torts and of crime.").

111 Howe, *supra* note 9, at 242. *See also* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 Calif. L. Rev. 1743, 1755 (2000) ("By the term 'conventional,' Holmes apparently meant a formal expression whose meaning and significance is artificially determined, like a bidding convention in the game of bridge. Therefore, if the parties deliberately adopted the convention (form) of a bargain, the law would enforce their promises as though they had deliberately adopted the convention (form) of the seal."); Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 Harv. L. Rev. 1828, 1833 (1983) ("'Conventional' referred to the terms of the agreement: consideration thus became a form, and a kind of objectivity was served.").

112 Holmes, *supra* note 2, at 230.

113 *See id.*

114 *Id.* at 215.

115 Howe, *supra* note 9, at 232.

116 *See id.*

> making of a contract must be a question of form, even if the details of our law should be changed. There never was a more unfortunate expression used than "meeting of the minds." It does not matter in the slightest degree whether minds meet or not. If the external expression on the one side and the other coincide, the fact that one party meant one thing and the other another does not prevent the making of the contract.[117]

He believed, however, that "[a] consideration may be given and accepted, in fact, solely for the purpose of making a promise binding."[118] He supposed, therefore, that a truckman's promise to carry a cask would be binding even if the owner knew the truckman was willing to carry it without any bargain, provided the truckman stated he would carry it in consideration of the owner delivering him the cask and letting him carry it.[119] Framing the agreement in the form of a bargain was sufficient: "The promise is offered in terms as the inducement for the delivery, and the delivery is made in terms as the inducement for the promise."[120] Thus, as noted by one scholar, "[i]ronically, as the bargain theory of consideration was actually elaborated by the classical school, it could be satisfied even though no bargain had been made. Under the doctrine of nominal consideration, embraced by Holmes . . . the *form* of a bargain would suffice to make a promise enforceable."[121]

Holmes's belief that consideration should play the role of a formality—even to the point of accepting nominal consideration as a basis for enforceability—was likely based on his desire to move from the subjective to the objective. In discussing the truckman example, he stated that "[i]t may be very probable that the delivery would have been made without a promise, and that the promise would have been made in gratuitous form if it had not been accepted upon consideration; but *this is only a guess after all*."[122] For example, Holmes believed that an analysis into motive was also off limits when an offeree performed the act necessary to claim a reward, and thus a finding that the offeree was in fact actuated by motives other than claiming the reward would be "beside the mark."[123] For Holmes, it was all about the expressed terms of the transaction: "It would seem therefore that the same transaction in substance and spirit might be voluntary or obligatory, according to the *form of words* which the parties chose to employ for the

117 *Id.* at 232–33 (corrected draft of letter dated Jan. 4, 1896).

118 HOLMES, *supra* note 2, at 230.

119 *Id.* at 231.

120 *Id.*

121 Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1112–13 (1984).

122 HOLMES, *supra* note 2, at 231 (emphasis added).

123 *Id.* at 231 n.13.

purpose of affecting the legal consequences."[124]

Holmes then shifted toward supporting his theory that contract law was not about moral fault by discussing the proper meaning of "promise." He argued that a person could promise—in a legal sense—that an event outside of his control would happen, taking issue with the contrary definition in the Indian Contract Act of 1872,[125] which had been acclaimed by both Pollock and Anson.[126] The Act had defined "promise" as requiring a person to signify "his willingness to do or to abstain from doing anything," along with the promisee accepting the proposal. [127] Holmes took issue with this definition, believing that it confined contract law to promises relating to the promisor's conduct,[128] and thus supporting a theory that a promisor cannot be held accountable for the nonoccurrence of events that were not his fault. Instead, Holmes argued that "a promise . . . is simply an accepted assurance that a certain event or state of things shall come to pass."[129] Years later he wrote, "no contract depends for its performance solely on the will of the contractor, and that apart from special objections to wagers a man may contract for a future event that is wholly outside of his power, but the non-occurrence of which will be a breach, none the less."[130] Holmes also criticized Langdell's argument that an exchange of promises subject simply to whether a past event had occurred was not consideration for each other since only one person, in fact, promised to perform.[131] This was consistent with Holmes's apparent belief that parties could agree to assume whatever risks they wanted. Presumably, his point was that the law did not base the enforcement of promises on moral obligation, noting that in contrast to the legal world, "[i]n the moral world it may be that the obligation of a promise is confined to what lies within reach of the will of the promisor . . . ."[132]

Holmes also emphasized that, in general, a promisor was free to break a contract and would only be required to pay damages rather than specifically perform.[133] Holmes wrote that "[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass."[134] To Holmes, a contract was

124 *Id.* at 232 (emphasis added).
125 *Id.* at 233–35.
126 Howe, *supra* note 9, at 234.
127 Holmes, *supra* note 2, at 233–34.
128 *Id.* at 234.
129 *Id.* at 235.
130 Howe, *supra* note 9, at 237 (quoting letter from Holmes to Cook, Feb. 25, 1919).
131 Holmes, *supra* note 2, at 239.
132 *Id.* at 234.
133 *Id.* at 236.
134 *Id.*

simply an agreement to assume risks.[135]

He further supported his argument that a breach of contract did not necessarily involve fault by pointing to the rule from *Hadley v. Baxendale*,[136] arguing that if a breach was viewed as a tort then any loss that was foreseeable before breach (rather than foreseeable at the time of contract formation) would be recoverable.[137] Holmes even noted support for the so-called tacit agreement test under which foreseeability at the time of contract formation was insufficient; it must appear that the defendant, at the time of contract formation, tacitly agreed to liability for the loss.[138] Holmes believed that "[w]hat consequences of the breach are assumed is . . . a matter of construction, having regard to the circumstances under which the contract is made."[139] Holmes viewed damages as simply being a part of construing the contract's terms—determining what the parties agreed to or what they would have agreed to had they thought about the matter.[140] To Holmes, the "true theory of contract under the common law" was that all of the rights and duties—including the duty to pay damages—were based on a construction of the agreement[141] and what risks the parties had agreed to assume. Thus, "[i]n the Holmesian revision foreseeability was not enough; there must have been a deliberate and conscious assumption of the risk by the contract-breaker . . . ."[142] So, while Holmes believed that contract

135 *Id.*

136 *See* Hadley v. Baxendale [1854] 156 Eng. Rep. 145, 151; 9 Exch. 341, 354 ("Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, *at the time they made the contract*, as the probable result of the breach of it." (emphasis added)).

137 HOLMES, *supra* note 2, at 236.

138 *Id. See also* Robert M. Lloyd & Nicholas J. Chase, *Recovery of Damages for Lost Profits: The Historical Development*, 18 U. PA. J. BUS. L. 315, 357–59 (2016) ("Under this test, a party seeking to recover lost profits (or any other consequential damages) had to do more than simply show that the defendant had notice of the special circumstances giving rise to the damages. They had to show that the defendant had manifested (expressly or impliedly) an intent to assume the risk of those damages." (footnote omitted)).

139 HOLMES, *supra* note 2, at 237.

140 *Id.*

141 *Id.* at 237–38.

142 GILMORE, *supra* note 1, at 58. The tacit-agreement test predated Holmes's argument for it in *The Common Law*. *See* Lloyd & Chase, *supra* note 138, at 358 ("This rule apparently originated in England shortly after *Hadley*. Most accounts trace it back to *B.C. Saw-Mill Co. v. Nettleship*, an English opinion of 1868." (footnotes omitted)); Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339, 349 (1998) ("Holmes drew this test from a series of English cases that followed swiftly upon *Hadley* . . . ."). HOLMES, *supra* note 2, at 237 (citing British

law should be based on policy and should also "correspond with the actual feelings and demands of the community, whether right or wrong,"[143] this apparently meant limiting liability for damages to those risks to which a party had expressly or tacitly assented.

Grant Gilmore wrote that Holmes's theory of contract "seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything," and because the ideal was unattainable, "[l]iability . . . was . . . to be severely limited."[144] Gilmore believed that the bargain theory of consideration was "a tool for narrowing the range of contractual liability," and no matter how much a promisee detrimentally relied on a promise, "[u]nless the formalities were accomplished, there could be no contract and, consequently, no liability."[145] Gilmore also argued that the objective theory—which Holmes used as support for a move away from moral culpability as a basis for liability—would not only make former issues of fact now issues of law,[146] but would lead to a theory of absolute liability that discouraged excuses for nonperformance.[147] This, in turn, Gilmore argued, made Holmes's restrictive approach to damages necessary to ameliorate the harshness of absolute liability.[148] In Part II, attention will be paid to whether there is support in Holmes's opinions for Gilmore's argument that Holmes's theory of contract was "dedicated to the proposition that, ideally, no one should be liable to anyone for anything."[149]

Columbia & Vancouver's Island Spar, Lumber & Saw Mill Co. Ltd. v. Nettleship [1868] L.R. 3 C.P. 499). But Holmes's use of the test in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 545 (1903), made the test popular in the U.S. for a short time. *See* Larry T. Garvin, Globe Refining Co. v. Landa Cotton Oil Co. *and the Dark Side of Reputation*, 12 Nev. L.J. 659, 660 (2012) ("This new test made some immediate headway, but soon fell under formidable and almost universal attack from such sources as *Williston on Contracts*, the two Restatements of Contracts, and Article Two of the Uniform Commercial Code. The courts, after gingerly stepping in that direction, turned tail and ran, so that only a few jurisdictions now employ *Globe Refining*'s tacit agreement test. It was, by any measure, a resounding failure." (footnotes omitted)).

143 Holmes, *supra* note 2, at 36.

144 Gilmore, *supra* note 1, at 15.

145 *Id.* at 23.

146 *Id.* at 46–47.

147 *Id.* at 48–49 & n.99.

148 *Id.* at 54.

149 *Id.* at 15 (citations omitted).

II. *THE COMMON LAW* AT THE SUPREME JUDICIAL COURT

During Holmes's twenty-year tenure on the Massachusetts Supreme Judicial Court from 1882 to 1902, he would have ample opportunity to implement his general theory of contract law as set forth in *The Common Law*, including the objective theory of contract and the bargain theory of consideration. And as will be shown below, Holmes consistently emphasized in his opinions his themes from the contracts lectures in *The Common Law*, though it will also be shown that Gilmore's assertion that Holmes's goal was that "no one should be liable to anyone for anything" lacks support.

A. *Objective Theory of Contract*

With respect to the objective theory of contract, Holmes repeatedly stressed that contract law duties arise as a result of a person's overt acts and not as a result of what they intended.[150] He wrote that "[i]t is . . . immaterial what the plaintiff may have intended so long as it was not disclosed"[151] and "[i]f, without the plaintiff's knowledge, [the defendant] did understand the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts."[152] What was important was not whether the plaintiff "inwardly assented," "but whether the reasonable import of her overt acts was assent to its terms."[153]

In a case involving deceit, rather than contract, Holmes explained why he supported the objective theory, asserting it was based on "one of the first principles of social intercourse":

> When a man makes . . . a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and it seems to me one of the first principles of social intercourse that he is bound at his peril to known [sic] what that meaning is. In this respect it seems to me that there is no difference between the law of fraud and that of other torts, or of contract or estoppel. If the language of fiction be preferred, a man is conclusively presumed in all parts of the law to contemplate the

150 *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 274–75 (1993) (noting that "[i]n several decisions he attempted to strip the process of contract formation of its subjective elements and apply objective standards").

151 Norton v. Brookline, 63 N.E. 930, 931 (Mass. 1902).

152 Mansfield v. Hodgdon, 17 N.E. 544, 547 (Mass. 1888).

153 Gallagher v. Hathaway Mfg. Co., 48 N.E. 844, 845 (Mass. 1897). Holmes, however, in the same opinion, wrote: "But there is a further difficulty from which we cannot escape. Whether the plaintiff understood, and by implication agreed . . . ." *Id.*

> natural consequences of his act, as well in the conduct of others as in mechanical results. . . . [A] defendant cannot be heard to say that for some reason he had in his mind and intended to express by the words something different from what the words appear to mean and were understood by the plaintiff to mean, and are interpreted by the court to mean, whether the action be in tort or contract.
>
> . . . .
>
> [A] man takes the risk of the interpretation of his words as it may afterwards be settled by the court.[154]

As is shown below, Holmes faithfully applied his objective theory to both contract formation and contract interpretation even though (as will also be shown) there were important limits to his use of the theory. The first Subsection below analyzes Holmes's decisions involving contract formation and the issue of assent. The second Subsection analyzes Holmes's decisions involving contract interpretation. The third Subsection is a brief conclusion regarding his use of the objective theory.

i. Contract Formation and the Issue of Assent

At first blush, Holmes's decisions involving contract formation and the issue of assent seem to bear little connection to one another. They range from such disparate issues as whether services were provided gratuitously, when a revocation is effective, when an acceptance is effective, whether silence can be an acceptance, and when a contract is void or voidable for duress. But a close inspection of these decisions reveals a common thread—the appropriate rule for each issue follows from an application of the objective theory of contract.

For example, Holmes held that a defendant could be held to have entered into a contract to pay for services even if he believed they were provided gratuitously as long as a reasonable person would have understood they were provided with an expectation of compensation:

> [I]t would be enough to make a contract if the defendant as a reasonable man ought to have understood that the services were rendered for pay and not merely for love. . . . *Of course it does not matter whether the defendant expected to pay for the services or not, the question is as to the natural import of his overt acts.* Again, it is not necessary that the defendant should have believed that the plaintiff expected pay. If as a reasonable man he should have understood from what

154 Nash v. Minn. Title Ins. & Tr. Co., 40 N.E. 1039, 1042–43 (Mass. 1895).

> he knew that such was the expectation, he would be bound by accepting the services.[155]

In *Brauer v. Shaw*, he applied the objective theory to contract formation in refusing to find that a revocation of an offer is effective prior to receipt by the offeree.[156] The defendants had made an offer to the plaintiffs by telegram at 11:30 a.m., which was received by the plaintiffs at 12:16 p.m., and the plaintiffs telegraphed an acceptance of the offer at 12:28 p.m., which was received by the defendants at 1:20 p.m.[157] At 1:00 p.m., the defendants sent a telegraph revoking their offer, the revocation being received by the plaintiffs at 1:43 p.m.[158] Holmes held that the offer was still outstanding at the time it was accepted, and thus a contract formed,[159] writing:

> It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it has been revoked. By their choice and act, they brought about a relation between themselves and the plaintiffs, which the plaintiffs could turn into a contract by an act on their part, and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. *Knowingly to lead a person reasonably to suppose that you offer, and to offer, are the same thing. . . . It would be monstrous to allow an inconsistent act of the offerer [sic], not known or brought to the notice of the offeree, to affect the making of the contract*; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking.[160]

Holmes also rejected Langdell's idea that an acceptance would only be effective if such acceptance was communicated to the offeror, holding that communication (and hence a subjective meeting of the minds) was unnecessary when there was an understanding that no communication was necessary:

> But it is objected further that acceptance of the guaranty, or, more strictly, the furnishing of the consideration by the plaintiffs, was not communicated to the defendant. We are of opinion, as

155 Spencer v. Spencer, 63 N.E. 947, 948 (Mass. 1902) (emphasis added) (citations omitted).

156 Brauer v. Shaw, 46 N.E. 617, 617 (Mass. 1897).

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.* at 617–18 (emphasis added) (citations omitted); *see also* WHITE, *supra* note 150, at 276–77 (discussing *Brauer* and concluding, "[h]ere again the question of contract formation was analyzed by reference to external evidence and objective standards").

> we have said, that it would have been open to the jury to find that the guaranty was signed on the understanding that, if it was signed, the plaintiffs would sign. *If so, when the understanding was carried out it was not necessary to notify the defendant.* He already had all the notice he needed, and to send him notice would have been merely a formal act, which is not required, either by custom, or by the theory of contract. *There is no universal doctrine of the common law, as understood in this commonwealth, that acceptance of an offer must be communicated in order to make a valid simple contract, although such a necessity might be inferred from some of the language in [listing cases]; Langd. Cas.Cont. § 2 et seq.*[161]

Despite Holmes's emphasis on overt acts, he was willing to find that silence operated as an acceptance, provided that a reasonable person in the offeror's position would construe it as such, even if the offeree did not intend to accept.[162] In *Hobbs v. Massasoit Whip Co.*, the plaintiff sent eel skins to the defendant (a whip manufacturer), who kept them for some months without ever telling the plaintiff that it did not want them, and they were then destroyed.[163] Holmes held that there was sufficient evidence to support a finding of acceptance by silence, relying on the fact the plaintiff had sent eel skins to the defendant four or five times before and each time they had been accepted and paid for.[164] Holmes believed that it was fair for the plaintiff to assume that if the eel skins were fit for the defendant's business, as the jury found they were, the defendant would accept them.[165] Thus,

> sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. *The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party,-a principle sometimes lost sight of in the cases.*[166]

161 Lennox v. Murphy, 50 N.E. 644, 645–46 (Mass. 1898) (emphases added) (citations omitted).

162 *See* Wheeler v. Klaholt, 59 N.E. 756, 756–57 (Mass. 1901) (holding that the jury was warranted in finding that an offeree's retention of goods for an unreasonable time constituted an acceptance, when the goods were in the offeree's possession with their assent); Hobbs v. Massasoit Whip Co., 33 N.E. 495, 495 (Mass. 1893) (holding that there was sufficient evidence that offeree accepted through silence when parties had a previous course of dealing).

163 *Hobbs*, 33 N.E. at 495.

164 *Id.*

165 *Id.*

166 *Id. See also* WHITE, *supra* note 150, at 276 (discussing *Hobbs*, stating, "[t]he *Hobbs* case was

Similarly, in *Earle v. Angell*, when the defendant's testatrix had promised to pay the plaintiff $500 if the plaintiff agreed to come to her funeral and the plaintiff arguably made a counteroffer, offering to come if alive and notified in time, Holmes held there was sufficient evidence that the decedent accepted the counteroffer: "It is suggested that the acceptance varied from the terms of the offer; but the parties were face to face, and separated seemingly agreed. The jury well might have found, if that was the only question, that the variation, if any, was assented to on the spot."[167]

Holmes would not, however, infer a promise when the evidence did not support it. For example, in *Merriam v. Goss*, he refused to infer a promise by the plaintiff (who sought to redeem a mortgage) to pay for improvements to land made by one of the defendants (a prior mortgagee in possession).[168] All that was shown was the plaintiff knew the defendant was making the improvements and made no objection, when at the time both parties understood he was making them on his own account, anticipating the release of the equity of redemption to him.[169] In *Graham v. Stanton*, the plaintiff sought compensation for household services she provided for the defendant's intestate after being taken in by him from an orphanage and treated as his adopted daughter.[170] Holmes wrote that

> [i]t would be a strong thing to say that an actual contract to pay for services could be inferred from the conduct of one who takes a child into his household under the name of daughter. The fact of his calling her so implies that he is not purporting to enter into relations with her on a business footing.[171]

There was a limit, however, to Holmes's use of the objective theory with respect to the issue of assent. Holmes would not apply the objective theory to a situation in which a party was physically compelled to manifest assent, even if such compulsion was done by a third party and the other party had no reason to know of it. Holmes wrote:

> No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, the signature would not have been her act, and if the signature had not been her act, for whatever reason, no contract would have been made,

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another example, for Holmes, of the objective theory of contract formation. . . . The issue was . . . not the 'actual state of mind' of the whip manufacturer, but his conduct") (emphasis added) (citations omitted).

167 Earle v. Angell, 32 N.E. 164, 164 (Mass. 1892).

168 Merriam v. Goss, 28 N.E. 449, 451 (Mass. 1885).

169 *Id.*

170 Graham v. Stanton, 58 N.E. 1023, 1023 (Mass. 1901).

171 *Id.* (citations omitted).

> whether the plaintiff knew the facts or not.[172]

Also, with respect to duress by threats, Holmes's devotion to objectivity did not prevent him from rejecting the rule that "duress must be such as would overcome a person of ordinary courage."[173] Holmes wrote that

> the dictum referred to is taken literally in an attempt to apply an external standard of conduct in the wrong place. If a party obtains a contract by creating a motive from which the other party ought to be free, and which, in fact, is, and is known to be, sufficient to produce the result, it does not matter that the motive would not have prevailed with a differently constituted person, whether the motive be a fraudulently created belief or an unlawfully created fear. Even in torts,—the especial sphere of external standards,—if it is shown that in fact the defendant, by reason of superior insight, contemplated a result which the man of ordinary prudence would not have foreseen, he is answerable for it; and, in dealing with contributory negligence, the personal limitations of the plaintiff, as a child, a blind man, or a foreigner unused to our ways, always are taken into account. Late American writers repudiate the notion of a general external measure for duress, and we agree with them.[174]

But short of physical compulsion, if the other party did not know or have reason to know that a third-party's wrongdoing induced the party's manifestation of assent, the manifestation was effective under the objective theory: "A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant."[175]

ii. Contract Interpretation

Like Holmes's decisions involving assent, at first blush Holmes's decisions involving contract interpretation seem to bear little connection to one another. They range from such disparate issues as the meaning of words, the parol evidence rule, warranties, gaps in contracts, the duty to read rule, and mutual mistake. But again, a close inspection reveals a common thread—the appropriate rule for each issue follows from an application of the objective theory of contract.

172 Fairbanks v. Snow, 13 N.E. 596, 598 (Mass. 1887).
173 Silsbee v. Webber, 50 N.E. 555, 556 (Mass. 1898).
174 *Id.* (citations omitted).
175 *Fairbanks*, 13 N.E. at 598–99.

With respect to the meaning of words, Holmes wrote that "in the case of . . . contracts . . . we ask what the words used would mean in the mouth of one writing the language in a normal way, under the circumstances."[176]

> But evidence of actual intent is not admissible to change the construction of written instruments if otherwise plain, for the reason that what a court must look for is not what the parties had in their minds, but the meaning of the words according to the general usage of speech. Reformation, not construction, is the means for meeting such a mistake as supposed. When it is said that the intent of the parties . . . is the lodestar, etc., all that is meant is that in interpreting a particular sentence you may look at the general scheme, and the habit of language disclosed by the instrument, and may ascertain the facts under which the party acted, to qualify what might be the result of the particular words if they were taken alone.[177]

Holmes's application of the objective theory remained firm. He even rejected the idea that a word whose meaning was plain could be given a different meaning by an extrinsic agreement between the parties or as a result of a mutual mistake. He feared that, otherwise, the risks to predictability of contractual obligation were too great:

> [Y]ou cannot prove a mere private convention between the two parties to give language a different meaning from its common one. It would offer too great risks if evidence were admissible to show that when they said 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the Old South Church. As an artificial construction cannot be given to plain words by express agreement, the same rule is applied when there is a mutual mistake, not apparent on the face of the instrument.[178]

Holmes also wrote:

> [T]o give evidence requiring words to receive an abnormal meaning is to contradict. It is settled that the normal meaning of language in a written instrument no more can be changed by construction than it can be contradicted directly by an avowedly inconsistent agreement, on the strength of the talk of the parties at the time when the instrument was signed. When evidence of circumstances or local or class usage is admitted, it tends to show the ordinary meaning of the language in the mouth of a normal

176 Honsucle v. Ruffin, 52 N.E. 538, 538 (Mass. 1899).
177 Smith v. Abington Sav. Bank, 50 N.E. 545, 546 (Mass. 1898) (citation omitted).
178 Goode v. Riley, 28 N.E. 228, 228 (Mass. 1891) (citation omitted).

> speaker, situated as the party using the language was situated; "but to admit evidence to show the sense in which words were used by particular individuals is contrary to sound principle." "If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything." . . . The case of Keller v. Webb, 125 Mass. 88, goes a good way, but was not intended, we think, to qualify the principle settled by the earlier and later Massachusetts cases, some of which we have cited. In that case evidence of conversation was admitted to show that "casks," in a written contract, meant casks of a certain weight. It was assumed that the contract meant casks of some certain weight, but did not state what, and thus that the evidence supplemented, without altering, the written words.[179]

Similarly, Holmes followed the parol evidence rule, refusing to consider evidence that contradicted the written contract.[180] He wrote:

> Of course, parties who have made a written contract may change it 30 seconds after it is made, if they want to. But, on the other hand, they may talk it over, and attempt to explain and construe it, without any intent to modify it, or make a change; and if the talk takes place soon after the writing is signed, and at the same interview, the latter kind of conversation is the more likely of the two. Perhaps, in the absence of express evidence, it would be presumed, certainly it is open to the tribunal of fact to find, that the latter, rather than the former, was what took place. Upon such a finding, the conversation becomes inadmissible, so far as it

179 Violette v. Rice, 53 N.E. 144, 144–45 (Mass. 1899) (citations omitted).

180 *See* Henry Wood's Sons Co. v. Schaefer, 53 N.E. 881, 882 (Mass. 1899) ("[I]f the defendant's counsel, contrary to the plain meaning of the defendant's evidence, wanted to contend that Wood's agreement was an agreement by the company not to enforce the note according to its tenor, such an agreement, made at the time the note was delivered, is in flat contradiction of the instrument, and cannot be proved." (citations omitted)); Clemons Elec. Mfg. Co. v. Walton, 53 N.E. 820, 821 (Mass. 1899) ("What the defendant was trying to do looks much more like an effort to override the promise to pay a certain sum, contained in the notes, by oral evidence that the real undertaking was to pay an amount equal to the claims. This was in flat contradiction of the instruments, and could not be done."); Hall v. First Nat'l Bank, 53 N.E. 154, 154–55 (Mass. 1899) ("The understanding alleged in the bill that the bank would renew the plaintiff's notes until such time as the improvement in the business situation should enable the plaintiff to proceed in business without such assistance, is an understanding which directly contradicts the promise expressed on the face of the notes; for whereas, the promise expressed in the notes is a promise to pay money at the maturity of the instrument, the contemporary understanding cuts it down to a promise to give a new promise to pay. It is not denied, and, on the contrary, rather is implied, in the bill that the agreement to renew was not in writing. If so, it could not be proved in contradiction of any written contract . . . ." (citations omitted)).

> attempts to modify what otherwise would be the construction or effect of the writing.[181]

Holmes was also reluctant to find that statements of opinion about the quality of goods would give rise to a warranty, even when the statement was allegedly made in bad faith, for fear that disappointed buyers would often remember things differently than they had actually been:

> The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as "seller's statements," apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion,—which do not imply untrue assertions concerning matters of direct observation, and as to which "it always has been understood, the world over, that such statements are to be distrusted," . . . . [T]he rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. . . .
>
> . . . . If [the defendant] went no further than to say that the bond was an "A No. 1" bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable, under the circumstances of this case, even if he made the statement in bad faith. The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed.[182]

Holmes also used the objective theory to resolve matters the parties likely never considered, as was shown by *Drummond v. Crane*, in which the plaintiff sued the decedent's administrator and administratrix for breaching a contract to buy water for ten years.[183] The decedent had died shortly after entering into the contract, and the issue was whether the court should infer that the promise was only to be performed as long as the decedent lived.[184] The defendants relied on the fact that

> as the plaintiff knew, the reason why [the decedent] wanted the water was that he might use it in his business; that his business was the manufacture of woolens under a lease and business

181 Dixon v. Williamson, 52 N.E. 1067, 1067 (Mass. 1899) (citations omitted).
182 Deming v. Darling, 20 N.E. 107, 108–09 (Mass. 1889) (citations omitted).
183 Drummond v. Crane, 35 N.E. 90, 91 (Mass. 1893).
184 *Id.* at 91.

> arrangement with the Monument Mills; that by the terms of his lease the mills had a right to terminate it, and did terminate it in fact, within three months of [the decedent's] death. The plaintiff knew the kind of business in which [the decedent] was engaged, and that it was carried on under some arrangement with the Monument Mills, but did not know what the arrangement was.[185]

Holmes, however, did not consider these facts particularly important. Rather, he believed what was more important was the plaintiff's manifested motive for extracting the promise to buy from the decedent:

> [T]he motives which induced [the decedent] to make the promise are not so important an aid in determining its scope as the object which the plaintiff manifestly had in exacting it. It was perfectly plain that the reason why the plaintiff required the promise as a condition of making his investment and building the reservoir was that he might have some security for returns. The plaintiff committed himself absolutely to the investment, whether [the decedent] lived or died. Obviously, the security which he wanted was one equally independent of [the decedent]'s life. From the point of view of the plaintiff, the contract was like a guaranty, upon executed consideration, that he should have so much business for a certain time, which, of course, would run on whether the guarantor lived or died.[186]

Holmes then made it clear that it was irrelevant that the decedent likely never gave the chance of his dying within ten years any thought. Had that been the case, the decedent "might have hesitated if the present aspect of his contract had been called to his attention. But the circumstances and the words used gave notice of the extent of the obligation which he was entering into . . . ."[187]

A case similar to *Drummond* was *Rotch v. French*, in which the plaintiffs sued for breach of a guaranty to pay a dividend of six percent per annum on stock in the corporation of French, Potter & Wilson.[188] One of the issues was whether there was sufficient evidence to support an agreement to pay the dividends for the life of the corporation, even after the death of the stockholders.[189] Suspecting that neither the stockholders nor the defendant had thought about the matter, Holmes wrote:

> Probably neither party thought the transaction out to its logical

185 *Id.*
186 *Id.* (citations omitted).
187 *Id.*
188 Rotch v. French, 56 N.E. 893, 893 (Mass. 1900).
189 *Id.* at 893–94.

> end, or put to himself definitely the question how long the guaranty was to last. . . . We must decide, therefore, by drawing the line as we think most in accordance with the exact words used, and with what the parties would have been likely to agree upon if they had thought and talked about the matter.[190]

To do this, Holmes employed the objective theory, writing that

> [t]he meaning of the words might vary according to circumstances, and the interpretation of them is a question for the instructed imagination, taking the facts just as they are. When a guaranty is asked for and given in the way in which this was, what is it reasonable to suppose that a normal business man means?[191]

In providing an answer, Holmes wrote that "[w]e do not pretend to think that our conclusion is the only one possible. . . . But we think that a line must be drawn somewhere, and that it falls most naturally where we have drawn it."[192]

Holmes, although a staunch advocate of the objective theory, did not believe that the dictionary meaning of words should prevail over the commercial understanding. For example, he wrote:

> [I]f the words used are technical, or have a peculiar meaning in the place where they were used, this can be shown; if by the context or the subject-matter or the circumstances the customary meaning of the words is modified, this can be shown by proof of the circumstances, the subject-matter, and the contract . . . .[193]

This was also shown by his discussion of contracts for the sale of specific goods:

> [W]hen the sale is of specific goods, but the buyer has no chance to inspect them, the name given to the goods in the contract, taken in its commercial sense, may describe all that the purchaser is entitled to demand. So it was held with regard to "Manilla sugar" in Gossler v. Eagle Sugar Refinery, 103 Mass. 331.
>
> But in many cases like the present [the sale of a cargo of ice of 360 tons] *the inference is warranted that the thing to be furnished must be not only a thing of the name mentioned in the contract, but something more*. How much more may depend upon circumstances, and at times the whole question may be for the jury. *If a very vague, generic word is used, like "ice," which, taken literally, may be satisfied by a worthless article,*

190 *Id.* at 894.
191 *Id.*
192 *Id.*
193 Nash v. Minn. Title Ins. & Tr. Co., 40 N.E. 1039, 1042–43 (Mass. 1895).

> *and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary*, and calls for a merchantable article of that name. If that is not furnished, the contract is not performed.[194]

In a case involving defamation, Holmes made the importance of context clear:

> In the present case we are concerned only with the meaning of the defendant in regard to the person to whom the language of the published article was to be applied, and the question to be decided is, how may his meaning legitimately be ascertained? Obviously, in the first place, from the language used; and, in construing and applying the language, the circumstances under which it was written, and the facts to which it relates, are to be considered, so far as they can readily be ascertained by those who read the words, and who attempt to find out the meaning of the author in regard to the person of whom they were written. It has often been said that the meaning of the language is not necessarily that which it may seem to have to those who read it as strangers, without knowledge of facts and circumstances which give it color and aid in its interpretation, but that which it has when read in the light of events which have relation to the utterance or publication of it.[195]

Consistent with the objective theory, Holmes applied the duty to read rule, writing that

> [i]f a man signs a . . . contract and the other side is not privy to any improper motive for his signing it, such as may be created by fraud, duress, or mistake as to its contents, he is bound, whatever his voluntary ignorance or his involuntary misinterpretation of its words.[196]

In another case he wrote:

> The plaintiff accepted the defendant's rules by signing the contract, whether she knew them or not. . . . The plaintiff expressly adopted any rules which there might be within the reasonable import of the name, even though not set out in the contract, and, if she adopted them in the dark, she was bound none the less.[197]

And in another case Holmes held it was error for a trial court to instruct a jury that it was necessary for a party to have signed a release with knowledge

194 Murchie v. Cornell, 29 N.E. 207, 207 (Mass. 1891) (emphasis added) (citations omitted).
195 Hanson v. Globe Newspaper Co., 34 N.E. 462, 463 (Mass. 1893).
196 Clark v. City of Boston, 60 N.E. 793, 793 (Mass. 1901).
197 Violette v. Rice, 53 N.E. 144, 144 (Mass. 1899).

of its contents for it to be effective: "It is contrary to first principles to allow a person whose overt acts have expressed assent to deny their effect, on the ground of an undisclosed state of his mind, for which no one else was responsible."[198] Thus, Holmes reiterated his view that the subjective mindset of the parties bore no relevance on enforceability when their overt actions affirmed assent.

While Holmes applied the duty to read rule as an adjunct of the objective theory, he refused to apply it when the defendant was aware that the plaintiff misunderstood its terms and remained silent, finding such a failure to disclose was fraud, irrespective of any corrupt motive or intent. Holmes wrote, with respect to a particular plaintiff who could not read:

> If the petitioner was ignorant of the contents of the instrument prepared by the defendant, and was known to be so by the defendant's agents, and if he expressly declared, in good faith, that he set his mark to it as a receipt for the damage to his land alone, and the defendant's agents thereupon accepted the instrument in silence, or with words importing an assent to that declaration, such conduct would be a representation that the instrument was what it was signed for. And a representation of what is known to be false may be none the less a fraud that it is made without any corrupt motive or intent.[199]

Holmes then relied on the objective theory to ultimately hold that a defendant's motive in misleading the plaintiff as to the contents of the writing through a different oral arrangement was irrelevant:

> [I]f the conduct of the defendant's agents was calculated to lead the petitioner to suppose that the money was paid for the land alone, and did lead him to suppose so, then it was paid for the land alone. To lead a person reasonably to suppose that you assent to an oral arrangement is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words.[200]

Holmes also applied the doctrine of reformation to reform a writing when, as a result of a mutual mistake, the terms did not accurately reflect the parties' deal, rejecting the notion that the formality of the written instrument precluded relief:

> Since, then, the instrument must be construed to mean what

198 Rosenberg v. Doe, 15 N.E. 510, 512 (Mass. 1888).

199 O'Donnell v. Town of Clinton, 14 N.E. 747, 750 (Mass. 1888) (citations omitted).

200 *Id.* at 751.

> the words would mean if there were no mistake, evidence of the mistake shows that neither party has purported or been understood to express assent to the conveyance as it stands. It is not necessarily fatal that the evidence is parol which is relied on to show that the contract was not made as it purports on the face of the document to have been made. *There was a time when a man was bound if his seal was affixed to an instrument by a stranger and against his will. But the notion that one who has gone through certain forms of this sort, even in his own person, is bound always and unconditionally, gave way long ago to more delicate conceptions.*
>
> So it is settled, at least in equity, that this particular kind of parol evidence—that is to say, evidence of mutual mistake as to the meaning of the words used—is admissible for the negative purpose we have mentioned. And this principle is entirely consistent with the rule that you cannot set up prior or contemporaneous oral dealings to modify or override what you knew was the effect of your writing.[201]

Holmes also had the opportunity to apply the objective theory to a mutual mistake case similar to *Raffles v. Wichelhaus*. In *Mead v. Phenix Insurance Co.*, the plaintiff had applied for insurance to cover grain "contained in the elevator building of the Ogdensburg Terminal Company at Ogdensburg, N.Y."[202] There were, however, two grain elevators operated by the Ogdensburg Terminal Company in Ogdensburg, one owned by the company and another leased by it, the former known as Ogdensburg's grain elevator and the latter known by the name of the lessor.[203] The plaintiff's grain was in the latter elevator, and it was the elevator to which the plaintiff obviously intended the description to refer.[204] The morning after the application was submitted, the latter elevator (with the defendant's agent present) burned.[205] Later that day the defendant accepted the application, obviously believing the description referred to the former elevator.[206] The issue was whether a contract for insurance formed covering the plaintiff's loss.[207]

Holmes first suggested that the result in *Raffles v. Wichelhaus* should be limited to the use of proper names (which had not happened here), writing that

201 Goode v. Riley, 28 N.E. 228, 228–29 (Mass. 1891) (emphasis added) (citations omitted).
202 Mead v. Phenix Ins. Co., 32 N.E. 945, 945 (Mass. 1893).
203 *Id.*
204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.* at 945–46.

> [p]erhaps it would be pressing the principle of such cases as Kyle v. Kavanagh, 103 Mass. 356, and Raffles v. Wichelhaus, 2 Hurl. & C. 906, too far to say that the description of the elevator containing the corn was one proper name in the mouth of the plaintiff and another in that of the defendant, and that, therefore, the policy was void, and the supposed contract never made.[208]

Holmes also believed, however, that it could not be said that the description on the application's face clearly pointed to one or the other elevator, or that the defendant knew the elevator that the plaintiff meant.[209] Thus, the plaintiff would have to rely on the description being broad enough to cover either elevator, and thus being "latently ambiguous."[210] Holmes held that with respect to determining the contract's meaning one would have to take account of the circumstances surrounding formation.[211] Importantly, the plaintiff knew that there were two elevators in Ogdensburg, that the defendant's agent was in Ogdensburg, and that the agent would not inquire at the elevators as to which contained the plaintiff's grain and would instead rely on the description in the application. [212] Also, the plaintiff must have had notice that if an elevator burned the agent would know about it and would not insure grain that had already been destroyed.[213] Holmes concluded that

> [u]nder these circumstances, we think it plain that justice is against the plaintiff's claim, and perhaps it is not necessary to decide with extreme accuracy what the true ground for giving judgment for the defendant is. It might be argued that the plaintiff was bound by that construction of the policy which a reasonable man would give it under the circumstances in which it was issued, if the defendant gave it that construction in fact; that the only reasonable construction is one which would describe the still standing elevator, especially as that elevator was, in a fuller

208 *Id.* at 945. Interestingly, Holmes later seemed to attribute the holding in *Mead* to the rationale of *Raffles v. Wichelhaus*. *See* Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 n.2 (1899). *Kyle v. Kavanagh*, 103 Mass. 356 (1869), involved a contract for the sale of land on "Prospect Street" in Waltham and there were two such streets in Waltham. The court wrote: "The instructions given were, in substance, that, if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This ruling is in accordance with the elementary principles of the law of contracts, and was correct." *Id.* at 358–60.

209 *Mead*, 32 N.E. at 945–46.

210 *Id.* at 946.

211 *Id.*

212 *Id.*

213 *Id.*

> sense than the other, the building of the terminal company, and, therefore, that, the policy being upon grain in a building where the plaintiff had no grain, it was void.[214]

Accordingly, at the time of contract formation, a reasonable person in the plaintiff's position would have known the defendant's meaning.

iii. Conclusion on Objective Theory

An analysis of Holmes's cases dealing with the objective theory show that he was a strong follower of the theory during his time on the Massachusetts court. Importantly, however, he considered context significant in deciding how a reasonable person would construe a party's overt acts (including the language they used) and did not confine interpretation to dictionary meanings. And there were important limits to the objective theory. If a party was aware of another party's meaning at the time of contract formation, the former party was bound by the latter's meaning. If a party was physically compelled to manifest assent, there was no contract, even if the other party was unaware of the compulsion. Also, while the words of a contract could not be given an unreasonable meaning, even if the parties had agreed to such meaning, the remedy of reformation was available for mutual mistakes. And a party could not avoid a defense of duress simply because a reasonable person would not have succumbed. Having shown that Holmes remained largely faithful to the objective theory in his decisions on the Massachusetts court, the analysis now turns to the bargain theory of consideration.

B. *Bargain Theory of Consideration*

An analysis of Holmes's decisions on the Massachusetts court reveals that he consistently applied the bargain theory of consideration and refused to recognize unbargained-for reliance as a basis for making a promise enforceable. For example, in *Commonwealth v. Scituate Savings Bank*, Holmes held that a bank could not be responsible for its alleged promise to pay a judgment creditor funds from the judgment debtor's bank account in partial satisfaction of the judgment (a promise arguably inferred from the bank's treasurer issuing the creditor the bank account passbook) because the promise lacked consideration and the creditor's reliance had not been bargained for.[215] Holmes wrote that

214 *Id.*

215 Commonwealth v. Scituate Sav. Bank, 137 Mass. 301, 302–03 (1884).

> even if the bank itself had issued the book, the promise contained in it would have been without consideration. . . . The only detriment to the promisee, in any way connected with the issue of the book, was the indorsement of partial satisfaction upon the execution. But that was merely an act done by the petitioner of his own motion, in reliance upon the book, not the conventional inducement for its issue. It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it. If it should be suggested that the bank was estopped to deny a consideration, the answer is, that no representation was made other than what was necessarily implied by issuing the book, and that no action on the faith of it can be taken to have been contemplated other than an attempt to collect the amount when thought desirable.[216]

Holmes followed this rule even if the promisee's reliance had resulted in substantial harm, arguing that the promisee relied at his peril: "[T]he very meaning of the requirements of a consideration for a promise or other agreement is that, if that element is wanting, the party relies on the agreement at his peril. The fact that he suffers substantial damages by doing so does not render a void contract valid."[217] In fact, with respect to an action for deceit, Holmes wrote in a dissenting opinion:

> If I were making the law, I should not hold a man answerable for representations made in the common affairs of life without bad faith in some sense, if no consideration was given for them, although it would be hard to reconcile even that proposition with some of our cases.[218]

A mere benefit to the promisor was also insufficient. For example, Holmes wrote that "[i]f . . . work is done without intent to be paid for it, the law leaves the parties where they are, and does not give it the character of a compulsory consideration, in case you afterwards change your mind." [219]

Rather, for there to be consideration, there had to be conventional inducement. "[T]he burden must be upon the plaintiffs to prove that what they seek to recover for was furnished as a consideration for a legal obligation."[220] Even actions that were necessary to enable a party to perform were insufficient because they were not bargained for. In *Kenerson v. Colgan*, the

216 *Id.*

217 Bragg v. Danielson, 4 N.E. 622, 623 (Mass. 1886).

218 Nash v. Minn. Title Ins. & Tr. Co., 40 N.E. 1039, 1042 (Mass. 1895) (Holmes, J., dissenting).

219 Johnson v. Kimball, 52 N.E. 386, 387 (Mass. 1899).

220 *Id.*

plaintiff and the defendant entered into a contract under which the defendant promised to give her land to the plaintiff's wife upon the defendant's death, and in exchange the plaintiff promised to move to the defendant's home and care for her.[221] The plaintiff moved onto the defendant's property and erected certain buildings, but the defendant thereafter repudiated the agreement and refused to allow the plaintiff to remove the buildings.[222] The plaintiff sued to recover the value of the materials and labor employed in moving to and erecting the buildings, but Holmes held that there was no consideration for the plaintiff moving his buildings because that was not the consideration for the defendant's promise:

> According to the agreed statement of facts, the consideration of the defendant's promise to "make papers giving the property to Mary, the wife of the plaintiff, after her death," was that the plaintiff "would move from his residence in East Cambridge to her [defendant's] home in Allston, and take care of her." Moving his buildings was no part of the consideration, and therefore, conversely, the defendant's promise was not the consideration or conventional inducement for moving the buildings . . . . Moving the buildings was either a gratuitous act, or at most a means by which the plaintiff enabled himself to do his stipulated part. It was not within the defendant's request.[223]

Consistent with the bargain theory of consideration and his rejection of the benefit-detriment test, Holmes refused to find that past consideration was sufficient to make a subsequent promise binding. In *Holcomb v. Weaver*, the plaintiff recommended the defendant to a third party as a builder for a project.[224] The third party hired the defendant for the project, and the defendant promised to pay the plaintiff $250 "as a commission or compensation for his trouble in the matter."[225] Holmes noted that "if the promise was made after the plaintiff had written . . . recommending the defendant, the plaintiff would have a good deal of difficulty in showing a consideration which was not executed before the promise was made."[226]

In *Moore v. Elmer*, the plaintiff sued the administrators of an estate for breaching the following written promise by the decedent:

> Springfield, Mass., Jan. 11th, 1898. In Consideration of Business and Test Sittings Reseived [sic] from Mme Sesemore, the

221 Kenerson v. Colgan, 41 N.E. 122, 122 (Mass. 1895).
222 *Id.*
223 *Id.* (citations omitted).
224 Holcomb v. Weaver, 136 Mass. 265, 265–66 (1884).
225 *Id.* at 265.
226 *Id.* at 266–67.

> Clairvoyant, otherwise known as Mrs. Josephene L. Moore on Numerous occasions I the undersighned [sic] do hearby [sic] agree to give the above naned [sic] Josephene or her heirs, if she is not alive, the Balance of her Mortgage note whitch [sic] is the Herman E. Bogardus Mortgage note of Jan. 5, 1893, and the Interest on sane [sic] on or after the last day of Jan. 1900, if my Death occurs before then whitch [sic] she has this day Predicted and Claims to be the truth, and whitch [sic] I the undersighned [sic] Strongly doubt. Wherein if she is right I am willing to make a Recompense to her as above stated, but not payable unless death Occurs before 1900. Willard Elmer.[227]

Unfortunately for Elmer, Madame Sesemore's clairvoyant powers were better than he thought, but fortunately for any of his creditors or heirs this did not move Holmes to find the decedent's promise enforceable:

> It is hard to take any view of the supposed contract in which, if it were made upon consideration it would not be a wager. But there was no consideration. The bill alleges no debt of Elmer to the plaintiff prior to the making of the writing. It alleges only that the plaintiff gave him sittings at his request. This may or may not have been upon an understanding or implication that he was to pay for them. If there was such an understanding it should have been alleged or the liability of Elmer in some way shown. If, as we must assume and as the writing seems to imply, there was no such understanding, the consideration was executed and would not support a promise made at a later time. The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for.[228]

Holmes acknowledged, however, that there was no question "about the sufficiency of such a consideration to support a promise to pay for past services as well as for future ones."[229]

Holmes also applied the consideration requirement to a modification of the contract.[230] Consistent with freedom of contract, however, he believed

227 Moore v. Elmer, 61 N.E. 259, 259 (Mass. 1901) (citations omitted).

228 *Id.* at 259-60.

229 Graham v. Stanton, 58 N.E. 1023, 1024 (Mass. 1901).

230 *See* Margesson v. Mass. Benefit Ass'n, 42 N.E. 1132, 1133 (Mass. 1896) ("If it had imported more, there would have been no consideration for it, as he got nothing new, and the company incurred no detriment."); Davis v. German Am. Ins. Co., 135 Mass. 251, 256–57 (Mass. 1883) ("For, without disputing that one contract may be substituted for another, even when the consideration is executed, by way of accord and satisfaction,

that the parties had the right to orally modify their contract, even when there was a no-oral-modification clause:

> Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and defendant, no doubt. But it cannot be assumed, as matter of law, that the contract governed all that was done until it was renounced in so many words, because the parties had a right to renounce it in any way, and by any mode of expression, they saw fit. They could substitute a new oral contract by conduct and intimation, as well as by express words.
>
> In deciding whether they had waived the terms of the written contract, the jury had a right to assume that both parties remembered it, and knew its legal meaning. On that assumption, the question of waiver was a question as to what the plaintiff fairly might have understood to be the meaning of the defendant's conduct. If the plaintiff had a right to understand that the defendant expressed a consent to be liable, irrespective of the written contract, and furnished the work and materials on that understanding, the defendant is bound.[231]

Despite complaining in *The Common Law* that courts, due to an "anxiety to sustain agreements," had erroneously found consideration when there was only a condition,[232] Holmes did not have difficulty concluding that there was sufficient evidence of a bargain, rather than a promise subject to a condition, even outside a business setting. For example, in *Earle v. Angell*, the defendant's testatrix had promised to pay the plaintiff $500 if the plaintiff

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the form of such a transaction cannot be made to cover what is in substance adding a new and gratuitous promise to an existing agreement upon executed consideration. Were this not so, we should probably have seen attempts to avoid the well-settled doctrine that a present debt will not support a promise to pay *in futuro* (*Hopkins v. Logan*, 5 M. & W. 241) by simply applying a different form of words and calling the new promise a substituted contract. For that presents the converse case where the assumption of the less burdensome obligation to pay in future is no consideration for the discharge of the more burdensome one to pay now, and where, therefore, the discharge being void, the promise founded upon it is void, for that reason if not for others.").

231 Bartlett v. Stanchfield, 19 N.E. 549, 550 (Mass. 1889) (citations omitted). Despite his famous dissent in *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting), "Holmes most likely agreed with the principle of freedom of contract that the *Lochner* majority delivered . . . ." Allen Mendenhall, *Justice Holmes and Conservatism*, 17 Tex. Rev. L. & Pol. 305, 314 (2013). "[H]e was not[, however,] about to dictate his belief to a state or local government, especially on such a liberal reading of the Constitution." *Id.*

232 Holmes, *supra* note 2, at 229–30.

agreed to come to her funeral.[233] Holmes wrote that

> [a]ccording to the report, the plaintiff testified that the defendant's testatrix said, "If you will agree to come," etc., "I will give you five hundred dollars," etc., and that he promised to come if alive, and notified in time. We cannot say that this did not warrant a finding of promise for promise.[234]

Holmes did not suggest that the decedent's promise should be construed as simply a promise subject to a condition.[235]

Holmes also reiterated his belief that consideration was the equivalent of form,[236] and, consistent with this view, he refused to inquire into whether the promisor's promise induced the promisee to enter into the contract. For example, Holmes held that when a warranty is given in a written contract, reliance on it—and thus inducement—is presumed:

> When a representation of fact is made as an inducement to an oral purchase, no doubt the question whether it was relied on as a ground for purchasing may be material to the determination whether it is to be taken to enter into the contract as a term or warranty. But when the contract is reduced to writing, the question whether certain expressions constitute a warranty is a matter of construction, and does not depend upon the representation or promise which they embody having afforded a preliminary inducement to entering into the contract. Every expression which by construction is a term of one party's undertaking is presumed to be relied on by the other when he makes the contract.[237]

Holmes's willingness to find consideration is perhaps best exemplified by his opinion in *Martin v. Meles*, an opinion written a year before leaving the Massachusetts court that would set forth almost all of his views on the

233 Earle v. Angell, 32 N.E. 164, 164 (Mass. 1892).

234 *Id.*

235 In another case, the defendant had promised money to a college if the college raised $100,000 within five years, but, unfortunately, it was unnecessary to decide whether the raising of the money was consideration or a condition because the court concluded that the college had not raised the money. *See* President of Bates College v. Bates, 135 Mass. 487, 489 (1883) ("As the defendant must prevail on the ground that the plaintiff has not satisfied the condition of Mr. Bates's promise, it is not necessary to discuss the question whether compliance with that condition would have constituted a consideration, or whether any other consideration can be discovered.").

236 *See* Krell v. Codman, 28 N.E. 578, 578 (Mass. 1891) ("We presume that, in the absence of fraud, oppression, or unconscionableness, the courts would not inquire into the amount of such consideration. This being so, consideration is as much a form as a seal.").

237 Whitehead & Atherton Mach. Co. v. Ryder, 31 N.E. 736, 737 (Mass. 1885).

doctrine.[238] In *Martin*, the defendants and other firms that were engaged in leather manufacturing had promised to contribute to a committee (the plaintiff) a certain sum of money to defray the committee's future expenses in defending lawsuits growing out of patent rights for a tanning system.[239] Holmes held that the committee made an implied promise at the time of contracting to undertake such efforts, not simply upon receipt of the money, relying on the business nature of the transaction:

> It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.[240]

Holmes's analysis—finding an implied promise to undertake efforts based on the business context of the transaction—was sixteen years ahead of then-Judge Benjamin Cardozo's similar analysis in the celebrated case of *Wood v. Lucy, Lady Duff-Gordon*.[241]

Holmes, however, believed that "[t]he most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract."[242] Holmes first seemed to chastise former opinions for finding consideration based merely on a detriment incurred by the promisee:

> In the later Massachusetts cases more weight has been laid on

238 Martin v. Meles, 60 N.E. 397 (Mass. 1901).

239 *Id.* at 398.

240 *Id.*

241 Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 14 (N.Y. 1917). Holmes, in another opinion, relied in part on the transaction's business context in interpreting a satisfaction clause as requiring "that the satisfactoriness of the system, and the risk taken by the plaintiff, were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of the defendant." Hawkins v. Graham, 21 N.E. 312, 313 (Mass. 1889). Holmes wrote that "when the consideration furnished is of such a nature that its value will be lost to the plaintiff either wholly or in great part unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies [sic], of the interested party." *Id.*

242 *Martin*, 60 N.E. at 398.

> the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void.[243]

Holmes wrote that "[t]here must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise."[244] Holmes then echoed his concern that courts have sometimes found consideration where there was only a condition: "[C]ourts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise."[245]

But Holmes's tune then abruptly changed, and he gave a nod to such a practice with respect to business agreements: "There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted."[246] Holmes concluded that a finding of consideration was justified and, consistent with his view of consideration as form, he further concluded that it was improper to inquire as to whether the committee would have in fact performed the acts irrespective of the plaintiff's promise:

> What we have said justifies, in our opinion, the finding of a consideration . . . . It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct . . . .[247]

243 *Id.* (citations omitted). For the latter proposition, Holmes cited to his opinion in *Bragg v. Danielson*, 4 N.E. 622 (Mass. 1886).

244 *Martin*, 60 N.E. at 398.

245 *Id.*

246 *Id.*

247 *Id. See also* WHITE, *supra* note 150, at 279 ("What mattered [to Holmes in *Martin*] was that a pledge had been made that invited the committee to act, and that the committee had promised to act and may have engaged in some activities in keeping with that

Thus, while reiterating that un-bargained for reliance does not make a promise binding, Holmes would not only find consideration in an implied promise; he would—consistent with his view in *The Common Law*—deem irrelevant whether the defendant would have performed irrespective of the plaintiff's promise, following his view of consideration as form. What is most significant, however, is that he advocated for finding consideration when there was a business agreement, revealing that his complaints about courts finding consideration when there was only a condition was likely aimed at promises made outside of a business context.

An analysis of Holmes's cases dealing with consideration show that he was a strong follower of the bargain theory of consideration during his time on the Massachusetts Supreme Judicial Court, and also followed his view from *The Common Law* that consideration is a matter of form, rendering an inquiry into actual motive irrelevant. Importantly, however, Holmes also struck a different tone within the realm of business: despite chastising courts in *The Common Law* for finding consideration when there was only a condition, he argued that courts should work to find consideration for business agreements. Such an approach was, in a larger sense, consistent with *The Common Law*—consistent with his belief that law should be based on public policy. Holmes's discussion in *The Common Law* of the difference between consideration and a condition focused on applying the objective theory to the requirement of a bargain. Holmes the jurist was willing to focus more on experience than logic, arguing "[t]here is the strongest reason for interpreting a business agreement in the sense which will give it a legal support . . . ."[248]

Having shown that Holmes remained largely faithful to the bargain theory of consideration in his decisions on the Massachusetts court, the analysis now turns to his treatment of damages.

C. *Damages*

With respect to damages, Holmes, while on the Massachusetts court, reiterated his view set forth in *The Common Law* that the *Hadley* foreseeability rule should be based not only on whether the damages were foreseeable at the time of contract formation, but also on whether the defendant, at the time of contract formation, assumed the risk of paying for the damages

promise. The formal shell of a 'reciprocal conventional inducement' existed. Seen in this light, *Martin v. Meles* was another in a series of cases in which Holmes followed the goal he had set forth for contract law in *The Common Law*, that of stripping contract doctrine of subjective elements where possible.").

248 *Martin*, 60 N.E. at 398.

incurred. For example, he wrote that "[t]he fundamental principle in cases of contract is that the plaintiff is entitled to recover such damages as reasonably may be supposed to have been contemplated by the parties, when making the contract, as the probable result of its breach, *and as within the risk assumed by the defendant*."[249]

But on one occasion, Holmes seemingly retreated from his belief that damages were part of the parties' agreement. In a case involving an alleged oral agreement that there would be no personal liability on a promissory note given by a corporation, the issue was whether the oral agreement was inadmissible as being in variance with the promissory note. Holmes wrote:

> [T]he rule excluding evidence of oral agreements to vary a writing goes no farther than the writing goes. And, at most, the writing only expresses the obligation assumed by the party signing it. If an oral agreement were set up to diminish or enlarge the extent of the promisor's liability for a breach of the written promise, it might possibly be held inadmissible on the ground that a contract is at common law nothing but a conditional liability to pay damages, defeasible by performance, and that therefore the amount of damages to be paid is part of the legal import of the written words. But, even on this point, the tendency of some Massachusetts cases has been the other way. *And the most obvious and natural view is, that the promise is the only thing which the writing has undertaken or purports to express, either in words or by legal implication. Certainly the writing does not extend to the remedies which the law will furnish for the collection of damages, even from the promisor himself*, as is shown by the fact that they are governed by the *lex fori;* . . . The liability in question may be part of the obligation of contracts of the corporation in a constitutional sense, so that it could not be done away with by statute as to contracts already made. *But the same thing is quite as clearly true of the ordinary remedies against the promisor, which no one supposes to be part of the contract itself.*[250]

Holmes thus left a contradictory record with respect to his view on remedies being a matter of the parties' agreement, though in 1903 he would restate his view that it was a matter of the parties' agreement shortly after joining the United States Supreme Court.[251]

In any event, Holmes did not display an attitude that damages should, in general, be substantially limited. When applying his "assumption of risk" gloss on the *Hadley* rule, he was willing to find that defendants had

249 Whitehead & Atherton Mach. Co. v. Ryder, 31 N.E. 736, 737 (Mass. 1885) (emphasis added).

250 Brown v. E. Slate Co., 134 Mass. 590, 592 (1883).

251 *See* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 545 (1903).

assumed the risk of liability for consequential losses. In one case, he reversed a lower court ruling that had held the plaintiff's lost resale profits for the anticipated sale of bicycles could not be recovered, reasoning that the loss was within the scope of the risk undertaken by the defendant:

> The contract expressly contemplated that the plaintiff was buying in order to sell again. The defendants knew that was the object of the agreement. . . .
>
> The only difficulty in the way of the proposed measure of damages which impresses us is that, when the defendants made their contract, it was not certain, in a commercial sense, that the plaintiff could sell what he ordered. His bicycle seems to have been more or less of an experiment. But as remoteness—that is to say, whether, under given circumstances, upon an ascertained contract, certain damages are within the scope of the risk undertaken—is always a question of law, and as the auditor found the amount of the plaintiff's damages, if they were not too remote, we are compelled to say that, as between the plaintiff's claim and nominal damages, the former comes nearer to doing justice than the latter . . . . The defendants, by their contract, took the risk of damages to that extent, if it should turn out that the plaintiff could sell as it was contemplated and expected that he would.[252]

In another case, Holmes held that when a defendant sold a machine in England, but the defendant knew it was sold for use in the United States, damages for breach of warranty should include the expense involved in attempting to get it to work in the United States.[253]

Holmes also permitted the recovery of lost profits even though the amount might seem speculative:

> [W]e are of opinion that the assessor was warranted in finding substantial damages. . . . [A]nd it would be unjust to turn the plaintiff off with a dollar because he could not prove with prophetic certainty what the exact course of performance would have been. . . . [I]n estimating the worth of the contract of which the plaintiff has been deprived we are to consider not what legally might have happened but what would have happened had the

252 Johnston v. Faxon, 52 N.E. 539, 539–40 (Mass. 1899); *see also* Hyde v. Mech. Refrigerating Co., 11 N.E. 673, 674 (Mass. 1887) ("If a refrigerating company undertakes to store apples at a temperature below a certain height, decay caused, as it was shown to be in this case, by the temperature being allowed to reach a much greater height, is the specific consequence which the contract was made to prevent; and, if the decay caused a diminution of market value, such diminution may be considered as an element of damage.").

253 *Whitehead*, 31 N.E. at 738.

> defendant done as it agreed; or, to put it a little differently, we are to consider commercial, not legal, possibilities. It is absurd to imagine the defendant in performing the contract employing a lawyer's acumen to find out in what way it could deprive the plaintiff of profit instead of employing business intelligence to decide how it could best make profit for itself.[254]

He wrote in another case that "on the facts in evidence, the jury might have found substantial damages without the aid of testimony directed specifically to the amount."[255] And in a case in which a plaintiff sued a defendant for breaching a promise to not foreclose on a mortgage on the plaintiff's farm, Holmes held that the plaintiff's testimony regarding what the farm was worth to him was admissible:

> The plaintiff was allowed to testify what the farm was worth to him from June 1, 1882, to July, 1883, with his stock of cows; and the defendant excepted. Generally speaking, such a question is objectionable. But, in view of the argument, and all the circumstances, we assume that it was understood to mean simply, What was the money value of the farm to one engaged in your special business, and in your general position with regard to it? And so understood, we cannot say, on the bill of exceptions, that it was improper. It does not appear what rule of damages was laid down to the jury; but, assuming that they were allowed to adopt the standard suggested by the question and answer, still we cannot say from anything that appears in the bill of exceptions that the defendant's contract was not made in express contemplation of the plaintiff's use of the farm as a milk farm. If there was no such evidence, it was for the defendant to disclose the fact in his bill of exceptions. It would rather seem that the plaintiff was using the farm in that way at the time the contract was made; that the defendant knew that fact; and that the contract was made for the very purpose of preventing the breaking up of the plaintiff's business, according to the understanding of both parties. In that case, at least, the evidence was admissible.[256]

Holmes, consistent with freedom of contract, also readily upheld liquidated damages provisions.[257] Holmes wrote:

254 Speirs v. Union Drop-Forge Co., 61 N.E. 825, 826 (Mass. 1901).

255 Oak Island Hotel Co. v. Oak Island Grove Co., 42 N.E. 1124, 1125 (Mass. 1896).

256 Manning v. Fitch, 138 Mass. 273, 276–77 (1885).

257 *See, e.g.*, Garst v. Harris, 58 N.E. 174, 174 (Mass. 1900) ("It is suggested that the sum agreed upon in the writing as liquidated damages is a penalty. But it is admitted in the agreed facts that the damages are substantial and difficult to estimate, and it was recognized in the contract that they would be so. It has been decided recently that parties are to be held to their words upon this question, except in exceptional cases,

> [W]e heartily agree with the court of appeals in England that, so far as precedent permits, the proper course is to enforce contract[s] according to their plain meaning, and not to undertake to be wiser than the parties, and therefore that in general, when parties say that a sum is payable as liquidated damages, they will be taken to mean what they say, and will be held to their word.[258]

Holmes's support for freedom of contract extended to distinguishing between a liquidated damages provision and a price to be paid to engage in a particular act, the latter of which is not subject to a penalty analysis:

> The defendant covenanted never to practice his profession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff $2,000, "but not otherwise." This sum of $2,000 was not liquidated damages; still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid.
>
> The defendant expressly covenanted not to return to practice in Gloucester unless he paid this price. It would be against common sense to say that he could avoid the effect of thus having named the sum by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less than $2,000. The express covenant imported the further agreement that if the defendant did return to practice he would pay the price. No technical words are necessary if the intent is fairly to be gathered from the instrument. . . .
>
> [T]his case falls within the language of Lord MANSFIELD in Lowe v. Peers, 4 Burrows, 2225, 2229, that if there is a covenant not to plough, with a penalty, in a lease, a court of equity will relieve against the penalty; "but if it is worded 'to pay £5 an acre for every acre ploughed up,' there is no alternative; no room for any relief against it; no compensation. It is the substance of

where there are special reasons for a different decision. In this case there is every reason for upholding the general rule." (citations omitted)); Standard Button Fastening Co. v. Breed, 39 N.E. 346, 347 (Mass. 1895) ("Payment by the day is a liability attached to the single case of a failure to keep and render a true account, and is required only for such time as the failure lasts. It has none of the characteristics of a penalty to be chancered, and, in our opinion, it is not one.").

258 Guerin v. Stacey, 56 N.E. 892, 892 (Mass. 1900).

> the agreement."[259]

Thus, while Holmes reiterated his gloss on the *Hadley* rule, the evidence does not support the belief that he took a restrictive approach to liability for damages.

259 Smith v. Bergengren, 26 N.E. 690, 690–91 (Mass. 1891).

Conclusion

An analysis of Holmes's contracts opinions on the Massachusetts Supreme Judicial Court shows that he closely followed his theory of contract law that he had set forth in *The Common Law*.[260] The parties' subjective intentions were generally irrelevant—what mattered was the parties' overt acts and how a reasonable person would construe them. The objective theory prevailed both in terms of contract formation and in terms of contract interpretation. The benefit-detriment test for consideration was rejected—what mattered was whether there was a bargain. The critical question was whether what the parties gave was the conventional motive or inducement for entering into the agreement. But inquiry into a party's actual motive for entering into the agreement was irrelevant; consideration was a matter of form. And despite one instance of contradictory dicta, Holmes followed and applied his "assumption of risk" gloss to the *Hadley* foreseeability rule.

At the same time, however, the analysis of Holmes's application of his theory of contract law does not reveal a dedication "to the proposition that, ideally, no one should be liable to anyone for anything," and that "liability . . . was . . . to be severely limited."[261] While Gilmore believed that the bargain theory of consideration was "a tool for narrowing the range of contractual liability,"[262]—and it did in fact have this effect when there was only unbargained-for reliance—Holmes inferred promises to find consideration, refused to inquire into a party's actual motives to defeat a finding of consideration, and argued that consideration should be found in business arrangements. And Holmes's gloss on the *Hadley* rule had, in application, no apparent limiting effect on a defendant's liability for damages. Holmes was willing to find that a defendant had assumed the risk of liability for consequential damages, and also refused to apply a strict standard with respect to proving the amount of consequential damages.

Interestingly, despite initially hoping that *The Common Law* would influence the bench and the bar, in 1900, just two years before leaving the Massachusetts court, Holmes cautioned against too dramatic a shift in the common law:

> We appreciate the ease with which, if we were careless or

260 This conclusion is consistent with that reached by Professor White. *See* White, *supra* note 150, at 280 ("In the main, Holmes was faithful in his Massachusetts contracts decisions to the principles of contract law he had affirmed in *The Common Law*."). White, however, discussed fewer cases than this Article, inasmuch as his biography did not focus on contract law.

261 Gilmore, *supra* note 1, at 15.

262 *Id.* at 23.

> ignorant of precedent, we might deem it enlightened to assume [a particular power]. We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain. No one supposes that this court . . . could abolish the requirement of consideration for a simple contract. In the present case we perceive no such pressing need . . . as to justify our departure from what we cannot doubt is the settled tradition of the common law . . . . It will be seen that we put our decision, not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case.[263]

This passage was consistent with Holmes's application of his theory of contract law while on the Massachusetts Supreme Judicial Court. If his theory set forth in 1881 in *The Common Law* was "astonishing"[264] and "dedicated to the proposition that, ideally, no one should be liable to anyone for anything" and that "liability . . . was . . . to be severely limited,"[265] his application of his theory reveals a much more restrained approach.

263 Stack v. N.Y., New Haven & Hartford R.R., 58 N.E. 686, 687 (Mass. 1900).

264 GILMORE, *supra* note 1, at 6.

265 *Id.* at 15.

FINDING THE LINE BETWEEN CHOICE AND COERCION: AN ANALYSIS OF MASSACHUSETTS'S ATTEMPT TO DEFINE SEX TRAFFICKING

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CONTENT WARNING

The following article engages critically with issues of prostitution and sex trafficking. This may be difficult for some readers.

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INTRODUCTION

"No one defends trafficking. There is no pro-sex-trafficking position any more than there is a public pro-slavery position . . . . The only issue is defining these terms so that nothing anyone wants to defend is covered."[1]

Sex trafficking is an extreme permutation of gender-based violence.[2] However, its definition is often contested because of the long-standing dispute as to whether prostitution is a profession and, therefore, not encompassed in the definition of sex trafficking or sexual exploitation.[3] At the international level, the formation of two rival coalitions depicts this schism. In 1988, feminist activists formed the Coalition Against Trafficking in Women (CATW).[4] In 1994, human rights activists formed the Global Alliance Against Traffic in Women (GAATW).[5] At the Palermo Protocol,[6] CATW—which equates prostitution with slavery—and GAATW—which recognizes prostitution as a profession—attempted to define sex trafficking.[7] The result was a definition encompassing broad means of "abuse of power or of a position of vulnerability" that notably did not limit the means to

1 Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 271 (2011).

2 *Human Trafficking Fuels Violence Against Women*, UNITED NATIONS OFFICE ON DRUGS & CRIME (Nov. 25, 2009), https://www.unodc.org/unodc/en/frontpage/2009/November/human-trafficking-fuels-violence-against-women.html ("Human trafficking is . . . one of the worst forms of violence against women and girls."). This Note does not assert that men, non-binary folks, and gender non-conforming folks are not affected by sex trafficking. However, this Note focuses on female victims because they are at the heart of trafficking legislative efforts and feminist theories. *Id.*

3 Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96, 101 (2017); MacKinnon, *supra* note 1, at 271; Carol H. Hauge, *Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality*, 8 N.Y. INT'L. L. REV. 23, 24–25 (1995) (discussing the debate whether prostitution is a profession or slavery).

4 *About*, COALITION AGAINST TRAFFICKING IN WOMEN, https://catwinternational.org/about/ (last visited June 28, 2020).

5 *History*, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, https://www.gaatw.org/about-us/history (last visited Mar. 23, 2020).

6 The Palermo Protocol is a protocol adopted by the United Nations to combat trafficking of women and children. *See* United Nations Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Preamble, *adopted by United Nations* Nov. 15, 2000, S. TREATY DOC. NO. 108–16 (2004), 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

7 Sanja Milivojevic & Sharon Pickering, *Trafficking in People, 20 Years On: Sex, Migration and Crime in the Global Anti-Trafficking Discourse and the Rise of the 'Global Trafficking Complex'*, 25 CURRENT ISSUES CRIM. JUST. 585, 587, 593–94 (2013); *History*, *supra* note 5.

solely force, fraud, or coercion.[8]

Concurrently, the U.S. federal government criminalized sex trafficking with the enactment of the Trafficking Victims Protection Act of 2000 (TVPA).[9] Its aim was to define trafficking, enhance penalties for traffickers, and provide government assistance to victims.[10] Notably, this statute is limited by a force, fraud, or coercion element.[11] After the federal government enacted its definition of trafficking, state legislatures followed with their own definitions of the crime, often mirroring the federal statute.[12] However, in 2011, Massachusetts passed a statute without the limiting force, fraud, or coercion element, thus differing significantly from its federal counterpart.[13] There are several reasons why the legislature felt that the state statute must have a broader scope.[14] However, the survey of court cases analyzed throughout this Note suggest that this new statute is not successfully aiding the fight against sex trafficking.[15]

The focus of this Note is primarily on sex trafficking,[16] basing the analysis on the position that sex trafficking and sex work should not be conflated. This Note finds that the Massachusetts statute is not successfully fighting sex trafficking and is inherently problematic in its nature. As it stands, the Massachusetts statute is so overbroad that it damages women's agency and does not hold actual traffickers accountable.[17] When applied, the law has not been used to punish traffickers for trafficking but to persuade them into taking pleas for other, lesser crimes involving prostitution, such as solicitation or assisting prostitution.[18] Arguably, this shows that the

8 Palermo Protocol, *supra* note 6, at art. 3(a) (adopting a broad definition encompassing any "means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits").

9 Trafficking Victims Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464.

10 Melissa Dess, *Walking the Freedom Trail: An Analysis of the Massachusetts Human Trafficking Statute and Its Potential to Combat Child Sex Trafficking*, 33 B.C. J.L. & Soc. Just. 147, 150 (2013).

11 18 U.S.C. § 1591(a) (2012) (limiting applicability to "[s]ex trafficking of children or by force, fraud, or coercion").

12 *See* Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 Wm. & Mary J. Women & L. 83, 101–02 (2009).

13 Mass. Gen. Laws ch. 265, § 50(a) (2012).

14 *See infra* Part III(B).

15 *See infra* Part IV.

16 Even though this Note will focus only on sex trafficking, Polaris has identified a total twenty-five different types of human trafficking. *The Typology of Modern Slavery*, Polaris (Mar. 1, 2017), https://polarisproject.org/wp-content/uploads/2019/09/Polaris-Typology-of-Modern-Slavery-1.pdf.

17 *See infra* Part V(A).

18 *Id.*

legislature sees prostitution as an inherently immoral crime because sex traffickers end up being convicted of crimes involving prostitution rather than those involving trafficking. The statute simply acts as a band-aid to fix sex trafficking without addressing the inherent societal issues that are at the root of the sex trafficking pandemic. The statute's language should be amended and sex work should be decriminalized in order to address these root issues.

Part I frames the discussion by examining the fundamental debates over sex work and sex trafficking. Primarily, this part looks at the main arguments for the two principal groups involved in the debates: the pro-sex work and the abolitionist positions. Part II provides an overview of sex trafficking in the United States. Part III analyzes how the Massachusetts sex trafficking statute differs from the federal statute by examining the state statute's legislative history. This part also focuses on a review of *Commonwealth v. McGhee*, the seminal Supreme Judicial Court ("SJC") case analyzing the statute. Part IV presents the landscape of the Massachusetts sex trafficking cases. This part surveys sixty-three sex trafficking cases that were brought in various Massachusetts superior courts from 2012 to 2019, analyzing trends in conviction rates, prosecutorial decisions, and defendant demographics. Part V discusses the implications of the results of the surveyed cases and potential future areas of research in this specific field. Part VI concludes with recommendations on how to amend the statute to more successfully address the problem at hand.

I. Framing the Discussion

Efforts to end sex trafficking are plagued with constant debates surrounding the definition of the term.[19] The two main groups involved in these debates are abolitionist and pro-work advocates.[20] The former movement equates and "conflate[s] sex work with trafficking [by] view[ing] sex work as inherently harmful and exploitive."[21] Prabha Kotiswaran, a legal scholar specializing in sex work, stated: "Abolitionists adopting a sexual subordination approach are against the commodification of sex and view sex work as a paradigmatic form of violence against women, embodying gender inequality. For them, sex workers are victims and lack agency in the context of pervasive institutional violence."[22] The latter movement recognizes sex work as a profession and strongly opposes its criminalization.[23] Kotiswaran describes "[s]ex work advocates . . . [as] agnostic to the commodification of sex per se and . . . view[ing] sex workers as agents with some ability to negotiate within the sex industry. Thus, their emphasis is on protecting and promoting the rights of sex workers."[24]

Abolitionists see sex work as the oldest form of oppression.[25] They believe that all "prostitution is intrinsically abusive."[26] They argue that prostitution is necessarily physically and mentally damaging:

> In prostitution, no woman stays whole. It is impossible to use a human body in the way women's bodies are used in prostitution and to have a whole human being at the end of it, or in the middle of it, or close to the beginning of it . . . . And no woman gets whole again later, after.[27]

Research has been compiled to support this idea, ranging from studies that indicate "sexual and physical abuse against sex workers is common, severe,

19 *See* Barnhart, *supra* note 12, at 88–89; *see also* MacKinnon, *supra* note 1, at 273.

20 *See* Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. Pa. L. Rev. 1729, 1730 (2010).

21 Stephanie M. Berger, *No End in Sight: Why the "End Demand" Movement Is the Wrong Focus for Efforts to Eliminate Human Trafficking*, 35 Harv. J.L. & Gender 523, 527 (2012).

22 Prabha Kotiswaran, Dangerous Sex, Invisible Labor: Sex Work and the Law in India 10 (2011).

23 *See* Anna North, *The Movement to Decriminalize Sex Work*, Vox (Aug. 2, 2019), https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc.

24 Kotiswaran, *supra* note 22, at 10.

25 MacKinnon, *supra* note 1, at 273.

26 Andrea Dworkin, *Prostitution and Male Supremacy*, 1 Mich. J. Gender & L. 1, 2–3 (1993); *see also* Barnhart, *supra* note 12, at 89 ("[Abolitionists believe that b]oth prostitution and sex trafficking must be eradicated in order to free women from male dominance.").

27 Dworkin, *supra* note 26, at 3.

and widespread" and "sex workers suffer 'devastating' effects on their physical and mental health," to studies that show sex buyers "have heightened violent inclinations."[28] Abolitionists hold the opinion that a "prostituted woman"[29] cannot willingly give consent for paid sex.[30] They believe that if a victim has consented, it is because she has convinced herself that that is what she voluntarily needs to do in order to survive.[31] This ideology brings about the possible danger of patronizing and victimizing women, which is largely representative of the way society thinks about women's place in society.[32] In fact, historically, "regulation of prostitution was based on restrictive attitudes regarding female sexuality, which aimed to prevent 'promiscuous unchastity.'"[33]

On the other side, pro-work advocates argue that sex workers enter the profession for a variety of reasons, and that looking at sex-work on a spectrum better suits the needs of the women involved.[34] Advocates argue that "treating all sex work as forced removes women's agency and infantilizes them."[35] Agency is a woman's right to privacy, sexual freedom, economic freedom, and control of her body.[36] In fact, sex work is an expression of agency: "[A]gentic actors, sex workers, . . . control the sexual interaction, are compensated for what is usually expected from women for free, and have independent lives and anonymous sex with many partners – behaviors usually monopolized by men, hence liberating for women."[37]

The harmful aspects of sex work result not from selling sex in and

28 Berger, *supra* note 21, at 529–30.

29 Abolitionists refer to sex workers as "prostituted women" because it implies that prostitution is something done to a woman against her will. Ronald Weitzer, *The Mythology of Prostitution: Advocacy Research and Public Policy*, 7 SEX RES. & SOC. POL'Y 15, 17 (2010).

30 Berger, *supra* note 21, at 530. *See* MacKinnon, *supra* note 1, at 300 ("You cannot traffic yourself, which separates it from prostitution. Sexual exploitation can also be slavery. Right there, in the international definition, is what is sometimes criticized as a 'conflation' of slavery with trafficking. You cannot enslave yourself either. For her prostitution to be exploited, she has to be sold to someone.").

31 Berger, *supra* note 21, at 530.

32 *See* GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 129–30 (2007), http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf (alluding to the consideration that viewing all sex work as forced patronizes and infantilizes women).

33 Berger, *supra* note 21, at 532.

34 *Id.* at 531.

35 *Id.* at 531–32.

36 Elizabeth M. Donovan, *Same as It Ever Was: In Support of the Rights of Sex Trafficking Victims*, 36 QUINNIPIAC L. REV. 489, 592 (2018).

37 MacKinnon, *supra* note 1, at 273.

of itself but rather from external factors such as violence. Victimization is another such factor that "varies across time, place, and echelon."[38] Violence in sex work also comes in many forms.[39] It is possible that violence may happen as a result of several societal issues such as white supremacy and police brutality.[40] Violence can be minimized by creating programs that reduce stigma, improving the conditions of voluntary sex workers, implementing health and safety guidelines created with and by sex-working communities, and developing sensitivity training and education for police regarding crimes against and by sex workers.[41] Pro-sex work advocates find that "although harms will always exist in prostitution, efforts to eliminate prostitution – especially outdoor/street sex work – do not encourage women to leave sex work. Rather, it pushes the most desperate women further underground into more dangerous, less controllable situations where harm is even more likely."[42]

In response to abolitionists' views, pro-sex work advocates argue that abolitionists conflate the definitions of trafficking and prostitution, thus producing a "'chilling effect' on the public discourse around sex work."[43] This conflation occurs when abolitionists fail to acknowledge other forms of trafficking and fail to understand that prostitution falls on a spectrum.[44] In fact, it is both under- and over-inclusive: it does not adequately acknowledge other forms of trafficking or the possibility of voluntary sex work.[45] While abolitionists believe that efforts to end trafficking and prostitution cannot be separated,[46] pro-work advocates find that equating trafficking and prostitution is problematic because "[p]rostitution per se as the exclusive purpose of trafficking is an untenable definition as not all victims are prostitutes and

38 Weitzer, *supra* note 29, at 16.

39 Graham Hudson & Emily van der Meulen, *Sex Work, Law, and Violence:* Bedford v. Canada *and the Human Rights of Sex Workers*, 31 Windsor Y.B. Access Just. 115, 116 (2013).

40 World Health Org. et. al., Implementing Comprehensive HIV/STI Programmes with Sex Workers: Practical Approaches from Collaborative Interventions 22–23 (2013), https://apps.who.int/iris/bitstream/handle/10665/90000/9789241506182_eng.pdf?sequence=1.

41 Emily van der Meulen & Elya Maria Durisin, *Why Decriminalize? How Canada's Municipal and Federal Regulations Increase Sex Workers' Vulnerability*, 20 Can. J. Women & L. 289, 310 (2008) (listing recommendations for improving sex workers' conditions).

42 Berger, *supra* note 21, at 533; *see also* Katie Tastrom, *Want to Reduce Sex Trafficking? Decriminalize Sex Work*, Rewire News (July 18, 2019), https://rewire.news/article/2019/07/18/want-to-reduce-sex-trafficking-decriminalize-sex-work/.

43 Berger, *supra* note 21, at 535, 537.

44 *Id.*

45 *Id.*

46 *See* MacKinnon, *supra* note 1, at 299–300.

nor have all the prostitutes been trafficked."[47] A background understanding of these debates surrounding the definition of sex trafficking is important in order to fully grasp the complexity of the problem of sex trafficking and the actors involved.

47 Lin Lean Lim, *Trafficking, Demand, and the Sex Market*, INT'L INST. FOR LAB. STUD. (Mar. 12, 2007), http://lastradainternational.org/lsidocs/334%20Lin%20Lean%20Lim%20TraffickingDemand%20Sex%20market.pdf.

II. Overview of Sex Trafficking

A. *The Problem*

Sex trafficking[48] is a pervasive problem that encompasses a wide spectrum of behavior ranging from sexual assault, false promises, and dehumanizing conditions to physical violence.[49] It is one of the largest and fastest growing criminal enterprises in the world.[50] The nature of the crime and the isolation of its victims make statistical research difficult, but experts estimate that there are as many as 24.9 million victims of human trafficking worldwide at any given time,[51] including 4.8 million victims of sex trafficking.[52]

Trafficking involves the illegal trade of people for exploitation or commercial gain[53] and allows perpetrators to "earn[] profits of roughly $150 billion a year."[54] It is not required that a victim be transported from one location to another, across state or international boarders, for the crime of trafficking to occur.[55] Sex trafficking is also a "market-driven criminal industry."[56] Human beings, unlike drugs or other illegal products, are a reusable resource: "[W]omen and girls sold into sex trafficking earn profits

48 Trafficking differs from human smuggling. Trafficking centers on exploitation, while human smuggling centers on transportation. *See Human Trafficking and Smuggling*, U.S. Immigr. & Customs Enforcement (Jan. 16, 2019), https://www.ice.gov/factsheets/human-trafficking.

49 *Human Trafficking*, Polaris, https://polarisproject.org/human-trafficking (last visited Mar. 22, 2020).

50 Ewelina U. Ochab, *The World's Fastest Growing Crime*, Forbes (July 29, 2017), https://www.forbes.com/sites/ewelinaochab/2017/07/29/the-worlds-fastest-growing-crime/#2c2511c93aae.

51 *Human Trafficking*, *supra* note 49. *See generally The Traffickers*, Nat'l Hum. Trafficking Hotline, https://humantraffickinghotline.org/what-human-trafficking/human-trafficking/traffickers (last visited Mar. 31, 2020) (identifying human trafficking as a high profit low risk enterprise).

52 *Forced Labour, Modern Slavery and Human Trafficking*, Int'l Lab. Org., https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm (last visited Mar. 29, 2020).

53 *Human Trafficking*, Nat'l Hum. Trafficking Hotline, https://humantraffickinghotline.org/type-trafficking/human-trafficking (last visited July 19, 2020).

54 *Human Trafficking by the Numbers*, Hum. Rts. First (Sept. 7, 2017), https://www.humanrightsfirst.org/sites/default/files/TraffickingbytheNumbers.pdf ($99 billion of this $150 billion is from commercial sexual exploitation).

55 MacKinnon, *supra* note 1, at 299–300 ("Movement across jurisdictional lines is not . . . an element of the international definition of trafficking . . . . The sine qua non [essential, crucial, or indispensable ingredient] of trafficking is thus neither border crossing nor severe violence. It is third-party involvement.").

56 *Human Trafficking*, *supra* note 53.

for their pimps and traffickers over a great number of years."[57] Traffickers can often earn more money by prostituting women than they could by committing other crimes because the commodity of humans can be sold repeatedly.[58]

Sex trafficking is a prominent problem in Massachusetts.[59] Trafficking takes place all throughout the state, "from Allston/Brighton and East Boston, to Worcester, Lowell, and affluent suburbs."[60] Boston, in particular, is considered a major hub for sex trafficking in the Northeastern region of the United States.[61] The National Human Trafficking Hotline reports that in 2019, 107 human trafficking cases were reported in Massachusetts.[62] Of those reports, 80 were related to sex trafficking.[63] Between 2007 and 2019, the hotline received 2,976 contacts (phone calls, texts, online chats, and emails) about human trafficking crimes in Massachusetts.[64] A 2018 investigative journalism series identified approximately 185 illicit massage parlors in Massachusetts on a "popular [sex-buyer] board dedicated to erotic massage."[65] These reports and investigative discoveries document the prevalence of sex trafficking in Massachusetts.

B. *The Perpetrators*

Perpetrators of sex trafficking generally range from a diverse variety of organized criminal groups to lone individuals.[66] These groups "vary in terms of their leadership structure, level of organizational sophistication,

57 Neha A. Deshpande & Nawal M. Nour, *Sex Trafficking of Women and Girls*, 6 REVS. OBSTETRICS & GYNECOLOGY 22, 25 (2013).

58 *Who Are Human Traffickers?*, HUM. RTS. FIRST 1 (June 10, 2014), https://www.humanrightsfirst.org/sites/default/files/Who%20are%20human%20traffickers.pdf.

59 *See* MASS. INTERAGENCY HUMAN TRAFFICKING POLICY TASK FORCE, FINDINGS AND RECOMMENDATIONS 15 (Aug. 19, 2013), http://www.mass.gov/ago/docs/ihttf/ihttf-findings.pdf [hereinafter TASK FORCE REPORT].

60 Dess, *supra* note 10, at 155.

61 *Id.*

62 *Massachusetts*, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/state/massachusetts (last visited Mar. 29, 2020). It is important to note that this is an underreported crime, thus the real statistics are likely to be much higher. *See Myths, Facts, and Statistics*, POLARIS, https://polarisproject.org/myths-facts-and-statistics/ (last visited Mar. 31, 2020).

63 *Massachusetts*, *supra* note 62.

64 *Id.*

65 Jenifer McKim & Phillip Martin, *Illicit Massage Parlors Are Across Massachusetts. Why Is Police Action So Rare?*, WGBH NEWS (Jan. 16, 2018), https://news.wgbh.org/2018/01/16/local-news/illicit-massage-parlors-are-across-massachusetts-why-police-action-so-rare.

66 *Who Are Human Traffickers?*, *supra* note 58. For an understanding of the perpetrators in Massachusetts, see *infra* Part IV(B)(iv).

transnational reach, membership size, ethnic and social composition, dependence on human trafficking as a primary source of profit, [and] use of violence . . . ."[67] Sex trafficking can take place on the street, through escort services, and at strip clubs, massage parlors, hotels, and brothels.[68] Depending on the type of sex trafficking, the ways by which traffickers exploit victims differ greatly.[69] "Most trafficking operations in the Northeast are transient, are mobile, and operate under layers of deception."[70] There are also secondary profiteers, such as "hotels, restaurants, taxi services, property owners who rent to pimps, and other businesses that provide support services to the sex industry."[71] Additionally, because of the widespread nature of the internet and technology,[72] traffickers can now reach a wider client base and connect more quickly with clients.[73] This expansion in technology has led to an expansion of the sex trafficking market.[74]

C. *The Victims*

Sex trafficking can affect anyone.[75] While it is unfair to generalize the experiences of sex trafficking victims, this Note acknowledges that most traffickers target victims that are particularly vulnerable due to a myriad of characteristics.[76] These characteristics include poverty, limited education,

67 Alison Siskin & Liana Sun Wyler, Cong. Research Serv., RL34317, Trafficking in Persons: U.S. Policy and Issues for Congress 5 (Feb. 19, 2013), https://fas.org/sgp/crs/row/RL34317.pdf.

68 Andrea J. Nichols, Sex Trafficking in the United States 140 (2016); Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. St. Thomas L. J. 28, 35, 40 (2008).

69 "From sex trafficking within escort services to labor trafficking of farmworkers, the ways humans are exploited differ greatly. Each type has unique strategies for recruiting and controlling victims, and concealing the crime." Polaris, *supra* note 16, at 5.

70 Brief of the Massachusetts Attorney General as Amicus Curiae at 6, Commonwealth v. McGhee, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

71 Hughes, *supra* note 68, at 40.

72 *See generally* U.N. Inter-Agency Coordination Grp. Against Trafficking in Persons, Human Trafficking And Technology: Trends, Challenges And Opportunities 1 (July 2019), https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/07/report/human-trafficking-and-technology-trends-challenges-and-opportunities/Human-trafficking-and-technology-trends-challenges-and-opportunities-WEB...-1.pdf.

73 *See id.*; *Technology and Trafficking*, Equality Now (Aug. 14, 2019), https://www.equalitynow.org/technology_and_trafficking_the_need_for_a_stronger_gendered_and_cooperative_response.

74 *Technology and Trafficking*, *supra* note 73.

75 However, it is important to note that, as described *supra* in note 2, most victims of sex trafficking are women.

76 Dara Goodman et al., Representing Victims of Human Trafficking in Massachusetts:

lack of employment opportunities, lack of family support, mental health problems, substance abuse, and history of physical or sexual abuse.[77] Traffickers exploit these vulnerabilities in order to gain a profit.[78] Victims may be enticed by traffickers through promises of "protection, love, marriage . . . or a better lifestyle."[79] Traffickers also recruit victims through fraud and manipulation, such as threats of violence to the victims and their families, forced drug use, or threats of shaming.[80] Once involved, it is difficult for victims to escape because they often face physical and psychological harms.[81]

An analysis of this problem is not complete without acknowledging the sensationalism that is apparent in the debates surrounding the trafficking definition. Abolitionists, in fact, often use selective "horror stories" and tragic depictions of victims to advance their position:[82] "BEATEN. Burned. Branded with a bar code or with a pimp's name carved into her thigh. Thrown into the trunk of a car for punishment. Forced to provide sexual services for countless callous and violent men."[83] These tactics serve to arouse indignation and "fuel[] deeply flawed campaigns against prostitution."[84] The way something is defined and described greatly impacts the way it is perceived by outsiders. This sensationalism conflates sex work with other practices that are generally condemned, such as rape and domestic violence.[85] Calling prostitution "paid rape" has enormous shock value.[86] This "categorical terminology obscures the empirically documented relationships between workers and customers, which are complex and varied."[87]

Through categorical terminology, abolitionists have created unsubstantiated and dubious generalizations,[88] further infantilizing women.

A GUIDE FOR ATTORNEYS 5 (Seth Orkland & Julie Dahlstorm eds., 1st ed. 2013),https://docs.wixstatic.com/ugd/6d5c12_e4e8c12d8ea3487fbebfa0f7d3eabdb0.pdf.

77 Heather J. Clawson et al., *Human Trafficking into and Within the United States: A Review of the Literature*, U.S. DEP'T HEALTH & HUM. SERVS. 7–8 (Aug. 30, 2009), https://aspe.hhs.gov/system/files/pdf/75891/index.pdf.

78 ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 2, 5 (2013), https://fas.org/sgp/crs/row/RL34317.pdf.

79 GOODMAN ET AL., *supra* note 76, at 6.

80 *Id.*

81 *See id.* at 5.

82 Weitzer, *supra* note 29, at 17–18.

83 Noy Thrupkaew, *A Misguided Moral Crusade*, N.Y. TIMES (Sept. 22, 2012), https://www.nytimes.com/2012/09/23/opinion/sunday/ending-demand-wont-stop-prostitution.html.

84 *See id.*

85 *See* Weitzer, *supra* note 29, at 17.

86 *Id.*

87 *Id.*

88 *Id.* at 18.

These tactics are intentional and have political consequences. In fact, abolitionists have crafted a "prototypical victim" that serves perfectly to advance their agenda.[89] "[This] victim—an abused teenage girl raised in the blight of the inner city and forced into the sex trade by an older man—does exist."[90] However, this prototypical victim disregards the fact that individuals enter sex work for a variety of reasons. Additionally, true victims do not need to be made into symbolic figures used as pawns to color the public's perception of sex work; they need access to government services and real protection.[91] Generalizing victim experiences is self-serving; it simply helps abolitionists gain support without actually addressing any of the inherent issues at the root of the sex trafficking problem. To do so, advocates need to prioritize ensuring shelter, job opportunities, and other social services for all victims.[92]

As previously stated, this Note advocates for the pro-sex work position through the lens of acceptance of the profession as the best way of reducing harms against women while simultaneously respecting their agency. It is imperative to recognize "the varied and intersectional experiences of [sex] trafficking victims" in order to initiate an effective response to trafficking.[93] In fact, abolitionists largely erase the distinct experiences of women by combining them into a single theory that all women are oppressed, which disregards the contextual reasons why the women initially decided to get involved in sex work.[94] In order to fully recognize the varied reasons for entering sex work and to respect women's agency, it is important to understand the goals and effects of the implementation of various different statutory schemes.

89 Thrupkaew, *supra* note 83.

90 *Id.*

91 *Id.*

92 *See id.*

93 Barnhart, *supra* note 12, at 103–04 ("[Scholars] critique[] the underlying assumption of many feminists that essentializes women's gender as a force that binds women together under similar oppression. This criticism finds its weight in the race and class conflicts surrounding discussions of women's work in domestic and market spheres.").

94 *Id.* at 103.

III. SEX TRAFFICKING STATUTORY SCHEME

A. *Fighting Trafficking at the Federal Level*

The U.S. federal government criminalized human trafficking, including sex trafficking, with the enactment of the Trafficking Victims Protection Act of 2000 (TVPA).[95] Its aim was to "define[] and criminalize[] human trafficking, enhance[] penalties for traffickers, [and] provide[] government assistance to victims . . . ."[96] Subsequently, Congress reauthorized the TVPA in 2003, 2005, 2008, and 2013.[97]

The current statute states in pertinent part:

> Whoever knowingly—
>
> . . . [R]ecruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or in reckless disregard of the fact, that means of **force, threats of force, fraud, coercion** . . . or any combination of such means will be used to cause the person to engage in a commercial sex act, . . . shall be punished . . . .[98]

The federal statute is divided into three main elements: methods used to gain control over the victim, means the trafficker uses to exploit the victim, and the specific purpose of the exploitation.[99] The key aspect of this statute is the limiting means, requiring force, fraud, or coercion. Coercion is defined as: "(A) threats of serious harm . . .; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm . . .; or (C) the abuse . . . of law or the legal process."[100]

In 2007, the House of Representatives passed the William Wilberforce Trafficking Victims Protection Reauthorization Act, which sought to create a broader offense of sex trafficking that would not require a finding of force, fraud, or coercion.[101] This change was driven by the recognition that "[p]imps typically recruit . . . vulnerable individuals through

95 Trafficking Victims Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464, 1464–66.

96 Dess, *supra* note 10, at 150.

97 GOODMAN ET AL., *supra* note 76, at 16.

98 18 U.S.C. § 1591(a) (2018) (emphasis added).

99 *Id.*

100 *Id.* at (e)(2).

101 H.R. 3887, 110th Cong. (2007) (as referred to Senate, Dec. 5, 2007) https://www.congress.gov/bill/110th-congress/house-bill/3887.

use of persuasive tactics that do not rise to the level of the force, fraud, or coercion."[102] However, the bill failed to pass the Senate[103] due in part to criticism from pro-work advocates for "improperly equating all prostitution with sex trafficking" and for "assuming that no individual could choose to engage in prostitution of [their] own will."[104] As a result, the scope of the TVPA remains limited.

The TVPA provided for a federal response to trafficking through prosecution but also improved access to protection for victims.[105] However, many recognize that the statute has failed to fully address the problem at hand.[106] For example, between 2000 and 2010, the U.S. Department of Justice ("DOJ") only convicted 607 individuals for human trafficking.[107] Recognizing the limitations of the TVPA, in 2004 the DOJ published a Model State Anti-Trafficking Criminal Statute for state legislators to use as a guide to create laws that address human trafficking.[108] The U.S. Senate endorsed this model legislation.[109]

State laws are important not only because criminal law is primarily a state function[110] but also because they supplement federal law in the fight

102 John Elrod, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 Vand. L. Rev. 961, 980 (2015).

103 H.R. 3887.

104 Elrod, *supra* note 102, at 984.

105 Increased benefits include access to a T-visa (a non-immigrant status visa which protects the victims from being removed from the United States) and federal victim services such as health benefits and witness protection. *See* U.S. Dep't Health & Hum. Servs., Services Available to Victims of Human Trafficking: A Resource Guide to Social Service Providers 1, 6–7, 10, 12–14, 23–24 (May 2012), https://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf.

106 *See* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 Fordham L. Rev. 2977, 3020 (2006) ("[Despite] an increase in the prosecution of sex and labor trafficking prosecutions when compared to the numbers prior to the enactment of the TVPA . . . these numbers remain troublingly low."); *id.* at 2978 (arguing consensus exists that the TVPA failed to sufficiently address human trafficking); *see also* Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 Stan. L. & Pol'y Rev. 379, 384 (2005) (discussing how victim protection under the TVPA has not been extremely effective).

107 Dess, *supra* note 10, at 165-66.

108 *See* Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 Wm. & Mary J. Women & L. 403, 414, 425 (2006). The Model Statute largely mirrored the federal statute. Barnhart, *supra* note 12, at 101–02.

109 S. Res. 414, 108th Cong. 2d Sess., 3–4 (2004) ("[E]nactment of comprehensive State laws criminalizing human trafficking . . . may be necessary to ensure that Federal efforts are accompanied by robust efforts at the State and local levels.").

110 *See* Barnhart, *supra* note 12, at 97.

against human trafficking.[111] "Comprehensive state legislation specifically addressing this crime is critical to" combatting sex trafficking.[112] There are several more specific reasons why state laws regulating sex trafficking are critical: (1) federal resources cannot keep up with the number of trafficking cases; (2) state and local law enforcement are more likely to make the first contact with victims; and (3) state laws can provide additional resources for victims.[113]

Before 2011, forty-seven states enacted anti-trafficking laws[114] through varying approaches.[115] As of 2020, all fifty states have enacted some form of sex trafficking statute.[116] In drafting their sex trafficking statutes, state legislatures often mirrored the federal definition of the crime.[117] However, a few states omitted the force, fraud, or coercion element from their statutes, which could signal an effort to make the scope broader.[118] One of these states is Massachusetts.[119]

B. *Unusual Characteristics of the Massachusetts Statute*

On February 19, 2012, sex trafficking was officially criminalized in Massachusetts.[120] State Attorney General (AG) Martha Coakley and Suffolk

111 *See* Jim Finckenauer & Min Liu, *State Law and Human Trafficking*, *in* MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING 3, 7 (Dessi Dimitrova ed., 2007); *see also* Michelle Crawford Rickert, *Though the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level*, 4 LIBERTY U. L. REV. 211, 236 (2010).

112 John Tanagho, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with Its Federal and State Counterparts*, 38 LOY. U. CHI. L.J. 895, 918 (2007); *see also* Barnhart, *supra* note 12, at 86–87.

113 Dess, *supra* note 10, at 151–52. *See* Tanagho, *supra* note 112.

114 Massachusetts, West Virginia and Wyoming did not have criminal human trafficking laws in 2011. GOODMAN ET AL., *supra* note 76, at 17.

115 Chacón, *supra* note 3, at 99 ("Some [states] were more concerned with antitrafficking as a means of regulating migration through state criminal law, while others were more concerned with the criminal regulation of prostitution or the protection of victims of sexual exploitation.").

116 *2014 State Ratings on Human Trafficking Laws*, POLARIS (Sept. 1, 2014), https://polarisproject.org/wp-content/uploads/2019/09/2014-State-Ratings.pdf.

117 *See* Barnhart, *supra* note 12, at 101–02.

118 Illinois, Minnesota, and Maine have also chosen to omit the requirement of force, fraud or coercion in their human trafficking statutes. *See* 720 ILL. COMP. STAT. 5/10-9 (LexisNexis 2020); ME. STAT. tit. 17, § 853 (Westlaw 2019); MINN. STAT. ANN. § 609.322 (Westlaw 2020). However, these will not be discussed in detail in this Note.

119 *See* MASS. GEN. LAWS ANN. ch. 265, § 50 (Westlaw 2020).

120 *See* An Act Relative to the Commercial Exploitation of People, ch. 178, § 23, 2011 Mass. Acts ch. 178 (codified at MASS. GEN. LAWS ANN. ch. 265, §§ 49–50 (Westlaw 2012)).

County District Attorney Daniel Conley strongly advocated for the bill.[121] The current statute states, in pertinent part:

> Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means . . . another person to engage in commercial sexual activity . . . or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude . . . .[122]

Similarly to the federal statute, the Massachusetts statute separates the definition of trafficking into three main elements: the methods of gaining control over the victim, the means used to exploit the victim, and the purpose of the exploitation.[123] However, the means are much broader than those in the federal statute, as this statute lacks the additional element of force, fraud, or coercion.[124] Likely due to this omission, the Massachusetts law is considered one of the toughest sex-trafficking laws in the nation.[125] In addition to broadening the scope of offenses, the statute also increased the penalty for sex-buyers to 2.5 years of imprisonment.[126]

In order to achieve its goals of expanding the types of behavior covered by the statute, the legislature "purposefully chose [this] language . . . so that [it] would focus appropriately on the offending mental intent and conduct of the defendant rather than just certain means by which that conduct could be committed."[127] "[T]his way, the statute [covers] offensive forms of [sex] trafficking that may not involve obvious physical coercion or force."[128] For example, victims often experience homelessness, substance abuse problems, and/or lack of familial support, and are thus unable to remove themselves from a harmful situation regardless of physical coercion

121 Brief and Appendix for the Commonwealth on Appeal at 30, Commonwealth v. McGhee, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

122 Mass. Gen. Laws Ann. ch. 265, § 50(a) (Westlaw 2020). The phrase "[c]ommercial sexual activity" is defined as "any sexual act on account of which anything of value is given, promised to or received by any person." *Id.* § 49.

123 *See id*. § 50.

124 *See id.*

125 Matt Murphy, *Massachusetts Among Last States to Adopt Anti-Human Trafficking Law*, St. House News Serv., (Nov. 21, 2011), https://www-statehousenews.com.ezproxy.neu.edu/?login=yes&trial=yes&path=cms/news.aspx&yr=2011&select=2011187.

126 Mass. Gen. Laws Ann. ch. 272, § 8 (Westlaw 2020). Previously, the penalty was one year in prison. Mass. Gen. Laws Ann. ch. 272, § 8 (Westlaw 2011) (amended by An Act Relative to the Commercial Exploitation of People, 2011 Mass. Acts ch. 178).

127 Brief of the Massachusetts Attorney General as Amicus Curiae at 12, Commonwealth v. McGhee, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

128 *Id.*

or force.[129] Victims may feel helpless and rely on their traffickers to give them food and shelter or to support their addictions.[130] To require a finding of force or coercion could make the prosecution of these cases more challenging.[131] The legislature chose not to impose such a requirement so that the statute would encompass these types of sex trafficking schemes.[132]

During the legislative process, AG Coakley offered testimony regarding the goals of the statute.[133] She stated that the proposed law would "go after the [trafficking] supply" by creating the crime of sex trafficking, "address the demand that feeds this industry" by increasing the penalty for sex buyers, and "support its victims" by creating a task force to study the problem and recommend further solutions.[134] One tactic employed by the Massachusetts legislature to meet these goals is known as demand reduction,[135] which focuses on shaming and punishing sex buyers ("johns") in an effort to discourage them from buying sex.[136] Advocates of this tactic often refer to the need to end demand for prostitution as the most effective way to end sex trafficking: "[T]he male demand for . . . prostitution is the most immediate cause of the expansion of the sex industry without which it would be highly unprofitable for pimps and traffickers to seek out a supply of women. . . . [A] prostitution market without male consumers would go broke."[137] Advocates of this position make oversimplified claims about supply and demand in this industry:

> Without the demand for commercial sex, there would be no

129 *Id.*

130 *Id.* at 12–13.

131 *Id.* at 13; *see also Force, Fraud or Coercion*, U.N. WOMEN: VIRTUAL KNOWLEDGE CENTRE TO END VIOLENCE AGAINST WOMEN & GIRLS (Jan. 25, 2011), https://www.endvawnow.org/en/articles/549-force-fraud-or-coercion.html (highlighting an element that could be hard to prove because of the need to rely on victim testimony); *see also* Philip Marcelo, *State Prosecutors Struggle with Human Trafficking Case*, AP NEWS (May 26, 2019), https://apnews.com/a27f0cb72b4a48ca96f9b8249480d579 (indicating a conviction rate of just over 8% in Massachusetts in 2011).

132 Brief of the Massachusetts Attorney General, *supra* note 127, at 13.

133 *See* Testimony of Attorney General Martha Coakley on S. 827/H. 2850, An Act Relative to the Commercial Exploitation of People (May 18, 2011), https://www.mass.gov/files/documents/2016/08/qa/ht-testimony-for-judiciary.pdf [hereinafter Coakley Testimony].

134 *Id.* at 2–3.

135 TASK FORCE REPORT, *supra* note 59, at 32.

136 *Id.* at 32–33; GLOBAL NETWORK OF SEX WORK PROJECTS, THE IMPACT OF END DEMAND LEGISLATION ON WOMEN SEX WORKERS 1 (2018), https://www.nswp.org/sites/nswp.org/files/pb_impact_of_end_demand_on_women_sws_nswp_-_2018.pdf.

137 COAL. AGAINST TRAFFICKING IN WOMEN, PRIMER ON THE MALE DEMAND FOR PROSTITUTION 15–16 (Ilvi Jõe-Cannon ed., 2006), http://media.virbcdn.com/fies/b0/FileItem-149956-PRIMERonmaledemand.pdf.

> market forces producing and sustaining the roles of pimps and traffickers as 'distributors,' nor would there be a force driving the production of a 'supply' of people to be sexually exploited. *Supply and distribution are symptoms; demand is the cause*.[138]

These proponents see increased law enforcement action against johns as a very effective method to stop both prostitution and sex trafficking.[139] In support of this position, AG Coakley stated in her testimony, "[t]o stem the demand side, the bill increases penalties for current 'john' crimes. Simply put, if no one were buying sex, traffickers and pimps wouldn't be supplying an endless stream of victims."[140] However, this position commodifies workers and largely ignores "the very real fact that trafficked persons . . . are people who are trying to access labour . . . opportunities for themselves and their families, and who often try to resist or escape exploitative situations."[141]

Despite this new statute with a claimed increased focus on sex buyers rather than sex workers, selling sex remains a crime.[142] Where there is no force, fraud, or coercion element in a statute, it is possible for the statute to be used in instances where 'victims' are not being trafficked at all but instead have chosen sex work of their own volition. Without the limiting element, the statute does not differentiate between sex work and sexual exploitation, thus taking the choice, the agency, away from women. The law does nothing to ensure that prosecutions of sex workers will not continue.[143] It also does little to increase access to social services needed by victims that actually do wish to leave sex work. In fact, it is likely that since these tactics expand criminalization to anyone that assists sex workers, sex workers may find it "harder to protect themselves . . . or hir[e] security, because those actions could be interpreted as 'promoting prostitution' or running a brothel . . . ."[144]

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138 Berger, *supra* note 21, at 542. *But see* GAATW, Moving Beyond 'Supply and Demand' Catchphrases 7 (2011), https://www.gaatw.org/publications/MovingBeyond_SupplyandDemand_GAATW2011.pdf (listing reasons why End Demand strategies are limited and, therefore, not effective).

139 Task Force Report, *supra* note 59, at 32; *The Issue*, Demand Abolition, https://www.demandabolition.org/the-issue/ (last visited Mar. 31, 2020).

140 Coakley Testimony, *supra* note 133, at 2.

141 GAATW, *supra* note 138, at 16.

142 Mass. Gen. Laws Ann. ch. 272, § 53A (Westlaw 2020).

143 "Criminalization of sex work, as opposed to decreasing demand, may create a stronger underground market that enables trafficking." Berger, *supra* note 21, at 543.

144 Sebastian Kohn, *The False Promise of "End Demand" Laws*, Open Soc'y Founds. (June 2, 2017), https://www.opensocietyfoundations.org/voices/false-promise-end-demand-laws.

C. *Massachusetts's Seminal Sex Trafficking Case: Commonwealth v. McGhee*

In 2015, the SJC reviewed the new sex trafficking legislation in *Commonwealth v. McGhee*, the seminal case that significantly impacted sex trafficking jurisprudence in Massachusetts.[145] This case upheld the constitutionality of the new statute, thus allowing prosecutors to be more confident in their prosecutions.[146]

The case reached the SJC after a Suffolk County grand jury indicted Tyshaun McGhee and Sidney McGee in 2012[147] for aggravated rape,[148] trafficking persons for sexual servitude, [149] and deriving support from prostitution.[150] The victims alleged "that the defendants approached them, took their photographs to post . . . on Backpage.com,[151] drove them to various locations to have sex with men . . . and then retained . . . the money that the women received as payment . . . ."[152] Following the trial, the defendants were convicted on all sex trafficking indictments.[153] On appeal, the defendants sought to overturn their convictions on the basis that MASS. GEN. LAWS ch. 265, § 50(a), the Massachusetts sex trafficking statute used to convict them, was unconstitutionally vague and overbroad.[154] One basis for their appeal was that the Massachusetts statute is in all aspects identical to its federal counterpart except for the fact that it lacks the element of force, fraud or coercion.[155] They argued that because the Massachusetts statute lacks this element, it failed to give defendants fair warning about the prohibited conduct.[156]

145 Commonwealth v. McGhee, 35 N.E.3d 329, 333 (Mass. 2015).

146 *Id.* at 339.

147 *Id.* at 333.

148 MASS. GEN. LAWS ANN. ch. 265, § 22(a) (Westlaw 2020).

149 *Id.* § 50(a).

150 *Id.* ch. 272, § 7; *McGhee*, 35 N.E.3d at 333.

151 Backpage.com was a classified advertising website that used to be the largest marketplace for buying and selling sex until April 2018, when federal law enforcement agencies seized it. Sarah Lynch & Lisa Lambert, *Sex Ads Shut Down by U.S. Authorities*, REUTERS (Apr. 6, 2018), https://www.reuters.com/article/us-usa-backpage-justice/sex-ads-website-backpage-shut-down-by-u-s-authorities-idUSKCN1HD2QP.

152 *McGhee*, 35 N.E.3d at 333.

153 *Id.* at 334.

154 Redacted Brief and Record Appendix for the Defendant on Appeal at 21, 27–28, Commonwealth v. McGhee, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

155 *Id.* at 22; *Compare* MASS. GEN. LAWS ANN. ch. 265, § 50(a) (Westlaw 2020), *with* 18 U.S.C. § 1591(a) (2018).

156 *See* Redacted Brief and Record Appendix for the Defendant on Appeal, *supra* note 154, at 23, 25, 27–28 ("[W]here our state statute is clearly modeled after its federal counterpart but for the essential element of coercion and force, the defendant is entitled to the resolution of vagueness in his favor.").

The SJC held that the sex trafficking statute is not unconstitutionally vague because it sufficiently defines the prohibited conduct to give the defendant fair notice.[157] Specifically, the statute provided notice to the defendants that their conduct was the conduct prohibited by the legislature.[158] The SJC further noted that the omission of specific language included in the analogous federal statute "reflect[s] a conscious decision by the legislature to deviate from the standard embodied in the federal statute."[159] The Court concluded that the deliberate aim of the statute, and intent of the legislature, was to focus on the "intent of the perpetrator, not the means they used . . . to accomplish . . . [their] intent."[160] The Court found the determining question is "whether the perpetrator has engaged in the enumerated proscribed conduct with the requisite mens rea."[161] The mens rea requirement outlined in the statute, requiring knowledge of the illegal conduct, tends to narrow and clarify the scope of a criminal statute.[162]

The *Commonwealth v. McGhee* decision was significant because it cemented the fact that, in Massachusetts, there is no requirement that a defendant use force, fraud or coercion upon a person to be convicted under the sex trafficking statute.[163] However, while the SJC determined that the statute is constitutional, it does not necessarily mean that the statute, as it is currently drafted, is the most effective way to solve the sex trafficking problem in Massachusetts.

157 *McGhee*, 35 N.E.3d at 339–40, 342 (also holding that the statute is not overbroad as it does not infringe on the right of freedom of association).

158 *Id.* at 339. The defendant's argument that the statute "as written, permits the Commonwealth to decline to prosecute a taxicab driver who transports a known prostitute to an appointment to engage in commercial sexual activity, but to prosecute the defendants who provide the same service[,]" was dismissed. *Id.* at 338 n.9.

159 *Id.* at 338 n.8 (citations omitted).

160 *Id.* at 339.

161 *Id.*

162 *See id.* Additionally, the "[Supreme] Court has long recognized that the constitutionality of a vague [statute] is closely related to whether that [statute] incorporates a requirement of *mens rea*." Colautti v. Franklin, 439 U.S. 379, 395 (1979).

163 In 2018, the Court reaffirmed the *McGhee* holding in the case *Commonwealth v. Dabney*, 90 N.E.3d 750, 763 (Mass. 2018).

IV. TRIAL COURT LANDSCAPE: THE COURT STUDY

A major concern regarding the Massachusetts statute is that since it was passed recently in 2012, individuals assessing its impact are unsure of the daily, on-the-ground application of the law by police, prosecutors, and judges. Without accurate information about court practice, it is hard for attorneys, government officials, and scholars to assess the implications of the new law. This study surveys trial courts in Massachusetts in order to understand some of the case-by-case implications of the statute. More specifically, the study analyzes the conviction rates on sex trafficking charges, the change in conviction rates over time, the demographics of sex trafficking defendants, the type of sex trafficking cases that are prosecuted, and the reason why certain charges are dropped. This study finds that the current day-to-day operation of the statute achieves problematic results.

A. *Data Collection and Methodology*

The study is based upon data collected in the following Massachusetts Superior Courts: Suffolk, Middlesex, Essex, Bristol, Norfolk, and Hampshire counties.[164] No data was collected from courts in Barnstable, Berkshire, Dukes, Franklin, Hampden, Nantucket, Plymouth, and Worcester counties. The primary sources of data are the dockets of all cases involving a sex trafficking charge between 2012 and 2019. All cases involving sex trafficking charges that were prosecuted by the Attorney General's Office (AGO) in

164 These counties were chosen because they had sex trafficking cases that had already been litigated to some dispositive conclusion as of October 31, 2019.

Bristol,[165] Norfolk,[166] Suffolk,[167] Middlesex,[168] Essex,[169] and Hampshire[170] are in the sample. Cases involving sex trafficking charges that were prosecuted by the District Attorney's Offices (DAOs) in Essex,[171] Suffolk,[172] and

165 The Bristol County case is *Commonwealth v. Lara*, No. 1473CR00174 (Mass. Super. Ct. filed Mar. 6, 2014).

166 The Norfolk County cases are: *Commonwealth v. Dong*, No. 1382CR00100 (Mass. Super. Ct. filed Jan. 7, 2013); *Commonwealth v. Girouard*, No. 1382CR00101 (Mass. Super. Ct. filed Jan. 7, 2013); *Commonwealth v. Lai*, No. 1382CR00099 (Mass. Super. Ct. filed Jan. 7, 2013); *Commonwealth v. Sanchez*, No. 1382CR01206 (Mass. Super. Ct. filed Dec. 9, 2013).

167 The Suffolk County cases are: *Commonwealth v. Berdet*, No. 1784CR00202 (Mass. Super. Ct. filed Mar. 23, 2017); *Commonwealth v. Xu*, No. 1684CR00621 (Mass. Super. Ct. filed Aug. 18, 2016); *Commonwealth v. Tang*, No. 1684CR00620 (Mass. Super. Ct. filed Aug. 18, 2016); *Commonwealth v. Wong*, No. 1784CR00619 (Mass. Super. Ct. filed Aug. 18, 2016); *Commonwealth v. Alicea*, No. 1684CR00511 (Mass. Super. Ct. filed July 7, 2016); *Commonwealth v. Pompilus*, No. 1584CR11238 (Mass. Super. Ct. filed Nov. 30, 2015); *Commonwealth v. Leoney*, No. 1384CR10947 (Mass. Super. Ct. filed Oct. 3, 2013); *Commonwealth v. Leony*, No. 1384CR10294 (Mass. Super. Ct. filed Mar. 28, 2013); *Commonwealth v. Lopez-Martinez*, No. 1284CR10496 (Mass. Super. Ct. filed May 24, 2012); *Commonwealth v. Suarez*, No. 1284CR10497 (Mass. Super. Ct. filed May 24, 2012); *Commonwealth v. Henriquez*, No. 1284CR10492 (Mass. Super. Ct. filed May 24, 2012); *Commonwealth v. Hernandez*, No. 1284CR10491 (Mass. Super. Ct. filed May 24, 2012).

168 The Middlesex County cases are: *Commonwealth v. Lucas*, No. 1681CR00174 (Mass. Super. Ct. filed Apr. 6, 2016); *Commonwealth v. Andino*, No. 1581CR00122 (Mass. Super. Ct. filed Mar. 27, 2015); *Commonwealth v. Cipriano*, No. 1481CR01309 (Mass. Super. Ct. filed Sept. 30, 2014); *Commonwealth v. Chen*, No. 1381CR00816 (Mass. Super. Ct. filed June 26, 2013); *Commonwealth v. Keplin*, No. 1381CR00817 (Mass. Super. Ct. filed June 26, 2013).

169 The Essex County cases are: *Commonwealth v. Campbell*, No. 1477CR00965 (Mass. Super. Ct. filed July 31, 2014); *Commonwealth v. Diaz*, No. 1477CR00966 (Mass. Super. Ct. filed July 31, 2014).

170 The Hampshire County cases are: *Commonwealth v. Liu*, No. 1780CR00012 (Mass. Super. Ct. filed Feb. 15, 2017); *Commonwealth v. Yin*, No. 1780CR00020 (Mass. Super. Ct. filed Feb. 15, 2017).

171 The Essex County cases are: *Commonwealth v. Deras*, No. 1777CR00640 (Mass. Super. Ct. filed Dec. 14, 2017); *Commonwealth v. Beeson*, No. 1777CR00186 (Mass. Super. Ct. filed May 1, 2017); *Commonwealth v. Toney*, No. 1777CR00185 (Mass. Super. Ct. filed May 1, 2017); *Commonwealth v. Garcia*, No. 1677CR00255 (Mass. Super. Ct. filed June 13, 2016); *Commonwealth v. Davis*, No. 1577CR00591 (Mass. Super. Ct. filed Sept. 24, 2015); *Commonwealth v. Morse*, No. 1577CR00377 (Mass. Super. Ct. filed May 15, 2015); *Commonwealth v. Morse*, No. 1377CR01479 (Mass. Super. Ct. filed Dec. 2, 2013); *Commonwealth v. Barron*, No. 1377CR00846 (Mass. Super. Ct. filed June 27, 2013).

172 The Suffolk County cases are: *Commonwealth v. Shea*, No. 1884CR00779 (Mass. Super. Ct. filed Sept. 25, 2018); *Commonwealth v. Walker*, No. 1884CR00452 (Mass. Super. Ct. filed June 8, 2018); *Commonwealth v. Hernandez*, No. 1684CR00421 (Mass. Super. Ct. filed June 10, 2016); *Commonwealth v. Barbosa*, No. 1584CR10598 (Mass. Super. Ct. filed June 30, 2015); *Commonwealth v. Acevedo*, No. 1584CR10226 (Mass. Super. Ct

Middlesex[173] are also in the sample.[174] In sum, the sample includes sixty-three cases.[175] One case represents one defendant. It is possible that two or more defendants were involved in the same incident, but for docket purposes, they are considered different cases. It should also be noted that court records are adequate for identifying charges, dispositions, and penalties, but they lack the detail necessary for a complete analysis. The following tables represent the sample of cases and charges.[176]

filed Mar. 25, 2015); *Commonwealth v. Dew*, No. 1584CR10164 (Mass. Super. Ct. filed Mar. 11, 2015); *Commonwealth v. Dabney*, No. 1584CR10064 (Mass. Super. Ct. filed Feb. 4, 2015); *Commonwealth v. Gallego*, No. 1384CR10924 (Mass. Super. Ct. filed Oct. 1, 2013); *Commonwealth v. Smith*, No. 1384CR10808 (Mass. Super. Ct. filed Aug. 27, 2013); *Commonwealth v. Ahmed*, No. 1384CR10625 (Mass. Super. Ct. filed June 25, 2013); *Commonwealth v. McGhee*, No. 1284CR11187 (Mass. Super. Ct. filed Dec. 19, 2012); *Commonwealth v. McGee*, No. 1284CR11188 (Mass. Super. Ct. filed Dec. 19, 2012).

173 The Middlesex County cases are: *Commonwealth v. Acevedo*, No. 1881CR00417 (Mass. Super. Ct. filed Sept. 6, 2018); *Commonwealth v. Crawley*, No. 1881CR00108 (Mass. Super. Ct. filed Mar. 15, 2018); *Commonwealth v. McNeill*, No. 1781CR00050 (Mass. Super. Ct. filed Feb. 14, 2017); *Commonwealth v. Lowery*, No. 1681CR00128 (Mass. Super. Ct. filed Mar. 17, 2016); *Commonwealth v. Simpkins*, No. 1681CR00115 (Mass. Super. Ct. filed Mar. 8, 2016); *Commonwealth v. Elibox*, No. 1681CR00025 (Mass. Super. Ct. filed Jan. 22, 2016); *Commonwealth v. Lattimore*, No. 1681CR00024 (Mass. Super. Ct. filed Jan. 22, 2016); *Commonwealth v. Sagastizado*, No. 1581CR00486 (Mass. Super. Ct. filed Dec. 1, 2015); *Commonwealth v. Hall*, No. 1581CR00470 (Mass. Super. Ct. filed Nov. 17, 2015); *Commonwealth v. Burleigh*, No. 1581CR00249 (Mass. Super. Ct. filed June 23, 2015); *Commonwealth v. Pierre-Louis*, No. 1581CR00232 (Mass. Super. Ct. filed June 9, 2015); *Commonwealth v. Gustave*, No. 1581CR00218 (Mass. Super. Ct. filed June 2, 2015); *Commonwealth v. Smith*, No. 1581CR00217 (Mass. Super. Ct. filed June 2, 2015); *Commonwealth v. Hughes*, No. 1581CR00066 (Mass. Super. Ct. filed Mar. 13, 2015); *Commonwealth v. Kirnon*, No. 1481CR01676 (Mass. Super. Ct. filed Dec. 18, 2014); *Commonwealth v. Edwards*, No. 1481CR01218 (Mass. Super. Ct. filed Sept. 18, 2014); *Commonwealth v. Streety*, No. 1381CR01261 (Mass. Super. Ct. filed Oct. 3, 2013).

174 After discussing this Note with several state trafficking prosecutors, they concluded that these counties are the only ones where the District Attorney's office has prosecuted most cases.

175 Cases involving other crimes, such as keeping a house of prostitution, are not included in the sample unless a charge for sex trafficking was also brought at the same time.

176 This sample is not comprehensive and representative of every single case that prosecutors have prosecuted statewide. As the dockets can only be manually searched month-by-month in the online database, this process required a lot of time. Because of lack of resources, the author only manually searched counties where experts indicated most of the cases were.

Table 1: Cases/Defendants in the Survey Sample

	AGO Cases	DAO Cases	*Total Cases*
Suffolk	12	12	24
Middlesex	5	17	22
Essex	2	8	10
Bristol	1	0	1
Norfolk	4	N/A[177]	4
Hampshire	2	N/A	2
Total	26	37	63

Table 2: Charges in the Survey Sample

	AGO Trafficking Charges	DAO Trafficking Charges
Suffolk	55	26
Middlesex	17	27
Essex	2	13
Bristol	3	0
Norfolk	5	N/A
Hampshire	2	N/A
Total	84	66

For each case, prosecutors may indict on more than one trafficking charge. For the twenty-six cases prosecuted by the AGO, prosecutors indicted a total of eighty-four trafficking charges with an average of 3.2 sex trafficking charges per case (against a single defendant). For the thirty-seven cases prosecuted by DAOs, prosecutors indicted defendants on a total of sixty-six trafficking charges with an average of 1.8 charges per case. The first part of this analysis will be based on individual charges, while the latter part will be based on cases.

177 N/A means that I did not obtain data for this county. It does not necessarily mean that no cases have been prosecuted.

B. *Findings and Interpretations*

The efforts to analyze the Massachusetts sex trafficking statute resulted in several lines of inquiry. First, the study evaluates the impact of the new broad trafficking charge on securing convictions both statewide and by county. Second, the study investigates whether the rate of conviction changed over time, particularly before and after the SJC decision in *Commonwealth v. McGhee*. Third, the study explores potential reasons for dismissal in cases that do not result in conviction. Fourth, the study analyzes conviction trends based on race and gender. Fifth, the study analyzes convictions based on conduct of the defendant because in order to determine whether the statute is effectively meeting the legislature's goals, it is important to consider specifically which type of sex trafficking activities are most often prosecuted. These activities may include activities such as illicit massage businesses, brothels, and escort services.[178]

i. Convictions

In order to determine the impact of the statute, it is important to note the total number of charges per county and the resulting adjudication of each charge. The following table shows the disposition[179] of every sex trafficking charge in the sample for cases prosecuted by the AGO and by the DAOs.

178 *See generally* POLARIS, *supra* note 16.

179 A nolle prosequi ("NP") is a formal abandonment of an action for a specific charge by a prosecutor. *Nolle Prosequi*, BLACK'S LAW DICTIONARY (11th ed. 2019). A dismissal is when a judge disposes of an action by granting a motion to dismiss. *See Judgment of Dismissal*, BLACK'S LAW DICTIONARY (11th ed. 2019). A guilty plea is when a defendant admits to committing a crime, thus accepting the charges. *Plea*, BLACK'S LAW DICTIONARY (11th ed. 2019). A guilty verdict is when a jury finds the defendant guilty of the charged offense. *Guilty Verdict*, BLACK'S LAW DICTIONARY (11th ed. 2019). A guilty finding is when a judge finds the defendant guilty of the charge beyond a reasonable doubt. *Finding of Guilt*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Table 3: Disposition of Sex Trafficking Charges in the Survey Cases

		Prosecuting Office			
		AGO		DAO	
County	Disposition	*Total*	*Percentage*	*Total*	*Percentage*
Suffolk	NP/Dismissed	22	40.0	8	30.8
	Guilty Plea	17	30.9	10	38.5
	Guilty Verdict/Finding	12	21.8	7	26.9
	Not Guilty Verdict	4	7.3	1	3.8
	Total	55	–	26	–
Middlesex	NP/Dismissed	8	47.1	20	74.1
	Guilty Plea	0	0	2	7.4
	Guilty Verdict/Finding	6	35.3	5	18.5
	Not Guilty Verdict	3	17.6	0	0
	Total	17	–	27	–
Essex	NP	0	0	9	69.2
	Guilty Plea	1	50.0	1	7.7
	Guilty Verdict/Finding	1	50.0	3	23.1
	Not Guilty Verdict	0	0	0	0
	Total	2	–	13	–
Bristol	NP/Dismissed	3	100	–	–
	Guilty Plea	0	0	–	–
	Guilty Verdict/Finding	0	0	–	–
	Not Guilty Verdict	0	0	–	–
	Total	3	–	0	–
Norfolk	NP/Dismissed	5	100	–	–
	Guilty Plea	0	0	–	–
	Guilty Verdict/Finding	0	0	–	–
	Not Guilty Verdict	0	0	–	–
	Total	5	–	–	–
Hampshire	NP/Dismissed	1	50.0	–	–
	Guilty Plea	1	50.0	–	–
	Guilty Verdict/Finding	0	0	–	–
	Not Guilty Verdict	0	0	–	–
	Total	2	–	–	–

The following table uses the data above to show the conviction rate on sex trafficking charges both by county and statewide. Overall, the statewide conviction rate for both offices is largely similar. The main differences appear between the counties.

Table 4: Conviction Rate on Sex Trafficking Charges

	CONVICTION RATE		
COUNTY	AGO	DAO	*Total*
SUFFOLK	52.7%	65.4%	56.8%
MIDDLESEX	35.3%	25.9%	29.5%
ESSEX	100%	30.8%	40.0%
BRISTOL	0%	–	0%
NORFOLK	0%	–	0%
HAMPSHIRE	50.0%	–	50.0%
Total	45.2%	42.4%	44.0%

As depicted above, the AGO obtained a conviction on 45.2% of the sex trafficking charges it brought since the statute was passed. This rate is the result of thirty-eight successful convictions out of eighty-four total charges. The DAOs obtained an overall conviction rate of 42.4% on all the trafficking charges they brought in this same period. This rate is a result of twenty-eight successful convictions out of sixty-six total charges.

Suffolk County is the county with the most charges and the highest conviction rate. On the other hand, Middlesex, the county with the second most charges, has the lowest conviction rate of the counties surveyed. Bristol County and Norfolk County both have never had a conviction but this is likely not significant because very few cases have been tried there.

ii. Changes Over Time

The study investigates whether the conviction rate changed over time, particularly before and after the SJC decision in *Commonwealth v. McGhee* in 2015. The following table shows the number of non-convictions (including nolle prosequi, dismissals, and acquittals) and convictions for the sixty-three sample cases from 2012 to 2018.

Table 5: Change in Conviction Rate based on the Year the Charge Originated

Year Charge Originated[180]	Total Charges	Dismissals and Acquittals	Guilty Plea	Guilty Verdict	Conviction Rate
2012	10	2	0	8	80%
2013	30	16	5	9	46.7%
2014	8	6	1	1	25.0%
2015	41[181]	21	8	12	48.8%
2016	31	26	3	2	16.1%
2017	19	5	14	0	73.7%
2018	11	8	1	2	27.3%

In the above table, the dispositions are ordered by year. This was done in order to understand whether prosecutors grew in confidence regarding their cases as the years went by and were no longer affected by uncertainty-avoidance. Uncertainty-avoidance is the concept that prosecutors are less likely to try a case when they are unsure whether their convictions will get overturned on appeal.[182] After the 2015 *McGhee* decision, which established that the sex trafficking statute was constitutional, this uncertainty should have decreased. With the added confidence they would not be challenged on the constitutionality of the statute and were more likely to win at trial, it follows that prosecutors would bring more numerous and stronger cases. Following this assumption, it is likely that the *McGhee* decision contributed to the spike in cases since 2015.

The table above shows the range of conviction rates since the statute was passed. Of the cases originating in 2012, Superior Courts disposed of ten complaints for sex trafficking. Of the sex trafficking charges from 2012, 20% were dismissed or acquitted and 80% had findings of guilty. Of the cases originating in 2013, the courts disposed of thirty complaints for sex trafficking – a significant increase from the previous year. Of these

180 The year the charge originated is not necessarily the same year a final disposition was entered. This Note considered presenting the data by the year the charge was disposed of, but eventually decided to order it by year the charge originated in order to observe potential patterns of how prosecutors decide to file charges.

181 Of the cases brought during 2015, ten were brought before August 13 (the day McGhee was decided), and five were brought after August 13. Therefore, it is likely that 2016 would have been the first year where a significant change would be observed.

182 Amy Farrell et. al, *The Prosecution of State-Level Human Trafficking Cases in the United States*, Anti-Trafficking Rev., at 48–49 (May 2016).

charges, 53.3% were dismissed or acquitted, and 46.7% resulted in a guilty plea or finding. Of the cases originating in 2014, courts disposed of eight complaints: 75.0% of charges were dismissed outright and 25.0% resulted in a conviction. Of the 2015 charges, the courts disposed of forty-one complaints: 51.2% were dismissed or resulted in a not guilty finding, and 48.8% resulted in a conviction. While on its face this may seem like an increase, it is important to note that ten out of the twelve guilty verdicts (83.3%) are on charges originating from the same case.[183] Therefore, the data is slightly skewed. Of the 2016 charges, the courts disposed of thirty-one complaints: 83.9% were dismissed or resulted in a not guilty finding, and 16.1% resulted in a conviction. Surprisingly, the year after the *McGhee* decision was the year with the most dismissals and acquittals, and the year with the lowest conviction rate. Of the cases originating in 2017, the courts disposed of nineteen charges: 26.3% were dismissed, and 73.7% resulted in a conviction. Like in 2015, the results are slightly skewed because twelve out of the fourteen guilty pleas (85.7%) resulted from the same case.[184] Finally, of the 2018 cases, courts disposed of eleven complaints: 72.7% were dismissed and 27.3% resulted in a conviction.

This pattern of case dispositions shows that the *McGhee* decision did not significantly change the likelihood of obtaining a conviction. At least half of the charges ended up either being dismissed by a judge or dismissed by a prosecutor through a nolle prosequi entry. This could imply that despite knowing that their cases are not going to be overturned on appeal on a constitutional challenge, prosecutors still have a lot of uncertainty as to whether they can meet their burden at trial. Is it because there are not enough resources in place for law enforcement and prosecutors to properly detect sex trafficking? Is this because the statute encompasses so much behavior that it is harder for prosecutors to determine which cases should be pursued? Further research is necessary in order to fully answer these questions.[185] However, it remains clear that the new statute has not been a perfect solution to fixing the problems identified by the legislature, as prosecutors still remain more likely to dismiss their charges rather than proceed to trial or attempt a plea deal.

183 The case is *Commonwealth v. Pompilus*, No. 1584CR11238 (Mass. Super. Ct. filed Nov. 30, 2015).

184 The case is *Commonwealth v. Berdet*, No. 1784CR00202 (Mass. Super. Ct. filed May 23, 2017).

185 *See infra* Part V.

iii. Reasons for Nolle Prosequi

A nolle prosequi is a notice of abandonment by a prosecutor for a specific charge.[186] It is an "affirmative exercise of a prosecutorial tool to discontinue prosecution."[187] There are several reasons why a prosecutor may choose to proceed with this. First, prosecutors may fear that there is insufficient evidence and thus they cannot meet the tough burden of proof on all elements at trial.[188] They may also uncover more information regarding the defendant's innocence and thus decide not to proceed with the prosecution.[189] Second, prosecutors often use nolle prosequi to get plea deals on other, lesser charges.[190] This means that a more serious charge is used as a "hammer," and then dropped, in order to get the defendant to plead guilty to other, less serious charges.[191] Third, prosecutors may use nolle prosequi to obtain more evidence through proffers, or as a way to ensure that conspirators will testify against the main defendant.[192] This means that prosecutors may opt to drop some or all charges if the conspirator agrees to testify at trial as a witness for the government.[193]

The prosecutorial system thrives largely on discretion, which is exemplified in the prosecutorial use of nolle prosequi. Under Massachusetts law, prosecutors are supposed to file a signed written statement explaining the reason for their abandonment of charges.[194] However, court case filings are sometimes incomplete; many cases lack written or oral records as to why prosecutors decided to withdraw certain charges and proceed with others. Because of the limited records available for review, this study is limited to a quantitative analysis of the charges listed on the dockets. The table below shows the results of nolle prosequi entries in this data set. Out of the sixty-three cases surveyed, thirty cases involved sex trafficking charges that were dismissed through a nolle prosequi (not including defendants that were acquitted at trial).

186 Commonwealth v. Denehy, 2 N.E.3d 161, 172 (Mass. 2014).

187 *Id.*

188 *Reasons Why Criminal Charges Are Dropped or Dismissed*, Neal Davis Law Firm, https://www.nealdavislaw.com/criminal-defense-guides/criminal-charges-dropped-dismissed.html (last visited Mar. 31, 2020).

189 *Id.*

190 *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

191 Neal Davis Law Firm, *supra* note 188.

192 *See* Spencer Martinez, *Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency*, 47 Clev. St. L. Rev. 141, 144 (1999); Neal Davis Law Firm, *supra* note 188.

193 *See* Martinez, *supra* note 192.

194 Mass. R. Crim. P. 16.

Table 6: Result of Filing Nolle Prosequi

RESULT	NUMBER (RATE)
Full Case Dropped	9 (30.0%)
Partially Dropped Charges	1 (3.3%)
Plea Deal on Non-Trafficking Charges	20 (66.7%)

As seen from the table above, twenty defendants accepted a plea deal on lesser charges once the sex trafficking charges were dropped. This represents 31.7% of the total sample. This means that in almost one-third of cases, it can be argued that the trafficking statute was likely being used as a hammer to get a conviction on lesser charges. The lesser charges include but are not limited to: deriving support from prostitution,[195] soliciting prostitution,[196] maintaining a house of prostitution,[197] and keeping a house of prostitution.[198] It is apparent that these charges primarily involve prostitution, and thus their use contributes further to the conflation of prostitution and sex trafficking. While the law purports to be focused on trafficking, rather than prostitution, the data shows that a large portion of the defendants are not being convicted of trafficking but instead of crimes involving prostitution.

The fact that a large number of cases end in a conviction of prostitution charges, rather than trafficking charges, may be the result of the statute's vague references to "recruit[ing], entic[ing], harbor[ing], transport[ing], [and] provid[ing]."[199] These vague references allow the statute to be used to target a variety of activities other than actual trafficking. For example, the statutory definition of sex trafficking "could include sex workers who encourage friends to join the sex trade or recommend a friend to a client (enticing and recruiting) or who help run a brothel (harboring)."[200] This is a major cause for concern as some women may choose sex work out of preference or necessity.[201] By prosecuting these crimes, the Commonwealth is moving further away from actually prosecuting sex trafficking. The focus should not be on women who may choose sex work voluntarily, but rather

195 MASS. GEN. LAWS ANN. ch. 272, § 7 (Westlaw 2020) (criminalizing support from, or sharing, earnings from prostitution).
196 *Id.* § 8 (criminalizing solicitation of prostitute).
197 *Id.* § 6 (criminalizing ownership of a place inducing or suffering a person to resort in such place for sexual intercourse).
198 *Id.* § 24 (criminalizing "[k]eeping house ill of fame").
199 MASS. GEN. LAWS ANN. ch. 265, § 50(a) (Westlaw 2020).
200 Berger, *supra* note 21, at 562.
201 *Id.*; *see supra* Part I.

on those cases in which "women have been forced into prostitution against their will or have been subjected to abusive and exploitive conditions even if they initially consented . . . ."[202]

iv. Race/Ethnicity and Gender Trends

Police and prosecutors have limited resources so it is important to understand what types of decisions they make. Which trafficking cases rise to the level of using these resources? In order to begin answering this question, the data was broken up by race/ethnicity and gender. It is important to note these determinations were made based on what was written in prosecutorial findings; they may not accurately reflect how a defendant wishes to identify themselves.[203]

The dominant image of sex trafficking is that of violent men trafficking innocent young female victims.[204] However, this does not accurately represent the diversity of the experience of sex trafficking. Research suggests that women are also perpetrators of sex trafficking.[205] This survey sample includes sixty-three defendants. Of these defendants, ten are white, twenty-nine are Black, eight are Asian, and sixteen are Latinx. Additionally, forty-eight are men and fifteen are women. [206]

Table 7: Demographics of Sex Trafficking Defendants in the Sample

	Men	Women	*Total*
White	9	1	10
Black	24	5	29
Asian	4	4	8
Latinx	11	5	16
Total	48	15	63

As seen from the data, Black people, especially Black men, are the individuals most prosecuted in Massachusetts for sex trafficking. This is

202 Berger, *supra* note 21, at 564.

203 While not measurable, there is a possibility that non-binary and multiracial identities might not be represented accurately in court filings.

204 Lauren A. McCarthy, *A Gendered Perspective on Human Trafficking Perpetrators: Evidence from Russia*, 6 J. Hum. Trafficking 79, 79 (2020); *see supra* Part II(C).

205 McCarthy, *supra* note 204.

206 Tables 7–9 use data collected and compiled by the author from court case files for each respective case.

consistent with nationwide research.[207] White women are the least prosecuted individuals. While it is important to understand which individuals are more likely to be prosecuted, it is also important to see which individuals are more likely to be convicted. The following table shows convictions by race/ethnicity and gender.

Table 8: Disposition of Sex Trafficking Charges based on Defendant Demographics

	Dismissals/ Acquittals	Trafficking Pleas/Convictions	Pleas/ Convictions on Other Charges
White Men	3	1	5
White Women	0	1	0
Black Men	6	15	3
Black Women	3	0	2
Asian Men	2	1	1
Asian Women	1	2	1
Latino Men	3	4	4
Latina Women	0	1	4

Black men are the individuals that are most likely to be convicted on sex trafficking charges. Black men are also more likely to be convicted of sex trafficking rather than for other, lesser charges. All other individuals are more likely to have their trafficking charges dismissed, accept plea deals, or be convicted on lesser charges than be convicted on sex trafficking charges. The data suggests that there are significant disparities in how the law is applied between individuals of different races and ethnicities.

v. Conduct Trends

Along with race/ethnicity and gender trends, the data can be used to understand which method of sex trafficking is prosecuted most often. Methods included in this data are pimps, brothels, illicit massage businesses, and domestic violence. A pimp is an individual "who solicits customers for a prostitute, usu[ally] in return for a share of the prostitute's earnings."[208]

207 *See* North, *supra* note 23 ("People of color are significantly more likely to be arrested for sex work-related offenses than white people.").

208 *Pimp*, Black's Law Dictionary (11th ed. 2019).

A brothel is a place where individuals engage in sexual activities, operating as organized crime networks.[209] Brothels "tend to cater to commercial sex buyers from similar ethnic and/or language backgrounds advertising through word of mouth" or Backpage.com.[210] Illicit massage businesses are hidden behind a façade of legitimate spa services concealing that their main business is the sex trafficking of female employees.[211] Domestic violence trafficking is trafficking that occurs in a domestic setting where individuals force their intimate partners to perform sex work.[212] The number of cases prosecuted under each method is depicted in the table below.

Table 9: Methods of Sex Trafficking Prosecuted by Law Enforcement

	Mass. Attorney General	District Attorney	*Total*
Pimp	11	30	41
Brothel	3	4	7
Massage Business	12	1	13
Domestic Violence	0	2	2

There is a clear difference in the methods of sex trafficking that are prosecuted by the AGO and the various DAOs. The data shows that while the AGO is more likely to tackle the larger scale cases that tend to be more complex and involve more victims and defendants (similar to organized crime networks),[213] the DAOs are more likely to tackle pimp cases which usually involve one victim and one defendant.[214]

These results are not surprising. The AGO has an entire division dedicated solely to prosecuting human trafficking.[215] The various DAOs generally do not have a dedicated unit.[216] This shows the large difference

209 Polaris, *supra* note 16, at 17.

210 *Id.*

211 *Id.* at 12.

212 *See What is Human Trafficking?*, Ctr. for Sexual Assault Survivors: Blog (Jan. 7, 2020), https://visitthecenter.org/the-blog/f/what-is-human-trafficking; *see generally* Commonwealth v. Dabney, 90 N.E.3d 750 (Mass. 2018).

213 *See* Polaris, *supra* note 16, at 12, 17–18.

214 *See Pimp*, *supra* note 208.

215 *Fighting Human Trafficking*, Mass.gov, https://www.mass.gov/fighting-human-trafficking (last updated 2020).

216 Suffolk County is the only District Attorney Office that has a dedicated sex trafficking unit. *See Bureaus of the Suffolk DA's Office*, Suffolk District Att'y Mass., https://www.suffolkdistrictattorney.com/about-the-office/bureaus-of-the-suffolk-das-office (last updated 2019).

in resources that are available to both offices. The prosecutors in the Human Trafficking Division at the AGO have at their disposal a "team of prosecutors, advocates, . . . troopers, and a paralegal who work alongside . . . local law enforcement to investigate and prosecute cases of human trafficking."[217] These resources make it easier to identify and investigate sex trafficking crimes especially those more complex ones with a larger scope. Additionally, the AGO, unlike the DAO, has statewide jurisdiction.[218] This means that they can prosecute cases which occur across multiple counties. Based on the review of AGO cases in this survey sample, this happens often in cases involving organized brothels and illicit massage businesses.

217 *Fighting Human Trafficking*, *supra* note 215.

218 *See Directory of District Attorney Offices*, MASS.GOV, https://www.mass.gov/directory-of-district-attorney-offices (last updated 2020); *Fighting Human Trafficking*, *supra* note 215.

V. Summary and Implications

A. *Summary of Findings*

This part will frame the principal conclusions drawn from this study analyzing trial court cases and highlight potential implications. Overall, the statute, as presently written, has not accomplished the goals of the legislature. Instead, by allowing prosecutors to use the sex trafficking statute as a hammer to obtain a conviction on charges involving prostitution, it conflates different activities, potentially hurting the true victims.

As previously mentioned, the sponsors of the sex trafficking bill intended for it to be a weapon in the fight against the increasing rates of sex trafficking in Massachusetts.[219] AG Coakley hoped to expand the definition of sex trafficking in order to make more behaviors prosecutable, to make it easier for prosecutors to secure convictions, and to protect more victims.[220] However, the current day-to-day operation of the statute instead achieves some problematic results.[221] Prosecutors still have a hard time obtaining convictions on sex trafficking charges, evidenced by the fact that less than 50% of the total survey charges resulted in a conviction.[222] The data suggests that rather than seeking convictions on these charges, prosecutors end up using the sex trafficking charge as a hammer to induce defendants into accepting a plea deal on lesser charges. This inducement happens in almost one-third of cases.[223]

This behavior of dismissing the more serious charges in order to get plea deals on lesser charges is not unique to sex trafficking. In fact, plea deals represent a majority of convictions in the American legal system.[224] However, this pattern begs the question of whether the statute really is as effective as the legislature deems it to be. If the purpose of the statute was to expand the behavior that could be prosecuted and make it easier for prosecutors to obtain convictions, why is that not the result? The language of the statute likely needs to be revisited and amended in order to actually help combat sex trafficking because, in its current form, the statute still punishes individuals for merely being involved in sex work or aiding sex work. By putting sex work and violent human trafficking on the same level, the statute ignores the

219 *See supra* Part III(B).
220 *Supra* Part III(B).
221 *See generally supra* Part IV.
222 *See supra* Table 3.
223 *See supra* Table 5 and accompanying text.
224 *Plea Bargains*, Justia, https://www.justia.com/criminal/plea-bargains/ (last updated May 2019).

striking moral differences between the two and potentially harms both true victims and sex workers.[225]

Furthermore, this statute seems to be used primarily to prosecute individual pimps rather than arguably more serious systematic activities such as illicit massage businesses and brothels.[226] This contributes to the mistaken conflation of activities where the sex worker is consenting and activities where the victim does not. Additionally, the law is disproportionately applied against Black men,[227] which could imply possible racial undertones in the statute's administration by law enforcement and prosecutors.

B. *Broader Implications*

This study has been limited to carrying out an empirical analysis using concrete information about a particular human trafficking statute in one particular jurisdiction. Reviewing the broader debates on prosecutorial discretion and on victim protections is beyond the scope of this article. Nonetheless, the findings from this study could potentially have significance for each of these larger topics, and thus it is appropriate to highlight these potential implications.

First, prosecutorial discretion contributes to the unequal bargaining power between prosecutors and defendants and causes defendants to accept plea offers prematurely to avoid more serious charges, which was supported by the data in the survey cases.[228] Prosecutorial discretion means that a prosecutor has the ability to choose whether or not to charge a potential defendant with a crime.[229] Some argue that a prosecutor has more control over a person's life and liberty than any other individual does in this country.[230] This discretion is largely unreviewable except in a few specific instances.[231] For this reason, plea deals generally involve unequal bargaining power and thus may not lead to accurate or just dispositions.[232] Furthermore, as plea deals typically happen "behind closed doors" with no oversight, there are several concerns regarding the process and its

225 *See generally supra* Part I.
226 *See supra* Table 8.
227 *See supra* Table 7.
228 Rakoff, *supra* note 190.
229 *Id.*
230 *See, e.g.*, Robert H. Jackson, Attorney Gen. of the U.S, The Federal Prosecutor, Address Before the Second Annual Conference of United States Attorneys, 1 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.
231 *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996); Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Blackledge v. Perry, 417 U.S. 21, 28 (1974).
232 Rakoff, *supra* note 190.

legitimacy.[233] The plea-bargaining process allows prosecutors to use add-on charges as weapons to effectively coerce defendants into pleading guilty.[234] Prosecutors have most of the information regarding the case, such as police reports, witness interviews, and forensic reports.[235] Defense counsels do not have access to the same information, leaving them at a significant informational disadvantage, especially if the client is detained and they have limited opportunities to meet.[236] This unequal bargaining power often causes defendants to prematurely accept plea offers because they fear that the prosecution could potentially win on much more serious charges. [237] In theory, the criminal justice system is based on the notion that one needs to have their "day in court" in front of a jury of their peers before being deprived of their liberty, and yet the plea-bargaining system, ever present in the realm of sex trafficking, represents the exact opposite of this notion.[238] The data gathered in this study is merely further evidence that prosecutorial discretion needs to be challenged and that the legislature needs to demand more accountability from law enforcement offices.

Second, the broad language in the statute and the low conviction rates can create problems for victim protection. Part of the reason that the legislature adopted the broader statute was to be able to prosecute more activities in the hopes of protecting and rescuing more victims.[239] However, as shown by the survey results, more often than not the sex trafficking charges are being dropped in favor of other, lesser crimes which do not offer the same statutory protections for victims. In cases where sex trafficking charges are dropped, victims do not have access to the civil remedies, safe-harbor provisions, affirmative defenses, and the human trafficking victim trust fund.[240] Civil remedies allow sex trafficking victims to bring a tort action against the traffickers.[241] The safe harbor provision establishes a presumption that any child charged with common night walking or prostitution is a victim of trafficking and not a criminal.[242] Additionally, under the Massachusetts statute, being a victim of human trafficking can serve as an affirmative defense to certain crimes, but the burden is on the victim to show that they

233 *Id.*
234 *Id.*
235 *Id.*
236 *Id.*
237 *Id.*
238 *Id.*
239 *Supra* Part III.
240 *See* Mass. Gen. Laws Ann. ch. 265, §§ 50, 55, 57, 59 (Westlaw 2020).
241 *Id.* § 50(d).
242 *Id.* § 59(a)(2).

were trafficked.[243] Furthermore, the trafficking statute established a Victims of Human Trafficking Trust Fund to assure assets forfeited and assessments collected from trafficking related offenses are deposited and then distributed to victims.[244] None of these protections are available if one is a victim of a lesser crime involving prostitution rather than trafficking. Thus, dropping the trafficking charge to entice a defendant to take a plea deal is not always the most beneficial option for the victim.

C. *Limits of this Study*

The research carried out in this study has some practical and theoretical weaknesses. First, the data used throughout this Note can only indirectly help measure the effectiveness of the Massachusetts sex trafficking statute. This Note focused primarily on the information presented in court dockets and filings which is an imperfect way of understanding all the complexities behind sex trafficking prosecution. Dockets are not always an accurate reflection of all the instances of sex trafficking because they only account for the instances that were investigated and eventually led to an indictment.[245] Additionally, this study did not rely on direct observation or actual interviews with judges or attorneys.

Second, the available data is not as detailed and complete as necessary in order to fully arrive at a conclusion on the efficacy of the statute. Court records only include information regarding charges, dispositions, and pleas. They do not include a judge's or prosecutor's reasoning behind dismissing certain charges and proceeding on others. Additionally, there are not many written or oral records of decisions on motions in the trial courts which contributes to the lack of transparency. Court dockets also lack information about jury deliberations. It is nearly impossible to analyze how juries are persuaded by the statutory construction since proceedings happen completely behind closed doors. The only way to get even the slightest insight behind the process is to interview prosecutors and defense attorneys and ask them to make an inference based on their experience trying sex trafficking cases.

Third, the limited time since the statute was passed presents another potential issue with the findings of this study. As the study was limited to cases disposed by October 31, 2019, the sample only contains sixty-three cases filed within a period of merely seven years. While this is sufficient to

243 *Id.* §§ 59(a)(1), 59(b).

244 *Id.* § 55; MASS. GEN. LAWS ANN. ch. 10, § 66A (Westlaw 2020).

245 Sex trafficking is underreported. It is likely that the true numbers are much higher. *See Myths, Facts, and Statistics*, *supra* note 62.

arrive at preliminary determinations, more time is required to determine whether these patterns have enduring significance. Furthermore, the sample only includes data from a limited number of counties. It does not represent a comprehensive overview of all sex trafficking cases that have been prosecuted statewide, meaning the conclusions only apply to the sample cases. This research does not guarantee that the highlighted practices are the same in counties not included in the study.

D. *Potential Future Research*

Given the scope of this research project, there are still many research avenues that could be pursued. The goal of this Note is to provide preliminary research and analysis on the effect of the new statute, but it is not intended to be an end point in ensuring that the Massachusetts legislature best serves and protects sex trafficking victims. In particular, further qualitative research; a more encompassing statewide comparison of all counties in Massachusetts; and a study of other states that omit the force, fraud, or coercion element in their sex trafficking statutes would help to inform this analysis.

As previously stated, court dockets can provide insightful information, but they lack the reliability necessary for a complete analysis. In the future, supplemental data sources can be used to check and fill in the gaps left by statistics. These sources could include: (1) law enforcement reports, (2) prosecuting attorney interviews, (3) defense attorney interviews, and (4) trial court observations. Law enforcement reports can provide insight into what police officers identify as sex trafficking behavior. Additionally, they can show how enforcement officers go about conducting their investigations. These reports may also include information that is not available in the prosecutorial court filings. Prosecuting attorney interviews can help provide insight into prosecutorial practice by explaining what decisions prosecutors have to make and why certain cases are dropped. Defense attorney interviews can help outline which issues defendants most commonly run into when arguing under this statute. Lastly, trial court observations can help with understanding what decisions judges make and why.

Another potential avenue of research is conducting a more in-depth statewide comparative analysis. This would help further highlight and explain the differences between various counties and between urban and non-urban areas within a specific county. Future research could include data from all fourteen counties in the state. Additionally, the research could differentiate between the towns of origin of the specific case. As counties include several different cities and towns, they are not necessarily representative of exactly where sex trafficking is happening. Furthermore, different law enforcement

entities across the state may have different priorities and different ways of detecting this behavior. A study documenting these differences and exploring the reasons for, and consequences of, these differences could make a significant contribution to understanding sex trafficking in Massachusetts.

Lastly, in order to understand the efficacy of the statute, it would be useful to compare these results to those of other states that also do not have the force, fraud, or coercion element in their statute. A comparative analysis can be used to evaluate the strength of different statutes and thus determine the most effective way to successfully fight sex trafficking on a national scale.

VI. Recommendations

First and foremost, the Massachusetts legislature should decriminalize sex work.[246] While this Note acknowledges that decriminalization is not a magic solution, it will likely better protect sex workers and true sex trafficking victims.[247] "Decriminalization would allow law enforcement [and prosecutors] to focus [entirely] on stopping exploitation and abuse, rather than [policing] consensual adult sex."[248] This would also enable sex workers to enforce their labor rights, thus gaining access to crucial services to protect their health. [249] Recognition of sex work as a form of labor often translates into regulation of the industry through health and safety codes.[250] Furthermore, decriminalization would allow for victims that generally would not report their abuse to feel more comfortable coming forward,[251] increasing the accuracy of reporting statistics. When sex work is criminalized, "[f]ear of arrest and other consequences means that those engaged in sex work are less likely to report instances of violence or exploitation, resulting in a 'climate of impunity [that] emboldens police, health sector, and non-state groups to abuse sex workers' rights.'"[252] Decriminalizing sex work will allow analysis from a labor perspective, restoring agency to women.[253] Women struggling for survival should not have to be punished by the criminal justice system for the hard economic choices they make: "[t]heir choice of sex work as the best option . . . should not then be used to further deny those women the bargaining power" to have agency in their life choices.[254]

Second, the legislature should shift the criminal justice system's focus to perpetrators, rather than victims of trafficking, by amending the sex trafficking statute. To assume adding a required mental state to the statute is

246 Decriminalization is the removal of all criminal prohibitions and penalties on sex work, including laws targeting clients and brothel owners. Open Soc'y Founds., 10 Reasons to Decriminalize Sex Work (Mar. 2015), https://www.opensocietyfoundations.org/uploads/cc072baf-14b2-48f8-8c5f-30d7e9a6ec14/10-reasons-decriminalize-sex-work-20150410_0.pdf.

247 Kohn, *supra* note 144.

248 *Id.*

249 *See id.*

250 *See* Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 Harv. J. L. & Gender 335, 398 (2006); Tastrom, *supra* note 42.

251 *See* Tastrom, *supra* note 42.

252 Erin Albright & Kate D'Adamo, *Decreasing Human Trafficking Through Sex Work Decriminalization*, 19 AMA J. Ethics 122, 123 (2017) (second alteration in original).

253 Berta E. Hernandez-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 Colum. Hum. Rts. L. Rev. 391, 438–40 (2006); Barnhart, *supra* note 12, at 113.

254 Barnhart, *supra* note 12, at 113.

sufficient to focus entirely on the perpetrators is a simplistic and inaccurate view. In order to adopt a perpetrator-centered approach, the legislature needs to amend the statute to focus on the means of trafficking, not the methods. This way, "the statute shifts the focus from how a victim was placed in a trafficking situation to the means that the trafficker used to keep them in a position of servitude."[255] In order to shift the focus, the legislature should be more specific about the means used to exploit victims. Currently, the statute reads "by any means."[256] However, as previously discussed, this conflates consensual sex work and coerced trafficking.[257]

A more specific recommendation is to consider using the language "a person who [substantially] deprives or violates . . . personal liberty,"[258] instead of the current language ("by any means"). This phrase remains broad but emphasizes the fact that sex work must be done involuntarily in order for it to be considered trafficking. "Deprivation or violation of personal liberty [can be further] defined [by] . . . listing . . . the most common means of exploiting trafficking victims."[259] This should include traditional methods of coercion, but also the other various ways that victim vulnerabilities are exploited that may not rise to the level of coercion described by the federal statute, such as through deceit, duress, and undue influence.[260] "The means by which traffickers overcome the will of their victims," rather than "the methods for gaining control over the victim," is the most important part of the sex trafficking definition.[261] A broader definition of coercion, which includes physiological coercion and abuse of vulnerabilities, would remove some of the obstacles that prosecutors face when trying trafficking cases. The

255 *Id.* at 116.

256 MASS. GEN. LAWS ANN. ch. 265, § 50(a) (Westlaw 2020).

257 *Supra* Part I, Part III(B).

258 Language taken from examples in Barnhart, *supra* note 12, at 115–16.

259 Barnhart, *supra* note 12, at 116.

260 Some definitions of "depriving or violating personal liberty" could be: "(1) unlawfully providing [drugs] to a person who is patronized, with intent to impair said person's judgment[;] . . . (2) making . . . false statements, misstatements, or omissions to induce or maintain the person being patronized to engage in or continue to engage in [commercial sexual] activity; (3) withholding, destroying or [concealing] any actual or purported . . . government identification document . . . of another person with intent to impair said person's freedom of movement; . . . (4) requiring that prostitution be performed to retire, repay, or service a real or purported debt; (5) using . . . any scheme, plan or pattern to compel or induce the person being patronized to engage in or continue to engage in prostitution"; or (6) abusing positions of power (not limited to political, legal, and educational power) in order to compel or induce the person to engage in prostitution. *See* Barnhart, *supra* note 12, at 121–22 n.235 (definitions taken from N.Y. PENAL LAW § 230.34); *supra* Parts III–V.

261 Barnhart, *supra* note 12, at 116.

specificity also makes the statute easier for law enforcement to implement.[262] Specificity will also allow the legislature to state explicitly the behavior they want to be covered by the statute without them having to overcompensate and revert to drafting a very broad statute to cover more behavior than what is needed. An amended statute would also need to recognize the explicit difference between voluntary sex work and coerced trafficking.[263] Lastly, it should include a section explicitly granting prosecutorial immunity for victims of trafficking, even if the perpetrator does not end up being successfully charged and convicted of trafficking.[264]

262 *See id*. at 129–30.

263 Halley et al., *supra* note 250, at 393.

264 *See* Legislation Online, State Model Law on Protection for Victims of Human Trafficking 6 (2005), https://www.legislationline.org/download/id/1264/file/5b6fb5af473eb70407d29b957330.pdf (providing examples of potential language).

CONCLUSION

Seeking to reduce the number of sex workers who are in exploitative, dangerous conditions is laudable, but Massachusetts should avoid going too far in conflating sex work and sex trafficking. Overall, the research in this Note suggests a move away from the current and ineffective statutory scheme towards a statute that seeks to redirect anti-trafficking energies into more effective methods for change that do not affect the integrity of women's agency. While some may argue that the force, fraud, or coercion limitation makes it impossible to prosecute any sex trafficking, it is evident that the omission of this limitation is still not the solution to the issue, as evidenced by the prosecutorial outcomes documented in this Note.

Efforts to combat human trafficking in Massachusetts, and the rest of the country, are fraught with ideological divides that halt meaningful identification of real victims. End Demand strategies do not end sex work and protect victims; they push true victims further into the shadows, putting them more at risk of experiencing violence and trauma.[265] Prosecutors should divert their resources to combating sex trafficking primarily against those individuals that take advantage of non-consenting victims. Viewing sex work as a spectrum—from the most involuntary and forceful (such as enslavement) to the more voluntary (influenced by poverty, lack of other options, or preference for sex work)—is necessary to avoid conflating sex work and trafficking which causes detriment to both true victims and voluntary sex workers.

Traffickers do need to be punished for preying on particular social vulnerabilities, but the legislature needs to be intersectional in its approach. Demand reduction strategies do not address the inherent societal issues that are at the root of the trafficking pandemic. The Massachusetts statute creates a harmful notion that because of their gender, women in sex work are all enslaved and exploited. This view needs to be adapted by amending the language of the statute to reflect the fact that there are various intersecting vulnerabilities, beyond gender, that traffickers exploit. Redrafting the statute to differentiate explicitly between choice and coercion, and to include a list of vulnerabilities the legislature wishes to protect, will allow true victims to be identified more quickly and voluntary sex workers to own their agency. Finding the line between choice and coercion is no simple task, but Massachusetts should work to push past patriarchal horror stories. Ending prostitution is not the answer: recognizing that women get a say is.

265 Kohn, *supra* note 144.

LITIGATION AS EDUCATION: THE ROLE OF PUBLIC HEALTH TO PREVENT WEAPONIZING SECOND AMENDMENT RIGHTS

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INTRODUCTION

Gun violence is a growing public health crisis in the United States. In 2017, nearly 40,000 people were fatally shot,[1] the highest recorded number since the Centers for Disease Control and Prevention (CDC) began tracking this data fifty years ago.[2] Though the data on firearm injuries is not as reliable, approximately 115,000 individuals are nonfatally wounded by firearms in a year.[3] These tragic injuries and fatalities alone are enough to justify public concern, yet they still fail to capture the full scope of harm caused by gun violence. Frequently overlooked examples include individuals suffering from lead poisoning associated with bullet fragments that could not be extracted and children suffering from trauma and post-traumatic stress by exposure to shootings.[4] Research now suggests the likelihood of knowing a gun violence victim within a social network is approximately 99.85%, regardless of race, ethnicity, or social class.[5]

Despite increasing gun violence in this country, and the consistent media coverage of high profile mass shootings, firearm regulations have been particularly difficult to pass.[6] In other areas of public health, such as tobacco and lead paint, when the legislature is unable or unwilling to

1 *Web-Based Injury Statistics Query and Reporting System (WISQARS): Explore Fatal Injury Data Visualization Tool*, CDC, https://wisqars-viz.cdc.gov:8006/explore-data/home (select "2017" for the "From" and "To" fields, then select "Explore Data" button).

2 Sarah Mervosh, *Nearly 40,000 People Died From Guns in U.S. Last Year, Highest in 50 Years*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/gun-deaths.html.

3 *See Facts and Figures*, U.C. DAVIS HEALTH, https://health.ucdavis.edu/what-you-can-do/facts.html (last visited Aug. 18, 2020). The CDC recently pulled the data for 2016 and later due to a concern that the data was unreliable. *See A More Complete Picture: The Contours of Gun Injury in the United States*, EVERYTOWN (Nov. 11, 2019), https://everytownresearch.org/a-more-complete-picture-the-contours-of-gun-injury-in-the-united-states/. Part of the concern was over the drastic increases in firearm injuries over those recent years. *See* Sean Campbell & Daniel Nass, *The CDC's Gun Injury Data Is Becoming Even More Unreliable,* TRACE (Mar. 11, 2019), https://www.thetrace.org/2019/03/cdc-nonfatal-gun-injuries-update/. For example, the estimates for firearm injuries in 2017 range from 31,000 to 236,000. *Id.*

4 *See* Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HASTINGS L.J. 1053, 1087–88 (2020) (describing a broader understanding of gun violence beyond fatalities).

5 Bindu Kalesan et al., *Gun Violence in Americans' Social Network During Their Lifetime*, 93 PREVENTIVE MED. 53, 55 tbl.1 (2016).

6 *See Why It's More Difficult to Change Gun Policy in the U.S. than in New Zealand*, NPR (Mar. 21, 2019), https://www.npr.org/2019/03/21/705594544/why-its-more-difficult-to-change-gun-policy-in-the-u-s-than-in-new-zealand (explaining some of the reasons it is difficult to pass national gun regulations, even after mass shootings).

make regulatory adjustments to protect the public, advocates have used the strategy of litigation as a regulatory tool.[7] Courtroom victories and the pressure of lawsuits have generated change in industries that have been harmful to public health and safety.[8] But such a strategy has been difficult when it comes to gun litigation. The Protection of Lawful Commerce in Arms Act (PLCAA) protects firearm manufacturers and sellers from civil liability actions,[9] thereby preventing the need for the industry to improve safety standards or alter sales practices.

Liability litigation, however, is not the only avenue for generating change. Constitutional litigation focused on the scope of Second Amendment protections has the possibility to significantly alter the legal landscape for gun control in the coming years. Our understanding of what protections the Second Amendment affords is, relatively speaking, new and still largely undefined. The boundaries and privileges the right provides to individuals are still yet to be determined. While the fight over the militia clause has waned, the debate still focuses most often on historical interpretations and guidance from other areas of more established jurisprudence. The legal community and the judiciary rarely discuss the public health impact of an expansive interpretation of Second Amendment rights. What this leaves is a debate without all the relevant information.

This article argues that the public health and legal community, using literature studying firearms and the impact of laws on gun violence, can help to fill this void by viewing Second Amendment constitutional litigation as an opportunity to educate the judiciary. While research data will not be dispositive in most cases, it can help create a more thorough ruling that better understands the context in which these seemingly narrow legal decisions are made. There is strong evidence to suggest that the judiciary can be educated through social science and, thereby, influenced in their legal analysis.[10] Justices are more likely to turn to social science in prominent cases of controversy, [11] of which Second Amendment cases would assuredly qualify. Moreover, the judiciary is more likely to take amicus briefs seriously when presented by expert, reliable sources.[12]

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7 *See* Wendy E. Parmet & Richard A. Daynard, *The New Public Health Litigation*, 21 Ann. Rev. Pub. Health 437, 437 (2000) (describing the increase in using litigation as a public health tool, including areas of tobacco and lead paint).

8 *Id.* at 439 (discussing the success of tobacco litigation encouraging public health advocates to use a similar strategy in other areas).

9 *See* 15 U.S.C § 7902 (2018).

10 *See infra* Part II.

11 William D. Blake, *"Don't Confuse Me with the Facts": The Use and Misuse of Social Science on the United States Supreme Court*, 79 Md. L. Rev. 216, 252 (2019).

12 *See* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine*

A consensus has emerged amidst the tragic events that have continuously unfolded in the United States over the last several years. As one mass shooting has led to another, a call to recognize gun violence as a public health problem has become the norm.[13] Those in public health may have recognized this need for years, but large portions of the public, community leaders, politicians, and policymakers now join them. It is time for the judiciary to do the same.

Second Amendment rights, however they are ultimately defined, are not absolute. Thus, regardless of the fact that the Amendment protects the right to keep and bear arms, the courts must consider this right in conjunction with the state's interest in limiting those rights to protect the public. In some cases, the data may suggest a broader authority to limit Second Amendment rights. But in other areas, it may suggest less authority. In either case, a better understanding of the role the Second Amendment decisions will have on gun violence will make these decisions more objective, more constitutionally precise, and, hopefully, more acceptable to a fiercely

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Balance of Access, Efficiency, and Adversarialism, 27 REV. LITIG. 669, 688 (2008).

13 *See, e.g.*, David Hemenway & Matthew Miller, *Public Health Approach to the Prevention of Gun Violence*, 368 NEW ENG. J. MED. 2033 (2013); Mark E. Cichon & Michael Hayes, *Gun Violence Is a Public Health Epidemic*, CHI. TRIB. (Mar. 25, 2016), https://www.chicagotribune.com/opinion/letters/ct-gun-violence-is-a-public-health-epidemic-20160325-story.html; Richard Gonzales, *Gun Violence 'A Public Health Crisis,' American Medical Association Says*, NPR (June 14, 2016), https://www.npr.org/sections/thetwo-way/2016/06/14/482041613/gun-violence-a-public-health-crisis-says-ama; Claire McCarthy, *Treat Gun Violence as a Public Health Issue*, N.Y. TIMES (Jan. 10, 2016), https://www.nytimes.com/roomfordebate/2016/01/10/making-gun-use-safer/treat-gun-violence-as-a-public-health-issue; Alexandra Sowa, *Treat Gun Violence Like the Public Health Epidemic It Is and Lift Research Ban*, BALT. SUN (Feb. 22, 2018), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0223-gun-research-20180222-story.html; Kate Walsh, *Gun Violence Is a Public Health Crisis*, BOS. GLOBE (Jan. 22, 2016), https://www.bostonglobe.com/opinion/2016/01/22/gun-violence-public-health-crisis/SIWyyNO0MWfqev32cF53AO/story.html; Catherine Troisi & Stephen Williams, *Public Health Approach Can Stem Gun Violence*, HOUS. CHRON. (Feb. 2, 2016), https://www.houstonchronicle.com/opinion/outlook/article/Troisi-Williams-Public-health-approach-can-stem-6802092.php; Dan Diamond, *How to Reduce Gun Violence? Treat It as a Public Health Problem*, FORBES (Oct. 1, 2015), https://www.forbes.com/sites/dandiamond/2015/10/01/gun-violence-is-a-public-health-problem-heres-why/#4ebce9364475; Nancy Dodson, *Gun Violence Is a Public Health Menace, too; It's Escaped Our Attention During the Coronavirus Pandemic*, N.Y. DAILY NEWS (June 26, 2020), https://www.nydailynews.com/opinion/ny-oped-gun-violence-public-health-menace-too-20200626-ptjlxh3mfjgbjkcb6budfusrce-story.html; Maggie Fox, *Gun Control Is a Public Health Issue, Experts Say*, NBC NEWS (Jan. 5, 2016), https://www.nbcnews.com/health/health-news/gun-control-public-health-issue-experts-say-n490846; Sean Palfrey, *What a Public Health Approach to Gun Violence Would Look Like*, HUFFINGTON POST (June 17, 2016), https://www.huffpost.com/entry/gun-violence-public-health_b_7605102.

divided public.[14] Thus, constitutional litigation is an opportunity for the public health community, in particular, to play a key role in demonstrating a path forward that properly balances the protections of the individual and the public, and that is grounded in evidence.

This Article begins in Part I by describing in more detail the difficulty in regulating firearms through litigation. A case involving an accidental shooting is examined to show how the PLCAA prevents liability of gun manufacturers even for overt disregard for increased safety measures, thus impeding victims or their families from bringing a successful cause of action. The potential for the judiciary to focus solely on the scope of Second Amendment protections and their reliance on historical analogues creates further barriers. Part II examines the informative function of litigation, which enables a mechanism for educating the judiciary on aspects of a case that may not have been apparent or for which they may not have the requisite expertise. Through amicus briefs, courts have been informed of the critical aspects of cases, including the lived experiences of underrepresented groups and how constitutional theory has a real-world impact outside of the courtroom. Finally, Part III will demonstrate how constitutional litigation opens the door for public health research to play a vital role in determining the circumstances and degree to which Second Amendment rights may be limited. Here, it becomes clear that the empirical nature of public health research may enable a truer understanding of gun violence and the impact deregulatory constitutional declarations may have on this growing epidemic.

14 *See* Kim Parker et al., Pew Res. Ctr., America's Complex Relationship with Guns 71 (2017), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2017/06/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf (finding 51% of surveyed responses said that it is more important to control gun ownership and 47% said protecting the right to own guns is more important).

I. LIMITATIONS IN LITIGATION

A. *Legislative Blockade*

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA) in response to an effort to regulate the firearms industry through litigation.[15] Evidently stymied in their efforts to pass desired legislation, some gun control advocates turned instead to the courts to advance their cause.[16] In addition to liability claims from interested groups, mayors of large cities and housing authorities brought lawsuits using innovative legal techniques to prevent consolidation and to maximize disadvantages for manufacturers.[17] The claims in the causes of action varied from product liability to negligence to nuisance.[18] While the suits may not have been successful in court, they put pressure on manufacturers, which had the potential to change the industry. But this change is specifically what Congress sought to prevent. According to Congressional findings, the Act was necessary due to "an abuse of the legal system . . . ."[19] Congress's aim was to prevent the "attempt to use the judicial branch to circumvent the Legislative branch," thereby limiting the ability to regulate the firearms industry through litigation.[20]

The PLCAA prevents industry change through litigation by prohibiting civil liability actions in federal or state court.[21] The statute generally provides immunity for manufacturers and sellers of firearms in suits that arise from criminal or unlawful use of the products by a third party.[22] This provides broad protection because shooting another individual

15 Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-–03).

16 Parmet & Daynard, *supra* note 7, at 437.

17 David Kopel, *The Protection of Lawful Commerce in Arms Act: Facts & Policy*, WASH. POST: VOLOKH CONSPIRACY (May 24, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-act-facts-and-policy/.

18 *Id.*

19 *See* 15 U.S.C. § 7901(a)(6) (2018). Congress also states that protection of the firearms industry, for the industry itself and the customers they serve, was a key purpose for passing the statute: "To preserve a citizen's access to a supply of firearms and ammunition . . . . " *Id.* § 7901(b)(2).

20 *Id.* § 7901(a)(8). Congress was focused on preventing judicial action against the firearm industry, aiming to prevent "possible sustaining of these actions by a maverick judicial officer" that would "expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States." *Id.* § 7901(a)(7).

21 *Id.* § 7902(a).

22 *Id.* § 7901(b)(1).

nearly always includes an unlawful act. The statute does include some exceptions, but they are quite narrow.[23]

For example, one exception was argued in a liability claim related to the Sandy Hook shooting. In *Soto v. Bushmaster*, the plaintiffs relied on an exception that relates specifically to the marketing of the product rather than the product itself.[24] This exception allows for claims to proceed when a manufacturer or seller knowingly violates a state or federal marketing law, and when that violation is the proximate cause of the harm.[25] The plaintiffs argued that the manufacturer of the semiautomatic firearm used to perpetrate the Sandy Hook shooting violated a Connecticut law prohibiting advertisements that promote or encourage violent, criminal behavior by marketing the weapon as a means to carry out military-style combat missions against someone's enemies.[26] Ultimately, the Connecticut Supreme Court ruled this claim was not blocked by PLCAA, rejecting the defendants' request for summary judgment.[27]

Conversely, a 2009 case, *Adames v. Sheahan*, illustrates the extent to which protections are afforded to manufacturers by the PLCAA.[28] This case involved the tragic death of Josh Adames, who was shot by his friend Billy Swan, then thirteen years old.[29] Home alone, Billy found three guns that were inside a box he saw on the top shelf of a closet in his parents' room.[30]

23 *See id.* § 7903(5).

24 Soto v. Bushmaster, 202 A.3d 262, 272, 274–75 (Conn. 2019).

25 15 U.S.C. § 7903(5)(A)(iii) (allowing claims where a "manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . ."). "The term 'qualified product' means a firearm . . . or ammunition, . . . or a component part of a firearm or ammunition . . . ." *Id.* § 7903(4). The other exceptions include: (1) an action brought against a transferor convicted under the Gun Control Act, or a comparable State felony law, for conduct that directly harmed the plaintiff; (2) an action brought against a seller for negligent entrustment or negligence per se; (3) an action for breach of contract or warranty; (4) an action for death, injury, or property damage due directly to a design or manufacture defect when used as intended or in a foreseeable manner, as long as there was no volitional act that constituted a criminal offense; and (5) an action or proceeding commenced by the Attorney General to enforce the Gun Control Act. *Id.* § 7903(5)(a)(i)–(vi).

26 *Soto*, 202 A.3d 262, 272–74. These include advertisements that promote the weapon as "the uncompromising choice when you demand a rifle as mission adaptable as you are," "the ultimate combat weapons system," and use the slogan "Forces of opposition, bow down. You are single-handedly outnumbered." *Id.* at 274, 276–78.

27 *Id.* at 324–25. The petition for certiorari was denied by the Supreme Court. Remington Arms Co. v. Soto, 140 S. Ct. 513 (2019).

28 *See* Adames v. Sheahan, 909 N.E.2d 742 (Ill. 2009), *cert. denied*, 558 U.S. 1100 (2009).

29 *Id.* at 745.

30 *Id.*

Handling a Beretta 92FS handgun, Billy pressed the button that removed the magazine,[31] believing incorrectly that the gun could not fire without the magazine. When Josh arrived at Billy's home, Billy showed Josh the Beretta as the boys began to play.[32] Believing the gun was empty, Billy pointed the firearm at Josh and pulled the trigger, discharging the gun. The bullet struck Josh in the stomach, resulting in his tragic death.[33]

Several available firearm features could have prevented Josh Adames's death. Experts for the plaintiffs testified that a magazine disconnect device, a mechanism first invented in 1910 and present in over 300 handgun models at the time, could have prevented the shooting.[34] Even without a magazine disconnect, experts testified that manufacturers could make the handgun safer with a loaded chamber indicator that was more easily visible.[35] This indicator would let the gun user know that a bullet was still in the chamber despite the absence of a magazine.[36] Wallace Collins, a firearms and ammunition design and safety expert, testified on behalf of the plaintiffs that these safety features were "readily available, inexpensive, and commercially feasible."[37] Therefore, as the challengers argued, specific choices by the manufacturer made the firearm more dangerous and more likely to cause the harm that occurred.

Johns Hopkins School of Public Health Professor Stephen Teret testified that in a survey of 1,200 respondents, nearly thirty-five percent either thought that a pistol could not fire after the magazine was removed or did not know whether it could.[38] Importantly, nearly thirty percent of those unaware that the pistol could fire without the magazine lived in a household where a firearm was present.[39] Thus, in Professor Teret's opinion, the lack of a magazine disconnect caused Josh's death.[40] Beretta's witnesses testified

31 *Id.*

32 *Id.* at 746.

33 *Id.* at 745–46.

34 *Id.* at 748–49. A magazine disconnect device or mechanism "prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted in the semiautomatic pistol." *Design Safety Standards in California*, GIFFORDS L. CTR. (updated July 28, 2020), https://giffords.org/lawcenter/state-laws/design-safety-standards-in-california/#footnote_11_16042.

35 *Id.* at 749.

36 *Id.* at 748–50.

37 *Id.* at 749.

38 *Id.*

39 *Id.*

40 *Id.* Professor Teret echoed the other plaintiffs' experts in declaring the chamber-loaded warning on the Beretta to be ineffective in conveying that the handgun was still loaded without the magazine. *Id.*

that the cost of a magazine disconnect was approximately two percent of the firearms price and that the primary reason that they chose not to include one was that there was no market for that feature.[41] Yet, in liability cases, this evidence matters little due to the immunity granted to manufacturers by the PLCAA.

Under the PLCAA, the Supreme Court of Illinois had little choice but to grant summary judgment for Beretta despite these testimonies. According to the court, there was a "criminal or unlawful misuse" of the firearm by a third party, regardless of whether Billy had the intent to shoot Josh.[42] The primary concern for the court was that Billy pointed the firearm at his friend and pulled the trigger.[43] According to the court, this qualified as a volitional act that constituted a criminal offense, removing all possibility that one of the exceptions to the PLCAA applied.[44] Specifically, despite affordable solutions[45] readily available to Beretta, the exception to immunity for a "*defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner*," did not apply here.[46]

This case demonstrates the difficulty in winning a liability claim against gun manufacturers. The inherent dangerousness and ease with which the product can cause serious harm appears to be a primary justification for impeding liability claims. Here, despite being just a child, knowingly pointing the gun and pulling the trigger is enough to exculpate the manufacturer for the perilous product they have created. Because of the barrier created by the PLCAA, even the testimony demonstrating a lack of awareness of how firearms work and readily available safety features to reduce the risk of harm was rendered moot.[47] Under the PLCAA, it is apparent that not only are manufacturers not liable for the harm caused by their product, be it purposeful or otherwise, but they are under no obligation to maximize the safety of their product or to educate their consumers. This legislative

41 *Id.*

42 *Id.* at 761–62 (quoting 15 U.S.C. § 7903(5)(A) (2006)).

43 *Id.* at 763.

44 *Id.* at 762–63 ("Plaintiffs and the appellate court read volitional act to require a finding that Billy intended to shoot Josh or understood the ramifications of his conduct. We disagree. As Beretta argues, even if Billy did not intend to shoot Josh, Billy did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger. Although Billy did not intend the consequences of his act, his act nonetheless was a volitional act. Accordingly, pursuant to the PLCAA, the discharge of the Beretta in this case was caused by a volitional act that constituted a criminal offense, which the PLCAA provides 'shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.'").

45 *Id.* at 749.

46 *Id.* at 765 (emphasis added) (quoting 15 U.S.C. § 7903(5)(A)(v) (2006)).

47 *Id.* at 763.

limitation demonstrates that victims of gun violence need another avenue if they wish to have influence over the regulation of firearms.

While private actors were limited in their ability to sue for damages, cities attempted their own litigation strategies.[48] For example, New York City filed a claim against firearm suppliers for violating New York's criminal nuisance statute.[49] The city claimed manufacturers were knowingly distributing firearms to legitimate retailers that they knew would be diverted into illegal markets without making any efforts to prevent this diversion.[50] According to the city, firearm suppliers refuse to take reasonable steps available to them, such as monitoring sales, training dealers, or investigating which distributors have sales that disproportionately end up supplying the illegal secondary market.[51] One of the city's claims for contribution to the illegal markets was manufacturers purposefully oversupplying firearms in markets where gun regulations were particularly lax.[52] As a result, New York sought injunctive relief requiring suppliers to alter their marketing and distribution practices to effectively minimize these illegal markets.[53]

Ultimately, the city's efforts were unsuccessful. The court determined that the PLCAA preempted the city's application of its criminal nuisance statute and that no exception was applied.[54] Applying the statutory canon of avoiding absurdity, the court stated that allowing this case to move forward would enable the "exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets."[55] Undeterred

48 *See, e.g.*, District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 172 (D.C. 2008) (rejecting the District's attempt to impose strict liability on assault weapons manufacturers).

49 City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 389–91 (2d Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009).

50 *Id.* at 391.

51 *Id.* The city asserted various mechanisms for facilitating the movement of legally distributed handguns into illegal markets: (1) gun shows; (2) private sales, which do not require background checks or record keeping required by federal firearm licensees; (3) straw purchases, where qualified individuals purchase firearms for those who are not qualified; (4) selling multiple firearms at once or in a short period of time; (5) intentional trafficking by corrupted federal firearm licensees; (6) thefts from licensees with poor security; and (7) "oversupply of markets where gun regulations are lax." *Id.*

52 *Id.*

53 *See id.* at 390–91.

54 *See id.* at 390, 399–400. Under the PLCAA, a lawsuit may proceed in "an action in which a manufacturer or seller . . . knowingly violated a State or federal statute applicable to the sale or marketing of [firearms], and the violation was a proximate cause of the harm . . . ." 15 USC § 7903(5)(A)(iii) (2018).

55 *Beretta*, 524 F.3d at 403. Conversely, the dissent finds the majority's interpretation will in fact lead to "the sort of practical problems and absurd results we usually try to avoid."

by concerns of federalism, the court ultimately prevented New York from applying its laws to manufacturers the city believed contributed to substantial harm to its citizens.[56]

B. *Judicial Engagement*

i. The Use, Misuse, and Absence of Data

While the PLCAA prevents regulating firearms through liability litigation, constitutional claims implicating the Second Amendment can have a profound impact on firearm regulations. A broad interpretation of Second Amendment protections has the potential to strike down existing regulations and prevent future policies aimed to curb gun violence. Meanwhile, a narrower reading of the Second Amendment may enable efforts to reduce gun violence but could also restrict the rights of those seeking to protect themselves from harm.

The Supreme Court has provided little guidance on how lower courts should decide these critical cases.[57] In *Heller*, the Court made clear that the Second Amendment provided an individual right to keep and bear arms, anchored by the right of self-defense.[58] Yet the majority opinion gave hardly any other information on what this meant for existing laws limiting firearm access.[59]

Id. at 406 (Katzmann, J., dissenting) (citations omitted). In particular, the dissent questions the reasoning that while "a statute need not expressly regulate firearms to be 'applicable' to firearms, the majority comes to the conclusion that [criminal nuisance] is not a statute that 'clearly can be said to regulate the firearms industry' or 'actually regulate[s] the firearm industry.'" *Id.* (second alteration in original) (footnote omitted) (citations omitted). Therefore, the dissent reads the holding to mean that a statute is not applicable unless and until it is in fact applied to the firearms industry. "Unlike, say, a fruit, which is edible long before someone has eaten it, or gasoline which is flammable even before someone has ignited it, the majority finds that a state law is not applicable until a state court actually applies it." *Id.* (citation omitted).

56 *Id.* at 390–91 (majority opinion). The majority held that the only concern with respect to the Tenth Amendment was whether the federal government was commandeering the state's authority to act autonomously. *Id.* at 396. The court ruled commandeering was not present because "it imposes no affirmative duty of any kind." *Id.* at 397 (quoting Connecticut v. Physicians Health. Servs. of Conn., Inc., 287 F.3d 110, 122 (2d Cir. 2002) (internal quotation marks omitted)).

57 *See, e.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 88 (2d Cir. 2012) ("*Heller* provides no categorical answer to this case. And in many ways, it raises more questions . . . .").

58 *See* District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 591–92 (2008).

59 *Id*. at 719–23 (Stevens, J. dissenting) (arguing that the majority did not give any information on how its ruling would impact existing laws).

Gun violence and gun rights are fiercely debated in the public discourse, with passionate advocates on each side.[60] Most, though, acknowledge that gun violence is indeed a national problem.[61] It is, therefore, not a question of should we address gun violence, but rather, *how* do we address gun violence—regulation or increased access to firearms for self-defense—that provokes emotionally charged responses. While the judiciary continues to determine the contours of the Second Amendment right, it is imperative that they do so deliberately and as objectively as possible. Objectivity in this area may be particularly important to encouraging public trust in the judiciary's ability to insulate itself from the politics of the issue.

The use of empirical evidence and the growing body of public health research may provide a useful avenue with which to achieve this goal. Data cannot necessarily answer a legal question, and in some circumstances, data may even be lacking or unavailable. But at other times, there may be data supporting the arguments on each side of a case, a situation that typically results in deference to the legislature. Emphasizing the relevance of public health research is not to suggest that it will answer any and all legal queries. Rather, it provides a more robust understanding of the legal question. Data can contextualize the legal analysis and provide more thorough reasoning for the court's ultimate conclusion. Using research that focuses on the relationship between gun laws and gun violence provides the judiciary with another important tool for accomplishing a complete analysis of the constitutionality of any firearm regulation. Yet too many cases tend to ignore the public health aspects of the issue.

Instead, cases often focus on the scope of the right, ignoring the harm that an expansive interpretation of Second Amendment protections may cause. There is some logic to this approach. *Heller* provided very little information outside of the fact that the District of Columbia could not ban individuals from possessing handguns in their homes. The Court's narrow ruling and reliance on historical analysis to find an individual right has led some jurists to turn to history for answers.[62] But there are limitations to what history can provide in constitutional analysis, including state authority, to limit a right in response to a public health crisis.[63]

To be sure, science and data tell us nothing of the scope of an amendment's protection. But under the police powers, the state is authorized

60 *See* KIM PARKER ET AL., *supra*, note 14.

61 *See id.* at 53 (showing that only 2% of respondents felt gun violence was not a problem at all in the United States).

62 *See* discussion *infra*, Part I.B.ii.

63 *See id.*; *see also* Michael R. Ulrich, *Revisionist History? Responding to Gun Violence Under Historical Limitations*, 45 AM. J.L. & MED. 188, 190 (2019).

to pass laws to protect public health, safety, and welfare.[64] Constitutional rights can and have been limited in the name of public health since the founding.[65] Thus, the public health impact is not only important but constitutionally relevant. A focus entirely on the right is simply an incomplete legal analysis. The scope of the right, the degree to which it is infringed, and the potential benefits to the public are all critical components of a constitutional evaluation.[66]

Yet some prominent cases have been devoid of an empirical assessment while coming to conclusions that could have drastic impacts on gun control and exacerbate the gun violence epidemic. For example, questions have arisen regarding how to treat *Heller*'s declaration that:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[67]

The Sixth Circuit has dismissed Second Amendment claims for those convicted of felonies, relying almost entirely on this language.[68] One such case involved an individual convicted of running an illegal gambling business.[69] The Sixth Circuit dispensed the constitutional claim with no analysis of whether this type of crime is associated with an increased likelihood of future violence by grounding its opinion on this quote from *Heller*, where the Supreme Court said prohibiting felons from possessing firearms was "presumptively lawful" [70] but provided no explanation or citations to explain

64 Jacobson v. Massachusetts, 197 U.S. 11, 25, 27 (1905).

65 *See* Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 Hastings Const. L.Q. 267, 285–302 (1993) (describing public health regulations in the colonial period and founding era); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (declaring the inherent police power as "a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government," including "[i]nspection laws, quarantine laws, [and] health laws of every description . . ."); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872) (acknowledging the historical acceptance of police power authority and "the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.") (citation omitted).

66 Ulrich, *supra* note 4, at 1061.

67 *Heller I*, 554 U.S. at 626–27.

68 United States v. Carey, 602 F.3d 738, 739, 741 (6th Cir. 2010).

69 *Id.* at 739.

70 *Heller I*, 554 U.S. at 627 n.26.

this conclusion.[71] Meanwhile, the Seventh Circuit in 2010 upheld the statute's application to an individual convicted of robbery, relying in part on a Note from 1982 that cited recidivism research published in 1979, thirty-one years prior to its opinion.[72]

Laws limiting firearms access to the mentally ill received a slightly more deliberate analysis from the Sixth Circuit in *Tyler v. Hillsdale County Sheriff's Department*.[73] The question there was whether the mentally ill, a designation established in the federal statute by adjudications of incompetency and involuntary commitment, may be permanently prohibited from owning firearms.[74] Unlike the analysis for the permanent ban for felons, the Sixth Circuit did not take the *Heller* language to be "an analytical off-ramp to avoid constitutional analysis."[75] However, the differing treatment of felons and the mentally ill do not appear to be based on one being more or less likely to commit future violence. Instead, the court looked to history, finding the prohibition of firearm possession by the mentally ill to lack "historical pedigree."[76] Yet, as Judge Moore's dissent in *Tyler* notes, the ban on possession by all felons was enacted in 1961, 170 years after the Second Amendment was ratified and a mere seven years before the ban on the mentally ill.[77]

The Sixth Circuit acknowledged that the purpose of the statute was to keep firearms out of the hands of "risky people."[78] Yet, after examining the ban more closely, the majority opinion found that nearly all of the government's evidence lacked justification for a permanent prohibition for those who have been involuntarily committed at some point in their life.[79] The majority even cited a study finding that the rates of violent acts by those involuntarily committed and the general population in the observed

71 *Carey*, 602 F.3d at 741. The Sixth Circuit's determination in *Carey* also relies heavily on its own decision in *United States v. Frazier*. *See* 602 F.3d at 741–42. In *Frazier* the Sixth Circuit upheld the constitutionality of the felon ban, citing several cases that pre-dated *Heller* even though *Frazier* was decided after *Heller*. *See* United States v. Frazier, 314 F. App'x. 801, 807 (6th Cir. 2008).

72 United States v. Williams, 616 F.3d 685, 692–93 (7th Cir. 2010) (citing Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 515, 515 n.24 (1982)).

73 *See generally* Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016).

74 *Id.* at 681.

75 *Id.* at 686 (citations omitted).

76 *Id.* at 687. According to the court, the limits on the mentally ill are "of 20th Century vintage" (quoting United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010)), and lack "historical evidence" in support. *Id.*

77 *See id.* at 715–16 (Moore, J., dissenting).

78 *Id.* at 693 (majority opinion) (citations omitted).

79 *See id.* at 694–98.

community to be statistically indistinguishable.[80] Indeed, the evidence suggests people with mental illness are no more likely to be violent than those without mental illnesses.[81] In fact, people with mental illnesses are more likely to be the victims of violence,[82] which actually may suggest their right to self-defense should be more ardently protected.

Still, the majority decided to remand the case to give the government another chance to meet their burden of proof.[83] Multiple concurring opinions questioned the validity of offering the government another opportunity to justify the lifetime ban, and Judge McKeague characterized the government's evidence as "woefully short of demonstrating the required reasonable fit"[84] between the ban and their interests.[85] Here the problem is not necessarily that the court did not engage with research; rather, the Sixth Circuit did not come to the most logical conclusion in light of the fact that all of the government's research was deemed insufficient. Again, it is not that data will necessarily be controlling, but it should be persuasive. And a cursory discussion of empirical evidence that is not relied upon in reaching the court's conclusion hardly qualifies as a thorough analysis.

Courts have demonstrated a willingness to disregard data not only as it relates to limited Second Amendment rights of felons and the mentally ill but in finding an expansive view of Second Amendment rights as well. Broad protection of Second Amendment rights can have serious implications that may adversely affect the public. The right to carry firearms in public offers one such example. While dangers are present for the individual and those they live with when a firearm is present in the home, a decision to carry a gun

80 *Id.* at 696 (citing Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 Archives Gen. Psychiatry 393, 400 (1998)).

81 *See, e.g.*, Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 Am. J. Pub. Health 240, 241–42 (2015) (demonstrating that only about 4% of violence is attributable to people with mental illnesses). Perhaps more importantly, this fact holds true when looking at harm from firearms. Studies "show that fewer than 5% of the 120,000 gun-related killings in the United States between 2001 and 2010 were perpetrated by people diagnosed with mental illness." *Id.* at 241.

82 *Id.* at 242 ("[P]eople diagnosed with schizophrenia have victimization rates 65% to 130% higher than those of the general public.").

83 *See Tyler*, 837 F.3d at 699 (McKeague, J., concurring).

84 *Id.* Judge McKeague also stated, "I agree with Judge Sutton that . . . it would be fruitless to give the government a second bite at the apple . . . ." *Id.*

85 *Id.* at 699; *see also id.* at 700 (White, J., concurring) ("[T]he government has not met its burden . . . ."); *id.* at 708 (Sutton, J., concurring) ("[T]he government has not presented any individualized evidence about Tyler's fitness to possess a gun but instead has relied on stereotypes about the mentally ill.").

in public has the potential to increase the risk for others. More importantly, it creates risk for individuals who have no control over the decision of others to carry their firearms and, in the case of concealed carry, may have no way of knowing if and when firearms are present in a public setting.

Yet, in *Wrenn v. District of Columbia*,[86] the D.C. Circuit struck down a limitation on carrying firearms in public with no reference, citation, or discussion of what impact this may have on gun violence and the public.[87] The case concerned a "good reason" restriction, which required individuals to demonstrate a need beyond general self-defense to carry a firearm in public.[88] The District was not trying to eliminate citizens' right to carry firearms in public completely; rather, it attempted to limit concealed carrying rights to those who demonstrated a true need for it.[89] It seems unremarkable to see this as an attempt to strike a balance between the needs of individuals for self-defense and the risks to the public.[90] Consequently, a constitutional analysis would presumably examine the justification for these restrictions to determine whether they have a reasonable chance to mitigate risk or whether they go too far.

But the D.C. Circuit avoided such an analysis completely.[91] Performing some logical gymnastics, the Circuit Court found the city's regulation to be a complete ban for those residents who are denied a license to carry in public, thus falling in line with the complete ban of handguns by any resident that the Court categorically rejected in *Heller*.[92] The majority in *Wrenn* focused entirely on the scope of the right, whereas the dissent highlighted the relevance of the District's consideration of "vast amounts

86 Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017).

87 *Id.* at 668.

88 *Id.* at 655–56.

89 *Id.*

90 *Compare Wrenn*, 864 F.3d at 667–68, *with* Kachalsky v. County of Westchester, 701 F.3d 81, 98 (2d Cir. 2012) (applying intermediate scrutiny and finding New York's "proper cause" restriction a proper balance between Second Amendment rights and the State's authority to protect the public), *and* Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012) (supporting the Second Circuit's analysis in *Kachalsky* that New York took a moderate approach to fulfilling its objective to protect the public).

91 *Wrenn*, 864 F.3d at 666 ("[W]e strike down the District's law here apart from any particular balancing test."). The court did this despite recognizing that "our previous cases have always applied tiers of scrutiny to gun laws." *Id.*

92 *Id.* at 665–66. The court ignores the fact that individuals would be able to reapply for public carry licenses in the future, which would contradict the categorization of the law as a permanent ban. Moreover, the court declares that *Heller* prohibits total bans yet, as discussed above, courts have rather easily accepted lifetime bans for anyone who has been convicted of a felony, including those that are nonviolent offenses. *See supra* notes 67–72 and accompanying text.

of data" that found an "empirical connection between a profusion of guns and increased violent crime."[93] After declaring the right to carry a firearm in public a part of the core of Second Amendment protections, the *Wrenn* court held that it "would flout [the] lesson of *Heller I* if we proceeded as if some benefits could justify laws that necessarily destroy the ordinarily situated citizen's right to *bear* common arms."[94]

The court here explicitly ignored the role of the government in protecting public health, safety, and welfare. It would be one thing to consider the evidence and determine that the law simply goes too far. Perhaps what qualifies as a "good reason" is too narrow, for example. But the court never weighed any evidence, let alone research considering to what extent public carry laws minimize or exacerbate gun violence. Regardless of the outcome, to be so cavalier about regulations aimed at minimizing the number of firearms in public is troubling. Gun violence is inarguably a problem and one that should be genuinely engaged with by the judiciary when considering firearm regulations.

It is worth noting two points about these cases. Although they are important, they are lower courts and obviously do not set a binding precedent throughout the country. Moreover, these cases do not represent the entirety of the Second Amendment landscape among the lower courts, including the use of empirical evidence. But with little Supreme Court case law to examine, these lower court cases are illustrative of how courts can ignore data and relatively easily dispense with state interests or even Second Amendment protections for certain groups.

It is, therefore, particularly important to understand how the Supreme Court Justices may grapple with empirical data or if they will at all. The litigation of the Supreme Court's most recent Second Amendment case, *New York State Rifle & Pistol Association v. City of New York*,[95] is demonstrative of the uncertainty surrounding the Justices' approach. New York City limited carrying handguns only to shooting ranges within the city limits.[96] The restriction was challenged as a violation of the Second Amendment, but the City won in the District and Appellate Courts.[97] After the Supreme Court granted certiorari to hear the case, however, New York reversed course and

93 *Wrenn*, 864 F.3d at 666, 671 (Henderson, J., dissenting). The majority holds that "we needn't pause to apply tiers of scrutiny, as if strong enough showings of public benefits could save this destruction of so many commonly situated D.C. residents' constitutional right to bear common arms for self-defense is any fashion at all." *Id.* at 666.

94 *Id.* at 665 (emphasis in original).

95 N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020).

96 *Id.* at 1530 (Alito, J., dissenting).

97 *Id.* at 1527–28.

amended the law to appease the challengers and argued the case was moot.[98]

New York did not fear that the Supreme Court would strike down the restriction; the fact that the law was amended evidences as much. But arguing that the case was moot might have been an attempt to forestall an adverse ruling broad enough to impact other firearm regulations critical to the fight against gun violence.[99] At every judicial level, Second Amendment rulings define the contours of the solutions available to policymakers. But the Supreme Court has the power to control all of those cases, and it appears that some members of the Court are more likely to look backward at the history of the Second Amendment, rather than forward, when making their decision. As illustrated below, such a backward-looking approach would be limiting.

ii. Historical Limitations

McDonald v. City of Chicago[100] is the only other Supreme Court case on the Second Amendment decided since *Heller*, but other sources provide insight into the approach certain justices might take.[101] Importantly, many justices seem intent on using history as the primary tool for determining the constitutionality of gun laws. This approach, however, is misguided because it limits the influence and importance of social science and ignores the potential for public health issues to evolve over time, expanding government authority to act in times of crisis and restricting authority when the risk has been minimized or eliminated. As our understanding of public health problems and methods to address them improve over time, the analysis of state efforts to protect the public should evolve as well. But reliance on history may create a barrier to a modern, data-driven approach to gun violence.

Given Justice Thomas's numerous dissents from the Court's denials of certiorari for Second Amendment appeals, his opinion is perhaps the easiest on the Court to predict in these matters. Justice Thomas has declared the Second Amendment a "disfavored right" and castigated lower courts for their "general failure to afford the Second Amendment the respect due an enumerated right."[102] More importantly, he rejects lower courts'

98 *See id.* at 1526 (plurality opinion).

99 Even Justice Alito questions the logic behind the government's change of heart: "Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed its ordinance." *Id.* at 1527–28 (Alito, J., dissenting).

100 McDonald v. City of Chicago, 561 U.S. 742, 764 (2010).

101 *See infra* notes 102–12 and accompanying text.

102 Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the Court's

use of a two-step inquiry that incorporates the tiers of scrutiny in Second Amendment cases, finding the test to be "entirely made up" and inconsistent with *Heller*'s rejection of an interest-balancing inquiry.[103] Instead, Justice Thomas appears to prefer that courts follow *Heller*'s suggestion that "courts could conduct historical analyses for restrictions" that may be analogous to the current laws that are challenged.[104] In another dissent, joined by Justice Gorsuch, Justice Thomas explicitly stated that historical digging into sources from England, the founding era, the antebellum period, and Reconstruction helped him determine that the Ninth Circuit Court of Appeals incorrectly upheld a firearm restriction.[105]

Justice Alito took the historical approach in his dissent[106] from the Supreme Court's most recent Second Amendment case, *New York State Rifle & Pistol Association v. City of New York*, a case the majority declared moot in light of recent amendments made to the city's handgun licensing statute.[107] After explaining why the case was not moot, Justice Alito stated that the constitutional question was an easy one to answer using a historical analysis that showed a lack of analogous laws at the time the Second Amendment was adopted.[108]

Justice Kavanaugh, a recent appointment to the Court, was equally explicit in favoring a historical approach to Second Amendment analysis while a lower court judge on the D.C. Circuit.[109] In the follow-up case to

denial of certiorari).

103 Rogers v. Grewal, 140 S. Ct. 1865, 1866–67 (2020) (Thomas, J., dissenting).

104 *Id.* at 1866. While Justice Thomas rejects the two-step inquiry that includes a tiers-of-scrutiny analysis, he believes that jurists who have "concluded that text, history, and tradition are dispositive in determining whether a challenged law violates the right to keep and bear arms" espouse an approach consistent with *Heller*. *Id.* (citations omitted); *see also Silvester*, 138 S. Ct. at 945 (Thomas, J., dissenting).

105 Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016), *cert. denied sub nom.* Peruta v. California, 137 S. Ct. 1995, 1996–98 (2017) (Thomas, J., dissenting).

106 N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1544 (2020) (Alito, J., dissenting).

107 *Id.* at 1526 (per curiam).

108 *See id.* at 1538–42, 1544 (Alito, J., dissenting) ("History provides no support for a restriction of this type."). Justice Alito states that if history were insufficient to demonstrate that the law is invalid, then New York City lacks justification for their restriction. *Id.* at 1541–42. Justices Thomas and Gorsuch joined the dissent except for the last section analyzing the City's justification. *Id.* at 1527. Justice Kavanaugh also proclaimed his support for Justice Alito's analysis of *Heller* and *McDonald*, while expressing concern over lower courts improperly applying those cases. *Id.* at 1527 (Kavanaugh, J., concurring).

109 Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1295 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Justice Kavanaugh also, unsurprisingly, joined Justice Thomas's most recent dissent from denial of certiorari where Justice Thomas

Heller—referred to as *Heller II*—then Judge Kavanaugh stated quite clearly his belief that history is the proper manner in which these regulations should be evaluated,[110] and he decried the use of any traditional standard of review as "judge-empowering 'interest-balancing inquir[ies].'"[111]

Chief Justice Roberts does not have a written opinion discussing which analytical tools he believes should be used in analyzing Second Amendment challenges, but there may be hints that he too feels historical inquiry is the best methodology. During the *Heller* oral argument, the Chief Justice questioned the value of the traditional tiers-of-scrutiny standards of review, instead asking pointedly whether it would be better to simply look to the past and examine the regulations that were available at the time of the Amendment's adoption:

> [T]hese various phrases under the different standards that are proposed . . . none of them appear in the Constitution; . . . Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time . . . and determine how these—how this restriction and the scope of this right looks in relation to those?[112]

If implemented, this approach would require the current restriction to be compared to what was acceptable historically and would avoid balancing the benefits and burdens of the law, as found in the traditional standards of review.

The potential for a majority of Supreme Court justices to rely primarily, if not solely, on a historical inquiry for constitutional analysis is quite troubling. For one thing, judges are not historians. As Fordham history professor Saul Cornell has pointed out, both Justice Scalia's and Justice Stevens's historical analysis in *Heller* fell short of the standards that historical scholarship demands.[113] Even Justice Scalia, author of the majority opinion in *Heller*, conceded in his concurrence in *McDonald* that historical analysis is not necessarily an objective determinant of constitutionality, finding instead

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advocated for a historical analysis and used that framework to analyze a restriction to carry a firearm in public. Rogers v. Grewal, 140 S. Ct. 1865, 1865 (2020) (Thomas, J., dissenting).

110 *Heller II*, 670 F.3d at 1295 (Kavanaugh, J., dissenting).

111 *Id.* at 1277.

112 Transcript of Oral Argument at 44, *Heller I*, 554 U.S. 570 (No. 07-290). Chief Justice Roberts, with a hint of disdain for tiers-of-scrutiny, went on to state that "these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up." *Id.*

113 Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626 (2008).

that "it sometimes requires resolving threshold questions."[114]

Judge Richard Posner took his critique of historical inquiry a step further, labeling the analysis "law office history."[115] Given the resources available to the Supreme Court, Judge Posner believes the Justices are able to selectively use historical sources to justify nearly any outcome.[116] Whether this is indeed what actually occurs may be less relevant than the perceived notion that it does. In such a contentious area as Second Amendment rights, the public perception of the Court's objectivity is paramount, and ignoring current empirical evidence, especially when available to the public, may create a tension that strains the public's trust in the Court's ability to avoid political partisanship.

The reliance on historical analysis, as opposed to current empirical data, also ignores the manner in which the police powers of the state authorize the government to be responsive to emerging threats to public health and safety. If government action is necessary to protect the public, the police powers enable some regulation of behavior and limitation of individual rights.[117] A critical part of the analysis, then, is whether the threat to the public warrants and is amenable to government action and if the means—which would factor in the burden on the individual right—are justified.[118] Without an actual threat to the public or a reasonable chance to mitigate the potential harm, government action is unwarranted. Empirical research would be a critical component of this evaluation because it would help to properly evaluate the nature of a modern public health threat and the potential for government action to mitigate that threat. This type of assessment demonstrates the limitation of a historical inquiry, at least in

114 *See* McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring).

115 Richard A. Posner, *In Defense of Looseness*, New Republic, Aug. 27, 2008, at 35.

116 *Id.* ("The judge sends his law clerks scurrying to the library and to the Web for bits and pieces of historical documentation. When the clerks are the numerous and able clerks of Supreme Court justices, enjoying the assistance of the capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position.").

117 Jacobson v. Massachusetts, 197 U.S. 11, 27–28 (1905) (finding the evaluation of necessity important to prevent arbitrary and oppressive government action unrelated to a true public health threat). For a further discussion on *Jacobson*, see Ulrich, *supra* note 4, at 1077 (describing the framework used in *Jacobson* as requiring a public health threat to justify government action).

118 *Jacobson*, 197 U.S. at 30–31 (stating that the vaccine was an effective measure in addressing smallpox while the government also exempted those who would be overly burdened due to a medical contraindication).

being dispositive for a regulation's constitutionality.[119]

As the public health and safety threats evolve, diminish, and emerge over time, so too must the action the government is authorized to take in response. As gun violence has become a greater threat to society, especially to communities of color, the state must be empowered to respond. Individual rights are and have always been a limitation on state action, as well they should be. But the determination of whether an action qualifies as a protected right is not the end of a constitutional inquiry if that right can be limited in a reasonable manner that benefits the greater good. This has been true since the country's founding.[120] But given the risk of abuse inherent in paternalistic actions in the name of public health, there is logic in questioning the validity of state action. Indeed, there are plenty of historical examples of abuse of power in the name of public health.[121] Again, this is where data provides a persuasive, though not necessarily conclusive, manner in which to evaluate the legitimacy of state action in the name of protecting the public.

119 As Justice Breyer notes in his dissent in *Heller*, "This historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry." *Heller I*, 554 U.S. at 687 (Breyer J. dissenting).

120 *See* Parmet, *supra* note 65, at 292 (discussing efforts in the early years of the country to protect public health, and the "relationship between limits on freedom and provision of care").

121 *See e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) (citing *Jacobson v. Massachusetts* to justify forced sterilization on individuals alleged to have insufficient mental capacity in an effort to "prevent our being swamped with incompetence" by those who "sap the strength of the State."); Wong Wai v. Williamson, 103 F. 1, 10 (C.C.N.D. Cal. 1900) (striking down a San Francisco quarantine ordinance that only applied to people of Chinese descent); Jew Ho v. Williamson, 103 F. 10, 23–24 (C.C.N.D. Cal. 1900) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations, between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.") (quoting Yick Wo. v. Hopkins 118 U.S. 356, 373 (1886)); *see also* Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 66–68 (1985) (describing health officials using quarantine against prostitutes as a complement to police work).

II. The Informative Function of Litigation

In a dissenting opinion, Justice Kagan accused the Court majority of "weaponizing the First Amendment" after it overturned a prior case that had stood for over forty years.[122] So, too, might the Second Amendment be weaponized to alter the legal landscape for firearm regulations at the federal, state, and local levels. With the PLCAA blocking impact litigation that would have the potential to regulate firearms, Second Amendment constitutional litigation is the new courtroom battleground. And this litigation will certainly have a significant impact on the future of gun control. Parts of the judiciary, including some justices, are focused primarily on the scope of the right and historic analogues,[123] but litigation provides a chance to inform them of the role the law plays in this growing public health crisis.

Public health research and law, therefore, must play a critical role in the future of Second Amendment jurisprudence.[124] Constitutional litigation provides an avenue to provide useful data relevant to the judiciary's legal analysis and may influence their ultimate conclusions. For example, when discussing amicus briefs, Justice Breyer stated that "[s]uch briefs play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated laypersons and thereby helping to improve the quality of our decisions."[125] The public health community, and experts in technical aspects of statistics and epidemiological principles, would be an excellent resource to convey emerging research on gun violence and the law in a manner that is easily understandable. Moreover, they can do so with credibility that the judiciary respects and appreciates. While the exact influence on an outcome may be incalculable, there is no doubt that amicus briefs, in particular, can provide important and relevant information that may not be well-represented—or represented at all—in the arguments put forth by the parties.

122 Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2501 (2018). For more on how First Amendment interpretations impact public health directly, see Yale Law School Conference, *Public Health in the Shadow of the First Amendment*, Yale L. Sch. (Oct. 7, 2014), https://law.yale.edu/yls-today/news/yale-law-school-hold-conference-first-amendment-shadow-public-health, and the accompanying symposium on Balkanization from the *Public Health in the Shadow of the First Amendment Conference* (2014), https://law.yale.edu/ghjp/events/past-events-archive/guest-bloggers-balkinization-public-health-shadow-first-amendment-conference (last visited Aug. 18, 2020).

123 *See supra* Part I.B.ii.

124 *See* Ulrich, *supra* note 4, at 1096–98.

125 *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. Times (Feb. 17, 1998), https://www.nytimes.com/1998/02/17/us/justice-breyer-calls-for-experts-to-aid-courts-in-complex-cases.html.

The judiciary's role is to decide cases and controversies brought before them. But the impact of these decisions, particularly appellate and Supreme Court opinions which control lower courts, can be far-reaching.[126] Yet it is rational to think judges may, at times, be blinded by the narrow focus of the facts and legal theory before them in a particular case. It can often be useful to present a broader perspective on what their decision might mean to society.[127] According to Judge Posner, "appellate lawyers would be more effective if . . . they instead emphasized the practical stakes in the case and thus the consequences of the decision."[128] Third parties may present the judiciary with a broader view of the litigation's impact.[129]

This is not to suggest that social science, storytelling, or historical contextualizing will always sway a court. To be sure, there are stories of judges disregarding, if not misunderstanding, the briefs they read.[130] For example, while Justice Brennan cited scientific studies quite often in his opinions, he was not immune to misinterpretations.[131] In *Craig v. Boren*, Justice Brennan found a disparity between male and female drivers for driving under the influence of alcohol to "hardly . . . form the basis for employment of a gender line as a classifying device. Certainly, if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'"[132] Yet there was no correlation involved, and the discrepancy was hardly trivial.[133] As Justice Rehnquist noted in his dissent, the discrepancy was higher by a factor of nearly eighteen.[134]

126 *See e.g. infra* Part II.A (discussing *Brown v. Board of Education*, *Grutter v. Bollinger*, and *McClesky v. Kemp*).

127 *See* Linda Greenhouse, *What Got Into the Court? What Happens Next?*, 57 MAINE L. REV. 1, 6–8, 10 (2005) (discussing the importance of considering not simply pure legal doctrine but how the opinions impact the real world).

128 Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1067 (2006). Professor Linda Sandstrom Simard has pointed out that "Judge Posner has been critical of the inefficiencies created by amicus briefs, noting that '[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs . . . .'" Simard, *supra* note 12 at 681 (2008).

129 *See* Simard, *supra* note 12, at 680 (2008) ("[A]mici curiae may play . . . an educational role by presenting technical information that creates a fuller context for the court to decide the case.").

130 *See* Blake, *supra* note 11, at 231.

131 *Id.*

132 Craig v. Boren, 429 U.S. 190, 201–02 (1976).

133 Blake, *supra* note 11, at 231.

134 *Craig*, 429 U.S. at 223 (Rehnquist, J., dissenting). According to Blake, Justice Brennan makes three important mistakes. "First of all, there is no correlational analysis taking place, so the term 'correlation' is not appropriate. Second, he mistakes the concepts of statistical significance . . . for substantive significance . . . . Finally, the substantive significance of the difference in arrest rates for men and women is massive, not merely

A majority of judges at every level of the federal bench have stated that amici curiae help "offer[] new legal arguments that are absent from the parties' briefs" and may provide perspective on the impact by highlighting "matters that extend beyond the parties' dispute."[135] This fact is consistent with the notion that the judiciary can, and at times must, be educated on critical information or perspectives. The Court's limitations may result from a lack of expertise or understanding of a nuanced scientific matter, or it may be from a lack of experience. The latter has almost certainly been key throughout the history of the Court. Consider the representation of the Court over its history, predominantly white males, as they have sought to answer questions implicating the lives of people of color, women, and, more recently, sexual minorities. In cases involving these three areas, outcomes have been influenced by non-party involvement in the litigation, acting to better inform the judiciary.

A. *Race*

Perhaps the most well-known example where a case's outcome may be credited to the research and data used to inform the judiciary is *Brown v. Board of Education*.[136] In the majority opinion, footnote eleven cites social science research to support the notion that school segregation causes psychological harm to Black students.[137] Many have questioned both the validity of the research cited in *Brown* and whether the Court relied on that research to reach its conclusion,[138] yet those questions do not necessarily

'not trivial.'" Blake, *supra* note 11, at 231. Justice Rehnquist, despite citing science in less than one percent of his opinions, correctly made note of this in his dissent in *Craig v. Boren*, finding male drivers eighteen to twenty years old were arrested for driving under the influence nearly eighteen times as often as females in the same age group. *Id.* at 232.

135 Simard, *supra* note 129, at 690–92. For the educational function of providing new legal arguments, all Supreme Court respondents supported this function, as did 77.1% of Circuit Court respondents and 82.5% of District Court respondents. *Id.* at 690. Professor Simard provides an example using *Mapp v. Ohio*. *Id.* at 691. In the case, the Supreme Court agreed with the argument made by the ACLU, acting as amicus curiae, who urged the Court to overturn prior precedent, an argument absent from the appellant's challenge. *Id*. Moreover, all Supreme Court respondents, along with 73.7% of judges on federal appellate courts and 72.7% of those on federal district courts, supported "focus[ing] the court's attention on matters that impact a direct interest that is likely to be materially impacted by the case." *Id.* at 692.

136 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

137 *Id.* at 494, n.11.

138 *See, e.g.*, Michael Heise, Brown v. Board of Education*, Footnote 11, and Multidisciplinarity*, 90 Cornell L. Rev. 279, 294–95 (2005).

diminish the importance of the role social science played. While the former has the benefit of over sixty years of hindsight,[139] the latter still represents the fact that the Court felt this controversial decision might be more palatable with scientific support.[140]

But *Brown* was certainly not the last race-centric case where information outside of the parties' legal arguments made a lasting impression. *Grutter v. Bollinger* was a highly visible affirmative action case involving Michigan Law School and the use of race in its admissions process.[141] Some commentators thought *Grutter* was the opportunity for the Court to overturn its prior affirmative action case, *Regents of California v. Bakke*,[142] but the Court provided "an unapologetic embrace of a proposition that put affirmative action on a stronger footing than Justice Powell's solitary opinion in *Bakke*."[143] An amicus brief from "retired military officers and superintendents of the military academies," among others, is credited with playing a central role in this surprising outcome.[144]

The brief's impact was evident early, becoming a prominent feature at oral argument with the Justices using it as the basis for questions to the solicitor general.[145] Importantly, the brief was not simply focused on whether the use of race-preference programs was constitutional. Rather, the brief examined the legally relevant issue of whether the affirmative action policies could help the academies fulfill their purposes.[146] This brief, along

139 *Id.* at 296.

140 *See id.* at 293–94; *see also* Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 794 ("The Court . . . embraced the footnote eleven studies to lend authority to its highly controversial, and legally precarious, decision to strike down public school segregation.").

141 *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

142 *See* Greenhouse, *supra* note 127 at 5–6.

143 *Id.* Greenhouse continues by stating that the decision recognized that "diversity serves a compelling state interest not only as an educational tool for enriching life in the classroom . . . but as a pathway for full participation by members of minority groups in the civic and economic life of the country." *Id.*

144 *Id.* at 6. *See also* Sylvia H. Walbot & Joseph H. Lang, Jr., *Amicus Briefs Revisited*, 33 STETSON L. REV. 171, 173 (2003) ("[W]ithout question a powerful influence in the case[] was the single amicus brief of 'the military,' as it came to be informally called.").

145 JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 228 (2007) ("Amicus briefs are rarely mentioned in Supreme Court arguments, but four justices had referred to the military in the first several minutes of *Grutter*."); *see also* Greenhouse, *supra* note 127, at 6 ("It was clear during the argument that the Justices had read [the military] brief . . . ."); Walbot & Lang, *supra* note 144, at 175. For a broader discussion of the impact of "the military's" amicus brief, see TOOBIN, *supra*, at 224–36.

146 *See* Walbot & Lang, *supra* note 144, at 175. *See also* Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 131 (2005) (describing how

with the many others filed in support of affirmative action policies, provided the Court with "an ingredient that was crucial to the outcome of the case: a sense of the culture."[147] Justice Ginsburg later singled out the military brief as "one of the most valuable briefs . . . submitted."[148]

People of color are underrepresented at every level and in every branch of governance. Social science and amicus briefs alone will not ensure they are appropriately represented or that they will receive the justice they seek. In fact, *McClesky v. Kemp* demonstrates the Court's most explicit rejection of social science.[149] The case challenged the State of Georgia's death penalty sentence against Warren McClesky, a Black man charged with killing a white police officer, by demonstrating empirically the systemic bias in death sentences if there is a white victim instead of a Black victim.[150] Ultimately, the majority rejected the claim because the data did not prove discrimination in the plaintiff's case,[151] though there is evidence the real reason for ignoring the data may have been a reluctance to create a precedent for evaluating racial disparities in a severely biased criminal justice system.[152]

Yet a lack of universal success in educating the Court does not mean it cannot be effective. While the Justices almost certainly realize their decisions have a broad impact on society, it may be difficult for them to keep that impact at the forefront of their mind. By expanding the scope of the issue, briefs, such as the military brief in *Grutter*, can help to emphasize that a case is not simply one of legal theory. It is imperative that the judiciary, in particular—often the last vestige of hope for justice—be acutely aware of

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the O'Connor opinion cited the military brief for the position that "diversity in the military is 'essential' for it to 'fulfill its principle mission to provide national security.'").

147 Greenhouse, *supra* note 127, at 7. More specifically, Greenhouse notes the connection to what Robert Post refers to as "the constitutional culture in which the Court is operating" with culture referencing "beliefs and values of nonjudicial actors." *Id.* at 7, n.13. "[T]he Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law." Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 1, 8 (2003).

148 Simard, *supra* note 12 at 696.

149 *See generally* McClesky v. Kemp, 481 U.S. 279 (1987).

150 *Id.* at 283, 286-87 ("[E]ven after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.").

151 *Id.* at 292–93.

152 *See* Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 Santa Clara L. Rev. 519, 527–28 (1995) (quoting Justice Scalia in a memo to the Conference of Justices) ("Since it is my view that unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.").

the practical effect communities of color will endure after the legal academy has moved on to the next big case.

B. *Sex*

Sex-related legal questions are particularly interesting given the progression of women's status in society and the makeup of the Court. The relevance of social science influencing Supreme Court decisions is often traced to the famous brief filed by Louis Brandeis[153] in the case of *Muller v. Oregon*.[154] On the heels of *Lochner v. New York*,[155] which rejected protective labor laws for bakers, there was a question of how the Court would handle protective labor laws for women.[156] The Brandeis brief contained 111 pages of "new empirical evidence" as compared to a mere two pages of legal arguments.[157] Ultimately, the Court found this information persuasive and upheld the restrictions on women's work hours.[158]

While arguments that employers should treat male and female workers differently seems misogynistic now—and sexist assumptions likely played a role as well[159]—the reliance on social science rather than legal theory did prove successful.[160] Moreover, the evolving data corrects the mistaken understanding of female fragility and the need for paternalistic protection. If anything, research is often likely to evolve much more quickly than public sentiment and, therefore, gives us a better chance of correcting past decisions. A reliance on past precedent and legal theory would make it more difficult for the underrepresented—in particular, people of color,

153 *See* Blake, *supra* note 11, at 219 ("The conventional account of social science influencing Supreme Court decisions typically begins with the 'Brandeis Brief' in *Muller v. Oregon*.").

154 Muller v. Oregon, 208 U.S. 412 (1908).

155 Lochner v. New York, 198 U.S. 45 (1905).

156 Perhaps important to Brandeis's strategy in *Muller* was Justice Harlan's dissent in *Lochner*, which recognized the liberty of contract but stated that it may be limited due to the dangerous working conditions and health impact faced by bakers. *Id.* at 70–71 (Harlan, J., dissenting); Blake, *supra* note 11, at 220. The New York Attorney General in *Lochner* failed to raise these concerns and, instead, the Court deferred to legislative judgments about a state's use of police powers. *Id.* at 221.

157 Blake, *supra* note 11, at 220.

158 *Muller*, 208 U.S. at 419, 422–23.

159 *See* Judith Olans Brown, Lucy A. Williams & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 470 (1996) ("*Muller*'s holding that legislation limiting hours for women was constitutional rests on 'facts' (myths) about women workers that differentiated them from male workers, thereby avoiding the conundrum that, if men had a constitutional right to labor in an unregulated economy, women should enjoy the same 'right.'").

160 *Muller*, 208 U.S. at 419–22 (mentioning Brandeis's brief before describing the justifications for upholding the law).

women, and sexual minorities—to gain greater access to justice.

Another example can be found in the abortion context. Abortion rights suffered a crucial blow in *Gonzales v. Carhart*, where the Court essentially reclassified the undue burden test as a rational basis evaluation.[161] Perhaps influenced by a pro-life brief that described women having adverse emotional and psychological effects from undergoing an abortion, the Court validated the government's concern for women's mental states.[162] With echoes of *Muller*, the Court stated: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[163]

In an abortion case to follow, *Whole Woman's Health v. Hellerstedt*,[164] abortion rights advocates countered this unsubstantiated claim with more than 100 female lawyers, law students, law professors, and former judges filing a brief explaining why abortion was the right decision for them and why it helped them achieve their position within the legal field.[165] This brief used a very specific group of women "inside the Justices' rhetorical circle" to

161 Gonzales v. Carhart, 550 U.S. 124, 158, 166 (2007) ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."). Justice Ginsburg points out in her dissent what an incredibly low bar the majority sets for their evaluation: "Today's ruling, the Court declares, advances 'a premise central to [*Casey*'s] conclusion'—*i.e.*, the Government's 'legitimate and substantial interest in preserving and promoting fetal life.' . . . But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion." *Id.* at 181 (Ginsburg, J., dissenting) (alteration in original) (citation omitted). The Fifth Circuit relied on this when declaring "the first-step in the analysis of an abortion regulation, however, is *rational* basis review, not *empirical* basis review." Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 596 (5th Cir. 2014).

162 *See* Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 Mich. St. L. Rev. 1327, 1343 (2015). The brief was particularly critical of prior abortion jurisprudence, which it claimed "made non-evidence based assumptions," whereas this brief provided real life experiences. Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, & 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 2, *Gonzales*, 550 U.S. 124 (No. 05-380) [hereinafter Cano Brief]. Despite the implicit claim that this brief was based on evidence, there is no description of the sources or methodologies that produced the affidavits included from the women, nor do the affidavits provide information on what led to the women having abortions. *See* Edwards, *supra*, at 1344.

163 *Gonzales*, 550 U.S. at 159 (citing Cano Brief).

164 Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

165 Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 Yale J.L. & Feminism 29, 30–32 (2017).

counter the narrative that women needed the government or the judiciary to protect them from making poor decisions.[166]

This brief helped to contextualize the case by reframing the issue before the Court. In *Whole Woman's Health*, Texas claimed the regulations were meant to protect the health and wellbeing of women by increasing the safety of abortion procedures.[167] But the opposition brief filed by women challenged the notion that they needed such paternalistic regulations that offered restriction with no protection, thus providing an avenue for the Court to focus on the merits of the claim instead of simply deferring to State authority.[168] Indeed, what is "undue" requires a close examination of the facts on the ground.[169]

This opened the door for other amici to provide critical facts about the burden the Texas laws created while providing no benefits. For example, research demonstrated that abortion procedures were safer and had lower mortality rates than procedures that were not subject to the regulations, raising questions as to why the regulations applied only to abortion procedures.[170] Moreover, as Justice Breyer noted in his majority opinion, when complications do arise, they occur well after the procedure, making the necessity of the admitting privileges requirement doubtful.[171] While providing little to no benefit, the evidence established to the Court the drastic increase in burdens on women, especially considering that the provider closures forced under the regulations drastically increased the distances needed to travel to obtain an abortion.[172] This information led the Court to strike down the Texas regulations[173] in an opinion filled with data that gave specific details on the burdens and, importantly, the lack of benefits for the women of Texas.[174]

166 *Id.* at 31. "It's the Justices' community—it's their colleagues and people who have argued before them and former law school classmates and co-clerks." *Id.* (citation omitted) (quoting Ruth Marcus, *In a Supreme Court Brief, Lawyers Bravely Tell Their Own Stories*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/opinions/in-a-supreme-court-brief-lawyers-tell-their-own-abortion-stories/2016/01/26/19c410fa-c457-11e5-a4aa-f25866ba0dc6_story.html).

167 *Whole Woman's Health*, 136 S. Ct. at 2320 (Ginsburg, J., dissenting).

168 *See* Edwards, *supra* note 165, at 31–33.

169 Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J.F. 149, 154 (2016).

170 *See Whole Women's Health*, 136 S. Ct. at 2315.

171 *See id.* at 2311.

172 *See id.* at 2313.

173 *Id.* at 2318–19, 2320.

174 *Id.* at 2311–14; *see also* Greenhouse & Siegel, *supra* note 169, at 156 ("The Court's decision is rich with factual findings of the district court and of amici that bear on the balance of benefits and burdens in the case.").

C. *Sexual Orientation*

Likewise, the evolution of gay rights in the Supreme Court owes significant credit not simply to new constitutional interpretation but to a broader understanding of the context in which that legal analysis takes place. In *Bowers v. Hardwick*, a decision that has since been overruled on the basis that it was "not correct when it was decided,"[175] the Supreme Court upheld a Georgia sodomy law[176] because the Constitution, including the right to privacy, does not extend to "homosexual sodomy."[177] The Court declared that prohibitions of this conduct have "ancient roots," precluding status as a fundamental right.[178] The Court went on to uphold the law under rational basis review, despite acknowledging that it was grounded in notions of morality[179] rather than the need to protect public health, safety, or welfare.

But the assumptions made about the historical treatment of gays by "Western civilization," as Justice Burger noted in his concurrence,[180] were later shown to be inaccurate. The briefs in *Lawrence v. Texas* were critical of the faulty logic upon which *Bowers* relied.[181] Briefs written by professors of history, and by organizations led by the Human Rights Campaign, focused on the historical treatment of gay people to undercut the *Bowers* assumptions.[182] They also used social science research to explain stigma, internalized psychological harm, and the gay community's exposure to violence.[183] It went on to demonstrate that the gay community does not conform to stereotypes and caricatures, but in fact, is quite diverse in their demographics and lived experiences.[184] Meanwhile, a brief filed by Yale law professor Harold Koh provided the Court with updated legal developments in other Western countries to counter the narrative in *Bowers* that gay sexual practices garnered near-universal rejection.[185] The brief stated that "'foreign and international courts have barred the criminalization of sodomy between

175 Lawrence v. Texas, 539 U.S. 558, 578 (2003).
176 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).
177 *Id.* at 190, 196.
178 *Id.* at 192.
179 *Id.* at 196.
180 *Id.* at 196–97 (Burger, J., concurring).
181 *See, e.g.,* Lawrence v. Texas, 539 U.S. 558, 567–71 (2003) (citing briefs of amici curiae the ACLU, et al.; the Cato Institute; and Professors of History et al.).
182 Greenhouse, *supra* note 127, at 8.
183 *See* Edwards, *supra* note 162 at 1346.
184 *See* Amicus Brief of Human Rights Campaign et al. in Support of Petitioners at 19, *Lawrence*, 539 U.S. 558 (No. 02-102).
185 Greenhouse, *supra* note 127, at 8.

consenting adults'" in South Africa, Israel, Columbia, and the European Court of Human Rights.[186]

These briefs demonstrate the manner in which the Court can be updated on an evolving understanding of the gay community. In the fight for gay rights, briefs have been used to demonstrate the similarities between same-sex couples and different-sex couples.[187] For example, studies have been used to dispel the notion that children of same-sex parents are more likely to be harmed than children of different-sex parents.[188] The data used in these studies is not only about who those in the gay community are as people, such as psychological or personality characteristics but also how they value intimate relationships.[189]

Research has also been critical to illustrate more tangibly the harm that seems so evident from discriminatory treatment. Sexual minorities suffer from disparities in mental health that are no longer seen as part of their sexual identity.[190] Instead, it is now clear that it is, in fact, the marginalization and social stigma they endure that has perpetuated health inequities, as well as stressors that put them at increased risk for physical health disparities.[191]

Evidence of damage was then demonstrated to extend to the children of same-sex parents. Again, these children suffered harm not because they had same-sex parents but, instead, because of societal discrimination these families faced. At oral argument for *Hollingsworth v. Perry*, which concerned California's Proposition 8 ban on same-sex marriage, it became clear that there was a need to explain the difference between these conclusions to the Court.[192] During oral argument, Chief Justice Roberts believed there was an inherent tension between the claims that children of same-sex couples were no less "healthy" than children of heterosexual couples but that the children of same-sex couples were harmed by denials to marriage.[193] But a

186 *Profs. Koh and Yoshini Submit Brief to Supreme Court on Lawrence v. Texas*, YALE L. SCH. (Jan. 22, 2003), https://law.yale.edu/yls-today/news/profs-koh-and-yoshino-submit-brief-supreme-court-lawrence-v-texas.

187 *See* Russell K. Robinson & David M. Frost, *"Playing It Safe" With Empirical Evidence: Selective Use of Social Science in Supreme Court Cases About Racial Justice and Marriage Equality*, 112 NW. U. L. REV. 1565, 1576–77, 1583–84 (2018).

188 *Id.* at 1576–79.

189 *Id.* at 1578.

190 *See id.* at 1579.

191 *Id.*

192 *See* Transcript of Oral Argument at 61–62, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144); *see also* Robinson & Frost, *supra* note 187, at 1576 (discussing oral argument in *Hollingsworth*).

193 *See* Transcript of Oral Argument at 61–62, *Hollingsworth*, 570 U.S. 693 (No. 12-144). During oral arguments, Chief Justice Roberts made it clear he believed there to be an inconsistency: "[I]t seems to me that your position that you are supporting is somewhat

brief for the case helped by successfully highlighting the voices of children while integrating legal theory and social science data to demonstrate that these two stances are not mutually exclusive.[194]

The evidence of damage was not featured as significantly or explicitly in major gay rights opinions as compared to evidence of sameness, but it seems likely that both were influential in the Court's evolution. *Obergefell v. Hodges*—the case recognizing the right to same-sex marriage—was primarily focused on the fact that heterosexual and same-sex couples find marriage essential for similar reasons and, therefore, marriage of same-sex couples deserves equal protection.[195] But there are references to the harm of exclusion as well. For the children of same-sex couples "suffer the stigma of knowing their families are somehow lesser . . . [and] [t]he marriage laws at issue here thus harm and humiliate the children of same-sex couples."[196] For the adults denied the privilege of marriage, Justice Kennedy held that the law "demeans" them and "disrespect[s] and subordinate[s] them."[197]

The fight for marriage equality was an important step, but certainly not the end of the search for equality. In this regard, many civil rights battles share a common thread. They demonstrate both the promise of educating the judiciary through social science and the limitations. Far too often, the narrow legal arguments provide narrow understandings of the underrepresented.[198] The right to a marriage license does not eliminate the number of other barriers that sexual minorities continue to face. Likewise, increased access to Michigan Law School does not address the vast number of structural barriers people of color face starting in the womb.

But these cases provide an opportunity for change. And these areas of law exhibit the manner in which the Court can be informed and influenced in a way that enhances the Justices' thought process. In writing for the *Obergefell* majority, Justice Kennedy explicitly referenced the evolving understanding of the gay community: "the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread

internally inconsistent. We see the argument made that there is no problem with extending marriage to same-sex couples because children raised by same-sex couples are doing just fine and there is no evidence that they are being harmed. And the other argument is Proposition 8 harms children by not allowing same-sex couples to marriage [sic]. Which is it?" *Id.*

194 Edwards, *supra* note 162, at 1347.

195 Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015).

196 *Id.* at 668.

197 *Id.* at 672–676.

198 *See also, e.g.*, Robinson & Frost, *supra* note 187, at 1581 ("Judges should make decisions with a full understanding of LGBT people's lives, not just the slivers that lawyers sometimes choose to serve up to them.").

social conventions."[199] Gone is the time when Justice Powell, in deciding to cast the decisive vote in *Bowers v. Hardwick*, would tell his fellow justices that he had never met a homosexual despite the fact that one of his clerks that term was gay.[200] Now, due in part to briefs that included substantial and significant research, the Justices have a "sense that the culture ha[s] changed, not only outside the Court, but within it."[201]

These examples demonstrate how litigation can open the door for an opportunity to expand the judiciary's view of what matters in a constitutional analysis. These cases are important given the precedential value appellate decisions can have, binding not only lower court judges but policymakers as well. In the Second Amendment arena, where the Supreme Court has made so few declarations, the Court must support future decisions with a proper framing on the impact those decisions can and will have on a country struggling to grapple with the growth of gun violence. Thus, gun reform stakeholders should view future cases as a chance to explain how the law can be a powerful tool in tackling gun violence.

199 *Obergefell*, 576 U.S. at 660–61.

200 Adam Liptak, *Exhibit A for a Major Shift: Justices' Gay Clerks*, N.Y. TIMES (June 8, 2013), https://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html?smid=pl-share.

201 Greenhouse, *supra* note 127, at 8.

III. Constitutional Litigation as a Path for Education

Given the evidence above that outside information can inform and influence the judiciary, the public health community, public health research, and public health law have essential roles to play in framing the future of firearm regulations and Second Amendment jurisprudence. If the analysis centers primarily around a search for historical analogues, the future of gun violence will be dictated by what people centuries ago thought was a proper method to reduce the harm of muskets. This would be inadequate. Thankfully, constitutional litigation provides an opportunity to engage the judiciary in the growing body of research assessing the connection between the law and gun violence and the consensus that gun violence is one of this country's most pressing public health issues. Moreover, public health law demonstrates that the scope of the Second Amendment right is not the end of a constitutional inquiry. As with all rights, the Constitution does not provide absolute protection, and, in certain circumstances, the good of the people can limit even the most protected fundamental rights.

A. *The Role of Public Health*

The role of public health research is vital for Second Amendment cases because evidence suggests that justices are more likely to reference scientific information in more prominent cases.[202] And any Second Amendment case would certainly qualify as prominent. Meanwhile, the majority of Supreme Court clerks have stated that briefs with "social science content merited special consideration."[203] Thus, constitutional litigation is a chance for public health research to highlight data that may not be at the forefront of the judiciary's analysis when determining the scope of Second Amendment protections. Indeed, this expert perspective is essential given that research reveals that a brief from "a credible public interest or research organization is much better positioned to provide social science findings than a typical litigant."[204]

Public health experts are in a unique position to fulfill this role. In doing so, they can refocus the analysis on the state's ability to limit risk to the public. Risk is not simply the probability of harm occurring, but the magnitude of that harm as well. And while the *Heller* Court emphasizes the

202 Blake, *supra* note 11.

203 Kathleen E. Hull, *The Role of Social Science Expertise in Same-Sex Marriage Litigation*, 13 Ann. Rev. L. & Soc. Sci. 471, 473 (2017).

204 Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 67 (2004).

rights of "law-abiding citizens," a population perspective illuminates the fact that lax gun laws increase the risk of harm, and it does so to more than just the individual gun owner.[205]

To be sure, a state cannot necessarily predict when gun violence will occur or from whom. But they do know that it will occur. And the more guns that are prevalent in a community, the more likely that harm will occur. This population-level perspective is necessary to counter the more prevalent individual-level argument where a challenger is almost certain to argue that they have not and will not misuse their firearm. But as any public health professional knows, nobody expects the harm to happen to them until it does. And while opponents of gun regulations may make that claim in earnest, we know from data that arguments become escalated, emotional outbursts occur, and dark moments of sadness or isolation can turn deadly if guns are present.

The public health community has a role to play in conveying this key information to the judiciary and to do so in an understandable manner. In one of the few studies on the influence of amici curiae in federal courts, the data found that a majority of federal judges, including all Supreme Court justices who responded to the survey, indicated that the identity, prestige, or experience of the amicus curiae was influential.[206] Public health experts lend credibility to the research, as well as an ability to discuss what the research does *not* say as much as what it does. Public health research is not about causation, but more often correlation. Consequently, the research is not meant to be dispositive of any legal query. Rather, it is informative of the manner in which the law may have a reasonable chance to mitigate or exacerbate gun mortality and morbidity.

This includes the fact that gun violence accounts for nearly 40,000 deaths annually.[207] Estimates suggest another 100,000 or more individuals sustain nonfatal injuries by firearms each year.[208] With a majority of these injuries sustained by people between fifteen and thirty-four years of age, the

205 *Heller II*, 670 F.3d at 1284.

206 Simard, *supra* note 12; *see also* Nathalie Gilfoyle & Joel A. Dvoskin, *APA's Amicus Curiae Program: Bringing Psychological Research to Judicial Decisions*, 72 AM. PSYCHOLOGIST 753, 753 (2017) ("Justice Harry Blackmun specifically noted in an opinion that the American Psychological Association's (APA) *amicus* briefs informed and helped the Court in arriving at its decisions.").

207 *Web-Based Injury Statistics Query and Reporting System (WISQARS)*, *supra*, note 1. This was the highest recorded account of gun deaths since the CDC began tracking the data over fifty years ago. Sarah Mervosh, *Nearly 40,000 People Died From Guns in U.S. Last Year, Highest in 50 Years*, N.Y. TIMES, Dec. 18, 2018, at A19.

208 *Facts and Figures*, U.C. DAVIS HEALTH, *supra*, note 3 (describing death statistics associated with gun violence).

chronic complications from these wounds will impact their remaining years.[209] Emerging evidence shows that this chronic suffering can include previously unknown harms, such as "neurological problems, kidney dysfunction, and reproductive" complications stemming from lead poisoning from bullets designed to explode inside the body and that are unable to be safely removed during surgery.[210]

And yet these physical harms do not fully encompass the harms being sustained. Those directly exposed to shootings who sustain no physical injury suffer from issues such as trauma, post-traumatic stress, anxiety, and depression.[211] Survivor's guilt can be particularly harmful because it can prevent survivors from seeking help.[212] And with the increased gun violence across the country and the corresponding media coverage—especially for mass shootings—many are suffering from psychological effects even without direct exposure to shootings.[213] This includes a growing number of students who report regular concerns that they may become victims of a shooting in their school or community.[214]

This data provides a broader, and certainly more accurate, depiction of what gun violence truly is and the impact it is having across the country. A mere nod to the state's interest to protect public safety hardly provides the appropriate balance when considering the state's justification for firearm regulations. The culture in which the courts make these Second Amendment decisions is relevant: "[T]o the extent that a court views the substance of constitutional law as, in part, dependent upon the outlook of nonjudicial actors, it will exercise what Felix Frankfurter once called the 'awesome

209 *A More Complete Picture*, *supra*, note 3; *see also* Bindu Kalesan et al., *The Hidden Epidemic of Firearm Injury: Increasing Firearm Injury Rates During 2001–2013*, 185 Am. J. Epidemiology 546, 546 (2017).

210 Melissa Chan, *They Survived Mass Shootings. Years Later, the Bullets Are Still Trying to Kill Them*, Time (May 31, 2019), https://time.com/longform/gun-violence-survivors-lead-poisoning/. These complications can include neurological problems, kidney dysfunction, and reproductive issues. *Id.*

211 *See* Sarah McCammom, *The Uninjured Victims of the Virginia Tech Shootings*, NPR (Apr. 14, 2017), https://www.npr.org/transcripts/523042249.

212 Patricia Mazzei & Miriam Jordan, "*You Can't Put It Behind You": School Shootings Leave Long Trail of Trauma*, N.Y. Times (Mar. 28, 2019), https://nyti.ms/2UYsb3C.

213 Sarah R. Lowe & Sandro Galea, *The Mental Health Consequences of Mass Shootings*, 18 Trauma, Violence, & Abuse 62, 62-63 (2017).

214 Protecting the Next Generation: Strategies to Keep America's Kids Safe from Gun Violence, Giffords L. Ctr. 12 (2018), https://giffords.org/wp-content/uploads/2019/12/Giffords-Law-Center-Protecting-the-Next-Generation.pdf; *see also* Liam Stack, *'I Think About It Daily': Life in a Time of Mass Shootings*, N.Y. Times (Dec. 3, 2015), https://www.nytimes.com/interactive/2015/12/03/us/mass-shootings-fear-voices.html (describing testimony from a fifteen-year-old: "I would say I think about the possibility of a shooting in my life regularly.").

power' of judicial review with some attention to the understandings of those actors."[215]

The public health community is equipped with the skillset to properly educate and frame the gun violence epidemic in a manner that is salient to constitutional decisions. Moreover, as experts, they can describe the research in a way that is approachable for the lay reader. This can help to avoid mistaken understandings of the data. The information will contextualize the case not only for the narrow interests of the challenger but also in terms of how the ruling may exacerbate or mitigate gun violence and, given the rash of media attention on mass shootings, influence the country's psyche as well.

As the great Supreme Court journalist Linda Greenhouse notes: "[N]o great Supreme Court case is only a question of law. It is always also an episode in the ongoing dialogue by which the Court engages with the society in which it operates and in which the Justices live."[216] In the time of Dayton, El Paso, Orlando, Virginia Tech, and Parkland, among many others, the notion that public health research has anything to teach the Court about gun violence may seem implausible. But a glance at remarks made by justices about Second Amendment rights and gun violence suggests the need for influence from the public health community is urgent.

Six days after the Parkland shooting, Justice Thomas issued a dissent from a denial of certiorari for a case upholding California's ten-day waiting period where he declared the Second Amendment the Court's "constitutional orphan."[217] Seeking to stifle what he deemed to be lower courts' "defiance," Justice Thomas made it clear that he intends to limit the judiciary's ability to uphold even regulations that do little more than make an individual wait ten days for their firearm.[218] Such an approach may amount to deregulation of firearms across the country and the weaponization of the Second Amendment against future gun control measures. As the deaths from firearms continue to climb, this is certainly a public health problem that warrants perspectives from experts in population-based analysis.

B. *The Role of Public Health Law*

Providing current public health data on gun violence is not simply to help the judiciary appreciate the cultural evolution of society's relationship with guns. The data must be accompanied by an explanation for why this

215 Post, *supra* note 147, at 7.

216 Greenhouse, *supra* note 127, at 2, 7.

217 Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from the Court's denial of certiorari).

218 *See id.* at 951.

data is necessary for a thorough constitutional analysis. The focus on the scope of Second Amendment protections has the potential to cast a shadow over the state's compelling interest in protecting public health and safety. But public health law experts can more accurately demonstrate that even fundamental rights can be limited in the name of public health and safety.[219] The question is whether there is sufficient justification to limit those rights, the degree to which those rights are limited, and whether the benefits to the public are sufficient in relation to those limitations.[220] A proper analysis of these considerations almost invariably requires more than a simple categorical approach. Rather, it requires evaluating data if it is available.

Public health law is a constantly developing field that reflects the changes in our understanding of public health outcomes and the mechanisms that influence them. Gun violence was hardly seen as a public health issue decades ago. Viewed more as random, tragic events that resulted from criminal activity and unforeseeable accidents, it was difficult to argue that gun violence was a public health problem that warranted public health solutions. But now, thanks to social science research, we understand that gun violence is not always sporadic and random and, instead, can be amenable to proactive government solutions.[221] This relatively new understanding is what raises the question of when the government may limit Second Amendment rights to protect public health and safety.

Take, for example, carrying firearms in public. When analyzing the constitutionality of restrictions on carrying firearms in public, courts should consider what lessons public health research has to offer. Shall-issue concealed carry permit laws are significantly more lenient than may-issue carry permit laws because they remove the discretion of the licensing body to deny a license to a small portion of individuals meeting narrow qualifying criteria. Shall-issue laws have been associated with higher rates of firearm-related homicide—and, importantly, handgun-specific homicide in particular—as compared to those states that have the stricter may-issue regulations.[222] While these correlation studies do not demonstrate causation,

219 *See* Jacobson v. Massachusetts, 197 U.S. 11, 25, 27–28 (1905).

220 Ulrich, *supra* note 4, at 1077–78.

221 *See, e.g.*, Andrew V. Papachristos et al., *Tragic, but Not Random: The Social Contagion of Nonfatal Gunshot Injuries*, 125 Soc. Sci. & Med. 139, 148 (2015); Ben Green, et al., *Modeling Contagion Through Social Networks to Explain and Predict Gunshot Violence in Chicago, 2006 to 2014*, 177 JAMA Internal Med. 326, 331–32 (2017).

222 Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1928 (2017) [hereinafter *Legal Access*]; *see also* Michael Siegal et al., *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991-2016: A Panel Study*, 34 J. Gen. Intern. Med. 2021, 2021 (2019), (finding that shall-issue laws are associated with a significant increase in the homicide

the researchers found no increase in long-gun homicide rates, which lends credence to the connection between the concealed carry laws and handgun violence.[223]

The data also pushes back on the increasingly suspect claim that more guns equate to less crime.[224] If more guns result in less crime, "one would expect to see lower handgun, nonhandgun, and nonfirearm homicide rates in shall-issue states when compared with may-issue states."[225] Yet this simply was not what researchers found. The deterrent effect lacks empirically supported credibility, as the older, minimal research supporting the claim has been consistently contradicted with new research demonstrating the opposite. These facts should be relevant to any legal analysis of restrictions to carry firearms in public, but some courts are more apt to evaluate laws from the 1700s than they are the most up-to-date research.

While originalism may have strong support within the judiciary, the notion that states are limited in their efforts to combat the emerging gun violence epidemic by founding era analogues misunderstands the nature of police powers.[226] Police powers authorize the state to act to protect public health, safety, and welfare.[227] As threats to public health evolve and emerge, so too must the state's ability to respond, both proactively and reactively, to those threats.[228] Just as the public would question the legitimacy of the government if they failed to act during a contagious disease epidemic, so too are many looking to their elected leaders for answers to the growing threat of gun violence. The toolkit of policymakers cannot be limited to an excavation of historical records to see how our founding fathers may have responded, but instead must be grounded in empirical facts to support narrowly tailored yet effective interventions.

The nascent Second Amendment jurisprudence is like a nearly blank canvas with which the legal community can work. This raises the stakes further for the need to ensure data-driven decisions that appropriately factor in what public health research can teach us. But it is important to note that this does not necessarily always mean the data will push in the direction of restricting rights. As mentioned above, the Second Amendment rights

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rate) [hereinafter *State Firearm Laws*].

223 *Legal Access, supra* note 222, at 1928.

224 *See* Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1285–86 (2003); Ian Ayres & John J. Donohue III, Commentary, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977–2006*, 6 ECON. WATCH J. 218 (2009).

225 *Legal Access, supra* note 222, at 1928.

226 *See* Ulrich, *supra* note 63, at 194–98.

227 Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

228 Ulrich, *supra* note 63, at 198.

of felons and those deemed mentally ill are too easily extinguished even by those who generally support individual rights.

In *Moore v. Madigan*,[229] a case focused on carrying firearms in public, Judge Posner felt compelled to discuss his lack of concern with not simply limiting, but completely eliminating, the fundamental constitutional rights of marginalized groups. In fact, he specifically states that data to support this claim is unnecessary: "And empirical evidence of a public safety concern can be dispensed with altogether when the ban is limited to obviously dangerous persons such as felons and the mentally ill."[230] This is contradictory to empirical evidence suggesting the mentally ill are no more violent than other citizens.[231] But as previously noted, people with mental illnesses are more likely to be victims of violence than perpetrators, which one would think makes for a strong argument to protect their constitutional right to self-defense. Therefore, an emphasis on the relevance of empirical data does not invariably lead to a restriction of rights and, in some cases, can expand Second Amendment protections.

229 Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012).

230 *Id.*

231 Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 Am. J. Pub. Health 240, 241–42 (2015).

CONCLUSION

This article is not meant to suggest that empirical evidence is the answer to any and all constitutional questions. There may be many circumstances where research is unavailable or data supports both sides of an argument. Data can be manipulated, selectively used, and misleading to an audience. In fact, there is strong evidence that social science is most often used in a manner to protect the status quo.[232] But the fact that data is not controlling does not mean it cannot and should not be persuasive in certain circumstances. And data misuse only strengthens the argument that public health experts should be more heavily involved in the interpretation and presentation of emerging empirics on gun violence.

The judiciary's role in determining Second Amendment rights cannot, and should not, be isolated from the gun violence controversy playing out in public and political fora. The judiciary is inherently entangled in the "culture wars" that divide this country.[233] But to recognize their role in this debate does not mean their decisions must be politically based. The judiciary can lead, and often has led, the country through contentious battles, often by relying on an evolving understanding informed through social science. Data has by no means helped the judiciary solve all the problems faced by underrepresented groups such as people of color, women, and sexual minorities. But outside education of the judiciary has helped courts better understand these groups and the impact judicial decisions have on their lives and wellbeing. In that regard, improvement became possible.

Gun violence is a growing plague in this country and one that the Supreme Court, along with the rest of the judiciary, will play a central role in addressing. Though the most recent Supreme Court case was essentially dismissed, another will soon be on the docket with all eyes watching closely. A more informed Court will provide a more thorough analysis. And an evidence-based decision, whatever the result, will be more palatable and hopefully lead the country in recognizing that protection of constitutional rights and the public are not mutually exclusive ends that we are forced to choose between.

232 *See, e.g.,* Robinson & Frost, *supra* note 187, at 1576–77, 1583–84.

233 Post, *supra* note 147, at 10.

TOBACCO LITIGATION, E-CIGARETTES, AND THE CIGARETTE ENDGAME

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INTRODUCTION

Professor Richard Daynard[1] was an early proponent of the view that tort litigation could lead to the "undoing of the tobacco industry," just as litigation had helped drive asbestos and other dangerous products from the market.[2] Despite some notable litigation successes—and litigation's crucial role in revealing the tobacco industry's previously-hidden misconduct—this outcome has not materialized. To the contrary, in many cases courts have instead distorted legal doctrine in order *not* to hold the tobacco industry accountable for its wrongdoing, in part because judges viewed it as beyond their proper role to effectively put the tobacco industry out of business.[3] These distortions in legal doctrine have, in turn, catalyzed legal developments that have "severely weakened the ability of personal injury litigation to effectively deter corporate misconduct and protect public health" more generally.[4] Thus, the decades of tobacco litigation—often described as occurring in three separate "waves"[5]—have shown that despite its promise, tobacco litigation is a public health tool to be used with caution.[6]

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1 The "Public Health Litigation: Possibilities and Pitfalls" symposium at which this paper was presented was held in honor of Professor Daynard's groundbreaking scholarship and activism in his many years as a professor of law at Northeastern and as the President of the Public Health Advocacy Institute. Professor Daynard has been a role model to me in demonstrating that scholarship and activism can go hand in hand and in showing the importance of questioning conventional thinking in service of justice and public health.

2 Graham E. Kelder Jr. & Richard A. Daynard, *Judicial Approaches to Tobacco Control: The Third Wave of Tobacco Litigation as a Tobacco Control Mechanism*, 53 J. SOC. ISSUES 169, 183 (1997); *see also* Richard A. Daynard, *Tobacco Liability Litigation as a Cancer Control Strategy*, 80 J. NAT'L CANCER INST. 9, 9 (1988) (predicting that "[s]uccessful products liability suits against cigarette manufacturers on behalf of diseased smokers and their families would be likely to reduce future cigarette consumption dramatically" because of the cascading effects on the industry such liability would trigger).

3 *See generally* Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 BROOK. L. REV. 1 (2009). As discussed in this article, a contributing factor was that the courts *didn't* want a replay of the asbestos litigation, *id.* at 58, which the Supreme Court described as an "elephantine mass [that] defies . . . customary judicial administration and calls for national legislation." Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999). And unlike asbestos, cigarette litigation involved tens of millions of consumers who were addicted to the product, making courts even more reticent to issue decisions that could jeopardize the product's availability. Berman, *supra* note 3, at 45–46.

4 Berman, *supra* note 3, at 58.

5 *See, e.g.*, Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO 176, 176–77 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

6 This is not to say that tobacco litigation has not also had positive results, many of which have been cataloged by Professor Daynard. *See, e.g.,* Richard A. Daynard, *Why*

Although continuing to think strategically about the use of litigation where appropriate, Daynard and others have more recently argued for legislative policies that would do what was once "unthinkable": prohibit the sale of cigarettes.[7] Daynard wrote in 2009:

> Cigarettes are the dirty needles of nicotine delivery devices. Addicts who get their nicotine from cigarettes are at least 10 times as likely to die from their nicotine delivery device as those who get it from non-smoked nicotine products. Phase out the cigarettes, while permitting non-smoked nicotine delivery devices to remain on the market, and the great majority of tobacco-caused diseases and deaths will disappear . . . [8]

Though suggesting the phase-out of cigarette sales may have been radical in 2009, it is now a much more widely (though by no means universally) accepted goal among tobacco policy scholars and advocates—and even among the general public.[9] Academic discussion and debate about possible "endgame" approaches has been extensive,[10] and two communities in California, Beverly Hills and Manhattan Beach, recently adopted ordinances that, as of January 2021, will prohibit the sale of nearly all tobacco products

Tobacco Litigation?, 12 Tobacco Control 1, 1 (2003) (noting, for example, the important role litigation played in forcing the disclosure of previously secret industry documents, which has reshaped public and policymaker perceptions of the industry).

7 Richard A. Daynard, *Doing the Unthinkable (and Saving Millions of Lives)*, 18 Tobacco Control 2, 2 (2009); *see also* Kenneth E. Warner, *An Endgame for Tobacco?*, 22 Tobacco Control (Supplement 1) i3 (2013) (summarizing various "endgame" policy proposals); Marita Hefler, *The Changing Nicotine Products Landscape: Time to Outlaw Sales of Combustible Tobacco Products?*, 27 Tobacco Control 1, 2 (2018) ("The new continuum of nicotine products presents an opportunity to end the exceptionalism of combustible tobacco, and allow the most dangerous end of the nicotine product continuum to be rapidly, and completely, phased out.").

8 Daynard, *supra* note 7, at 2.

9 *See* Elizabeth A. Smith & Ruth E. Malone, *An Argument for Phasing Out Sales of Cigarettes*, Tobacco Control, Sept. 21, 2019, at 1, 3–5, https://tobaccocontrol.bmj.com/content/early/2019/09/27/tobaccocontrol-2019-055079.info ("Polling data from various regions and countries indicate that, even in the absence of any campaigns for ending cigarette sales, majorities of non-smokers (and 12%–46% of smokers) support the idea."). Referencing Professor Daynard's 2009 article, the authors note that "[w]hile the work to accomplish [a phase-out of cigarette sales] will be daunting, it is not impossible, nor is it any longer so 'unthinkable.'" *Id.*

10 This includes a 2014 conference hosted by Professor Daynard and the Public Health Advocacy Institute at Northeastern University School of Law. For an already-outdated synthesis of the literature, see generally Patricia A. McDaniel, Elizabeth A. Smith & Ruth E. Malone, *The Tobacco Endgame: A Qualitative Review and Synthesis*, 25 Tobacco Control 594 (2016).

within their borders.[11] Other communities are considering similar measures.[12]

Perhaps surprisingly, the tobacco industry itself is now engaging in "endgame" rhetoric. The website of Philip Morris International (PMI) prominently declares its commitment to a "smoke-free future" (though it calls it a "long-term vision"),[13] while British American Tobacco (the parent company of R.J. Reynolds Tobacco Company)[14] states that it "aim[s] to generate an increasingly greater proportion of [its] revenue from products other than cigarettes and so reduce the health impact of [its] business."[15] While one should be skeptical of the companies' true degree of commitment to a "smoke-free future," these statements reflect the fact that all of the major tobacco companies are now engaged in selling e-cigarettes and other non-combustible nicotine products, which they (likely accurately) assert are less harmful nicotine-delivery devices than conventional cigarettes.[16] This enables them to contemplate operating in a future tobacco market without conventional cigarettes—however far off they may privately wish that future to be.

The tobacco companies' acknowledgement that a "smoke-free future" is coming makes it easier to argue that "endgame" policies are within

11 *Los Angeles Region Is the Epicenter of a Global Revolution in Public Health*, ACTION ON SMOKING & HEALTH (Feb. 19, 2020), https://ash.org/la-region-is-the-epicenter/.

12 *See, e.g.*, Kevin Uhrich, *Pasadena Officials to Look at Outlawing Tobacco Sales in City*, PASADENA WKLY. (Feb. 5, 2020), https://pasadenaweekly.com/pasadena-officials-to-look-at-outlawing-tobacco-sales-in-the-city/.

13 *Delivering a Smoke-Free Future*, PHILIP MORRIS INT'L (July 31, 2019), https://www.pmi.com/our-transformation/delivering-a-smoke-free-future. PMI also funded the non-profit "Foundation for a Smoke-Free World," which claims that "[o]ur mission is to end smoking in this generation." *Our Mission*, FOUND. FOR SMOKE-FREE WORLD, https://www.smokefreeworld.org/our-vision/ (last visited Aug. 9, 2020). Public health experts have generally dismissed the foundation as "a public relations ploy to boost PMI's corporate image and possibly produce misleading science, while PMI continues to attack effective tobacco control policies and profit from cigarette sales." Yvette van der Eijk et al., *Philip Morris International-Funded 'Foundation for a Smoke-Free World': Analysing its Claims of Independence*, 28 TOBACCO CONTROL 712, 712 (2018).

14 *BAT Completes Acquisition of Reynolds*, BRIT. AM. TOBACCO (July 25, 2017), https://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DOAPKCXS.

15 *Our Purpose and Strategy*, BRIT. AM. TOBACCO, https://www.bat.com/group/sites/UK__9D9KCY.nsf/vwPagesWebLive/DO9DEM4L (last visited Aug. 9, 2020).

16 If an individual switched to using e-cigarettes instead of conventional cigarettes, there is wide consensus that there would be health benefits to that individual, though the extent of such benefits is contested. KATHLEEN STRATTON ET AL., NAT'L ACADS. OF SCI., ENG'G, MED., PUBLIC HEALTH CONSEQUENCES OF E-CIGARETTES 11 (2018) (concluding that "[t]he evidence about harm reduction suggests that across a range of studies and outcomes, e-cigarettes pose less risk to an individual than combustible tobacco cigarettes."). Whether e-cigarettes benefit public health at the broader population level is far less clear, as discussed in Section I.B, *infra*.

the realm of possibility and not an ill-fated rerun of Prohibition. It also raises an obvious question that relates back to tobacco litigation: if tobacco companies themselves acknowledge that non-combustible products are less harmful alternatives to conventional cigarettes, *why are they still permitted to sell cigarettes*? Usually, under general principles of tort law, if a less harmful "reasonable alternative design" of a product is available, then the more harmful version is deemed to be defectively designed and cannot be sold without liability for the harm it causes.[17] Are e-cigarettes such a "reasonable alternative design" for cigarettes?

This article suggests that it is worth seriously considering whether litigation proposing e-cigarettes as a "reasonable alternative design" to cigarettes should be attempted. Though, as mentioned, tobacco litigation should be approached with caution, recent scholarship and analysis of newly uncovered tobacco industry documents may influence the calculus in this instance. These findings suggest that the tobacco industry has long seen precursors of modern e-cigarettes as potentially viable alternatives to cigarettes and that it suppressed the development of such products for exactly that reason.[18] For reasons explained in Professor Daynard's scholarship, litigation pressing on this point—and seeking the disclosure of additional documents—might end up benefitting public health even if the litigation itself is ultimately unsuccessful.[19]

Part I provides background by briefly reviewing the history of tobacco litigation, the emergence of e-cigarettes, and the tobacco industry's rhetorical endorsement of "harm reduction." Part II details historical efforts by the tobacco industry to develop e-cigarette-like products, starting in the 1960s. The historical record suggests that tobacco companies likely could have developed products similar to modern e-cigarettes decades ago, but they decided to abandon and hide these efforts in order to protect cigarette sales and minimize cigarette-related regulation and litigation. Part III reviews products liability doctrine and assesses whether plaintiffs could

17 As discussed in Part III, tort doctrine varies by state, but this is the general position endorsed by the Restatement (Third) of Torts: Products Liability, which explains that "[a] product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe[.]" Restatement (Third) of Torts: Prods. Liab. § 2 (Am. Law. Inst. 1998).

18 *See infra* Part II.

19 *See, e.g.*, Daynard, *supra* note 6 (explaining that even if ultimately unsuccessful, the benefits of tobacco litigation may include obtaining documents that demonstrate the industry's misconduct, pressuring the industry to behave more responsibly, deterring future misconduct, and informing the public).

plausibly assert that e-cigarettes constitute a "reasonable alternative design" to cigarettes. Finally, Part IV discusses how litigation presenting e-cigarettes as a "reasonable alternative design" to cigarettes—and using the industry's own words against it—could play a role in reshaping tobacco control discourse and building momentum towards phasing out the most harmful forms of nicotine delivery, as Daynard proposed in 2009.

I. Tobacco Litigation, E-Cigarettes, and the Tobacco Industry's Rhetorical Shift

A. *Tobacco Litigation*

Tobacco litigation is often described as having occurred in three distinct "waves."[20] The first began soon after the initial revelations about the connection between smoking and lung cancer in the 1950s, and it lasted until the 1980s. The plaintiffs were almost all lung cancer victims or their families, and they grounded their claims "in varying theories of negligence, misrepresentation and breach of warranty."[21] Due to the tobacco industry's early adoption of an aggressive "scorched earth" strategy, few of these cases made it to trial.[22] Of those that did, the industry's argument that the connection between smoking and lung cancer had not been conclusively established successfully defeated all claims of liability.[23]

When the causation defense became untenable in the 1980s, the tobacco industry shifted its argument to defend against the "second wave" of tobacco litigation. For years it had denied that cigarettes were unsafe. Now it insisted that despite the industry's past (and, in some cases, ongoing) denials, these risks were "in fact 'common knowledge'—so much so that people who chose to smoke 'assumed the risk' of death and disease."[24] As with all of the first wave cases, the hundreds of second wave plaintiffs were similarly unable to win a case against the tobacco industry—until a federal court jury in New Jersey finally found for the plaintiff in *Cipollone v. Liggett Group, Inc.* in 1988.[25] What tipped the balance in *Cipollone* was the discovery of tobacco company documents and the testimony of former employees

20 Rabin, *supra* note 5, at 176.

21 D. Douglas Blanke, *Towards Health with Justice: Litigation and Public Inquiries as Tools for Tobacco Control*, World Health Org. 1, 16 (2002), https://www.publichealthlawcenter.org/sites/default/files/resources/who-tobacco-litigation-2002.pdf.

22 Jess Alderman & Richard A. Daynard, *Applying Lessons from Tobacco Litigation to Obesity Lawsuits*, 30 Am. J. Preventative Med. 82, 82-83 (2006) (summarizing the industry's "scorched earth" approach to litigation).

23 Graham E. Kelder Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 Stan. L. & Pol'y Rev. 63, 71 (1997) ("Plaintiffs in the first wave were hampered by the paucity of medical studies establishing the link between smoking and disease, leading to difficulties in establishing proximate cause."). For a detailed discussion of "first wave" cases, see Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, *in* Smoking Policy: Law, Politics, and Culture 110, 111–18 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

24 Blanke, *supra* note 21, at 17.

25 Rabin, *supra* note 5, at 178; Cipollone v. Liggett Grp., 893 F.2d 541, 541 (3d Cir. 1990) (reinstating 1988 jury verdict on appeal), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

indicating the industry had hidden its knowledge of smoking's health risks and—critically for the discussion in this article—had suppressed internal efforts to develop a safer cigarette.[26]

The *Cipollone* verdict was voided by a 1992 U.S. Supreme Court decision ruling that failure to warn claims against cigarette manufacturers were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), a 1965 federal law requiring warning labels on cigarette packaging and advertising[27] (notably, though, the Supreme Court's ruling did not extend to products liability claims, which were—and are—still permitted[28]). The plaintiff could not afford the cost of a new trial and therefore dropped the suit, but the jury verdict in *Cipollone*, and the documents uncovered in that case, opened the door to the new "third wave" of tobacco litigation.[29]

The "third wave," which started in the early 1990s and is arguably still ongoing, was composed of several different types of cases, all built on the foundation of the industry's own incriminating documents. First, there were individual lawsuits premised on smoking-caused disease or death that proceeded within the bounds set by the Supreme Court's *Cipollone* decision.[30] As a result of differences in tort law doctrine, outcomes varied tremendously by state.[31] But unlike the first two waves, plaintiffs in some jurisdictions were able to win, cumulatively resulting in the industry paying out hundreds of millions of dollars in damages.[32] Second, in the mid-1990s, the attorneys

26 Kelder & Daynard, *supra* note 2, at 182 ("The documents in *Cipollone* included evidence that . . . Liggett & Myers (L&M) knew by the early 1970s how to make a safer cigarette, but suppressed it, for fear that implicit in marketing it would be the admission that L&M's other cigarettes were unsafe[.]").

27 Cipollone v. Liggett Grp., 505 U.S. 504, 504–05 (1992).

28 *Id.* at 523 (noting that FCLAA "does not generally 'pre-empt state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes'") (citations omitted).

29 Blanke, *supra* note 21, at 20–21.

30 *Id.* at 29–31.

31 *Compare, e.g.*, Evans v. Lorillard Tobacco Co., 990 N.E.2d 997, 1006 (Mass. 2013) (upholding wrongful death jury verdict against tobacco company) *with* Brown *ex rel.* Estate of Brown v. Philip Morris Inc., 228 F. Supp. 2d 506, 506 (D.N.J. 2002) (applying New Jersey law and dismissing wrongful death claims against tobacco company based on analysis of the New Jersey Product Liability Act).

32 *See* Noreen Marcus, *Florida Still a Dismal Swamp for Cigarette Makers Fighting Death and Injury Claims*, FAIRWARNING (July 25, 2018), https://www.fairwarning.org/2018/07/florida-cigarette-death-injury-claims/ (reporting that the tobacco industry had paid out "close to $800 million in damage awards and settlements" in Florida alone). Because of some unique legal context in Florida, plaintiffs against the tobacco industry start on more favorable ground in Florida than elsewhere, and much of the nation's personal injury tobacco litigation is, therefore, taking place in that state. For additional background, see *What is the "Engle Progeny" Litigation?*, TOBACCO CONTROL LEGAL CONSORTIUM 2–3

general of nearly every state sued the tobacco industry to recover smoking-related costs.[33] These lawsuits culminated in the 1998 Master Settlement Agreement (MSA), in which the major tobacco companies agreed to pay more than $200 billion to the states and limit their marketing in various ways.[34] The MSA also required further disclosure of industry documents.[35] In return, the states (and their political subdivisions) gave up their legal claims against the cigarette manufacturers, including the right to sue the industry for smoking-related costs in the future.[36] Other third-wave suits included lawsuits premised on secondhand smoke exposure[37] and violations of consumer protection laws.[38] While all of these lawsuits imposed some costs on the industry, the tobacco companies were able to absorb the costs and, in some respects, emerge even stronger.[39] The costs of the MSA, for example, were quickly shifted to individual smokers by raising prices, while the agreement itself provided the companies with protection from future litigation risk.[40]

In the last couple of years, states and plaintiffs' attorneys have increasingly turned their attention away from cigarette litigation and towards e-cigarette litigation. In particular, "market leader JUUL Labs, Inc., and its largest shareholder, Altria Group (the parent company of Philip Morris USA), have been the subject of mounting litigation, including multiple class

(Sept. 2015), https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-engle-progeny-2015.pdf. Nonetheless, litigation against the industry remains difficult and expensive, even in Florida, as the industry continues to engage in the same "scorched earth" tactics it developed in the first two waves of litigation. Blanke, *supra* note 21, at 18.

33 Blanke, *supra* note 21, at 25.

34 *Master Settlement Agreement*, Nat'l Ass'n Attorneys Gen. (1998) https://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf. The MSA was an agreement between the major tobacco companies and forty-six states. Blanke, *supra* note 21, at 25. The four other states—Florida, Minnesota, Mississippi, and Texas—had previously reached their own separate settlement agreements that roughly paralleled the MSA. *Id.*

35 Blanke, *supra* note 21, at 36.

36 *Id.* at 110–20.

37 *See* Patrick Luff, *Regulating Tobacco Through Litigation*, 47 Ariz. St. L.J. 125, 153 (2015).

38 *See, e.g.*, Altria Group v. Good, 555 U.S. 70 (2008). Third wave suits also included a concerted effort to pursue class action lawsuits against the tobacco industry, but these were generally unsuccessful. *See* Berman, *supra* note 3, at 42–47.

39 *See, e.g.*, F.A. Sloan et al., *Impacts of the Master Settlement Agreement on the Tobacco Industry*, 13 Tobacco Control 356, 358-59 (2004) (finding that in the years following the MSA, "participating manufacturers maintained or improved performance in terms of investor stock returns and profit from domestic tobacco sales").

40 For a discussion of the mixed legacy of MSA, see generally Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. Kan. L. Rev. 1029 (2019).

actions, individual lawsuits and . . . suits filed by state attorneys general."[41] These are largely based on allegations that JUUL marketed to youth and "misled its customers to believe its e-cigarettes were less addictive than traditional cigarettes."[42]

B. *E-Cigarettes*

E-cigarettes come in a wide variety of forms, but they all "deliver nicotine by heating (not burning) a nicotine-containing liquid until it aerosolizes."[43] The theory behind e-cigarettes is that if people "smoke for nicotine but they die from the tar"—as tobacco researcher Michael Russell famously suggested in 1976[44]—an alternative product for smokers

41 *The E-Cigarette Industry's Legal Troubles*, LEXISNEXIS (Jan. 14, 2020), https://www.lexisnexis.com/community/lexis-legal-advantage/b/trends/posts/the-e-cigarette-industry-s-legal-troubles. Federal lawsuits from around the country have been transferred to a Multi-District Litigation proceeding in the Northern District of California. *See In re* Juul Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig., No. 19-md-02913-WHO, 2020 WL 1487301, at *1 (N.D. Cal. Mar. 27, 2020).

42 *The E-Cigarette Industry's Legal Troubles*, *supra* note 41.

43 Patricia J. Zettler et al., *Closing the Regulatory Gap for Synthetic Nicotine Products*, 59 B.C. L. REV. 1933, 1947–48 (2018). *See id*. at 1948 n.87 for a discussion of how e-cigarette products "have evolved over time." To define terminology, "cigarettes," "traditional cigarettes," "conventional cigarettes" and "combustible cigarettes" all refer to the same familiar product: processed tobacco leaf wrapped in paper that is ignited on one end by the consumer. Note that, although the description of this product is simple, cigarettes are, in fact, a highly engineered product. *See How a Cigarette Is Engineered*, FDA., https://www.fda.gov/media/101198/download (last updated Oct. 2016). "E-cigarettes" go by many different names, including "[v]apes, vaporizers, vape pens, hookah pens . . . and e-pipes[,]" and they come in many shapes, sizes, and flavors. *Vaporizers, E-Cigarettes, and Other Electronic Nicotine Delivery Systems (ENDS)*, FDA, https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-elctronic-nicotine-delivery-systems-ends (last updated June 3, 2020). As the term is used in this article, these devices all heat a liquid (referred to as an "e-liquid") containing nicotine, which is heated and aerosolized using battery power and then inhaled by the consumer. *Id.* The nicotine is usually extracted from tobacco leaves, but the product does not otherwise contain any tobacco, unless tobacco extract is also used as a flavoring agent. Finally, "heat-not-burn" products or "heated tobacco products" are a cross between these two previous product categories. *How are Non-Combusted, Sometimes Called Heat-Not-Burn Products, Different from E-Cigarettes?*, FDA, https://www.fda.gov/tobacco-products/products-ingredients-components/how-are-non-combusted-cigarettes-sometimes-called-heat-not-burn-products-different-e-cigarettes-and (last updated May 1, 2020). These products heat—but do not burn—processed tobacco leaf, producing an aerosol that is inhaled by the consumer. *See Heated Tobacco Products*, CDC, https://www.cdc.gov/tobacco/basic_information/heated-tobacco-products/index.html (last updated July 17, 2020).

44 M.A.H. Russell, *Low-Tar Medium-Nicotine Cigarettes: A New Approach to Safer Smoking*,

that delivers nicotine in a "cleaner" way, while still satisfying one's nicotine addiction, could save millions of lives.[45] In other words, it is the nicotine in cigarettes that creates and sustains addiction, but it is the other aspects of the cigarette smoke that more proximately cause most smoking-related disease and death. Accordingly, though nicotine itself poses some health-related risks,[46] replacing cigarettes with a device that delivers nicotine without the toxic smoke could, at least in theory, dramatically reduce the death toll of tobacco products.[47]

The use of e-cigarettes in the United States has risen exponentially, especially among youth, since their introduction in 2007.[48] In 2019, 27.5% of high school students reported using an e-cigarette in the past 30 days, far more than the 5.8% who reported using traditional (combustible) cigarettes.[49] Only 3.2% of adults reported regular use of e-cigarettes in 2018,[50] but adult use is much more common among both current smokers engaging in "dual

1976:1 Brit. Med. J. 1430, 1431 (1976) (citation omitted) ("[S]mokers cannot easily stop smoking because they are addicted to nicotine, and to expect people who cannot stop smoking to smoke cigarettes that have hardly any nicotine is illogical. . . . Their risk of lung cancer and bronchitis might be more quickly and effectively reduced if attention were focused on how to reduce their tar intake, irrespective of nicotine intake.").

45 *See, e.g.*, Riccardo Polosa et al., *A Fresh Look at Tobacco Harm Reduction: The Case for the Electronic Cigarette*, Harm Reduction J., Oct. 4, 2013, at 7, https://harmreductionjournal.biomedcentral.com/track/pdf/10.1186%2F1477-7517-10-19 ("E-cigs may contain nicotine, which contributes to nicotine addiction and helps sustain tobacco use. However, if sufficient numbers of smokers can transfer their nicotine dependence to a less-harmful delivery method, millions of lives could be saved.").

46 Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Electronic Nicotine Delivery Systems*, World Health Org. 3 (July 21, 2014), http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_10-en.pdf (noting that nicotine, in addition to being addictive, "can have adverse effects during pregnancy and may contribute to cardiovascular disease" and "may function as a 'tumour promoter'" even though it is not a carcinogen itself).

47 This is of course the theory behind nicotine replacement therapies (NRTs) like nicotine patches and gums. The problem with NRTs has been their low rate of efficacy. *See, e.g.*, Eric C. Leas et al., *Effectiveness of Pharmaceutical Smoking Cessation Aids in a Nationally Representative Cohort of American Smokers*, 110 J. Nat'l Cancer Inst. 581, 582, 585–86 (2018) ("[P]harmaceutical aids for smoking cessation, despite strong evidence for efficacy from randomized trials, have not been effective at increasing successful quitting in the United States."). This may be because NRTs, in order to obtain FDA approval as pharmaceuticals, have been deliberately calibrated *not* to create and sustain nicotine dependence. Zettler, *supra* note 43, at 1944 n.62.

48 Zettler et al., *supra* note 43, at 1948.

49 Karen A. Cullen et al., *E-Cigarette Use Among Youth in the United States, 2019*, 322 JAMA 2095 (2019).

50 MeLisa R. Creamer et al., *Tobacco Product Use and Cessation Indicators Among Adults—United States, 2018*, 68 Morbidity & Mortality Wkly. Rep. 1013, 1014 (2019).

use" and former smokers, some of whom may have used e-cigarettes as a smoking cessation tool.[51]

On a product-to-product basis, e-cigarettes are almost certainly less toxic than conventional cigarettes, even though the full extent to which they pose health risks is still unknown.[52] This is not to suggest that e-cigarettes are harmless.[53] Though e-cigarettes likely pose a dramatically lower risk of cancer,[54] emerging evidence suggests that e-cigarette use contributes to cardiovascular disease (perhaps as much as smoking),[55] impairs respiratory health (to a still-unknown degree),[56] and harms oral health.[57] And nicotine exposure, from any source, is harmful to adolescent brain development.[58] But

51 Hongying Dai & Adam M. Leventhal, *Prevalence of E-Cigarette Use Among Adults in the United States, 2014-2018*, 322 JAMA 1824, 1826 (2019).

52 NAT'L ACADS. OF SCI., ENG'G, MED., *supra* note 16, at 15–16 (conducting a comprehensive review of the scientific literature on e-cigarettes and concluding that e-cigarettes "contain fewer toxicants" than conventional cigarettes, but that the long-term health effects of e-cigarettes are unknown).

53 *See* OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL (2016) (describing the risks that e-cigarette use poses to youth and young adults).

54 Maciej Lukasz Goniewicz et al., *Levels of Selected Carcinogens and Toxicants in Vapour from Electronic Cigarettes*, 23 TOBACCO CONTROL 133, 138 (2014) (finding that "the levels of potentially toxic compounds in e-cigarette vapour are [between 9 and] 450-fold lower than those in the smoke from conventional cigarettes, and in many cases comparable with the trace amounts present in pharmaceutical preparation").

55 Jessica L. Fetterman et al., *Alterations in Vascular Function Associated with the Use of Combustible and Electronic Cigarettes*, J. AM. HEART ASS'N (Apr. 29, 2020), https://www.ahajournals.org/doi/full/10.1161/JAHA.119.014570.

56 Jeffrey E. Gotts et al., *What Are the Respiratory Effects of E-cigarettes?*, BRIT. MED. J., Sept. 30, 2019, at 11, https://www.bmj.com/content/bmj/366/bmj.l5275.full.pdf (concluding that "e-cigarettes will likely prove to have at least some pulmonary toxicity with chronic and possibly even short term use" and that without long-term studies, "saying with certainty that e-cigarettes are safer than combustible cigarettes is impossible").

57 Sukirth M. Ganesan et al., *Adverse Effects of Electronic Cigarettes on the Disease-Naive Oral Microbiome*, SCI. ADVANCES, May 27, 2020, at 9, https://advances.sciencemag.org/content/advances/6/22/eaaz0108.full.pdf (finding that "e-cigarettes exert a powerful, detrimental effect on the subgingival ecosystem"). In 2019, e-cigarettes were also associated with an outbreak of an acute lung disease termed E-cigarette or Vaping Associated Lung Injury (EVALI). *Outbreak of Lung Injury Associated with the Use of E-Cigarette or Vaping Products*, CDC, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (last updated Feb. 25, 2020). As of February 2020, EVALI had been identified as the cause of 68 deaths and nearly 3000 hospitalizations in the U.S. The primary cause, however, appears to have been vitamin E acetate, an additive used in THC vaping products. At least in the vast majority of cases, nicotine e-cigarettes (the focus of this article), as opposed to THC-containing or mixed nicotine and THC-containing e-cigarettes, do not appear to have been implicated. *Id.*

58 Zettler et al., *supra* note 43, at 1941.

when compared to cigarettes—"the single most deadly consumer product ever made"[59]—there is wide consensus among experts that e-cigarettes are less harmful.[60] The scientific debate is about *how much* less harmful they will prove to be.[61]

But the fact that e-cigarettes are likely less harmful than cigarettes when compared product-to-product does not mean that the availability of e-cigarettes is necessarily beneficial for public health at the population level. As Zettler et al. summarize:

> If current smokers switched completely from smoking to e-cigarette use that would likely produce enormous public health gains. Currently, however, the majority of people who use e-cigarettes are also smoking. Youth e-cigarette use is additionally a concern, both because of the effects of nicotine on the developing brain, and because of accumulating evidence that e-cigarette use is a gateway to smoking. Moreover, the history of tobacco product marketing suggests that the industry has economic incentives to target the youth population in its marketing, and is likely to do so.[62]

In short, e-cigarettes hold the potential to improve public health because they are likely a far safer way to consume nicotine than conventional cigarettes. But it is unclear that they will deliver on that promise as long as conventional cigarettes are still for sale, both because (a) most adult e-cigarette users are also *dual users* of cigarettes, and thus not necessarily reducing harm,[63] and

59 Ruth Malone, Patricia McDaniel & Elizabeth Smith, *It Is Time to Plan the Tobacco Endgame*, Brit. Med. J., Feb. 11, 2014, at 1, https://www.bmj.com/content/348/bmj.g1453.

60 Nat'l Acads. of Sci., Eng'g, Med., *supra* note 16, at 11 (expert consensus report concluding that "[t]he evidence about harm reduction suggests that across a range of studies and outcomes, e-cigarettes pose less risk to an individual than combustible tobacco cigarettes").

61 For a window into this debate, see sources cited in Eric N. Lindblom, *Should FDA Try to Move Smokers to E-Cigarettes and Other Less-Harmful Tobacco Products and, If So, How?*, 73 Food & Drug L.J. 276, 281 n.18 (2018).

62 Zettler et al., *supra* note 43, at 1948–49 (2018) (citations omitted). E-cigarette companies could seek to have their products approved as smoking cessation therapies by the FDA. To date, however, no e-cigarette has been approved as a smoking cessation therapy, and there is no evidence that any e-cigarette company has sought such approval. *Cf.* Elizabeth G. Klein et al., *Online E-Cigarette Marketing Claims: A Systematic Content and Legal Analysis*, 2 Tobacco Regulatory Sci. 252, 258 (2016) ("Because the FDA has not approved any [e-cigarette] products for sale as a drug or device, any [e-cigarette] products making cessation or health-benefit claims are violating the law by marketing unapproved products.").

63 Lindblom, *supra* note 61, at 283 ("Switching to dual use from smoking is not less harmful to users than just smoking and could be somewhat more harmful—unless

(b) youth e-cigarette use may serve as a "gateway" to conventional cigarette use,[64] potentially undermining decades of tobacco control progress.

Adding to the concern about youth use is the runaway success of JUUL, a rechargeable e-cigarette shaped like a USB drive that uses nicotine salts in place of the free-base nicotine used by earlier e-cigarettes.[65] Each JUUL pod contains nicotine "equivalent to approximately 20 combustible cigarettes" (a full pack), and the use of nicotine salts allows for much higher levels of nicotine delivery "without an aversive user experience."[66] As Tackett et al. noted in 2020, "[i]t was not until the proliferation of nicotine-

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the dual use reduces smoking levels substantially, to very low levels."); *see also* Simon Chapman, *E-Cigarettes: The Best and the Worst Case Scenarios for Public Health*, BRIT. MED. J., Sept. 9, 2014, at 2, https://www.bmj.com/content/349/bmj.g5512 (suggesting that "[o]nly the most naive or captured advocates for vaping could fail to acknowledge that the tobacco industry wants people who vape to smoke and vape, not vape instead of smoking").

64 NAT'L ACADS. OF SCI., ENG'G, MED., *supra* note 16, at 10 ("There is substantial evidence that e-cigarette use increases risk of ever using combustible tobacco cigarettes among youth and young adults."). While the National Academies report "refers to this potential effect of e-cigarette use on increased smoking initiation as the 'catalyst' hypothesis" rather than a "gateway" effect because of the "colloquial" connotations of the latter term, the underlying idea remains the same: although youth and young adults may initially choose e-cigarettes over tobacco cigarettes because e-cigarettes are perceived as less dangerous, their continued exposure to e-cigarettes may eventually result in an "increase[d] proclivity" to try tobacco cigarettes. *Id.* at 496–97 n.1; *see also* Jasmine N. Khouja, et al., *Is E-Cigarette Use in Non-Smoking Young Adults Associated with Later Smoking? A Systematic Review and Meta-Analysis*, TOBACCO CONTROL, Mar. 10, 2020, at 7 https://tobaccocontrol.bmj.com/content/tobaccocontrol/early/2020/03/01/tobaccocontrol-2019-055433.full.pdf (finding "a strong consistent association in observational studies between e-cigarette use among non-smokers and later smoking," though noting that "findings from published studies do not provide clear evidence that this is explained by a gateway effect rather than shared common causes of both e-cigarette use and smoking").

65 Minal Patel et al., *JUUL Use and Reasons for Initiation Among Adult Tobacco Users*, 28 TOBACCO CONTROL 681, 681 (2019) (noting that by "April 2019, JUUL comprised 74.6% of the [e-cigarette] market"). The relevant difference between nicotine salts and freebase nicotine is that freebase nicotine "is harsh and difficult to inhale at high concentrations," whereas "Juul virtually eliminated the harsh side effects" by using nicotine salts. Chris Kirkham, *Addictive Nicotine in Juul Nearly Identical to a Marlboro: Study*, REUTERS (Dec. 17, 2019), https://www.reuters.com/article/us-juul-ecigarettes-study/addictive-nicotine-in-juul-nearly-identical-to-a-marlboro-study-idUSKBN1YL26R.

66 Jessica L. Barrington-Trimis & Adam M. Leventhal, *Adolescents' Use of "Pod Mod" E-Cigarettes – Urgent Concerns*, 379 NEW ENG. J. MED. 1099, 1100 (2018); *see also* Robert K. Jackler & Divya Ramamurthi, *Nicotine Arms Race: JUUL and the High-Nicotine Product Market*, 28 TOBACCO CONTROL 623, 626 (2019) ("The threshold for addiction of a young person has been estimated at 5mg/day, or about 4–5 traditional cigarettes. A youth would reach the addictive threshold by inhaling the aerosol generated by merely ¼ of a JUUL pod per day.").

salt-based, pod-style e-cigarette devices, of which the most well-known is JUUL, that youth e-cigarette use increased by 135% to the current record high."[67] The elevated levels of nicotine delivery that make JUUL and other pod-based devices highly addictive to youth could, in theory, also make them safer and more acceptable alternative products for current adult smokers.[68] To date, however, it appears that most adult tobacco users who also use JUUL do so "infrequently and concurrently with other products," which is unlikely to reduce tobacco-related health risks.[69]

C. *The Tobacco Industry's New Rhetoric*

The discussion in the previous subsection suggests that e-cigarettes are likely far less harmful, on a product-to-product basis, than cigarettes. Therefore, *if cigarettes were no longer sold*, death and disease from tobacco and nicotine would drop dramatically, even with widespread uptake of e-cigarettes. In the current environment, however, it is far less clear that e-cigarettes are contributing to improved population health. Glossing over these population-level concerns, the major tobacco companies[70]—all of which are either directly selling e-cigarettes or are heavily invested in

67 Alayna P. Tackett et al., Editorial, *E-Cigarette Regulation: A Delicate Balance for Public Health*, Addiction, Apr. 19, 2020, at 1, https://onlinelibrary.wiley.com/doi/10.1111/add.15092.

68 Anna K. Duell et al., *Nicotine in Tobacco Product Aerosols: 'It's Déjà Vu All Over Again'*, Tobacco Control, Dec. 17, 2019, at 6, https://tobaccocontrol.bmj.com/content/tobaccocontrol/early/2019/12/16/tobaccocontrol-2019-055275.full.pdf ("De-freebasing has undoubtedly made e-cigarettes more effective as substitutes to get smokers off combustibles. However, as with smoked tobacco, it is likely that e-cigarettes have also been made vastly more addictive for never-smokers.").

69 Patel et al., *supra* note 65, at 682 (recognizing that some dual users may transition to exclusive JUUL use over time but finding that most adults using JUUL did not report using the product in order to quit use of combustible tobacco products).

70 The major tobacco companies' organizational structures and inter-corporate relationships are exceedingly complex and frequently changing. *See generally*, David T. Levy et al., *The US Cigarette Industry: An Economic and Marketing Perspective*, 5 Tobacco Reg. Sci. 156 (2019). Currently, in the United States, the two major cigarette producers are (1) Philip Morris USA, a subsidiary of Altria (formerly known as Philip Morris), which sells Marlboro and other brands, and (2) R.J. Reynolds Tobacco Company, a subsidiary of British American Tobacco (BAT), which sells Camel, Newport, and other brands. *Id.* at 156-58, 164. For convenience, those two companies are referred to in this article as "Philip Morris" and "R.J. Reynolds." In 2008, Altria spun off Philip Morris International (PMI), which sells Marlboro and other Altria brands outside of the U.S. Though the focus of this article is on the U.S. market, PMI is also discussed, as "close association exists between [PMI and Altria] and the brand[s] they market," despite the fact that they are separate legal entities. Annalise Mathers et al., *Transnational Tobacco Companies and New Nicotine Delivery Systems*, 109 Am. J. Pub. Health 227, 228 (2019).

e-cigarette distribution—have enthusiastically embraced the language of "tobacco harm reduction," that is, the idea that current smokers should be encouraged "to move themselves down the risk spectrum by choosing safer alternatives to smoking – without demanding abstinence."[71]

Under the 2009 Tobacco Control Act (TCA), companies cannot promote a specific tobacco product as being less harmful than others unless that claim is reviewed and authorized by the FDA.[72] But the major tobacco companies are now quite clear that, in their view, e-cigarettes and heat-not-burn products are, in general terms, far less harmful than conventional cigarettes. As R.J. Reynolds states on its website,

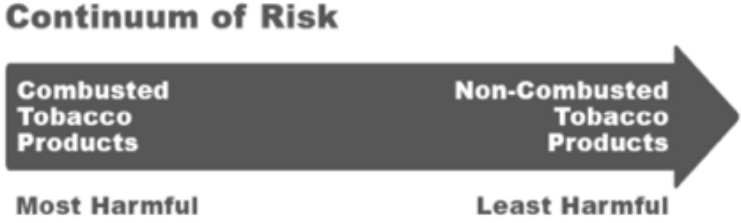
> "there is a growing body of scientific evidence that vapor and other noncombustible tobacco products may present significantly less risk than smoking. While some studies report that there may be health risks associated with these products, we believe those risks are lower than the risks of smoking cigarettes."[73]

71 David Sweanor et al., *Tobacco Harm Reduction: How Rational Public Policy Could Transform a Pandemic*, 18 INT'L. J. DRUG POL'Y 70, 70 (2007).

72 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 911, 123 Stat. 1776, 1812 (codified at 21 U.S.C. § 387(k) (2018)). Nor can they make claims that their products are effective for smoking cessation without obtaining approval for sale as a drug or drug-delivery device. Clarification of When Products Made or Derived from Tobacco Are Regulated as Drugs, Devices, or Combination Products; Amendments to Regulations Regarding "Intended Uses," 82 Fed. Reg. 2193, 2198 (Jan. 9, 2017) (to be codified at 21 CFR pt. 201, pt. 801, pt. 1100) ("FDA has long considered claims related to smoking cessation in the context of curing or treating nicotine addiction and its symptoms to bring products within FDA's 'disease prong' jurisdiction."). Implementation of this FDA rule has been delayed, but the underlying statutory scheme it describes still applies. *See* "Intended Uses"; Partial Delay of Effective Date, 83 Fed. Reg. 11,639, 11,639 (Mar. 16, 2018).

73 *Transforming Tobacco*, R.J. REYNOLDS TOBACCO, https://www.rjrt.com/transforming-tobacco/guiding-principles-and-beliefs/ (last visited May 26, 2020). General statements like this do not violate the TCA because they are not in reference to the marketing for any particular product. 21 U.S.C. § 387k.

Altria even makes this clear in visual form on its website:[74]



Why have these companies shifted their position to embrace the concept of tobacco harm reduction? Presumably because, while continuing to sell cigarettes, they have all started selling e-cigarettes (and other non-combustible products) as well—and they are seeking to market these products as less harmful alternatives for current smokers. Philip Morris recently received FDA authorization to market a "heat-not-burn" product named IQOS[75] with claims that it "significantly reduces the production of harmful and potentially harmful chemicals" compared to conventional cigarettes.[76] In order to avoid the TCA's required review of health-related claims, most e-cigarette ads more subtly suggest that e-cigarettes reduce health-related risks without stating so explicitly.[77] For example, ads for blu e-cigarettes state: "Why quit? Switch to blu[.] blu is the smart choice for smokers wanting a

74 *Our Approach to Harm Reduction*, Altria, https://www.altria.com/harm-reduction/our-approach-to-harm-reduction (last visited May 26, 2020) ("A strong public health consensus has formed that not all tobacco products present the same risk. Public health authorities agree that there is a broad continuum of risk among tobacco products, with cigarettes at the highest end of that spectrum. This continuum recognizes that most of the harm caused by tobacco results from the burning of tobacco.").

75 *FDA Authorizes Marketing of IQOS Tobacco Heating System with 'Reduced Exposure' Information*, FDA (July 7, 2020), https://www.fda.gov/news-events/press-announcements/fda-authorizes-marketing-iqos-tobacco-heating-system-reduced-exposure-information. A "heat-not-burn" product like IQOS is essentially a cross between a conventional cigarette and an e-cigarette; it uses cigarette-like sticks that contain tobacco, but the tobacco is heated to produce an inhalable aerosol, instead of combusted as in conventional cigarettes. *See* PHILIP MORRIS PRODUCTS S.A., PMI Research & Development, MRTPA Executive Summary 9–21 (2017), https://www.fda.gov/media/105437/download (detailing PMI's research toward "modified risk tobacco products applications," or "MRTPA").

76 *FDA Authorizes Marketing of IQOS Tobacco Heating System with 'Reduced Exposure' Information*, *supra* note 75.

77 *See*, *e.g.*, Kimberly G. Wagoner et al., *Health Claims Made in Vape Shops: An Observational Study and Content Analysis*, 28 TOBACCO CONTROL e119, e121–e123 (2019) (cataloging health-related claims made in vape shops and finding claims such as a testimonial from a smoker-turned-vaper stating: "'I breathe better. I smell better. I feel better.'").

change. . . . blu is everything you enjoy about smoking and nothing else."[78]

The idea that policy should reflect the "continuum of risk" concept featured on Altria's website is, in general terms, widely accepted by health experts.[79] But as stated above, the fact that a product is less harmful on a product-to-product basis does not mean that its availability will improve population-level health outcomes in the absence of corporate behaviors and regulatory measures directed towards that result. Though they claim to support harm reduction and a move toward a "smoke-free world," tobacco companies undermine their credibility when they advertise to youth, promote dual use, continue investing heavily in promotion of cigarettes, and fight against any efforts to regulate cigarette sales.[80] For instance, underscoring the depth of the industry's continued opposition to even minimal tobacco control measures, when the governor of Virginia—the state with *the lowest* cigarette tax in the nation—recently proposed a modest cigarette tax increase

78 *Why Quit? Switch to Blu*, TOBACCO.STANFORD.EDU, http://tobacco.stanford.edu/tobacco_main/images_ecigs.php?token2=fm_ecigs_st372.php&token1=fm_ecigs_img16975.php&theme_file=fm_ecigs_mt043.php&theme_name=Helps%20You%20Quit&subtheme_name=Quit (last visited May 26, 2020). The ad also seems to directly *discourage* complete cessation, adding "[n]obody likes a quitter, so make the switch today." *Id.* These ads ran in 2013, when blu was a subsidiary of Lorillard, Inc. *See* Brian Solomon, *Reynolds, Lorillard Dump Blu E-Cigarettes in $27 Billion Merger,* FORBES (July 15, 2014) https://www.forbes.com/sites/briansolomon/2014/07/15/reynolds-lorillard-dump-blu-e-cigarettes-in-27-billion-merger/#32f922dd1699. Lorillard was subsequently purchased by R.J. Reynolds, and the blu brand was transferred to Imperial Tobacco, a multinational tobacco company. *Id.*

79 *See, e.g.*, Mitchell Zeller & Dorothy Hatsukami, *The Strategic Dialogue on Tobacco Harm Reduction: A Vision and Blueprint for Action in the US*, 18 TOBACCO CONTROL 324, 327 (2009) (summarizing the findings of an expert workgroup as reporting that "there was a consensus about the value and the concept of this continuum of risk," though disagreement about the harm-reducing prospects of particular products). The "continuum of risk" concept was the theoretical basis for the FDA's 2017 "Comprehensive Plan for Tobacco and Nicotine Regulation," which suggested reducing nicotine levels in combustible tobacco products while delaying the regulation of e-cigarettes. That plan has now largely been abandoned by the FDA. *See* Micah L. Berman, *The Faltering Promise of FDA Tobacco Regulation*, 12 ST. LOUIS U.J. HEALTH L. & POL'Y 145, 159–65 (2018).

80 Tobacco companies continue to do all of these things. *See, e.g.,* Madlen Davies et al., *The 'Unsmoke' Screen: The Truth Behind PMI's Cigarette-Free Future*, BUREAU INVESTIGATIVE JOURNALISM (Feb. 24, 2020), https://www.thebureauinvestigates.com/stories/2020-02-24/the-unsmoke-screen-the-truth-behind-pmis-cigarette-free-future (discussing PMI's youth marketing and its plans to continue leading in cigarette sales); *Spinning a New Tobacco Industry*, TRUTH INITIATIVE 2–3, 15 (Nov. 2009), https://truthinitiative.org/sites/default/files/media/files/2019/11/Tobacco%20Industry%20Interference%20Report_final111919.pdf (discussing industry efforts to undermine and block regulations).

(which would have exempted e-cigarettes) Altria immediately objected.[81]

Developing and promoting a less harmful alternative to a dangerous product is, in most cases, a social good. What makes this situation unusual is that tobacco companies claim to offer the solution to a problem that they created and continue to sustain. Corporate statements make it clear that despite their rhetoric, the companies are in no rush to stop selling cigarettes—the deadliest, but clearly the most profitable, tobacco product. For example, when pressed on *exactly when* they would stop selling cigarettes, PMI leadership is deeply evasive. CEO André Calantzopoulos says, "[n]ot in my time as chief executive, but in my lifetime, I do hope."[82] Ignoring PMI's active promotion of cigarettes, the company's vice president of communications suggests that the timeline for achieving the company's stated "smoke-free" goal is out of its hands, stating: "[o]ur vision is that one day smoke-free products will replace cigarettes. The sooner the world transitions away from cigarettes, the sooner we can stop making them."[83]

81 Michael Martz, *Northam Wants to Boost Tobacco and Fuel Taxes, End Vehicle Inspections, Slash Registration Fees,* Richmond Times-Dispatch (Dec. 17, 2019), https://www.richmond.com/news/virginia/northam-wants-to-boost-tobacco-and-fuel-taxes-end-vehicle-inspections-slash-registration-fees/article_30f6bc9c-b0ad-5b0a-a270-e1931a1e72f9.html. The proposed measure, which has not been enacted as of this writing, would raise the state's cigarette tax from 30 cents per pack to 60 cents per pack. *Id.* This would still leave Virginia's cigarette tax lower than nearly all other states. *State Cigarette Tax Rates*, Tax Pol'y Ctr. (Jan. 27, 2020) https://www.taxpolicycenter.org/statistics/state-cigarette-tax-rates.

82 James Ashton, *One Day I Hope We Won't Sell Cigarettes, Says Marlboro Boss*, Sunday Times (Oct. 23, 2016), https://www.thetimes.co.uk/article/one-day-i-hope-we-wont-sell-cigarettes-says-marlboro-boss-zfclkx5dt.

83 Davies et al., *supra* note 80. PMI recently added, "[t]he Company will be ready to support an industry-wide gradual phase-out of cigarettes as soon as a majority of smokers in a country have switched to scientifically substantiated smoke-free products. PMI believes that with the right regulatory encouragement and support from civil society, cigarette sales can end within 10 to 15 years in many countries." *PMI's Statement of Purpose: Excerpt from PMI's Integrated Report 2019*, Philip Morris Int'l, https://www.pmi.com/integrated-report-2019/pmi's-statement-of-purpose (last visited July 24, 2020). Whether or not PMI is sincere about this commitment is a matter of judgment, but it is notable that the company is asking for immediate and concrete deregulatory actions from governments in return for a longer-term (and unenforceable) pledge to support a future phase-out of cigarettes.

II. TOBACCO INDUSTRY E-CIGARETTE RESEARCH

Though they only started selling and promoting e-cigarettes within the past decade, tobacco companies have been studying e-cigarette technology—and worrying about its potential to undermine their cigarette business—for much longer. Chinese pharmacist Hon Lik is generally credited with inventing the e-cigarette in 2003,[84] but tobacco companies have been working on some version of an e-cigarette since the 1960s, as the examples discussed below will illustrate.[85] Tobacco companies abandoned these projects, at least in part, because they viewed these inventions as potentially viable alternatives to (or replacements for) cigarettes, and they did not want to compete with their own highly profitable product. They also worried about triggering a new wave of cigarette-related litigation[86] or further regulatory oversight. Taken together, these examples suggest that although the tobacco companies have long had the ability to bring an e-cigarette (or e-cigarette-like) product to the market as a less harmful alternative to conventional cigarettes, they made a deliberate choice not to do so until independent companies demonstrated the commercial viability of e-cigarettes.[87]

84 *See, e.g.*, Martinne Geller, *E-Cigs a 'Consumer-Driven' Revolution Born from a Bad Dream*, REUTERS (June 9, 2015), https://www.reuters.com/article/us-ecigarettes-inventor/e-cigs-a-consumer-driven-revolution-born-from-a-bad-dream-idUSKBN0OP1YV20150609 ("Hon Lik invented the e-cigarette, a device now shaking up the Big Tobacco industry."). Lik later sold his invention to Imperial Tobacco Group. *Id*.

85 *See infra* Sections II(A)–II(C).

86 *See* Daniel Givelber, *Cigarette Law*, 73 IND. L.J. 876, 888, 891 (1998) ("Collusion, not competition, ensured that the companies [did not work] strenuously to bring to market a demonstrably safer product . . . [T]he existence of a safer cigarette would undermine the effective legal immunity flowing from the industry's insistence that it was not possible to make such a product.").

87 These independent companies also demonstrated that an e-cigarette market could exist without destroying the profitability of cigarettes. *See* Chapman, *supra* note 63 (suggesting that that tobacco companies are content to have many current smokers "smoke *and* vape" concurrently, while at the same time e-cigarette marketing can recruit new customers to long-term nicotine consumption) (emphasis added); Jennifer Maloney & Saabira Chaudhuri, *Against All Odds, the U.S. Tobacco Industry Is Rolling in Money*, WALL ST. J. (Apr. 23, 2017, 1:31 PM), https://www.wsj.com/articles/u-s-tobacco-industry-rebounds-from-its-near-death-experience-1492968698 (explaining how the tobacco industry has been able to increase its profitability by raising the price of cigarettes, despite declining cigarette consumption).

A. *BAT's Project Ariel*

British American Tobacco (BAT) developed the essential concept of e-cigarettes in the early 1960s through a research effort called "Project Ariel."[88] This project was a response to the "widely publicized epidemiological studies link[ing] smoking to lung cancer."[89] BAT, despite its public denials, already knew that the addictive power of nicotine drove tobacco use, so the goal of Project Ariel was to "make a space-age cigarette that would deliver nicotine 'satisfaction' without the 'unattractive side effects' of cancer and emphysema."[90]

By 1962, BAT had developed a working model that "vaporize[d] nicotine without burning it."[91] Two years later, it added citric acid to reduce the pH and make the aerosol easier to inhale, and it filed a series of patents to protect its invention.[92] Though the resulting prototype was still more irritating than products available today, BAT had, in essence, assembled a product with the key design features of a modern e-cigarette.[93] In 1965, as it prepared to commercialize the device, the project leader reported that despite some technical obstacles, BAT's work "show[ed] clearly that the original objective [was] *feasible* and achievable."[94] But company leadership slowed the project's development before ultimately canceling it altogether in 1969.[95] Researcher Stephen Risi suggests that the project was abandoned not because of any technical shortcomings, but because "the industry was highly successful in blocking any effective antitobacco regulation," and, contrary to what the industry had feared, "[c]igarettes were clearly not on their way out."[96] As a result, Project Ariel posed a potential threat to BAT's own most profitable product and had to be hidden. Risi writes:

88 Stephan Risi, *On the Origins of the Electronic Cigarette: British American Tobacco's Project Ariel (1962–1967)*, 107 Am. J. Pub. Health 1060, 1060 (2017).

89 *Id.*

90 Robert N. Proctor, *Acting Now Is Urgent: Commentary on Zeller*, 21 Nicotine & Tobacco Res. 340, 340 (2019). For background on BAT's efforts to mislead the public about the addictiveness and harms of cigarettes, see, e.g., Stanton A. Glantz et al., *Looking Through a Keyhole at the Tobacco Industry: The Brown and Williamson Documents*, 274 JAMA 219, 223 (1995) (finding that the company's internal documents showed that "BAT recognized more than 30 years ago that nicotine is addictive and that tobacco smoke is 'biologically active' (eg [sic], carcinogenic)").

91 Risi, *supra* note 88, at 1063.

92 *Id.* at 1064. The patents were filed by the Battelle Memorial Institute "to avoid associating BAT with this new device." *Id.*

93 *Id.* at 1063, 1065.

94 *Id.* at 1064 (emphasis added).

95 *Id.*

96 *Id.*

> BAT hid Ariel not because it was fraudulent but precisely because it worked: unlike other tobacco industry gimmicks, such as light cigarettes, the Ariel device was genuinely designed to be healthier and the developed prototypes showed tar deliveries far below those of filter cigarettes. . . . [I]nternal documents show that BAT presumably shut down Ariel precisely because it worked—it was threatening because it permitted one to think of a future when cigarettes could be replaced with a healthier way of administering nicotine.[97]

B. *Philip Morris's Capillary Aerosol Generator*

Philip Morris did not get to the same idea as early as BAT, but in the early 1990s it developed a Capillary Aerosol Generator (CAG), which was likewise built around the same basic concept as modern e-cigarettes: extracting nicotine from tobacco and heating it into an inhalable aerosol.[98] And like BAT, it chose not to commercialize the project, instead, shelving the project because of its "reluctance to develop and introduce products that would compete with tobacco cigarettes."[99]

Internal documents suggest that from the start, the CAG was intended as a "defensive strategy," to be commercialized "only if necessitated by competition or regulation, rather than by health concerns."[100] As William Farone, former Director of Applied Research for Philip Morris, explained:

> All of our research was done for defensive reasons . . . Philip Morris was preparing for a time when they were forced—by the government or by competitors in the marketplace—to make meaningful changes to their products . . . These techniques were put "on the shelf" until they might become needed, unless they

97 *Id.* at 1065. Instead, the industry focused on promoting "light" and "low-tar" cigarettes that created the perception of reduced risk but instead likely *increased* tobacco-related harms. Min-Ae Song et al., *Cigarette Filter Ventilation and Its Relationship to Increasing Rates of Lung Adenocarcinoma*, 109 J. NAT'L CANCER INST., Dec. 2017, at 1–2, 4, 12 (finding strong evidence that "the inclusion of ventilation in cigarette filters"—the main design feature of "light" and "low-tar" cigarettes—"contributed to increased lung adenocarcinomas among smokers").

98 Because Philip Morris did not develop an e-cigarette prototype until decades after BAT did, the products liability theory discussed in Part IV, *infra*, would only be available to smokers who purchased Philip Morris cigarettes as of the early 1990s, while suits against BAT could potentially reach back all the way to the late 1960s.

99 Zachary Cahn & Lindsay Eckhaus, *Explaining the Discontinuation of a Non-Tobacco Nicotine Project at Philip Morris: Obstacles to Innovation*, 39 J. PUB. HEALTH POL'Y 131, 133 (2018).

100 *Id.* at 136.

> could lead to an immediate profit.[101]

Philip Morris was also worried (for good reason) that marketing a nicotine aerosol device would undermine its public positions—maintained in both litigation and congressional testimony—that nicotine was not addictive and that it was not manipulating nicotine levels in cigarettes.[102]

Though Philip Morris was not "sitting on a finished version of an e-cigarette-like product" when it abandoned the CAG effort, research examining Philip Morris's internal documents (released as a result of litigation) suggests that "[t]he most important obstacles to CAG development appear to [have been] regulatory and business 'bottom-line' concerns," *not* technological feasibility concerns.[103] An internal 1998 Philip Morris report stated that the company "determined it was not in our business interests to continue to pursue research on this device," even though it "recognized the potential advantages this invention could have to the pharmaceutical and medical community."[104]

C. *R.J. Reynolds's Nicotine Salts*

In the early 1970s, cigarette giant R.J. Reynolds—as part of an effort to "get [its] share of the youth market"—started experimenting with nicotine salts.[105] Nicotine salts are formed by combining nicotine with a low-pH acid.[106] The resulting compound has a much lower pH than nicotine alone, making it more palatable for users.[107]

101 *Id.* at 133, 136–37 (quoting Farone). Putting it more bluntly, Farone also stated that Philip Morris "always worried in the ultimate about losing the damn gold mine they have." *Id.* at 139.

102 *Id.* at 135. These positions were knowingly fraudulent, and a federal court later ordered the major cigarette manufacturers (including Philip Morris) to issue public "corrective statements" that, *inter alia*, specifically referenced both of these falsehoods. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 27, 852 (D.D.C. 2006).

103 Cahn & Eckhaus, *supra* note 99, at 133, 139.

104 Lauren M. Dutra et al., *Philip Morris Research on Precursors to the Modern E-Cigarette Since 1990*, 26 Tobacco Control e97, e100 (2017) (quoting Philip Morris Int'l Inc., *Message Points: Aerosol Patent* (1998), https://www.industrydocuments.ucsf.edu/docs/#id=pynd0064). Philip Morris sought to further suppress cigarette alternatives by pressuring Merrell Dow Pharmaceuticals to limit its marketing of Nicorette. Robert N. Proctor, Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition 524–26 (2011).

105 Emily Baumgaertner, *Juul Took a Page from Big Tobacco to Revolutionize Vaping*, L.A. Times (Nov. 19, 2019), https://www.latimes.com/politics/story/2019-11-19/juul-vaping-chemical-formulas-based-in-big-tobacco. At the time of the developmental research discussed here, R.J. Reynolds was not a subsidiary of BAT.

106 *Id.*

107 *Id.* As discussed above, JUUL's use of nicotine salts enabled its e-cigarettes to pack a

According to recently-released R.J. Reynolds documents, the company synthesized and heated various nicotine salt combinations "in pursuit of the 'maximum release of nicotine.'"[108] It also "tested the salts' ability to dissolve into a liquid—a trait that would decades later become central to vaping products like JUUL."[109] Some of the resulting nicotine salts were later patented by R.J. Reynolds.[110] When confronted with these documents, a company spokesperson stated that they were part of an experimental effort by the company to "'reduce the risks' of smoking while 'maintaining nicotine delivery.'"[111]

Though R.J. Reynolds could have combined this nicotine salt breakthrough with other early vaping-like technologies it developed, it never did.[112] The reasons it dropped this line of research and product development is unclear, but it is likely similar to the reasons BAT and Philip Morris abandoned their early e-cigarettes: it did not want to undermine its false public statements about nicotine and invite additional regulatory scrutiny, nor did it want to cannibalize its own cigarette sales.

Decades later, the founders of JUUL carefully studied R.J. Reynolds's nicotine salt research, even referencing R.J. Reynolds's patent in their own patent application.[113] The ability of JUUL's founders—two Stanford graduate students—to develop a phenomenally successful vaping device using nicotine salts suggests that R.J. Reynolds would have had the technical capacity to do the same at a much earlier date, had it chosen to do so.

D. *Cigarette Companies in the E-Cigarette Business*

Starting in the 1960s, the tobacco companies developed and patented the technologies discussed in this section,[114] but all of them made

much larger nicotine punch than other e-cigarettes, fueling its meteoric rise. *Id.*

108 *Id.* These R.J. Reynolds papers were part of JUUL's internal documents that were turned over to the FDA as part of its investigation into the company's marketing activities. *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* (noting that R.J. Reynolds developed one of the first heat-not-burn cigarettes, indicating that it was exploring the aerosolization of nicotine in the same time frame).

113 *Id.*

114 The examples discussed in Sections II(A)–II(C) were just some of the tobacco industry's forays into "safer cigarette research"). *See* Givelber, *supra* note 86, at 891–93 (1998) (providing other examples). Professor Givelber, a long-time colleague and co-author of Professor Daynard, summarizes: "There were concerns that the safer cigarette would undermine the market for normal, unsafe cigarettes. These concerns melded with fear

the deliberate choice *not* to sell and instead conceal[115] their own e-cigarette products until decades later when independent companies began selling e-cigarettes. When it became clear that e-cigarettes were both attracting customers and clearing potential regulatory hurdles, the major tobacco companies quickly entered and took control of the e-cigarette market.[116] The cigarette companies acquired independent e-cigarette brands and quickly rolled out their own products,[117] in some cases with marked similarities to the prototypes discussed above.[118] In the case of JUUL, Altria acquired a 35% minority stake in the company, and a former Altria executive was installed as JUUL's new CEO.[119] The timing of these investments—especially when combined with "continu[ing] to aggressively market conventional cigarettes and challenge all attempts to . . . reduce smoking"—suggests that the companies are playing a largely defensive game (as the earlier Philip Morris documents indicated), rather than sincerely pursuing the goal of phasing out cigarette smoking.[120]

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of liability once it became clear that cigarette companies, if they wished to do so, could in fact make a healthier product." *Id.* at 892.

115 Kelder and Daynard provide a vivid example:

> [Former Vice President for Research at Brown & Williamson] Dr. Wigand also testified that, following a meeting of top scientists from B&W and its affiliates in Vancouver, British Columbia, in 1989, [B&W attorney J. Kendrick] Wells eliminated roughly twelve pages of the meeting's minutes. Wigand said that the missing pages detailed "the company's research on a safer cigarette and on nonaddictive nicotine alternatives[.]"
>
> Shortly after the 1989 Vancouver meeting, Wigand testified that he was summoned to [B&W President Thomas] Sandefur's office and told "there would be no further discussion or efforts on any issues related to a safer cigarette." Wigand also testified that Mr. Sandefur told him "that there can be no research on a safer cigarette. Any research on a safer cigarette would clearly expose every other product as unsafe and, therefore, present a liability issue in terms of any type of litigation."

Kelder & Daynard, *supra* note 2, at 177 (citations omitted).

116 Mathers et al., *supra* note 70, at 233.

117 *Id.* (detailing how the major tobacco companies "focused on acquiring independent cigalike manufacturers, thereby gaining intellectual property, market share, and distribution networks," and then also pursued the "internal development of additional branded e-cigarettes").

118 Dutra et al., *supra* note 104, at e102 (noting the "strong similarities and parallels" between the CAG and the e-cigarette design Philip Morris patented in 2009).

119 Baumgaertner, *supra* note 105.

120 Mathers et al., *supra* note 70, at 233. Tobacco companies may have also found that involvement in the e-cigarette sector provides them with other strategic and public relations advantages. *See* Chapman, *supra* note 63 ("E-cigarettes also promise hope of new respectability to tobacco companies. The same tobacco company staff who

III. ARE E-CIGARETTES A "REASONABLE ALTERNATIVE DESIGN"?

If a company sells a dangerous and deadly product when there are safer alternative designs for that product available, that is often grounds for liability under state tort law.[121] Importantly, whether or not such a "reasonable alternative design" should have been used is evaluated *as of the time of sale*, not at the time of litigation.[122] At first, this might seem to be a dead end for lawsuits seeking to hold up e-cigarette products as a "reasonable alternative design" for conventional cigarettes. But, as summarized in this section, the historical record suggests that, in fact, the major tobacco companies may have long had the capacity to create and market e-cigarette products like the ones they are now touting as less harmful—but for decades they chose not to. This section turns to the question of whether this historical evidence

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scheme to attack effective tobacco control and bust open low income, high illiteracy markets with cigarette promotions, suddenly have opportunities to present themselves as the harm reducing solution to the 'terrible' health problems that arise because of their work.").

121 Though this section focuses on the "reasonable alternative design" element of a design defect lawsuit, the plaintiff must always establish all of the other elements of a *prima facie* case as well, including causation, and defeat any affirmative defenses (such as assumption of risk) raised by the tobacco companies. Causation was fatal to the plaintiff's design defect claim in *Cipollone*. Cipollone v. Liggett Grp., Inc., 683 F. Supp. 1487, 1495 (D.N.J. 1988). The court concluded that even if the plaintiff had used the proffered alternative product—a palladium cigarette—instead of conventional cigarettes, it would have only marginally reduced the plaintiff's likelihood of developing cancer, which was not sufficient to establish causation. *Id.* The theory behind palladium cigarettes was that "incorporat[ing] palladium nitrate into tobacco . . . made combustion of the tobacco more thorough and complete, resulting in smoke containing less harmful byproducts." *Project XA*, SOURCEWATCH, https://www.sourcewatch.org/index.php/Project_XA (last modified Dec. 25, 2019). Liggett conducted extensive research on palladium cigarettes, but was ultimately pressured by other tobacco companies to abandon the research because of the fear that "[p]romoting one cigarette as 'safer' than others 'would be an indictment of the tobacco industry and its longstanding position that conventional cigarettes are not unsafe.'" *Id.* Another barrier may be that the plaintiff must be able to show that a reasonable alternative design was available to *the defendant company.* If a developmental e-cigarette is being introduced as the proposed alternative, the plaintiff must show that the defendant company possessed the technology to commercialize that product. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2, cmt. d. (AM. LAW. INST. 1998) ("[T]he plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution"). Thus the evidence summarized in Part II may only be relevant in litigation against those particular companies.

122 *See, e.g.*, Brown v. R.J. Reynolds Tobacco Co., 852 F. Supp. 8, 10 (E.D. La. 1994), ("[A] necessary element of proof for defective design is that an alternative design existed at the time the product left the manufacturer's control…."), *aff'd*, 52 F.3d 524 (5th Cir. 1995).

could be used in court to show that there were less harmful "reasonable alternative designs" for cigarettes that the tobacco companies could have—and, as a matter of law, should have—pursued.

A. *What Is a "Reasonable Alternative Design"*

Under *Cipollone* and its progeny, failure to warn claims against cigarette companies are preempted by federal law, but claims premised on a product's defective or negligent design are not. Whether or not a product's design is defective is evaluated through a *consumer expectations test* (whether or not a product conforms to a consumer's "reasonable expectations with regard to safety"), a *risk-utility* test (whether or not the manufacturer has employed available cost-effective measures to reduce harm), or some combination thereof.[123] Historically, pursuing defective design theories has not been fruitful for plaintiffs in cigarette-related litigation because (a) under the consumer expectations test, consumers arguably expect cigarettes to be harmful;[124] and (b) under the risk-utility test, defendants have successfully argued that cigarettes are simply "inherently dangerous," and no less harmful alternative designs are possible.[125]

123 *See* Restatement (Third) of Torts: Prods. Liab. § 2 cmt. d (Am. Law. Inst. 1998) (providing state-by-state review of approaches to design defects and concluding that the "overwhelming majority of American jurisdictions" require proof of a "reasonable alternative design" in design defect cases). The Restatement (Third) adopts such a "reasonable alternative design" requirement. *Id.*

124 The influential Restatement (Second) of Torts used a consumer expectations approach. Restatement (Second) of Torts § 402A cmt. i (Am. Law. Inst. 1965) Comment *i* to Section 402A of the Restatement provided, "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id*. This was historically a major obstacle to products liability lawsuits, particularly because another part of Comment *i* specifically provided that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful[.]" The tobacco industry attorneys "were deeply involved in drafting this document." Proctor, *supra* note 104, at 332; *see also* Givelber, *supra* note 86, at 880 (detailing the history of this provision). The Third Restatement preserves the rule that the sale of dangerous but "[c]ommon and widely distributed products such as alcoholic beverages, firearms, and above-ground swimming pools" is generally not grounds for liability. Restatement (Third) of Torts: Prods. Liab. § 2 cmt. d (Am. Law Inst. 1998). However, it notably excludes tobacco products from this list, and it also provides that liability for a design defect can attach—even to the listed products—"if reasonable alternative designs could have been adopted." *Id.*

125 *See, e.g.*, American Tobacco Co. v. Grinnell, 951 S.W.2d 420, 433 (Tex. 1997) ("Because American [Tobacco Co.] conclusively proved that no reasonably safer alternative design exists for its cigarettes, we hold that summary judgment was proper on all of the Grinnells' design defect claims.").

The risk-utility test seeks to "balance the risks of the product as designed against the costs of making the product safer[,]" factoring in any loss of utility to consumers as a cost.[126] In most jurisdictions using the risk-utility test, it is a required part of the plaintiff's *prima facie* case to present a "reasonable alternative design" (sometimes called a "safer alternative design" or a "feasible alternative design") that the defendant should have employed.[127] Co-Reporters of the Products Liability section of the Restatement (Third) of Torts Aaron Twerski and James Henderson summarize that in risk-utility design defect cases, plaintiffs "live or die by their ability to establish a reasonable alternative design."[128] Past lawsuits against cigarette companies have often foundered on this point.[129] Indeed, leading products liability scholars have suggested that "[a]lthough production of addictive and lethal cigarettes might be negligent or worse, it may be difficult to imagine a reasonable alternative design."[130]

Where a reasonable alternative design for cigarettes has been proffered by the plaintiffs, courts have been reluctant to even send the question to the jury, often noting that "feasibility" involves more than technical capacity. For example, in *Tompkins v. R.J. Reynolds*, the plaintiffs suggested that earlier versions of heat-not-burn products would have been feasible alternatives available to R.J. Reynolds.[131] The court granted summary judgment to the tobacco company, concluding that "Plaintiffs have failed to meet their burden pertaining to evidence of a *feasible*, alternative design" because "Plaintiffs [failed to] discuss the cost of manufacturing or marketing an alternative design, or whether an alternative product would be profitable

126 DAN B. DOBBS ET AL., DOBBS' LAW OF TORTS § 456 (2d ed. 2020 Update), Westlaw DOBBLOT 456. The risk-utility test is a balancing test. On the "risk" side, one considers "not only the likelihood of harm but also its magnitude." *Id.* The risk-utility test may therefore suggest that the immense harms caused by conventional cigarettes justifies requiring the use of a less harmful alternative, even if the alternative product offers somewhat lower "utility" (a concept difficult to apply in this context).

127 *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 2, 14, 24–25, 50 (AM. LAW INST. 1998) ("To establish a prima facie case of defect, the plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm."). Critically, this alternative must have been available to the manufacturer "at the time of sale or distribution." *Id.* § 14.

128 Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1108 (2009).

129 *See, e.g.*, *Grinnell*, 951 S.W.2d at 433; Miller v. Brown & Williamson Tobacco Corp., 679 F. Supp. 485, 488 (E.D. Pa. 1988) ("Plaintiff has the burden of proving defective design. On this record, plaintiff will not be able to demonstrate that there is something wrong with the design of cigarettes or how the design could be improved.").

130 DOBBS ET AL., *supra* note 126.

131 Tompkins v. R.J. Reynolds Tobacco Co., 92 F. Supp. 2d 70, 84–85 (N.D.N.Y. 2000).

for any company."[132] Even if they could clear this bar, courts may also require the plaintiff to show that consumers would have considered the alternative product to have been an acceptable substitute. For example, in *Adamo v. Brown & Williamson Tobacco Co.*, the New York Court of Appeals wrote that, even if plaintiffs could show that reduced-tar cigarettes were a safer alternative, they "did not show that cigarettes from which much of the tar and nicotine has been removed remain 'functional'" in the sense that they are "as satisfying as regular cigarettes" to current smokers.[133] Put together, this suggests a very high bar for plaintiffs to establish the availability of a "reasonable alternative design": they must show not only that defendant tobacco company had the technical ability to develop a less harmful alternative, but also that it would have been able to successfully commercialize the product and that consumers would have found it to be an acceptable replacement.[134]

132 *Id.* at 85.

133 Adamo v. Brown & Williamson Tobacco Corp., 900 N.E.2d 966, 968 (N.Y. 2008). In this case, the court was reviewing a jury verdict, not deciding whether to allow the case to go to the jury. But the standard the court set has been used to grant summary judgment for tobacco companies in subsequent design defect cases. *See, e.g.*, Fabiano v. Philip Morris Inc., 909 N.Y.S.2d 314, 319 (Sup. Ct. 2010). In *Adamo*, the plaintiffs presented "light" cigarettes as a reasonable alternative design, which should have been rejected not because "light" cigarettes are unacceptable to consumers, but because they are not, in fact, safer. Though they promoted them as less-harmful alternatives, the cigarette companies "were well aware that smokers of 'light' and 'low tar' cigarettes would 'compensate' for reduced nicotine levels by 'breathing more deeply, taking more puffs, or blocking the ventilation holes of cigarette filters,' thus negating any potential health benefits." Micah L. Berman, *Tobacco Litigation Without the Smoke? Cigarette Companies in the Smokeless Tobacco Industry,* 11 J. Health Care L. & Pol'y 7, 37 (2008). In any event, "consumer acceptability" is an odd standard to use (or to employ without defining it more precisely) in a context where consumer use is largely driven by the addictive power of nicotine, and most long-term consumers of cigarettes express a desire to quit.

134 The story of heat-not-burn products, including the Premier and Eclipse cigarettes discussed in *Tompkins*, complicates the historical record reviewed in Part II. These products were marketed by the tobacco industry starting in the 1990s as purportedly safer cigarettes and proved to be commercial flops. *See, e.g.*, Brown v. R.J. Reynolds Tobacco Co., 852 F. Supp. 8, 10 (E.D. La. 1994) (concluding that because "RJR's test market of the Premier cigarette was a failure, and . . . the product was withdrawn from the marketplace[,] plaintiff appears to be unable to establish the necessary element of alternative, feasible design"). The story of these product failures is more complicated than can be reviewed here, but in addition to being commercial flops, it is less clear that these products were substantially less harmful than cigarettes. For instance, R.J. Reynolds was forced to pay Vermont more than $8 million for making unsubstantiated health claims about its Eclipse cigarette, *State v. R.J. Reynolds Tobacco Co.*, No. S1087-05 CnC., 2013 WL 3184666, at *1 (Vt. Super. Ct. June 3, 2013); *State v. R.J. Reynolds Tobacco Co.*, No. S1087-05 CnC., 2010 WL 1323565, at *88 (Vt. Super. Ct. Mar. 10, 2010), and Eclipse was also criticized for having hazardous glass fibers in its filter. John L. Pauly et al., *Glass Fiber Contamination of Cigarette Filters: An Additional Health Risk*

As Daniel Givelber wrote back in 1998, requiring the plaintiff to establish the availability of a safer alternative seems to put the burden in the wrong place, at least in the context of cigarettes, as it requires "plaintiffs [to] establish as true that which the tobacco companies have gone to great lengths to keep secret," and "no one but the cigarette companies has the resources or expertise necessary to determine if cigarettes can be made safer." [135] Indeed, because the tobacco companies knew that developing a "safer cigarette" could potentially expose them to liability,

> they put lawyers rather than scientists or manufacturing executives in charge of the research that was conducted, and they withheld dissemination of the results of that research as privileged legal work product. Collusion, not competition, ensured that the companies neither discussed the relative safety of the various brands nor worked strenuously to bring to market a demonstrably safer product.[136]

Fear of legal liability is likely a key reason that the early e-cigarette projects discussed in Part II were hidden and then quashed by company leadership.

B. *What Is the Product?*

An additional major obstacle to arguing that e-cigarette products presented a "reasonable alternative design" for cigarettes is the question of whether such products are "alternative designs" or a different product altogether. In recent litigation, Philip Morris argued against other asserted alternative designs, writing:

> Any contention that PM USA should have made a nicotine-free or uninhalable "cigarette" suffers from exactly the same flaw. It is nothing more than a disguised claim that PM USA should have made an entirely different product. Courts across the country have consistently rejected such theories. Neither is a car an alternative safer design for a motorcycle, nor grape juice an alternative safer

to the Smoker?, 7 CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION 967, 967 (1998). The commercial failure of these products, though, does raise an interesting conceptual question about how far producers of a dangerous product must go to find a consumer-acceptable safer alternative. As Robert Proctor suggests, the cigarette companies may have been happy to see these products flop and were perhaps not interested in making them more acceptable to consumers. PROCTOR, *supra* note 104, at 531. Instead, they could shift blame to smokers by arguing that they had tried to offer a safer alternative, but smokers were not interested. *Id.*

135 Givelber, *supra* note 86, at 882, 888–89.

136 *Id.* at 888–89.

> design for wine.[137]

Though correct that an "entirely different product" cannot be an "alternative design," Philip Morris may be overstating its case here. Indeed, in the very litigation it cites, *Kimball v. R.J. Reynolds*, the court allowed the question of "what is a cigarette?" to go to the jury, specially raising the possibility that a cigarette may be nothing more than a "Nicotine-Delivery Device."[138] And the notion that a cigarette is, at essence, a nicotine delivery device comes directly from the companies' files. A 1972 Philip Morris memo, for example, explained:

> The cigarette should be conceived not as a product but as a package. The product is nicotine . . . Think of the cigarette pack as a storage container for a day's supply of nicotine . . . Think of the cigarette as a dispenser for a dose unit of nicotine.[139]

Similar statements can be found in the files of the other major tobacco

137 Defendant's Motion for a Directed Verdict on Plaintiff's Strict Liability Design Defect and Negligent Design Claims, Capone v. R.J. Reynolds Tobacco Co., No. 08-1464 CA, 2018 WL 7287441 (Fla. Cir. Ct. Dec. 12, 2018) (citing Kimball *ex rel.* Kimball v. R.J. Reynolds Tobacco Co., No. C03-664JLR, 2006 WL 1148506, at *3 (W.D. Wash. Apr. 26, 2006) ("[A] plaintiff injured in a motorcycle accident cannot argue that if the manufacturer had installed four wheels on the motorcycle, it would have been safer. 'Two-wheeledness' is an essential characteristic of a motorcycle. What are the essential characteristics of a cigarette? . . . The jury will decide the issue, and will thus decide whether any alternative design that [plaintiff] proffers is a feasible alternative.")).

138 Kimball *ex rel*. Kimball v. R.J. Reynolds Tobacco Co., No. C03-664JLR, 2006 WL 1148506, at *3 (W.D. Wash. Apr. 26, 2006); Plaintiff's Response to Motion to Exclude or Limit Testimony of K. Michael Cummings at 11, Kimball *ex rel*. Kimball v. RJ Reynolds Tobacco Co., No. CV 03-0664 JLR, 2006 WL 1499592 (W.D. Wash. Apr. 10, 2006). The plaintiffs in Kimball sought to introduce heat-not-burn tobacco products (Premier and Eclipse) as the reasonable alternative designs for conventional cigarettes. Ultimately, this case resulted in a jury verdict in favor of the defendant. *R.J. Reynolds Prevails in Jury Trial Brought by Smoker's Widower*, Jones Day (May 15, 2006), https://www.jonesday.com/en/practices/experience/2009/08/rj-reynolds-prevails-in-jury-trial-brought-by-smoker39s-widower. Plaintiffs also failed to prevail in earlier cases seeking to use heat-not-burn projects as reasonable alternative designs for cigarettes. *See, e.g.*, Brown v. R.J. Reynolds Tobacco Co., 852 F. Supp. 8, 10 (E.D. La. 1994), *aff'd*, 52 F.3d 524 (5th Cir. 1995); Neri v. R.J. Reynolds Tobacco Co., No. 98-CV-371, 2000 WL 33911224, at *13 (N.D.N.Y. Sept. 28, 2000); Tompkins v. R.J. Reynolds Tobacco Co., 92 F. Supp. 2d 70, 85 (N.D.N.Y. 2000).

139 Memorandum re Motives and Incentives in Cigarette Smoking, William L. Dunn, Jr., Phillip Morris Research Ctr. 5 (July 1, 1972), https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=tggp0125. This memo was uncovered through discovery in the *Cipollone* case. Myron Levin, *Key Smoker Death Trial Draws to Close; Jury Is First to See Company Documents*, L.A. Times (June 1, 1988), https://www.latimes.com/archives/la-xpm-1988-06-01-mn-3676-story.html.

companies as well.[140] They all recognized, long before they admitted it publicly, that cigarettes are, at their core, drug-delivery devices (as the FDA concluded in the 1990s).

A leading torts treatise, Dobbs' Law of Torts, suggests that this "functional" approach to what counts as a reasonable alternative design makes sense.[141] It notes that if you narrowly define "asbestos [as] asbestos[,]" then there is, by definition, no reasonable alternative to be used as a comparison.[142] But if you instead define the relevant product as "insulating material," "you can find very good substitutes that can easily count as reasonable alternative designs"—and that are much safer.[143] Dobbs suggests that although finding the precise boundaries of this concept may prove difficult, "[c]ourts should be permitted to characterize the product broadly or, much the same thing, to consider substitute products that have similar functions or those that would be accepted by consumers as substitutes."[144] The Third Restatement also endorses this functional approach, suggesting that "other products already available on the market may serve the same or very similar function at lower risk and at comparable cost" as the defendant's product, and "[s]uch products may serve as reasonable alternatives to the product in question."[145]

If the question then becomes *what is a reasonable substitute nicotine delivery device for a cigarette?*, the early e-cigarettes may fit the bill.[146] In at least one case, *Smith v. Brown & Williamson Tobacco Corp.*, the court agreed that the early e-cigarettes in BAT's Project Ariel could be presented to the jury as evidence of "specific design choices" made by the company that rendered conventional cigarettes "unreasonably dangerous."[147] This shows

140 *See generally Tobacco Company Quotes: Nicotine as a Drug*, CAMPAIGN FOR TOBACCO-FREE KIDS (1999), http://tobaccopolicycenter.org/wp-content/uploads/2017/11/161.pdf.

141 DOBBS ET AL., *supra* note 126, § 459.

142 *Id.*

143 *Id.*

144 *Id.*

145 RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (AM. LAW INST. 1998).

146 NRTs like gums and lozenges could also be presented as potential alternatives. These products, though, are not really intended to be substitute nicotine delivery devices; rather, they are a mode of treatment for nicotine addiction. If the "product" is defined as a recreational nicotine delivery device, then NRTs would be outside of that definition, but e-cigarettes would be within it. E-cigarettes have the added advantage of replicating the hand-to-mouth action of smoking, which on its own has been shown to somewhat reduce the urge to smoke. Martijn Van Heel et al., *The Importance of Conditioned Stimuli in Cigarette and E-Cigarette Craving Reduction by E-Cigarettes*, INT'L J. ENVTL. RES. & PUB. HEALTH, Feb. 2017, at 14 (2017).

147 Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748, 796 (Mo. Ct. App. 2008). Twerski and Henderson note that "Missouri is an interesting example of a state

a willingness by at least one court to think of the early, developmental e-cigarettes as potentially "safer cigarette[s]," which is likely how the industry conceptualized them.[148] And the jury, which ruled in favor of plaintiff, was apparently convinced by this characterization as well.[149]

Highly relevant to this question is the issue raised in the Massachusetts case *Evans v. Lorillard* in 2013.[150] In this case, the state's highest court asked, *who is the consumer for whom the "reasonableness" of the alternative design question is analyzed?* The consumer considering whether or not to smoke his or her first cigarette, or the already-addicted smoker?[151] As the court noted, if the answer is the latter, then the more addictive a product is, the more it will be immunized from liability, because only a similarly-addictive product could be a reasonable alternative.[152] Analyzing the issue that way, the court concluded, "would eliminate any incentive for cigarette manufacturers to make safer perhaps the most dangerous product lawfully sold in the market through reasonable alternative designs."[153] Instead, it wrote that "we must determine whether the design alternative unduly interfered with the performance of

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that, while disavowing reliance on the *Products Liability Restatement*, nevertheless requires plaintiffs to establish a reasonable alternative design in order to make out a prima facie case of design defect." Twerski & Henderson, *supra* note 128, at 1077.

148 *See Smith*, 275 S.W.3d at 821. Though the *Smith* court concluded that the plaintiffs had presented sufficient evidence to support a plaintiff's verdict on the design defect claim, it incongruously proceeded to say that the plaintiffs could not make out a negligent design claim. *Id.* at 748. The court wrote:

> [T]he conduct at issue for this claim is B & W designing cigarettes containing harmful constituents and failing to use ordinary care to design a safer cigarette. Viewed in the light most favorable to submissibility, the evidence establishes that B & W stopped trying to develop a safer cigarette for fear it would hurt the sales of its normal "non-safe" cigarette. Further, it attempted to persuade other tobacco companies not to pursue a safer cigarette for similar reasons. The implication is that B & W was more concerned with profits than with the development of a safe cigarette. Nonetheless, [the plaintiff's witnesses] testified that it is not possible to make a safe cigarette. The three brands currently on the market that may be characterized as "safer" have not been proven safer and still bear the Surgeon General's warning. This is not clear and convincing evidence that B & W's conduct was tantamount to intentional wrongdoing.

Id. at 821.

149 *Id.* at 759. A search by the author found that this is the only reported products liability case in which Project Ariel is mentioned.

150 Evans v. Lorillard Tobacco Co., 990 N.E.2d 997, 1018 (Mass. 2013).

151 *Id.* at 1018.

152 *Id.* at 1019–20. As the court noted, apart from cigarettes, there are few if any other consumer products for which this question would ever come up. *Id.*

153 *Id.* at 1019.

the product from the perspective of a rational, informed consumer, whose freedom of choice is not substantially impaired by addiction."[154]

This is important because most early e-cigarette products that the tobacco industry explored likely would not have delivered nicotine as effectively as cigarettes and thus would not have been as "satisfying" to current smokers. But if the product is reconceived as a recreational nicotine delivery device and viewed from the perspective of a nicotine-naïve potential consumer, an e-cigarette that is less toxic and less powerfully addictive might well be considered a *better* alternative. Approaching the issue in this way would undermine the industry's common talking point that any proposed alternative must have "large acceptance by a vast majority of the people who smoke."[155] The *Evans* court argues that the industry has it backwards; what is relevant is not what *current* smokers would view as an alternative, but what *potential* smokers would.

The approach taken by the *Evans* court has not been widely embraced beyond Massachusetts, and it stands in contrast to the view taken in the *Adamo* case discussed above and many others. But when combined with the "functional" approach to alternative designs endorsed by the Restatement, it does suggest a pathway, viable in at least some jurisdictions, for arguing that a proposed alternative product need not be *as* addictive as a conventional cigarette to be a reasonable alternative design.

C. *Public Policy Challenges*

Despite the glimmer of hope presented by cases like *Smith* and *Evans*, establishing that e-cigarettes present a reasonable alternative design for cigarettes is likely to be difficult in the vast majority of cases.[156] Even if a jury were inclined to accept such an argument (which may run contrary to jurors' general understanding of what a cigarette is), courts may reject such

154 *Id.* at 1019–20.

155 K. Michael Cummings et al., *Consumer Acceptable Risk: How Cigarette Companies Have Responded to Accusations That Their Products Are Defective*, 15 TOBACCO CONTROL (SUPP. IV) iv84, iv85, iv88 (2006) (quoting industry argument to jury and noting that similar argument was made in every case the authors reviewed).

156 *Smith* is not the only case in which a proposed "alternative design" for cigarettes has reached the jury. *See, e.g.*, Miele v. Am. Tobacco Co., 770 N.Y.S.2d 386, 392 (N.Y. App. Div. 2003) ("[Plaintiff's evidence] that the tobacco companies opted not to develop, pursue, or exploit available technologies to reduce the toxins in cigarettes which cause disease[] sufficed to raise an issue of fact as to whether the foreseeable risk of harm posed by cigarettes could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer respondents."); Haglund v. Philip Morris, Inc., No. 012367C, 2009 WL 3839004, at *9-10 (Mass. Super. Ct. Oct. 20, 2009) (low-nicotine cigarette as proposed alternative product).

suits on the grounds that such determinations are better left to the political branches of government. Put differently, a court or jury's determination that e-cigarettes are a safer alternative design for cigarettes that the tobacco companies should have sold instead is a different way of saying that *all* conventional cigarettes are defectively designed.[157] This is a conclusion with obviously significant economic and political implications that many courts are likely to shy away from.[158]

Courts' reluctance to impugn all cigarettes as defectively designed relates to the torts concept of "category liability," that is, whether an entire category of products can be considered to have been defectively designed. Twerski and Henderson, who are opposed to the concept of category liability, write:

> American courts have never imposed category liability, mainly because they intuitively (and correctly) understand that it would constitute an abuse of judicial power to decide which broad categories of products should not be distributed at all. Such sweeping regulation, courts have concluded, should be left to legislatures to undertake.[159]

Twerski and Henderson, however, explain that the Third Restatement rejects category liability *because it insists on evidence of a reasonable alternative design*.[160] If

157 *Cf.* Clinton v. Brown & Williamson Holdings, Inc., 498 F. Supp. 2d 639, 648 (S.D.N.Y. 2007) ("A state law requirement that allows only cigarettes with no tar or no nicotine to be sold is a virtual ban on cigarettes, just as a requirement that allows only 'alcohol-free' liquor to be sold would be a ban on whiskey."). Note, though, that holding that a product is defective is not the same as a ban. *See infra* note 160. Additionally, if the product category is conceptualized as a nicotine delivery device, then the better analogy would be to prohibiting the most toxic form of whiskey, not to banning alcohol.

158 *See, e.g.*, Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1159 (E.D. Pa. 1987) ("Whether products should be banned or whether absolute liability should be imposed for their use are determinations more appropriately made by the legislative branch of government.").

159 Twerski & Henderson, *supra* note 128, at 1069 (noting that "alcoholic beverages must, almost by definition, contain alcohol to be attractive to those who desire to consume such products. Removing the alcohol does not merely make such beverages safer for those who [abuse them], it also destroys their utility for everyone, including the significant majority who do not abuse them"). The cigarette/e-cigarette example could be distinguished from this alcohol example. The "utility" of cigarette smoking, such as it is, comes primarily from the nicotine delivery, which e-cigarettes also provide.

160 *Id.* at 1070. Other torts scholars are not opposed to the concept of category liability. *See* Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 Tenn. L. Rev. 1429, 1436 (1994) ("[P]roduct category liability and product abolition are two very different concepts. A product even with high dangers and no social utility will continue to exist as long as it turns a profit; strict liability exists simply to make sure that the profit is a true one and

there is a safer alternative design available for the same product, then, *ipso facto*, category liability is not being imposed. As such, the question becomes indistinguishable from the underlying issue of whether e-cigarettes are a reasonable alternative design for cigarettes or a different product altogether. Nonetheless, it seems likely the desire to avoid imposing what may look like a form of category liability may influence courts' conclusions about that underlying question.

not one created by exempting manufacturers from their responsibilities").

IV. The Intersection of Products Liability Litigation and Endgame Efforts

The discussion in Part III suggests that successfully establishing in court that e-cigarettes (or early versions thereof) present a reasonable alternative design for cigarettes may be possible in some cases, but doing so—much less prevailing on the entire lawsuit—will remain challenging. As briefly discussed in this section, though, pairing the lawsuit with a strategic public relations effort could help educate the public and build momentum for public policies designed to phase out the sale of combustible cigarettes.

As noted above, in any products liability lawsuit, the plaintiffs would have to show that an alternative was available *at the time the allegedly defective cigarettes were being sold* (which would vary by case), not at the present time.[161] Nonetheless, it is likely that the modern commercial success of e-cigarettes will shape the way courts and jurors receive and evaluate this historical evidence. The idea that a nicotine vaporizer could be a realistic alternative to cigarettes likely seemed wildly implausible to the average person fifteen or twenty years ago, when many of the third wave lawsuits were filed. It does not seem nearly so far-fetched now, in a world where leading Wall Street analysts have predicted that e-cigarette sales will eventually overtake and function as a substitute for cigarette sales.[162]

161 This is because for a products liability (or other torts) suit to proceed, there must be an injury. The death and disease from cigarette use often does not manifest for years. Thus, the relevant time period to examine is when the injury-causing cigarettes were consumed, not the present day. Suits trying to accelerate the time point at which a plaintiff can file a lawsuit by noting that current cigarette use increases the *risk* of future harms have, for the most part, been unsuccessful. *See, e.g.*, Caronia v. Philip Morris USA, Inc., 5 N.E.3d. 11, 14, 22 (N.Y. 2013) (rejecting lawsuit seeking "medical monitoring" for current smokers); *In re* Tobacco Litig. (Med. Monitoring Cases), 215 W. Va. 476 (W. Va. 2004) (upholding jury verdict denying recovery for medical monitoring and noting the "extremely high bar" plaintiffs face in such cases); Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 184 (Or. 2008) (similarly rejecting medical monitoring claim, writing that "the fact that a defendant's negligence poses a threat of future physical harm is not sufficient, standing alone, to constitute an actionable injury"). *But see* Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891 (Mass. 2009) (recognizing cause of action for medical monitoring under Massachusetts law).

162 Investment analyst Bonnie Herzog said in 2013, "[w]e have increased conviction that consumption of e-cigs could surpass consumption of conventional cigs within the next decade." Dan Mangan, *E-Cigarette Sales Are Smoking Hot, Set to Hit $1.7 billion*, CNBC (Aug. 28, 2013) https://www.cnbc.com/id/100991511. She has since retreated from this position but still believes the e-cigarette market will continue to grow and that it will account for approximately 30% of all nicotine sales by 2025 (driving continued overall growth of nicotine sales, despite further declines in cigarette use). Bonnie Herzog, *Wall Street Tobacco Industry Update*, Nat'l Ass'n Tobacco Outlets 25 (Feb. 11, 2019), http://

Furthermore, now—again in contrast to fifteen or twenty years ago—*even the cigarette companies themselves* are arguing that e-cigarettes are the ideal substitute for cigarettes, that they are less harmful, and that they should eventually replace cigarettes. Though these industry statements may be inadmissible in court (because they relate to the present context, not the time period that would be relevant in a given lawsuit), they also undoubtedly shape the litigation context. And, if the industry continues to argue in court that e-cigarettes are not feasible alternatives to cigarettes, it could be confronted out of court (e.g., in the press) with the hypocrisy of arguing the exact opposite in its advertising.

If a "fourth wave" of tobacco litigation based on reasonable alternative design arguments is attempted, it should be coupled with such an out-of-court public communications campaign. Such a campaign could press the industry to live up to its disingenuous "smoke-free future" rhetoric by highlighting that:

- the cigarette companies could have sold e-cigarettes decades ago, but deliberately chose not to, instead taking extreme measures to hide their research;[163]
- the companies only reluctantly started selling e-cigarettes when forced to do so by competition from independent companies;[164]
- the companies now assert that e-cigarettes are less harmful than cigarettes and a satisfying alternative product for current smokers, *but still*—despite their "smoke-free future" rhetoric—spend the bulk of their advertising dollars on combustible cigarettes and resist nearly all cigarette-focused regulation.[165]

Though the industry is likely to be unmoved by such a campaign, it could refocus legislators' and tobacco control advocates' attention on

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www.natocentral.org/uploads/Wall_Street_Update_Slide_Deck_February_2019.pdf.

163 *See supra* Sections II(A)–II(C).

164 *See supra* Section II(D).

165 *Is Reynolds American a Good Corporate Citizen? History and Recent Actions Say No*, CAMPAIGN FOR TOBACCO-FREE KIDS (Mar. 3, 2017), https://www.tobaccofreekids.org/assets/factsheets/0124.pdf (summarizing evidence that "the company remains focused on selling more cigarettes, despite claiming a commitment to reducing the harms of tobacco"); *see, e.g.*, Becky Freeman, *Is Big Tobacco Abandoning Smokes for E-cigarettes?*, CONVERSATION (July 8, 2014), https://theconversation.com/is-big-tobacco-abandoning-smokes-for-e-cigarettes-28328 ("Since acquiring e-cigarette brands, not one tobacco company has stepped out of the way of tobacco control policy makers working to reduce smoking."). For detailed information on the tobacco companies' marketing and lobbying campaigns, see generally *Tobacco Companies*, TOBACCO TACTICS, https://tobaccotactics.org/topics/tobacco-companies/ (last visited June 23, 2020).

conventional cigarettes, which (by far) remain the leading cause of tobacco-related disease and death.[166] Without discounting the very real harms caused by the surge in youth e-cigarette use, a renewed focus on the role of combustible tobacco products has the potential to break through the harm reduction debate that has consumed and divided the tobacco control community.[167]

As Richard Daynard suggested in 2009, communities around the country could (and, generally, have the legal authority to) prohibit cigarette sales while allowing for the sale of potentially less harmful products, like e-cigarettes.[168] This is the legislative mechanism for forcing the industry to live up to its own rhetoric and for communities to express—as some already have—that they have had enough of the entirely preventable disease and death that cigarette use has caused.[169]

One community, or even one state, prohibiting the sale of cigarettes

166 Office on Smoking & Health, U.S. Dep't of Health & Human Servs., The Health Consequences Of Smoking—50 Years of Progress: A Report of the Surgeon General 7 (2014) [hereinafter 2014 Surgeon General's Report] https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf (concluding that "[t]he burden of death and disease from tobacco use in the United States is overwhelmingly caused by cigarettes and other combusted tobacco products[and that] rapid elimination of their use will dramatically reduce this burden"); Michael C. Fiore et al., *Smoke, the Chief Killer: Strategies for Targeting Combustible Tobacco Use*, 370 New Eng. J. Med. 297, 297–99 (2014).

167 Notably, fostering such division has been a deliberate goal of the tobacco industry. Patricia A. McDaniel et al., *Philip Morris's Project Sunrise: Weakening Tobacco Control by Working With It*, 15 Tobacco Control 215, 215 (2006) (reviewing internal Philip Morris documents and detailing the company's "explicit divide-and-conquer strategy against the tobacco control movement, proposing the establishment of relationships with PM-identified 'moderate' tobacco control individuals and organisations and the marginalisation of others").

168 *See* Daynard, *supra* note 7, at 2. Because of state-level preemption and limitations on home rule authority, the ability of local jurisdictions to prohibit cigarette sales at the local level must by analyzed on a state-by-state basis.

169 *See* Patricia A. McDaniel & Ruth E. Malone, *Tobacco Industry and Public Health Responses to State and Local Efforts to End Tobacco Sales From 1969-2020*, PLOS One, May 22, 2020, at 1 (reviewing more than 20 local efforts around the U.S. to end or severely restrict cigarettes sales). Full consideration of the merits of phasing out cigarette sales is beyond the scope of this article. For a thoughtful consideration of the potential benefits and challenges, see Smith & Malone, *supra* note 9, at 7. Importantly, phasing out cigarette sales could help to address the significant and persistent smoking-related disparities that exist along lines of "educational attainment, poverty status, age, health insurance status, race/ethnicity, and geography." Office on Smoking & Health, U.S. Dep't Of Health & Human Servs., Smoking Cessation: A Report of the Surgeon General 7 (2020). One challenge, though, is that these disparities might be further exacerbated if cigarettes sales are only phased out in high socioeconomic status communities such as Beverly Hills.

would not make them unavailable—only more difficult to access.[170] But if cigarettes were harder to come by, the "harm reduction" potential of e-cigarettes would be far more likely realized. As summarized in the 2014 Surgeon General's Report: "[t]he impact of . . . noncombustible [e-cigarettes] on population health is much more likely to be beneficial in an environment where the appeal, accessibility, promotion, and use of cigarettes and other combusted tobacco products are being rapidly reduced, especially among youth and young adults."[171] Accordingly, the 2014 Surgeon General concluded that "greater restrictions on sales, particularly at the local level, including bans on entire categories of tobacco products, could significantly alter the strategic environment for tobacco control."[172] Put more directly, in Richard Daynard's words, such measures could "save[] millions of lives."[173]

170 To avoid replaying the failed punitive approach of the War on Drugs, any such laws should prohibit the commercial sale of cigarettes, not their possession or use. Daynard, *supra* note 7, at 3 ("[T]he US 'War on Drugs' has earned a bad reputation by targeting users for draconian sanctions; the phase-out, by contrast, should be of the commercial sale of cigarettes, and should not punish private possession or consumption.").

171 2014 Surgeon General's Report, *supra* note 166, at 859.

172 *Id.*

173 Daynard, *supra* note 7, at 2.

Conclusion

Professor Daynard has pointed out numerous benefits that can result—and have resulted—from tobacco litigation, even in the absence of a final judgment for the plaintiffs. These include uncovering previously hidden evidence of industry misconduct (which has reshaped the public's image of the industry) and pressuring the industry into "the first stirrings of responsible behavior."[174] But, as noted at the outset, litigation poses dangers as well. Litigation losses can establish troubling legal precedents that influence future public heath cases, even outside the context of tobacco.[175] And perhaps the most unfortunate legacy of tobacco litigation has been the way other health-harming industries have learned from the tobacco industry to engage in the same "scorched earth" litigation tactics and to manufacture doubt even where none exists.[176]

The conclusion of this article is, therefore, a qualified one: new avenues for litigation should be thoroughly explored, but they should be approached strategically and with caution. The available evidence suggests that the major tobacco companies could have developed e-cigarette-like products decades ago, even potentially incorporating the nicotine salts that drove JUUL's recent success. But they chose not to. To protect their bottom lines, they suppressed products that could have demonstrated far less deadly ways of delivering nicotine. Whether this evidence could be used to establish the availability of a reasonable alternative design under products liability law is unclear, but—with the tobacco companies now positioning e-cigarettes as a safer alternative product for cigarette smokers—there may be a more viable case to make than ever before.

Regardless of the decisions made in terms of litigation strategy, it is time to demand that the industry live up to its rhetoric. It cannot credibly claim to be helping current smokers transition to less harmful products so long as it is still aggressively promoting its cigarette brands and fighting against smoking-related regulations. We need a movement to build support for "endgame" policies that will phase out the sale of cigarettes—the deadliest consumer product ever created. Aided by the ever-growing historical record of the industry's misdeeds, litigation may help spur along that process, but it will also require political organizing, community engagement, public

174 Daynard, *supra* note 6, at 1.

175 *See* Berman, *supra* note 3.

176 *See generally* David Michaels, Doubt Is Their Product: How Industry's Assault on Science Threatens Your Health (2008); Naomi Oreskes & Erik M. Conway, Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Climate Change (2011).

education, and consensus building. Though it will undoubtedly be difficult, an incremental legislative approach starting at the local level provides the best route to achieving Professor Daynard's goal of doing what was once unthinkable—and, by so doing, save millions of lives.

BEYOND TRANSPARENCY AND ACCOUNTABILITY: THREE ADDITIONAL FEATURES ALGORITHM DESIGNERS SHOULD BUILD INTO INTELLIGENT PLATFORMS

*By Peter K. Yu**

 Regents Professor of Law and Communication, and Director, Center for Law and Intellectual Property, Texas A&M University. This article was commissioned for the 2020 *Northeastern University Law Review* Symposium entitled "Eyes on Me: Innovation and Technology in Contemporary Times" at Northeastern University School of Law, which was canceled due to the COVID-19 pandemic. The author would like to thank the editors of the *Review*, in particular Amy Hahn and Sarah Odion Esene, for their hard work in preparing for the Symposium and their professionalism in handling the challenging situation. He is also grateful to Ari Waldman for valuable comments and Somer Brown, Mark Hochberg, and Rohan Vakil for helpful editorial suggestions. The article draws on research the author conducted for earlier or forthcoming articles in the *Alabama Law Review* and the *Florida Law Review*.

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Editors' Note

The following article is written by Professor Peter K. Yu, an intended panelist for *Northeastern University Law Review*'s March 2020 Symposium, "Eyes on Me: Innovation and Technology in Contemporary Times," which was unfortunately canceled due to the COVID-19 pandemic. The Symposium was intended to host discussions about the impact of innovation and technology on contemporary legal society; following the event, the editors of the *Law Review* intended to publish three related Symposium pieces. This article, a Symposium piece that has been lengthened for clarity, was written based on Professor Yu's intended remarks at his panel on innovation.

INTRODUCTION

In the age of artificial intelligence (AI), innovative businesses are eager to deploy intelligent platforms to detect and recognize patterns, predict customer choices, and shape user preferences.[1] Yet such deployment has brought along the widely documented problems of automated systems, including coding errors, corrupt data, algorithmic biases, accountability deficits, and dehumanizing tendencies.[2] In response to these problems, policymakers, commentators, and consumer advocates have increasingly called on businesses seeking to ride the artificial intelligence wave to build transparency and accountability into algorithmic designs.[3]

While I am sympathetic to these calls for action and appreciate

1 *See* U.S. Pub. Policy Council, Ass'n for Computing Machinery, *Statement on Algorithmic Transparency and Accountability* 1, ASS'N FOR COMPUTING MACHINERY (Jan. 12, 2017), https://www.acm.org/binaries/content/assets/public-policy/2017_usacm_statement_algorithms.pdf [hereinafter *ACM Statement*] ("Computer algorithms are [now] widely employed throughout our economy and society to make decisions that have far-reaching impacts, including their applications for education, access to credit, healthcare, and employment."); VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 9 (2017) ("Digital tracking and decision-making systems have become routine in policing, political forecasting, marketing, credit reporting, criminal sentencing, business management, finance, and the administration of public programs."); Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 56 (2019) [hereinafter Katyal, *Private Accountability*] ("Today, algorithms determine the optimal way to produce and ship goods, the prices we pay for those goods, the money we can borrow, the people who teach our children, and the books and articles we read—reducing each activity to an actuarial risk or score."); Peter K. Yu, *The Algorithmic Divide and Equality in the Age of Artificial Intelligence*, 72 FLA. L. REV. 331, 332–33 (2020) [hereinafter Yu, *Algorithmic Divide*] ("In the age of artificial intelligence . . . , highly sophisticated algorithms have been deployed to provide analysis, detect patterns, optimize solutions, accelerate operations, facilitate self-learning, minimize human errors and biases, and foster improvements in technological products and services.").

2 *See* ANDREW MCAFEE & ERIK BRYNJOLFSSON, MACHINE, PLATFORM, CROWD: HARNESSING OUR DIGITAL FUTURE 53 (2017) (noting the "biases and bugs" in intelligent machines); Dan L. Burk, *Algorithmic Fair Use*, 86 U. CHI. L. REV. 283, 285 (2019) (listing "ersatz objectivity, diminished decisional transparency, and design biases" among the inherent pitfalls in reliance on algorithmic regulation); Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STAN. TECH. L. REV. 242, 275 (2019) ("As AI adjudicators play a larger role in the legal system, human participation will change and, in some respects, decrease. Those developments raise the prospect of alienation . . . ."); Peter K. Yu, *Can Algorithms Promote Fair Use?*, 14 FIU L. REV. 329, 335 (2020) [hereinafter Yu, *Fair Use*] (noting "the biases, bugs, and other documented problems now found in automated systems"); Yu, *Algorithmic Divide*, *supra* note 1, at 354–61 (discussing algorithmic discrimination and distortion).

3 *See infra* text accompanying notes 30–39.

the benefits and urgency of building transparency and accountability into algorithmic designs, this article highlights the complications the growing use of artificial intelligence and intelligent platforms has brought to this area. Drawing inspiration from the title "Eyes on Innovation" of my intended panel in the 2020 *Northeastern University Law Review* Symposium,[4] this article argues that owners of intelligent platforms should pay greater attention to three I's: inclusivity, intervenability, and interoperability.

Part I of this article sets the stage with a brief background on the black box designs that have now dominated intelligent platforms. Part II explains why the I in AI has greatly complicated the ongoing efforts to build transparency and accountability into algorithmic designs. Part III identifies three additional I's that owners of intelligent platforms should build into these designs: inclusivity, intervenability, and interoperability. These in-built design features will achieve win-win outcomes that help innovative businesses to be both socially responsible and commercially successful.

4 The canceled 2020 symposium was titled "Eyes on Me: Innovation and Technology in Contemporary Times." *Eyes on Me: Innovation and Technology in Contemporary Times*, Ne. U. L. Rev. (Mar. 21, 2020), http://nulawreview.org/2020-symposium.

I. THE DAMN BLACK BOX

In the age of artificial intelligence, algorithms and machine learning drive the operation of online platforms. Although the term "algorithms" has multiple definitions, ranging from arithmetic methods to computer-based instructions,[5] most discussions in the artificial intelligence context broadly define the term to cover those "self-contained step-by-step set[s] of operations that computers and other 'smart' devices carry out to perform calculation, data processing, and automated reasoning tasks."[6] Whether we

5 As Rob Kitchin observed:

> [Shintaro] Miyazaki traces the term "algorithm" to twelfth-century Spain when the scripts of the Arabian mathematician Muḥammad ibn Mūsā al-Khwārizmī were translated into Latin. These scripts describe methods of addition, subtraction, multiplication and division using numbers. Thereafter, "algorism" meant "the specific step-by-step method of performing written elementary arithmetic" and "came to describe any method of systematic or automatic calculation." By the mid-twentieth century and the development of scientific computation and early high level programming languages, such as Algol 58 and its derivatives (short for ALGOrithmic Language), an algorithm was understood to be a set of defined steps that if followed in the correct order will computationally process input (instructions and/or data) to produce a desired outcome.
>
> From a computational and programming perspective an "Algorithm = Logic + Control"; where the logic is the problem domain-specific component and specifies the abstract formulation and expression of a solution (what is to be done) and the control component is the problem-solving strategy and the instructions for processing the logic under different scenarios (how it should be done). The efficiency of an algorithm can be enhanced by either refining the logic component or by improving the control over its use, including altering data structures (input) to improve efficiency. As reasoned logic, the formulation of an algorithm is, in theory at least, independent of programming languages and the machines that execute them; "it has an autonomous existence independent of 'implementation details.'"

Rob Kitchin, *Thinking Critically About and Researching Algorithms*, 20 INFO. COMM. & SOC'Y 14, 16–17 (2017) (citations omitted); *see also* CHRISTOPHER STEINER, AUTOMATE THIS: HOW ALGORITHMS CAME TO RULE OUR WORLD 53–74 (2012) (providing a brief history of man and algorithms).

6 As the U.S. Public Policy Council of the Association for Computing Machinery defined:

> An algorithm is a self-contained step-by-step set of operations that computers and other "smart" devices carry out to perform calculation, data processing, and automated reasoning tasks. Increasingly, algorithms implement institutional decision-making based on analytics, which involves the discovery, interpretation, and communication of meaningful patterns in data. Especially valuable in areas rich with

notice them or not, algorithms are ubiquitous and have far-reaching impacts on our daily lives. As Pedro Domingos observed in the opening of his best-selling book, *The Master Algorithm*:

> You may not know it, but machine learning is all around you. When you type a query into a search engine, it's how the engine figures out which results to show you (and which ads, as well). When you read your e-mail, you don't see most of the spam, because machine learning filtered it out. Go to Amazon.com to buy a book or Netflix to watch a video, and a machine-learning system helpfully recommends some you might like. Facebook uses machine learning to decide which updates to show you, and Twitter does the same for tweets. Whenever you use a computer, chances are machine learning is involved somewhere.[7]

Thus far, platform owners have carefully protected information concerning algorithmic designs and operations, for reasons such as privacy protection, intellectual property, and platform security and integrity.[8] Frustrated by the "black box" designs that have now dominated intelligent platforms, commentators have widely condemned the continuous lack of algorithmic disclosure.[9] In his widely-cited book, *The Black Box Society*, Frank Pasquale described a black box system as one "whose workings are mysterious; we can observe its inputs and outputs, but we cannot tell how one becomes the other."[10] To him, these "[b]lack boxes embody a paradox

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> recorded information, analytics relies on the simultaneous application of statistics, computer programming, and operations research to quantify performance.

ACM Statement, *supra* note 1, at 1. For discussions of the transformation provided by the deployment of algorithms, see generally Pedro Domingos, The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World (2015); Steiner, *supra* note 5.

7 Domingos, *supra* note 6, at xi.

8 *See* discussion *infra* text accompanying notes 100–102.

9 *See* Domingos, *supra* note 6, at xvi ("When a new technology is as pervasive and game changing as machine learning, it's not wise to let it remain a black box."); Lee Rainie & Janna Anderson, Code-Dependent: Pros and Cons of the Algorithm Age 19 (2017), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2017/02/PI_2017.02.08_Algorithms_FINAL.pdf ("There is a larger problem with the increase of algorithm-based outcomes beyond the risk of error or discrimination – the increasing opacity of decision-making and the growing lack of human accountability." (quoting Marc Rotenberg, Exec. Dir., Elec. Privacy Info. Ctr.)). *See generally* Frank Pasquale, The Black Box Society: The Secret Algorithms That Control Money and Information (2015) (providing an excellent and comprehensive discussion of black box systems).

10 Pasquale, *supra* note 9, at 3. For Professor Pasquale, the term "black box" has a second meaning. That meaning focuses on the recording or tracking function, a function that

of the so-called information age: Data is becoming staggering in its breadth and depth, yet often the information most important to us is out of our reach, available only to insiders."[11] Likewise, Virginia Eubanks lamented the suffering of "being targeted by an algorithm: you get a sense of a pattern in the digital noise, an electronic eye turned toward *you*, but you can't put your finger on exactly what's amiss."[12]

As if the inscrutability of these black boxes were not disturbing enough, Kate Crawford and Ryan Calo highlighted their tendency to "disproportionately affect groups that are already disadvantaged by factors such as race, gender and socio-economic background."[13] Cathy O'Neil, who dubbed black box systems "weapons of math destruction," concurred: "[These systems] tend to punish the poor . . . because they are engineered to evaluate large numbers of people. They specialize in bulk, and they're cheap."[14] Even worse, "black box" designs "hid[e] us from the harms they inflict upon our neighbors near and far."[15]

Consider, for example, the following scenario, which has happened to many of us during the COVID-19 pandemic. When you encountered price surges on the platform on which you shopped for food and other basic necessities, you could not tell whether those surges were caused by supply and demand, a pricing algorithm, or other factors.[16] Likewise, when that

is often identified with "the [black boxes or] data-monitoring systems in planes, trains, and cars." *Id.*

11 *Id.* at 191.

12 EUBANKS, *supra* note 1, at 5.

13 Kate Crawford & Ryan Calo, *There Is a Blind Spot in AI Research*, NATURE (Oct. 13, 2016), https://www.nature.com/news/there-is-a-blind-spot-in-ai-research-1.20805; *see also* EUBANKS, *supra* note 1, at 12 ("Automated decision-making shatters the social safety net, criminalizes the poor, intensifies discrimination, and compromises our deepest national values."); ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE 28 (2018) ("Black box algorithms . . . discriminate against marginalized groups. Google shows ads for higher paying, more prestigious jobs to men and not to women, ads for arrest records show up more often when searching names associated with persons of color than other names, image searches for 'CEO' massively underrepresent women; and search autocomplete features send discriminatory messages, as when completing the search 'are transgender people' with 'going to hell.'" (footnotes omitted)). *See generally* SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018) (discussing how search engines promote racism and sexism).

14 CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 8 (2016) (noting that algorithm-driven automated systems "tend to punish the poor . . . because they are engineered to evaluate large numbers of people").

15 *Id.* at 200.

16 *See* Danielle Wiener-Bronner, *How Grocery Stores Restock Shelves in the Age of Coronavirus*, CNN BUSINESS (Mar. 20, 2020, 3:24 PM), https://www.cnn.com/2020/03/20/

platform informed you about a delay in delivery, you wondered whether the delay was the result of increased shopping orders or an algorithm that prioritized customers in high-spending neighborhoods.

As technology continues to improve and as platforms become more intelligent, online shopping will only become more complicated in the future. The next time you face a pandemic, the platform may automatically deliver food and other basic necessities to you based on your preferences and prior purchases and the behavior of other customers. As part of this delivery, the platform may also include hand sanitizers, household disinfectants, and toilet paper, even if you have not purchased them before. After all, the platform may be intelligent enough to notice the growing demand for those items in your area and therefore make a proactive decision to take care of the platform's repeat customers.

Since the mid-1990s, when the Internet entered the mainstream and online shopping became commonplace, governments introduced a wide array of legislation to protect consumers and their personal data.[17] Although the protection in the United States lagged behind what the European Union offered,[18] policymakers, legislators, and consumer advocates made efforts to ensure that the protection on this side of the Atlantic did not lag too far behind.[19] When the European Union introduced the General

business/panic-buying-how-stores-restock-coronavirus/index.html (reporting about panic shopping and hoarding in the early days of the COVID-19 pandemic).

17 *See generally* Waldman, *supra* note 13, at 80–85 (discussing the "notice and choice" regime for privacy protection); Symposium, *Data Protection Law and the European Union's Directive: The Challenge for the United States*, 80 Iowa L. Rev. 431 (1995) (providing an excellent collection of articles on data protection and the 1995 EU Data Protection Directive).

18 *See* Council Directive 95/46, art. 12, 1995 O.J. (L 281) 31, 42 (EC) (mandating EU-wide protection of personal data).

19 In response to the 1995 EU Directive and to enable EU-compliant data transfers, the United States negotiated with the European Union for the development of a "safe harbor" privacy framework. *See* Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. Cin. L. Rev. 569, 628–34 (2002) (discussing the EU-U.S. negotiation). This framework lasted for more than a decade until October 2015, when the Court of Justice of the European Union found it noncompliant with the Directive. *See* Case C-362/14, Maximillian Schrems v. Data Prot. Comm'r, 2015 EUR-Lex CELEX LEXIS 650 (Oct. 6, 2015) (Grand Chamber) (invalidating the Commission Decision 2000/520 that had found adequate the protection afforded by the safe harbor privacy principles and related frequently asked questions issued by the U.S. Department of Commerce). Since then, the U.S. Department of Commerce introduced the EU-U.S. Privacy Shield Framework, which was designed in conjunction with the European Commission to replace the old "safe harbor" privacy framework. *See* Int'l Trade Admin., U.S. Dep't of Commerce, *EU-U.S. and Swiss-U.S. Privacy Shield Frameworks*, Privacy Shield Framework, https://www.privacyshield.gov/servlet/

Data Protection Regulation (GDPR),[20] which took effect in May 2018, U.S. companies quickly scrambled to respond, fearing that their collection, storage, processing, and utilization of EU-originated data would violate the new regulation.[21]

In the artificial intelligence context, Recital 71 of the GDPR states that the automated processing of personal data "should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision."[22] Articles 13.2(f) and 14.2(g) further require data controllers to provide the data subject with information about "the existence of automated decision-making, including profiling, . . . and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject."[23] Although the nature and coverage of what commentators have called "the right to explanation" remain debatable,[24] the GDPR's emphasis on explainability shows its drafters' keen awareness of the complications

servlet.FileDownload?file=015t0000000QJdg (last visited July 11, 2020). In July 2020, the Court of Justice of the European Union once again invalidated the United States' privacy framework. *See* Case C-311/18, Facebook Ireland Ltd v. Maximillian Schrems, 2020 EUR-Lex CELEX LEXIS 559 (July 16, 2020) (Grand Chamber) (invalidating the Commission Implementing Decision 2016/1250 that had deemed the privacy shield framework to be adequate while leaving intact the Commission Decision 2010/87 on standard contractual clauses for the transfer of personal data to third-country processors). It remains to be seen what new framework the United States will institute.

20 Council Regulation 2016/679, art. 35(1), 2016 O.J. (L 119) 1.

21 *See* Sarah Jeong, *No One's Ready for GDPR*, VERGE (May 22, 2018, 3:28 PM), https://www.theverge.com/2018/5/22/17378688/gdpr-general-data-protection-regulation-eu (reporting that few companies were ready for full compliance with the GDPR); Steven Norton & Sara Castellanos, *Companies Scramble to Cope with New EU Privacy Rules*, CIO J. (Feb. 26, 2018, 6:14 PM), https://blogs.wsj.com/cio/2018/02/26/companies-scramble-to-cope-with-new-eu-privacy-rules/ (reporting the companies' intensive drive to comply with the GDPR).

22 Council Regulation 2016/679, *supra* note 20, recital 71.

23 *Id.* arts. 13.2(f), 14.2(g).

24 For discussions of the so-called right to explanation, see generally Isak Mendoza & Lee A. Bygrave, *The Right Not to Be Subject to Automated Decisions Based on Profiling*, *in* EU INTERNET LAW: REGULATION AND ENFORCEMENT 77 (Tatiani-Eleni Synodinou et al. eds., 2017); Lilian Edwards & Michael Veale, *Slave to the Algorithm: Why a "Right to an Explanation" Is Probably Not the Remedy You Are Looking for*, 16 DUKE L. & TECH. REV. 18 (2017); Margot E. Kaminski, *The Right to Explanation, Explained*, 34 BERKELEY TECH. L.J. 189 (2019); Andrew D. Selbst & Julia Powles, *Meaningful Information and the Right to Explanation*, 7 INT'L DATA PRIVACY L. 233 (2017); Bryce Goodman & Seth Flaxman, *European Union Regulations on Algorithmic Decision Making and a "Right to Explanation,"* AI MAG., Fall 2017, at 50.

brought about by the growing use of artificial intelligence and intelligent platforms.[25]

In the United States, the recent years have seen a growing volume of class action lawsuits targeting the unauthorized use of personal data in the artificial intelligence and machine learning contexts,[26] including the use of such data to train algorithms.[27] The Federal Trade Commission has also undertaken investigations or initiated lawsuits in cases involving artificial

25 The GDPR's right to explanation can be traced back to the 1995 EU Data Protection Directive. *See* Edwards & Veale, *supra* note 24, at 20 (noting that a remedy similar to the right to explanation "had existed in the EU Data Protection Directive . . . which preceded the GDPR" (footnote omitted)). Nevertheless, "commentators have now devoted greater energy and effort to understanding this emerging right, due in large part to the increasing need to explain how data are being collected and used in technological platforms that are heavily driven by algorithms." Yu, *Algorithmic Divide*, *supra* note 1, at 377.

26 *See, e.g.*, *In re* Google Assistant Privacy Litig., No. 19-CV-04286-BLF, 2020 WL 2219022 (N.D. Cal. May 6, 2020) (a class action lawsuit users of smart devices brought against Google for the unauthorized recording of conversations by its virtual assistant software and for further disclosure of such conversations); Davey Alba, *A.C.L.U. Accuses Clearview AI of Privacy 'Nightmare Scenario,'* N.Y. Times (June 3, 2020), https://www.nytimes.com/2020/05/28/technology/clearview-ai-privacy-lawsuit.html (reporting the American Civil Liberties Union's privacy lawsuit in Illinois against the facial recognition start-up Clearview AI for the unauthorized collection and use of personal photos found online and on social media); Brian Higgins, *Will "Leaky" Machine Learning Usher in a New Wave of Lawsuits?*, Artificial Intelligence Tech. & L. (Aug. 20, 2018), http://aitechnologylaw.com/2018/08/leaky-machine-learning-models-lawsuits/ (discussing the potential litigation involving the developers of customer-facing artificial intelligence systems that utilized flawed or "leaky" machine learning models).

27 As Amanda Levendowski explained:

> Good training data is crucial for creating accurate AI systems. The AI system tasked with identifying cats must be able [to] abstract out the right features, or heuristics, of a cat from training data. To do so, the training data must be well-selected by humans—training data infused with implicit bias can result in skewed datasets that fuel both false positives and false negatives. For example, a dataset that features only cats with tortoiseshell markings runs the risk that the AI system will "learn" that a mélange of black, orange, and cream markings [is] a heuristic for identifying a cat and mistakenly identify other creatures, like brindle-colored dogs, as cats. Similarly, a dataset that features only mainstream domestic cats could create an AI system that "learns" that cats have fluffy fur, pointy ears, and long tails and fail to identify cats of outlier breeds, like a Devon Rex, Scottish Fold, or Manx. And, in both examples, all manner of wildcats are excluded from the training data.

Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 Wash. L. Rev. 579, 592 (2018) (footnotes omitted).

intelligence and automated decision-making.[28] In addition, state government officials and legislators have stepped in to enhance consumer and privacy protections in this fast-changing technological environment when they find federal legislation inadequate.[29]

Apart from these efforts, legal commentators have advanced a plethora of promising proposals to address challenges posed by the growing use of artificial intelligence and intelligent platforms. In response to the problems precipitated by black box systems, Professor Pasquale outlined various legal strategies to provide checks against some of the systems' worst abuses while "mak[ing] the case for a new politics and economics of reputation, search, and finance, based on the ideal of an intelligible society."[30] In his new book, *Privacy's Blueprint*, Woodrow Hartzog also advanced "a design agenda for privacy law," explaining why "the design of popular technologies is critical to privacy, and the law should take it more seriously."[31] This agenda is built on the "privacy by design" approach the

28 As the director of the Bureau of Consumer Protection of the Federal Trade Commission (FTC) stated:

> Over the years, the FTC has brought many cases alleging violations of the laws we enforce involving AI and automated decision-making, and have investigated numerous companies in this space. For example, the Fair Credit Reporting Act . . . , enacted in 1970, and the Equal Credit Opportunity Act . . . , enacted in 1974, both address automated decision-making, and financial services companies have been applying these laws to machine-based credit underwriting models for decades. We also have used our FTC Act authority to prohibit unfair and deceptive practices to address consumer injury arising from the use of AI and automated decision-making.

Andrew Smith, *Using Artificial Intelligence and Algorithms*, FED. TRADE COMM'N (Apr. 8, 2020, 9:58 AM), https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.

29 *See, e.g.*, Rebecca Heilweil, *Illinois Says You Should Know If AI Is Grading Your Online Job Interviews*, VOX (Jan. 1, 2020, 9:50 AM), https://www.vox.com/recode/2020/1/1/21043000/artificial-intelligence-job-applications-illinios-video-interivew-act (reporting the adoption in Illinois of a first-of-its-kind law for regulating the use of certain artificial intelligence tools in video job interviews); Jon Porter, *Vermont Attorney General Is Suing Clearview AI Over Its Controversial Facial Recognition App*, VERGE (Mar. 11, 2020, 8:45 AM), https://www.theverge.com/2020/3/11/21174613/clearview-ai-sued-vermont-attorney-general-facial-recognition-app-database (reporting the State of Vermont Attorney General's litigation against Clearview AI for its unauthorized collection of Vermonters' photos and facial recognition data); *State Artificial Intelligence Policy*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/state-policy/ai/ (last visited July 11, 2020) (providing information about state artificial intelligence law and policy).

30 PASQUALE, *supra* note 9, at 15; *see also id.* at 140–218 (outlining the legal strategies to curb "black box" abuses and calling for the development of "an intelligible society").

31 WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF

Federal Trade Commission and other commentators have advocated for since the early 2010s.[32]

Finally, many commentators have underscored the need for greater transparency and accountability in the design and use of algorithms,[33] including the disclosure of technological choices made by algorithm designers.[34] As a group of legal and computer science researchers emphatically stated, "in order for a computer system to function in an accountable way—either while operating an important civic process or merely engaging in routine commerce—accountability must be part of the system's design from the start."[35] Some experts and professional associations have gone even further to call on businesses and organizations deploying automated systems to provide social impact statements[36] or be subject to

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New Technologies 7 (2018).

32 *See* Fed. Trade Comm'n, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers 22–34 (2012) (discussing "privacy by design" and the need for companies to "promote consumer privacy throughout their organizations and at every stage of the development of their products and services").

33 *See generally* Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. Pa. L. Rev. 633 (2017) (calling for the development of accountable algorithms); Frank Pasquale, *The Second Wave of Algorithmic Accountability*, L. & Pol. Econ. (Nov. 25, 2019), https://lpeblog.org/2019/11/25/the-second-wave-of-algorithmic-accountability/ (discussing the first and second waves of research on algorithmic accountability).

34 *See* Hannah Bloch-Wehba, *Access to Algorithms*, 88 Fordham L. Rev. 1265, 1295–1306 (2020) (calling for the use of the First Amendment, the Freedom of Information Act, and state equivalents to promote algorithmic transparency and accountability in the public sector); Danielle Keats Citron, *Open Code Governance*, 2008 U. Chi. Legal F. 355, 371–81 (discussing how open code governance would enhance the transparency, democratic legitimacy, and expert quality of automated decisions made by administrative agencies); Sonia K. Katyal, *The Paradox of Source Code Secrecy*, 104 Cornell L. Rev. 1183, 1250–79 (2019) (calling for the controlled disclosure of source code).

35 Kroll et al., *supra* note 33, at 640.

36 *See* Katyal, *Private Accountability*, *supra* note 1, at 111–17 (discussing human impact statements in the artificial intelligence context); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 Ga. L. Rev. 109, 168–93 (2017) (advancing a regulatory proposal based on the requirement of algorithmic impact statements); Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 87 Fordham L. Rev. 1085, 1133–38 (2018) (discussing algorithmic impact statements); Nicholas Diakopoulos et al., *Principles for Accountable Algorithms and a Social Impact Statement for Algorithms*, Fairness Accountability & Transparency in Machine Learning, https://www.fatml.org/resources/principles-for-accountable-algorithms (last visited June 13, 2020) (proposing that "algorithm creators develop a Social Impact Statement using the [listed] principles as a guiding structure").

periodic assessments[37] or algorithmic audits.[38] The calls for periodic analyses underscore the need for evaluations at different stages of the design and development process.[39]

37 *See* Council Regulation 2016/679, *supra* note 20, art. 35(1) ("Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data."); *see also* INST. ELEC. & ELEC. ENG'RS, ETHICALLY ALIGNED DESIGN: A VISION FOR PRIORITIZING HUMAN WELL-BEING WITH AUTONOMOUS AND INTELLIGENT SYSTEMS 98 (2017) ("A system to assess privacy impacts related to [autonomous and intelligent systems] needs to be developed, along with best practice recommendations, especially as automated decision systems spread into industries that are not traditionally data-rich."); Lorna McGregor et al., *International Human Rights Law as a Framework for Algorithmic Accountability*, 68 INT'L & COMP. L.Q. 309, 330 (2019) (discussing impact assessments in an algorithmic context); Diakopoulos et al., *supra* note 36 (calling for assessment "(at least) three times during the design and development process: design stage, pre-launch, and post-launch").

38 *See* Deven R. Desai & Joshua A. Kroll, *Trust but Verify: A Guide to Algorithms and the Law*, 31 HARV. J.L. & TECH. 1, 36–42 (2017) (discussing ways to test and evaluate algorithms); Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189, 190–91 (2017) [hereinafter Kim, *Auditing Algorithms*] (discussing the use of audits as a check against discrimination); Yu, *Algorithmic Divide*, *supra* note 1, at 380–82 (discussing the need for algorithmic audits); *Digital Decisions* 11, CTR. FOR DEMOCRACY & TECH., https://cdt.org/files/2018/09/Digital-Decisions-Library-Printer-Friendly-as-of-20180927.pdf ("While explanations can help individuals understand algorithmic decision making, audits are necessary for systemic and long-term detection of unfair outcomes. They also make it possible to fix problems when they arise.").

39 As Lorna McGregor, Daragh Murray, and Vivian Ng explained:

> During the design and development stage, impact assessments should evaluate how an algorithm is likely to work, ensure that it functions as intended and identify any problematic processes or assumptions. This provides an opportunity to modify the design of an algorithm at an early stage, to build in human rights compliance—including monitoring mechanisms—from the outset, or to halt development if human rights concerns cannot be addressed. Impact assessments should also be conducted at the deployment stage, in order to monitor effects during operation . . . .
>
> [T]his requires that, during design and development, the focus should not only be on testing but steps should also be taken to build in effective oversight and monitoring processes that will be able to identify and respond to human rights violations once the algorithm is deployed. This ability to respond to violations is key as [international human rights law] requires that problematic processes must be capable of being reconsidered, revised or adjusted.

McGregor et al., *supra* note 37, at 330; *see also* Diakopoulos et al., *supra* note 36.

II. Transparency and Accountability

Although transparency and accountability remain crucial to consumer and privacy protections—bringing to mind Justice Louis Brandeis's century-old adage that "[s]unlight is said to be the best of disinfectants"[40]—building these features into an environment involving artificial intelligence and machine learning has been difficult. To begin with, algorithmic transparency requires the disclosure of not only the algorithms involved (and the accompanying source code) but also training data and algorithmic outcomes.[41] The disclosure of these outcomes is particularly important because many of them will reenter the intelligent platforms as training or feedback data.[42] The continuous provision of these data will create a self-reinforcing feedback loop that amplifies the "garbage in, garbage out" problem, turning inaccurate, biased, or otherwise inappropriate inputs into faulty outputs.[43] As time passes, the biases generated through these loops

40 Louis D. Brandeis, *What Publicity Can Do*, Harper's Wkly., Dec. 20, 1913, at 10, *reprinted in* Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1st ed. 1914).

41 *See* O'Neil, *supra* note 14, at 229 ("We have to learn to interrogate our data collection process, not just our algorithms."); Anupam Chander, *The Racist Algorithm?*, 115 Mich. L. Rev. 1023, 1024–25 (2017) ("What we need . . . is a *transparency of inputs and results*, which allows us to see that the algorithm is generating discriminatory impact."); Kroll et al., *supra* note 33, at 641 ("[W]ithout full transparency—including source code, input data, and the full operating environment of the software—even the disclosure of audit logs showing what a program did while it was running provides no guarantee that the disclosed information actually reflects a computer system's behavior.").

42 Ajay Agrawal, Joshua Gans, and Avi Goldfarb distinguished between three types of data that enter artificial intelligence systems: "Input data is used to power [the machine] to produce predictions. Feedback data is used to improve it . . . . Training data is used at the beginning to train an algorithm, but once the prediction machine is running, it is not useful anymore." Ajay Agrawal et al., Prediction Machines: The Simple Economics of Artificial Intelligence 163 (2018).

43 *See* Sofia Grafanaki, *Autonomy Challenges in the Age of Big Data*, 27 Fordham Intell. Prop. Media & Ent. L.J. 803, 827 (2017) ("[A]lgorithmic self-reinforcing loops are now present across many spheres of our daily life (e.g., retail contexts, career contexts, credit decisions, insurance, Google search results, news feeds) . . . ."); Katyal, *Private Accountability*, *supra* note 1, at 69 ("Bad data . . . can perpetuate inequalities through machine learning, leading to a feedback loop that replicates existing forms of bias, potentially impacting minorities as a result."); Ronald Yu & Gabriele Spina Alì, *What's Inside the Black Box? AI Challenges for Lawyers and Researchers*, 19 Legal Info. Mgmt. 2, 4 (2019) ("[T]here is a strong risk that AI may reiterate and even amplify the biases and flaws in datasets, even when these are unknown to humans. In this sense, AI has a self-reinforcing nature, due to the fact that the machine's outputs will be used as data for future algorithmic operations."); *Digital Decisions*, *supra* note 38, at 8 ("Unreliable or unfair decisions that go unchallenged can contribute to bad feedback loops, which can make algorithms even more likely to marginalize vulnerable populations.").

will become much worse than the biases found in the original algorithmic designs or initial training data.

Worse still, it remains unclear if the full disclosure of all the information involved in the algorithmic designs and operations will allow users or consumer advocates to identify the problem. For example, such disclosure may result in an unmanageable deluge of information, making it very difficult, if not impossible, for the public to understand how data are used and how intelligent platforms generate outcomes.[44] Many commentators have also lamented how the public often finds source code and training data incomprehensible.[45] How many platform users or consumer advocates can actually understand algorithmic designs and operations by scrutinizing the source code and datasets involved? Even for those with the requisite skills to handle computer code and technical data, analyzing all the disclosed information will require considerable time, effort, resources, and energy.[46]

44 *See* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 180 (2019) ("In the era of information overload, . . . more comprehensive disclosures do not necessarily enhance understanding."); Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, 69 FLA. L. REV. 181, 194–96 (2017) (discussing the problem of having too much information about algorithmic designs and operations). *See generally* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2017) (discussing the limitations of mandatory disclosure requirements).

45 *See* RAINIE & ANDERSON, *supra* note 9, at 19 ("Only the programmers are in a position to know for sure what the algorithm does, and even they might not be clear about what's going on. In some cases there is no way to tell exactly why or how a decision by an algorithm is reached." (quoting Doc Searls, Dir., Project VRM, Berkman Klein Ctr. for Internet & Soc'y, Harv. Univ.)); Chander, *supra* note 41, at 1040 ("[T]he algorithm may be too complicated for many others to understand, or even if it is understandable, too demanding, timewise, to comprehend fully."); Kroll et al., *supra* note 33, at 638 ("The source code of computer systems is illegible to nonexperts. In fact, even experts often struggle to understand what software code will do, as inspecting source code is a very limited way of predicting how a computer program will behave."); Guido Noto La Diega, *Against the Dehumanisation of Decision-Making—Algorithmic Decisions at the Crossroads of Intellectual Property, Data Protection, and Freedom of Information*, 9 J. INTELL. PROP. INFO. TECH. & ELECTRONIC COM. L. 3, 23 (2018) (suggesting that "a technical document which includes the algorithm used and the mere explanation of the logic in mathematical terms will not in itself meet the legal requirement [for the right to explanation]" and that this requirement "should be interpreted as the disclosure of the algorithm with an explanation in non-technical terms of the rationale of the decision and criteria relied upon").

46 *See* Yu, *Algorithmic Divide*, *supra* note 1, at 375 ("[I]t can be cost-prohibitive to collect or disclose all algorithmic outcomes, not to mention the lack of incentives for technology developers to reveal the algorithms used or to make algorithmic outcomes available for public scrutiny."); *see also* Perel & Elkin-Koren, *supra* note 44, at 195–96 ("[A]nalyzing th[e] overflow of disclosed data in itself requires algorithmic processing that is capable

Such analysis will therefore be cost-prohibitive and difficult to conduct, except for individual projects.

Nevertheless, some target investigations have provided revealing analyses. One such analysis concerns ProPublica's widely cited exposé on COMPAS, the highly controversial scoring software used by law enforcement and correction personnel to determine risks of recidivism.[47] This investigatory report showed, shockingly, that "black defendants were far more likely than white defendants to be incorrectly judged [by the software] to be at a higher risk of recidivism, while white defendants were more likely than black defendants to be incorrectly flagged as low risk."[48]

For intelligent platforms using learning algorithms or neural networks,[49] it has become even more challenging to analyze the algorithmic operations. Because key parts of these operations come from what the platforms have learned on their own, a careful analysis of the original source code is unlikely to provide the explanations needed to fully understand the operations. As Kartik Hosanagar and Vivian Jair observed:

> [M]achine learning algorithms – and deep learning algorithms in particular – are usually built on just a few hundred lines of code. The algorithms[']logic is mostly learned from training data and is

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of turning the data into meaningful information. Yet this creates a vicious cycle: More transparency only strengthens users' dependence on algorithms, which further increases the need to ensure adequate accountability of the algorithms themselves." (footnote omitted)).

47 *See* Jeff Larson et al., *How We Analyzed the COMPAS Recidivism Algorithm*, ProPublica (May 23, 2016), https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm. COMPAS stands for "Correctional Offender Management Profiling for Alternative Sanctions." *Id.*

48 *Id.*

49 As a government report on artificial intelligence explained:

> Deep learning uses structures loosely inspired by the human brain, consisting of a set of units (or "neurons"). Each unit combines a set of input values to produce an output value, which in turn is passed on to other neurons downstream. For example, in an image recognition application, a first layer of units might combine the raw data of the image to recognize simple patterns in the image; a second layer of units might combine the results of the first layer to recognize patterns-of-patterns; a third layer might combine the results of the second layer; and so on.

Comm. on Tech., Nat'l Sci. & Tech. Council, Preparing for the Future of Artificial Intelligence 9 (2016), https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf. For discussions of deep learning, learning algorithms, and neural networks, see generally Ethem Alpaydin, Machine Learning: The New AI 104–09 (2016); John D. Kelleher, Deep Learning (2019); John D. Kelleher & Brendan Tierney, Data Science 121–30 (2018); Thierry Poibeau, Machine Translation 181–95 (2017).

> rarely reflected in its source code. Which is to say, some of today's best-performing algorithms are often the most opaque.[50]

Anupam Chander concurred: "[I]n the era of self-enhancing algorithms, the algorithm's human designers may not fully understand their own creation: even Google engineers may no longer understand what some of their algorithms do."[51]

Given these disclosure challenges, it is no surprise that many commentators, technology experts, and professional organizations have advocated the more active development of explainable artificial intelligence to help document algorithmic analyses and training processes.[52] As Pauline Kim explained:

> When a model is interpretable, debate may ensue over whether its use is justified, but it is at least possible to have a conversation about whether relying on the behaviors or attributes that drive the outcomes is normatively acceptable. When a model is not interpretable, however, it is not even possible to have the conversation.[53]

In sum, the myriad challenges identified in this Part highlight the difficulty in promoting transparency and accountability in the age of artificial intelligence. While building these features into intelligent platforms remains highly important and urgently needed, it will take time and require additional support. The next Part therefore calls on innovative businesses to build additional, and often complementary, features into algorithmic designs if they are to better protect consumers and be more socially responsible.

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50 Kartik Hosanagar & Vivian Jair, *We Need Transparency in Algorithms, but Too Much Can Backfire*, HARV. BUS. REV. (July 23, 2018), https://hbr.org/2018/07/we-need-transparency-in-algorithms-but-too-much-can-backfire.

51 Chander, *supra* note 41, at 1040 (citing Barry Schwartz, *Google's Paul Haahr: We Don't Fully Understand RankBrain*, SEARCH ENGINE ROUNDTABLE (Mar. 8, 2016, 7:55 AM), https://www.seroundtable.com/google-dont-understand-rankbrain-21744.html).

52 *See ACM Statement*, *supra* note 1, Princ. 4, at 2 ("Systems and institutions that use algorithmic decision-making are encouraged to produce explanations regarding both the procedures followed by the algorithm and the specific decisions that are made."); INST. ELEC. & ELEC. ENG'RS, *supra* note 37, at 68 (calling on software engineers to "document all of their systems and related data flows, their performance, limitations, and risks," with emphases on "auditability, accessibility, meaningfulness, and readability"); Diakopoulos et al., *supra* note 36 ("Ensure that algorithmic decisions as well as any data driving those decisions can be explained to end-users and other stakeholders in non-technical terms.").

53 Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 922–23 (2017) [hereinafter Kim, *Data-Driven Discrimination*].

III. The Three I's

In view of the ongoing challenge of building transparency and accountability into intelligent platforms, this Part calls on innovative businesses to build three additional design features into their platforms. This Part discusses each feature in turn and explains why these features can operate in tandem to enhance consumer protection while enabling the fulfilment of corporate social responsibility. Even better, the features can help platform owners achieve win-win outcomes that make good business sense.

Although these design features are usually classified as technology-based alternatives, extra-legal measures, or private self-regulation, they complement those legal and regulatory measures and proposals explored in Part I.[54] In the age of artificial intelligence, legal and technological measures will go hand-in-hand,[55] similar to how privacy designs and practices have not only been required by laws and regulations but have also informed and inspired new legal and regulatory developments.[56]

A. *Inclusivity*

The first proposed design feature targets the biases and discrimination—usually unintentional—found in algorithmic designs and

54 *See supra* text accompanying notes 22–39.

55 As Roger Brownsword observed:

> To the extent that technological management coexists with legal rules, while some rules will be redirected, others will need to be refined and revised. Accordingly, . . . the destiny of legal rules is to be found somewhere in the range of redundancy, replacement, redirection, revision and refinement.

Roger Brownsword, Law, Technology and Society: Re-Imagining the Regulatory Environment 181 (2019).

56 *See* Fed. Trade Comm'n, *supra* note 32, at i (calling on Congress "to consider enacting baseline privacy legislation and . . . data security legislation" while also "urg[ing] industry to accelerate the pace of self-regulation"); Hartzog, *supra* note 31, at 8 ("At base, the design of information technologies can have as much impact on privacy as any tort, regulation, or statute regulating the collection, use, or disclosure of information."); Waldman, *supra* note 13, at 4–5 ("[W]e should conceptualize information privacy in terms of relationships of trust and leverage law to protect those relationships."); *see also* Peter K. Yu, *Teaching International Intellectual Property Law*, 52 St. Louis U. L.J. 923, 939 (2008) ("As [technological and legal protections] interact with each other, and improve over time, they result in a technolegal combination that is often greater than the sum of its parts. It is therefore important to understand not only law and technology, but also the interface between the two.").

operations. In an environment involving artificial intelligence and machine learning, fostering inclusivity will require efforts to promote diversity in not only product choices and platform experiences but also training data.[57] Unless businesses deploying intelligent platforms have utilized sufficiently diverse datasets to train these platforms, the training and subsequent feedback will likely perpetuate the many historical biases found in the offline world[58] and will thereby generate what Sandra Mayson has termed the "bias in, bias out" phenomenon.[59]

Although different ways exist to make algorithmic designs and operations inclusive, commentators have widely underscored the desperate need to address the lack of diversity in the technology workforce.[60] As Justin

57 As I noted in an earlier article:

> [A]ddressing algorithmic distortion—and, to an equal extent, algorithmic discrimination—requires the development of a more inclusive environment. Such an environment needs to be diverse not only in terms of those designing algorithms and related technological products and services but also in terms of the training and feedback data that are being fed into the algorithms. The lack of diversity in either direction will likely perpetuate the many historical biases that originate in the offline world.

Yu, *Algorithmic Divide*, *supra* note 1, at 367–68 (footnote omitted); *see also* U.N. SEC'Y-GEN.'S HIGH-LEVEL PANEL ON DIGITAL COOPERATION, THE AGE OF DIGITAL INTERDEPENDENCE, 29–30 (2019) (underscoring the importance of developing "[a]n inclusive digital economy and society"); MEREDITH BROUSSARD, ARTIFICIAL UNINTELLIGENCE: HOW COMPUTERS MISUNDERSTAND THE WORLD 154 (2018) ("Th[e] willful blindness on the part of some technology creators is why we need inclusive technology . . . .").

58 *See* Katyal, *Private Accountability*, *supra* note 1, at 79 ("[W]hen algorithms train on imperfect data, or are designed by individuals who may be unconsciously biased in some manner, the results often reflect these biases, often to the detriment of certain groups."); Kim, *Data-Driven Discrimination*, *supra* note 53, at 861 ("Algorithms that are built on inaccurate, biased, or unrepresentative data can in turn produce outcomes biased along lines of race, sex, or other protected characteristics."); Tal Z. Zarsky, *Understanding Discrimination in the Scored Society*, 89 WASH. L. REV. 1375, 1392–94 (2014) (discussing the reliance on tainted datasets and data collection methods).

59 Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2218 (2019).

60 As Amy Webb, CEO of the Future Today Institute, declared:

> The only way to address algorithmic discrimination in the future is to invest in the present. The overwhelming majority of coders are white and male. Corporations must do more than publish transparency reports about their staff – they must actively invest in women and people of color, who will soon be the next generation of workers. And when the day comes, they must choose new hires both for their skills and their worldview. Universities must redouble their efforts not only to recruit a diverse body of students – administrators and faculty must support them through to graduation. And not just students. Universities must diversify their faculties, to ensure that students see themselves reflected in their

Reich, the executive director of the MIT Teaching Systems Lab, reminded us, "[t]he algorithms will be primarily designed by white and Asian men – with data selected by these same privileged actors – for the benefit of consumers like themselves."[61] Likewise, Andrea Matwyshyn lamented, "[s]oftware reflects the biases of its creators, and tends to be biased in favor of what are perceived by many to be boys' interests."[62] Indeed, the gender and minority gap in the technology community has been so enormous and notorious that Kate Crawford referred to this gap as artificial intelligence's "white guy problem."[63] As she explained:

> Like all technologies before it, artificial intelligence will reflect the values of its creators. So inclusivity matters – from who designs it to who sits on the company boards and which ethical perspectives are included. Otherwise, we risk constructing machine intelligence that mirrors a narrow and privileged vision of society, with its old, familiar biases and stereotypes.[64]

Given the lack of inclusivity in the technology community, businesses deploying intelligent platforms should actively promote diversity in their workforce. Such promotion will provide at least two benefits. First, a more diverse workforce will enable businesses to come up with new products and

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teachers.

Rainie & Anderson, *supra* note 9, at 23 (quoting Amy Webb, Chief Exec. Officer, Future Today Inst.).

61 Rainie & Anderson, *supra* note 9, at 12; *see also* Brad Smith & Carol Ann Browne, Tools and Weapons: The Promise and the Peril of the Digital Age 184–85 (2019) ("At most tech companies, women still represent less than 30 percent of the workforce, and an even lower percentage of technical roles. Similarly, African Americans, Hispanics, and Latinos typically account for less than half of what one would expect based on their representation in the American population."); Mariya Yao, *Fighting Algorithmic Bias and Homogenous Thinking in A.I.*, Forbes (May 1, 2017), https://www.forbes.com/sites/mariyayao/2017/05/01/dangers-algorithmic-bias-homogenous-thinking-ai ("When Timnit Gebru attended a prestigious AI research conference last year, she counted 6 black people in the audience out of an estimated 8,500. And only one black woman: herself.").

62 Andrea M. Matwyshyn, *Silicon Ceilings: Information Technology Equity, the Digital Divide and the Gender Gap Among Information Technology Professionals*, 2 Nw. J. Tech. & Intell. Prop. 35, 55 (2003) (footnote omitted).

63 Kate Crawford, *Artificial Intelligence's White Guy Problem*, N.Y. Times (June 25, 2016), https://www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html.

64 *Id.*; *see also* Katyal, *Private Accountability*, *supra* note 1, at 59 ("[A]lgorithmic models are . . . the product of their fallible creators, who may miss evidence of systemic bias or structural discrimination in data or may simply make mistakes. These errors of omission—innocent by nature—risk reifying past prejudices, thereby reproducing an image of an infinitely unjust world." (footnote omitted)).

services that improve platform experiences while expanding the customer base.[65] Because customers make different use of communication technologies, intelligent platforms, and smart devices,[66] having algorithm designers who understand, or are sensitive to, varied usage patterns will ensure the development of a wider array of products, services, and experiences.

Second, a more diverse workforce will enable algorithm designers to quickly spot problems that may seem odd from an engineering standpoint but are quite obvious when viewed through a social or socioeconomic lens. A case in point is the problem Amazon encountered when it rolled out same-day delivery services for its Prime members in several major cities.[67] Because the tech giant had deployed an algorithm that prioritized areas with "high concentration[s] of Prime members," its new service became unavailable in ZIP codes that had predominantly Black or Hispanic neighborhoods.[68] Anybody familiar with those neighborhoods would be quick to point out the different demographics involved and how an algorithmic focus on member concentration would ignore many current and potential customers living in

65 *See* RAINIE & ANDERSON, *supra* note 9, at 57–60 (collecting views on how "algorithms reflect the biases of programmers and datasets").

66 *See* GEOFFREY G. PARKER ET AL., PLATFORM REVOLUTION: HOW NETWORKED MARKETS ARE TRANSFORMING THE ECONOMY AND HOW TO MAKE THEM WORK FOR YOU 35 (2016) ("Platforms are complex, multisided systems that must support large networks of users who play different roles and interact in a wide variety of ways.").

67 As a *Bloomberg* report described:

> In Atlanta, Chicago, Dallas, and Washington, cities still struggling to overcome generations of racial segregation and economic inequality, black citizens are about half as likely to live in neighborhoods with access to Amazon same-day delivery as white residents.
>
> The disparity in two other big cities is significant, too. In New York City, same-day delivery is available throughout Manhattan, Staten Island, and Brooklyn, but not in the Bronx and some majority-black neighborhoods in Queens. In some cities, Amazon same-day delivery extends many miles into the surrounding suburbs but isn't available in some ZIP codes within the city limits.
>
> The most striking gap in Amazon's same-day service is in Boston, where three ZIP codes encompassing the primarily black neighborhood of Roxbury are excluded from same-day service, while the neighborhoods that surround it on all sides are eligible.

David Ingold & Spencer Soper, *Amazon Doesn't Consider the Race of Its Customers. Should It?*, BLOOMBERG (Apr. 21, 2016), https://www.bloomberg.com/graphics/2016-amazon-same-day/; *see also* Omer Tene & Jules Polonetsky, *Taming the Golem: Challenges of Ethical Algorithmic Decision-Making*, 19 N.C. J.L. & TECH. 125, 155–56 (2017) (discussing the problem with Amazon Prime).

68 Ingold & Soper, *supra* note 67.

the excluded neighborhoods. While a less inclusive but observant group of algorithm designers might still reach the same conclusion in the end, doing so would take more time, not to mention the group members' more limited ability to draw on their own personal experiences to develop appropriate solutions.

To be sure, it will take time to develop a technology workforce that is sufficiently diverse to push for products and services that would accommodate the needs and interests of a wide variety of platform users. Factors such as workplace hierarchy, peer pressure, inertia, and cost-effectiveness will not only continue to affect platform decisions but may also militate against the pro-diversity efforts.[69] Nevertheless, building inclusivity into algorithmic designs and operations will remain highly important, especially when the user base continues to grow and diversify.[70] As Microsoft President Brad Smith and his colleague rightly reminded us: "[I]n a world where today's hits quickly become yesterday's memories, a tech company is only as good as its next product. And its next product will only be as good as the people who make it."[71]

69 As Ruha Benjamin illustrated with an example concerning the decision not to focus on African Americans in the development of a speech recognition app for Siri, a virtual assistant program:

> [T]he Siri example helps to highlight how just having a more diverse team is an inadequate solution to discriminatory design practices that grow out of the interplay of racism and capitalism. Jason Mars, a Black computer scientist, expressed his frustration saying, "There's a kind of pressure to conform to the prejudices of the world . . . It would be interesting to have a black guy talk [as the voice for his app], but we don't want to create friction, either. First we need to sell products."

Ruha Benjamin, Race After Technology: Abolitionist Tools for the New Jim Code 28–29 (2019) (alteration in original). As she continued: "by focusing mainly on individuals' identities and overlooking the norms and structures of the tech industry, many diversity initiatives offer little more than cosmetic change, demographic percentages on a company pie chart, concealing rather than undoing the racist status quo." *Id.* at 61–62.

70 *See Black Impact: Consumer Categories Where African Americans Move Markets*, Nielsen (Feb. 15, 2018), https://www.nielsen.com/us/en/insights/article/2018/black-impact-consumer-categories-where-african-americans-move-markets/ ("Black consumers are speaking directly to brands in unprecedented ways and achieving headline-making results."); Sarah Cavill, *The Spending and Digital Habits of Black Consumers Present Opportunities for Marketers*, Digital Media Solutions (Feb. 27, 2019), https://insights.digitalmediasolutions.com/articles/black-consumers-digital (discussing the changing spending and digital habits of African American customers and how these changes have created new market opportunities).

71 Smith & Browne, *supra* note 61, at 169.

B. *Intervenability*

The second proposed design feature responds to ill-advised decisions generated by algorithms and intelligent platforms. Part II underscored the importance of conducting periodic assessments and making public disclosure of relevant information, including algorithms, training data, and algorithmic outcomes.[72] This Section turns to the need for operators of intelligent platforms to be ready to intervene when things go wrong.[73] Such intervention is particularly important considering that humans are known to have made better decisions than machines in many situations, especially unprecedented ones.[74] As Anthony Casey and Anthony Niblett reminded us:

> Algorithmic decision-making does not mean that humans are shut out of the process. Even after the objective has been set, there is much human work to be done. Indeed, humans are involved in all stages of setting up, training, coding, and assessing the merits of the algorithm. If the objectives of the algorithm and the objective of the law are perfectly aligned at the ex ante stage, one must ask: Under what circumstances should a human ignore the algorithm's suggestions and intervene *after* the algorithm has made the decision?[75]

72 *See* discussion *supra* Part II.

73 *See* Council Regulation 2016/679, *supra* note 20, art. 22(3) (requiring data controllers to "implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest [a decision based solely on automated processing, including profiling]"); SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA 61 (2019) (noting that human intervention is a "key . . . part of the production chain in sites that rely on user-generated uploaded content requiring screening"); Yu, *Fair Use*, *supra* note 2, at 356 ("Although automation enhances efficiency and effectiveness, human intervention can be highly beneficial."). *See generally* Aziz Z. Huq, *A Right to a Human Decision*, 106 VA. L. REV. 611 (2020) (discussing whether individuals have a "right to a human decision"); Meg Leta Jones, *The Right to a Human in the Loop: Political Constructions of Computer Automation and Personhood*, 47 SOC. STUD. SCI. 216 (2017) (tracing the historical roots of "the right to a human in the loop" back to rights that protect the dignity of data subjects).

74 *See* AGRAWAL ET AL., *supra* note 42, at 59 (noting the weaknesses of machines in making predictions "when there is too little data" and concerning "events that are not captured by past experience"); Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 53 (2019) ("Many past efforts to rationalize and algorithmatize the law have failed, for good reason: there is no way to fairly extrapolate the thought processes of some body of past decisionmaking to *all* new scenarios.").

75 Anthony J. Casey & Anthony Niblett, *A Framework for the New Personalization of Law*, 86 U. CHI. L. REV. 333, 354 (2019).

A case in point is the debacle confronting Uber when a gunman took seventeen hostages at the Lindt Chocolate Café in Sydney, Australia in December 2014.[76] Because many people were trying to simultaneously flee the Central Business District, the sudden increase in demand for rideshares caused the platform to "impose[] surge pricing in the city, charging passengers a minimum of [AU]$100 for a ride, four times the normal fare."[77] Unfortunately, the pricing algorithm was unable to connect the dots the same way a human operator could,[78] especially after the tragic news about the hostages had begun pouring in.

Even worse for Uber, charging higher prices in such an emergency situation created bad public relations—not that different from our reactions to price surges during the COVID-19 pandemic.[79] Following the unfortunate

76 *See* Michael Pearson et al., *With Two Hostages and Gunman Dead, Grim Investigation Starts in Sydney*, CNN (Dec. 15, 2014, 10:27 PM), https://www.cnn.com/2014/12/15/world/asia/australia-sydney-hostage-situation/index.html (reporting the "deadly siege" of the Sydney café and the hostage situation). As a *Wired* report recounted:

> On Sunday in Sydney, Australia, a hostage crisis caused extreme panic in the city's Central Business District, and ultimately, it left two hostages and one gunman dead. . . . As the crisis unfolded on Sunday and so many people were trying to flee Sydney's Business District, some noticed that Uber had imposed surge pricing in the city, charging passengers a minimum of [AU]$100 for a ride, four times the normal fare. Uber has always imposed surge pricing when demand for rides is highest, and it's not always popular, but in an emergency situation such as this one, the sky-high prices looked like yet another incredibly callous move by a company that's beginning to gain a reputation for putting profits before people. The public outcry was fierce.

Issie Lapowsky, *What Uber's Sydney Surge Pricing Debacle Says About Its Public Image*, Wired (Dec. 15, 2014, 12:30 PM), https://www.wired.com/2014/12/uber-surge-sydney/.

77 Lapowsky, *supra* note 76.

78 If one asks both a human and a computer to find the telephone number of classical music composer Ludwig van Beethoven, the former will likely respond more quickly than the latter. *See* Don Norman, The Design of Everyday Things 46 (rev. & expanded ed. 2013) ("What about Beethoven's phone number? If I asked my computer, it would take a long time, because it would have to search all the people I know to see whether any one of them was Beethoven. But you immediately discarded the question as nonsensical.").

79 *See AG Paxton Warns of Price Gouging as Texans Prepare to Prevent the Spread of Coronavirus*, Tex. Att'y Gen. (Mar. 13, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-warns-price-gouging-texans-prepare-prevent-spread-coronavirus (providing a reminder that "state law prohibits price gouging in the wake of a declared disaster"); Memorandum for All Heads of Department Components and Law Enforcement Agencies from the Office of the Attorney General (Mar. 24, 2020), https://www.justice.gov/file/1262776/download (providing warnings against hoarding and price gouging).

episode in Sydney, Uber quickly issued an apology, offered refunds to the affected customers, and "put in place the ability to override automatic surge pricing in some circumstances."[80] By the time a series of terrorist attacks occurred in Paris a year later, Uber was able to "cancel[] surge pricing in the city [within half an hour of the first attack] and alerted all of its users to the emergency."[81] This drastically different outcome shows the importance and wisdom of increasing the platform's readiness for human intervention.

While platform operators often intervene based on internal data, they can also utilize external information to determine their courses of action. In a recent article, I advocated the development of a notice-and-correct mechanism to rectify problems generated by automated systems.[82] Inspired by the notice-and-takedown arrangements in copyright law,[83] my proposed mechanism underscored the need for platform operators to take expedited actions after they have been notified of problems generated by platform algorithms.[84] As I noted in that article, "as technology becomes

80 MCAFEE & BRYNJOLFSSON, *supra* note 2, at 55.

81 *Id.*

82 *See* Yu, *Algorithmic Divide*, *supra* note 1, at 379–80 (proposing the mechanism).

83 *See* 17 U.S.C. § 512(c)(1)(C) (2018) (requiring online service providers to "respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity" once these providers have been notified of copyright infringement or obtained knowledge or awareness of such infringement); *see also* Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 709–13 (2010) (providing an overview of the notice-and-takedown procedure in copyright law).

84 *See* Yu, *Algorithmic Divide*, *supra* note 1, at 379–80 ("[R]emediation-based accountability will require technology developers to quickly correct the problems once they have been notified of these problems—similar, perhaps, to the 'notice and takedown' arrangements now found in copyright law." (footnote omitted)); *see also ACM Statement*, *supra* note 1, Princ. 2, at 2 ("Regulators should encourage the adoption of mechanisms that enable questioning and redress for individuals and groups that are adversely affected by algorithmically informed decisions."); BROWNSWORD, *supra* note 55, at 297 (calling for "the regulatory framework [to] provide for the correction of the malfunction" in the technology); Chander, *supra* note 41, at 1025 ("[I]f we believe that the real-world facts, on which algorithms are trained and operate, are deeply suffused with invidious discrimination, then our prescription to the problem of racist or sexist algorithms is *algorithmic affirmative action*." (footnote omitted)); Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 126–27 (2014) ("Once notice is available, the question then becomes how one might challenge the fairness of the predictive process employed. We believe that the most robust mechanism for this is the opportunity to be heard and, if necessary, correct the record."); Diakopoulos et al., *supra* note 36 ("Make available externally visible avenues of redress for adverse individual or societal effects of an algorithmic decision system, and designate an internal role for the person who is responsible for the timely remedy of such issues.").

increasingly complicated and inscrutable, ensuring quick correction of the problem will likely be more constructive than punishing those who have allowed the problems to surface in the first place, often unintentionally."[85]

This call for human intervention is nothing new; such intervention has already been built into many existing platforms, including those that utilize artificial intelligence and learning algorithms. In *Ghost Work*, Mary Gray and Siddharth Suri documented the large pool of human workers performing on-demand tasks in the shadow to advance the development of artificial intelligence and automated systems.[86] Among their tedious but indispensable tasks are content classification, image tagging, photo comparison, video screening, and data cleaning.[87] Sarah Roberts also provided an important ethnographic study of human commercial content moderators, who work behind the scenes to screen and remove content and enforce policies on online platforms.[88] Although policymakers and industry leaders have pushed aggressively for greater automation,[89] it will remain important for algorithm designers to build human intervenability into intelligent platforms. Better still, because decisions made by human intervenors can be fed back into the algorithms as training and feedback data, such intervention will help make the platforms even more "intelligent" in the future.[90]

85 Yu, *Algorithmic Divide*, *supra* note 1, at 380; *see also* Wendell Wallach & Colin Allen, Moral Machines 208 (2009) ("If you are convinced that artificial agents will never satisfy the conditions for real punishment, the idea of holding them directly accountable for their actions is a nonstarter.").

86 Mary L. Gray & Siddharth Suri, Ghost Work: How to Stop Silicon Valley from Building a New Global Underclass (2019). They went further to note the critical role this shadow workforce has played in advancing the field of artificial intelligence:

> Beyond some basic decisions, today's artificial intelligence can't function without humans in the loop. Whether it's delivering a relevant newsfeed or carrying out a complicated texted-in pizza order, when the artificial intelligence . . . trips up or can't finish the job, thousands of businesses call on people to quietly complete the project. This new digital assembly line aggregates the collective input of distributed workers, ships pieces of projects rather than products, and operates across a host of economic sectors at all times of the day and night.

Id. at ix–x.

87 *See id.* at x–xxiii.

88 Sarah T. Roberts, Behind the Screen: Content Moderation in the Shadows of Social Media (2019). As she observed, "[i]ssues of scale aside, the complex process of sorting user-uploaded material into either the acceptable or the rejected pile is far beyond the capabilities of software or algorithms alone." *Id.* at 34.

89 *See generally* Hannah Bloch-Wehba, *Automation in Moderation*, 52 Cornell Int'l L.J. (forthcoming 2020) (discussing the growing use of automation in content moderation and its impact on free speech, privacy, and other civil liberties).

90 *Cf.* Gray & Suri, *supra* note 86, at 6–8 (discussing the need for human workers to develop

Notwithstanding the need for and benefits of human intervention, deciding whether and when to intervene is not always easy, especially in an environment involving artificial intelligence and machine learning. While platform owners can set up monitoring procedures to ensure that the algorithm-generated outcomes match human intuition, such procedures may undermine a key advantage of intelligent platforms. Because humans and machines "think" differently,[91] these platforms can generate seemingly counterintuitive decisions that are superior to human decisions.[92] Even more complicated, human operators, due to cognitive barriers, may not always be able to fully appreciate the merits of those counterintuitive decisions. As Professors Casey and Niblett observed:

> Algorithms will often identify counterintuitive connections that may appear erroneous to humans even when accurate. Humans should be careful in those cases not to undo the very value that was added by the algorithm's ability to recognize these connections. This is especially true when the benefit of the algorithm was that it reduced human bias and behavioral errors.[93]

Thus, as important as it is for platform operators to intervene, they should be careful not to quickly reject counterintuitive algorithm-generated

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datasets that are used for training artificial intelligence and how the new advances have generated new cycles that require even more human workers to complete intervening tasks).

91 *See generally* Jason Millar & Ian Kerr, *Delegation, Relinquishment and Responsibility: The Prospect of Expert Robots*, *in* ROBOT LAW 102, 117–24 (Ryan Calo et al. eds., 2016) (discussing human–robot disagreement).

92 *See* RAY KURZWEIL, THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY 261 (2005) ("Machines can pool their resources in ways that humans cannot. Although teams of humans can accomplish both physical and mental feats that individual humans cannot achieve, machines can more easily and readily aggregate their computational, memory, and communications resources."); ERIC J. TOPOL, DEEP MEDICINE: HOW ARTIFICIAL INTELLIGENCE CAN MAKE HEALTHCARE HUMAN AGAIN 117–18 (2019) (discussing the impressive progress in algorithmic image processing); Jonathan Guo & Li Bin, *The Application of Medical Artificial Intelligence Technology in Rural Areas of Developing Countries*, 2 HEALTH EQUITY 174, 175 (2018) (noting research that shows that systems using deep convolutional neural networks are "able to classify skin cancer at a comparable level to dermatologists" and "could improve the speed, accuracy, and consistency of diagnosis [of breast cancer metastasis in lymph nodes], as well as reduce the false negative rate to a quarter of the rate experienced by human pathologists"); Peter K. Yu, *Artificial Intelligence, the Law–Machine Interface, and Fair Use Automation*, 72 ALA. L. REV. 187, 215–16 (2020) (discussing the growing evidence concerning the machines' ability to outperform humans in select areas); *Digital Decisions*, *supra* note 38, at 2 ("Algorithms . . . are better and faster than humans at detecting credit card fraud.").

93 Casey & Niblett, *supra* note 75, at 354.

outcomes.[94] What looks counterintuitive at first glance may make more sense with hindsight.

C. *Interoperability*

The final proposed design feature aims to improve the quality of predictive analyses generated by algorithms and intelligent platforms. Compared with inclusivity and intervenability, interoperability, at first glance, seems to be more about the platforms than about the consumers they serve. In reality, customers will likely have more accurate predictions and better platform experiences if greater interoperability and portability exist for data collected, stored, processed, or utilized by intelligent platforms.

In the age of big data, intelligent platforms need to amass, aggregate, and analyze vast troves of data to detect and recognize patterns, predict customer choices, and shape user preferences.[95] The more data the platforms have, the better their analyses and predictions will become. As Professor Hartzog boldly declared, "[i]n the world of big data, more is always better."[96] Viktor Mayer-Schönberger and Kenneth Cukier concurred: "[B]ig data relies on all the information, or at least as much as possible . . . ."[97] The converse is also true. In a recent article, I discussed how the lack of data from a large segment of the population can result in algorithmic distortion, which will harm not only the excluded population but also other segments of the population.[98] Even worse, in an environment involving artificial intelligence and machine learning, such distortion can amplify over time when the algorithmic outcomes are fed back into the algorithms as training and feedback data.[99]

94 *See* Rainie & Anderson, *supra* note 9, at 40 ("People often confuse a biased algorithm for an algorithm that doesn't confirm their biases. If Facebook shows more liberal stories than conservative, that doesn't mean something is wrong. It could be a reflection of their user base, or of their media sources, or just random chance." (quoting an anonymous principal consultant of a consulting firm)); Harry Surden & Mary-Anne Williams, *Technological Opacity, Predictability, and Self-Driving Cars*, 38 Cardozo L. Rev. 121, 158 (2016) ("[I]t is not uncommon for pilots in the cockpit to be surprised or confused by an automated activity undertaken by an autopilot system."). *See generally* Selbst & Barocas, *supra* note 36 (documenting the limitations of intuition while noting the need to address inscrutability).

95 *See* sources cited *supra* note 1.

96 Hartzog, *supra* note 31, at 51.

97 Viktor Mayer-Schönberger & Kenneth Cukier, Big Data: A Revolution That Will Transform How We Live, Work, and Think 30 (2013).

98 *See* Yu, *Algorithmic Divide*, *supra* note 1, at 354–61 (discussing algorithmic distortion).

99 *See id.* at 360 ("Because biases in machine-generated analyses can amplify themselves by feeding these biases into future analyses, the unreliability of those analyses that omit

Thus far, business leaders have found the sharing of source code, training data, or other proprietary information highly unappealing.[100] As the U.S. Public Policy Council of the authoritative Association for Computing Machinery acknowledged in its *Statement on Algorithmic Transparency and Accountability*, "concerns over privacy, protecting trade secrets, or revelation of analytics that might allow malicious actors to game the system can justify restricting access to qualified and authorized individuals."[101] Likewise, Pauline Kim lamented, "transparency is often in tension with other important interests, such as protecting trade secrets, ensuring the privacy of sensitive personal information, and preventing strategic gaming of automated decision systems."[102]

In fact, the increased use of artificial intelligence and machine learning in recent years has led policymakers, commentators, and industry leaders to push for greater protection of data generated by intelligent platforms, smart devices, and networked sensors. In October 2017, for example, the European Commission proposed a new sui generis data producer's right for nonpersonal, anonymized machine-generated data.[103] This proposal "aim[ed] at clarifying the legal situation and giving more choice to the data producer, by opening up the possibility for users to utilise their data and thereby contribute to unlocking machine-generated data."[104] Had this proposal been adopted,[105] data producers would have greater proprietary control over nonpersonal, anonymized data generated by intelligent platforms, smart devices, and networked sensors.[106]

[relevant] data . . . will increase over time. Such analyses will eventually become much more unreliable than the initial skewing caused by a lack of training data concerning [the excluded population].").

100 *See* Yu & Spina Alì, *supra* note 43, at 6 ("Commercial providers could be reluctant to share information on their models or have their systems openly compared to their competitors."); *see also* Kim, *Auditing Algorithms*, *supra* note 38, at 191–92 ("[T]ransparency is often in tension with other important interests, such as protecting trade secrets, ensuring the privacy of sensitive personal information, and preventing strategic gaming of automated decision systems.").

101 *ACM Statement*, *supra* note 1, Princ. 5, at 2.

102 Kim, *Auditing Algorithms*, *supra* note 38, at 191–92.

103 *See* EUR. COMM'N, BUILDING A EUROPEAN DATA ECONOMY 13 (2017), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0009&from=EN.

104 *Id.*

105 This proposal has not received much traction lately. *See* Mark Davison, *Databases and Copyright Protection*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND DIGITAL TECHNOLOGIES 63, 77 (Tanya Aplin ed., 2020) ("[I]t appears that the EU has now abandoned the idea [of creating a new data producer's right].").

106 *See generally* Peter K. Yu, *Data Producer's Right and the Protection of Machine-Generated Data*, 93 TUL. L. REV. 859 (2019) [hereinafter Yu, *Data Producer's Right*] (providing a comprehensive analysis and critique of the proposed EU data producer's right).

Despite the business leaders' eagerness to obtain stronger protection for data and their continued reluctance to share these data with competitors or third-party platforms, data interoperability and portability will be important to both businesses and consumers. From a business standpoint, greater data sharing—through voluntary transfer, pooling, licensing, or other arrangements—will allow businesses to undertake the much-needed big data analyses even when they do not have all the data needed for those analyses.[107] Unless the businesses involved have achieved a certain size (think about Google or Facebook) or have come up with ways to quickly collect a lot of data (think about Netflix[108]), they will need to actively share data to compete with those businesses that have already amassed prodigious quantities of data[109] and to provide customers with more accurate predictions and better platform experiences. Moreover, because accurate big data analyses sometimes require information not collected by the implicated platforms, even platforms with vast troves of data may still need to obtain data from others.[110]

From a societal standpoint, greater data interoperability and portability will also benefit consumers by making competition viable in the big data environment. Such competition will protect consumers from

107 *See id.* at 888–89 (discussing the business needs for large, comprehensive datasets to conduct big data analyses).

108 *See* Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. Rev. 1555, 1587 (2019) ("Some parameters that Netflix tracks include, but are likely not limited to, pause/rewind/fast-forward behavior; day of the week; date of viewing; time of viewing; zip code; preferred devices; completion rate; user ratings; user search behavior; and browsing and scrolling behavior."); Yu, *Fair Use*, *supra* note 2, at 345 ("Netflix . . . keeps track of the parts of a movie or TV program that its subscribers have paused or viewed repeatedly.").

109 *See* Viktor Mayer-Schönberger & Thomas Ramge, Reinventing Capitalism in the Age of Big Data 199 (2018) (calling for data to be made "available to small firms, especially start-ups, so that they can compete against the big players"). Data sharing is equally important to large technology companies. *See* Smith & Browne, *supra* note 61, at 282 ("Organizations need to decide whether and how to share data, and if so, on what terms.").

110 *See* Mayer-Schönberger & Cukier, *supra* note 97, at 153 ("[I]n a big-data age, most innovative secondary uses haven't been imagined when the data is first collected."); *see also* Mark Burdon & Mark Andrejevic, *Big Data in the Sensor Society*, *in* Big Data Is Not a Monolith 61, 69 (Cassidy R. Sugimoto et al. eds., 2016) (noting that the value in data "is provided by the fact that personal data can be aggregated with that of countless other users (and things) in order to unearth unanticipated but actionable research findings"); Margaret Foster Riley, *Big Data, HIPAA, and the Common Rule: Time for Big Change?*, *in* Big Data, Health Law, and Bioethics 251, 251 (I. Glenn Cohen et al. eds., 2018) ("The analysis of Big Data related to healthcare is often for a different purpose than the purpose for which the data were originally collected.").

monopoly pricing[111] while increasing the diversity of technological products and services.[112] As Ajay Agrawal, Joshua Gans, and Avi Goldfarb reminded us, "[t]here is often no single right answer to the question of which is the best AI strategy or the best set of AI tools, because AIs involve trade-offs: more speed, less accuracy; more autonomy, less control; more data, less privacy."[113] Because of the possibility for multiple technological solutions, competition will be badly needed to accommodate the different trade-offs consumers prefer. Such competition will also help identify problems in intelligent platforms, especially when those platforms utilize similar algorithms or training data.[114]

111 As Lee Kai-fu observed:

> As a technology and an industry, AI naturally gravitates toward monopolies. Its reliance on data for improvement creates a self-perpetuating cycle: better products lead to more users, those users lead to more data, and that data leads to even better products, and thus more users and data. Once a company has jumped out to an early lead, this kind of ongoing repeating cycle can turn that lead into an insurmountable barrier to entry for other firms.

LEE KAI-FU, AI SUPERPOWERS: CHINA, SILICON VALLEY, AND THE NEW WORLD ORDER 168–69 (2018); *see also* MAYER-SCHÖNBERGER & CUKIER, *supra* note 97, at 183 (expressing concern about "the rise of twenty-first-century data barons").

112 As I noted in a recent article:

> Competition is imperative if society is to develop more efficient, more effective, and less biased algorithms. Such competition is particularly needed when algorithmic choices are increasingly difficult, or time consuming, to explain. Indeed, without competition, it would be hard to identify problems within an algorithm or to determine whether that algorithm has provided the best solution in light of the existing technological conditions and constraints.

Yu, *Algorithmic Divide*, *supra* note 1, at 382–83 (footnotes omitted); *see also* Annie Lee, Note, *Algorithmic Auditing and Competition Under the CFAA: The Revocation Paradigm of Interpreting Access and Authorization*, 33 BERKELEY TECH. L.J. 1307, 1310 (2018) ("Online competitors . . . promote fair online practices by providing users with a choice between competitive products . . . .").

113 AGRAWAL ET AL., *supra* note 42, at 5; *see also* PAUL R. DAUGHERTY & H. JAMES WILSON, HUMAN + MACHINE: REIMAGINING WORK IN THE AGE OF AI 126 (2018) ("A deep-learning system . . . provides a high level of prediction accuracy, but companies may have difficulty explaining how those results were derived. In contrast, a decision tree may not lead to results with high prediction accuracy but will enable a significantly greater explainability.").

114 As Rob Kitchin observed:

> [R]esearchers might search Google using the same terms on multiple computers in multiple jurisdictions to get a sense of how its PageRank algorithm is constructed and works in practice, or they might experiment with posting and interacting with posts on Facebook to try and determine

Notwithstanding the benefits of competition, we cannot overlook the platforms' continuous need for large, comprehensive datasets for big data analyses, which has been frequently offered as a primary justification for the data-hoarding approach embraced by tech giants.[115] Indeed, the more competition there is, the more fragmentary datasets will become, and the more difficult it will be to realize the full potential of artificial intelligence.[116] Thus, if society is eager to develop a more competitive business environment—as many governments, policymakers, and commentators have strongly advocated[117]—businesses deploying intelligent platforms will need greater data interoperability and portability to achieve optimal performance in the big data environment.[118]

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how its EdgeRank algorithm positions and prioritises posts in user time lines, or they might use proxy servers and feed dummy user profiles into e-commerce systems to see how prices might vary across users and locales.

Kitchin, *supra* note 5, at 24 (citations omitted); *see also* Yu & Spina Alì, *supra* note 43, at 7 (calling on legal researchers to "compare outputs from different programs to detect flaws in the AI utilized and increase research accuracy").

115 *See* Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power 13 (2019) (noting "a decisive turn toward a new logic of accumulation").

116 *Cf.* James Manyika et al., Mckinsey Glob. Inst., Big Data: The Next Frontier for Innovation, Competition, and Productivity 12 (2011) ("To enable transformative opportunities, companies will increasingly need to integrate information from multiple data sources."); Riley, *supra* note 110, at 254 ("One of the biggest challenges for Big Data [in the healthcare space] is linking data from multiple sources so that data describing an individual located in one source are linked with data about the same individual in other sources.").

117 *See* Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 132–33 (2018) (discussing the benefits of the breakups and the blocking of mergers of large technology companies); Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 Geo. L. Tech. Rev. 275, 275–77 (2018) (discussing the actions taken by the European competition authorities against Google, Apple, Facebook, and Amazon); Matt Stevens, *Elizabeth Warren on Breaking Up Big Tech*, N.Y. Times (June 26, 2019), https://www.nytimes.com/2019/06/26/us/politics/elizabeth-warren-break-up-amazon-facebook.html (discussing Senator Elizabeth Warren's call for the breakup of Amazon, Apple, Facebook, and Google); Peter K. Yu & John Cross, *Why Are the Europeans Going After Google?*, Newsweek (May 18, 2015), https://www.newsweek.com/why-are-europeans-going-after-google-332775 (discussing the EU antitrust probe of Google).

118 *See, e.g.*, Council Regulation 2016/679, *supra* note 20, art. 20, at 45 (introducing the right to data portability). *See also* Mayer-Schönberger & Cukier, *supra* note 97, at 183 ("We should enable data transactions, such as through licensing and interoperability."); Josef Drexl, *Designing Competitive Markets for Industrial Data: Between Propertisation and Access*, 8 J. Intell. Prop. Info. Tech. & Electronic Com. L. 257, 292 (2017) ("The functioning of the data economy will . . . depend on the interoperability of digital formats and the tools of data collecting and processing."); Wolfgang Kerber, *A New*

Finally, a growing volume of research and commentary has emerged to challenge the fundamental premise of big data analysis—that the use of more data will always lead to more accurate predictions.[119] For example, Matthew Salganik and his collaborators showed recently that, "[d]espite using a rich dataset and applying machine-learning methods optimized for prediction, the best predictions were not very accurate and were only slightly better than those from a simple benchmark model."[120] Brett Frischmann and Evan Selinger argued passionately that businesses and organizations do not need all the data they collect and ever-increasing data-driven "techno-social engineering" could ultimately threaten humanity.[121] In the business context, commentators have further explained why lean data can be just as effective as, if not better than, big data.[122] Given this line of research and commentary, what constitutes an optimal level of data collection, processing, and sharing will likely remain the subject of a continuous debate.

(Intellectual) Property Right for Non-Personal Data? An Economic Analysis, 65 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL [GRUR INT] 989, 997 (2016) (Ger.) ("[S]upporting portability, interoperability and standardization in regard to data is seen as pivotal policy measures for improving the governance of data in the digital economy."); Yu, *Data Producer's Right*, *supra* note 106, at 889 ("[I]f we are to maximize our ability to undertake big data analyses, such analyses may require greater sharing of data—which, in turn, calls for greater data portability and interoperability.").

119 Thanks to Ari Waldman for pushing me on this point and offering reference suggestions.

120 Matthew J. Salganika et al., *Measuring the Predictability of Life Outcomes with a Scientific Mass Collaboration*, 117 PROC. NAT'L ACAD. SCI. U.S. 8398, 8398 (2020).

121 *See* BRETT FRISCHMANN & EVAN SELINGER, RE-ENGINEERING HUMANITY 17–28, 115–17, 166–72 (2018). Professors Frischmann and Selinger defined "techno-social engineering" as "processes where technologies and social forces align and impact how we think, perceive, and act." *Id.* at 4.

122 *See, e.g.*, Matti Keltanen, *Why "Lean Data" Beats Big Data*, GUARDIAN (Apr. 16, 2013), https://www.theguardian.com/media-network/media-network-blog/2013/apr/16/big-data-lean-strategy-business (offering four reasons why businesses may prefer lean data to big data); Daniel Newman, *Bigger Isn't Always Better: It's All About Lean Data*, FORBES (Dec. 4, 2019), https://www.forbes.com/sites/danielnewman/2019/12/04/bigger-isnt-always-better-its-all-about-lean-data/#7c84d0838940 (noting that many businesses "[a]re collecting a lot more data than [they] need or use" and that "being agile and lean in digital transformation doesn't require more data—it requires smarter data"); *Separating Better Data from Big Data: Where Analytics Is Headed*, KNOWLEDGE@WHARTON (May 10, 2018), https://knowledge.wharton.upenn.edu/article/where-analytics-is-headed-next/ (providing interviews with marketing professors at the Wharton School of the University of Pennsylvania who call on businesses to focus on better data, rather than big data).

Conclusion

In the age of artificial intelligence, innovative businesses will need to think carefully and proactively about the different features that algorithm designers can build into intelligent platforms. Although policymakers, commentators, and consumer advocates have placed transparency and accountability high on their lists, they should pay greater attention to three additional design features: inclusivity, intervenability, and interoperability. Building these features into intelligent platforms will not only protect consumers in an increasingly data-pervasive, algorithm-driven world, but it will also achieve win-win outcomes that will benefit both consumers and platform owners.

PREEMPTION AND PRIVATIZATION IN THE OPIOID LITIGATION

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ABSTRACT

The upsurge of litigation against opioid manufacturers, distributors, and sellers currently proceeding through the US court system—with nearly 3,000 state and local governments as plaintiffs—raises a number of complex legal, political, and strategic issues. Although offering a wide array of legal theories, most of the local government lawsuits have been consolidated in a multi-district litigation currently overseen by a federal judge in Ohio. The state government lawsuits are mostly proceeding separately in state courts. The multiplicity of theories, plaintiffs, and jurisdictions may lead to conflict and competition between plaintiffs, as state and local governments compete to control the legal strategy deployed in the cases and the resources that may be garnered from successful rulings or settlements.

This article explores the implications of conflict between state and local governments as the opioid lawsuits proceed. Some state attorneys general have already tried to halt, influence, or take control of local government claims. Understanding the dynamics of this situation requires an analysis of two key factors: preemption and privatization. State authority to preempt local government powers—a strategy increasingly used to constrain local public health initiatives—may provide a justification for state intervention in the local opioid lawsuits. Likewise, the increasing privatization of public health functions—and the fact that most of the local government opioid lawsuits are being handled by private trial attorneys—creates political and strategic concerns about incentives, resource allocation, and legal authority.

Introduction

The opioid crisis has taken a significant toll on the health and well-being of people across the United States. Over the past two decades, opioid use has been implicated in nearly 450,000 deaths in the United States.[1] Prescription opioid medications introduced in the 1990s hit the market with an aggressive marketing campaign that coincided with a spike in opioid use disorders and opioid-related overdose deaths.[2] Overdose-related mortality increased substantially between 2010 and 2018, driven by growth in the use of illicit heroin and fentanyl.[3] The surge in deaths related to opioid overdoses and the substantial medical, legal, and social hurdles facing people with substance use disorder present one of the great public health challenges of our time.[4] Scholars and policy-makers have chronicled these challenges,[5] and while the problems persist, the nature of the crisis and the factors driving it have morphed and shifted over time. Proposals for legal interventions to mitigate the scope and impact of the crisis abound,[6] and the impact of these proposals varies considerably. Nevertheless, the impacts of the opioid crisis—and of polysubstance use disorders[7]—on our society

1 Nana Wilson et al., *Drug and Opioid-Involved Overdose Deaths – United States, 2017-2018*, 69 Ctrs. For Disease Control Morbidity & Mortality Wkly. Rep. 290, 291 (2020).

2 Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 Am. J. Pub. Health 221, 222, 224 (2009).

3 Nabarun Dasgupta et al., *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 Am. J. Pub. Health 182, 182 (2018) (outlining the phases of the opioid overdose epidemic).

4 Among the challenges faced by people with opioid use disorders are legal barriers to accessing treatment and criminalization of harm reduction strategies. *See generally* Joanne Csete, *Criminal Justice Barriers to Treatment of Opioid Use Disorders in the United States: The Need for Public Health Advocacy*, 109 Am. J. Pub. Health 419 (2019); Corey Davis et al., *Changing Law from Barrier to Facilitator of Opioid Overdose Prevention*, 41 J.L. Med. & Ethics 33 (Supp. 2013).

5 *See generally* Anne Case & Angus Deaton, Deaths of Despair and the Future of Capitalism (2020).

6 *See generally, e.g.*, Leo Beletsky et al., Temple Univ. Sch. of Law Ctr. for Health Law, Policy & Practice, Conference Report, Closing Death's Door: Action Steps to Facilitate Emergency Opioid Drug Overdose Reversal in the United States (2009); Corey Davis et al., *State Approaches to Addressing the Overdose Epidemic: Public Health Focus Needed*, 47 J.L. Med. & Ethics 43 (Supp. 2 2019); Mariano-Florentino Cuellar & Keith Humphreys, *The Political Economy of the Opioid Epidemic*, 38 Yale L. & Pol'y Rev. 1 (2019); Scott Burris, *Where Next for Opioids and the Law? Despair, Harm Reduction, Lawsuits, and Regulatory Reform*, 133 Pub. Health Reps. 29 (2018); Andrew M. Parker et al., *State Responses to the Opioid Crisis*, 46 J.L. Med. & Ethics 367 (2018).

7 Polysubstance use disorder refers to concurrent use of opioid and non-opioid substances. Theodore J. Cicero et al., *Polysubstance Use: A Broader Understanding of Substance Use During the Opioid Crisis*, 110 Am. J. Pub. Health 244, 244, 247 (2020).

persist and will continue to demand deliberate, creative, and compassionate responses.

As often occurs during and after public health crises, even while we push ahead and grasp at policy changes that will solve ongoing problems, we simultaneously look back to seek accountability. Allocating responsibility for harm caused is never a simple and linear task in public health, and doing so for the opioid crisis is no different.[8] Numerous attempts are now in progress to hold opioid manufacturers, distributors, and sellers legally liable for the harms caused by their products and their respective roles in contributing to the spike in opioid-related deaths, using litigation,[9] legislation,[10] and regulations.[11] Other government interventions are also underway to mitigate the public health impact of the crisis.[12]

Thousands of claims have been filed in an effort to use civil litigation to accomplish these goals.[13] Litigation creates the potential for unusual dynamics between the thousands of plaintiffs that are currently bringing these lawsuits, most of whom are state and local governments.[14] Because the

8 Indeed, the impetus to seek accountability and blame specific actors or causes may itself be an unfortunate diversion of effort. *See* Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 651–55 (2019) (critiquing the retrospective "blame frame" used by the tort model).

9 *See, e.g.*, Richard C. Ausness, *The Current State of Opioid Litigation*, 70 S.C. L. REV. 565, 566 (2019); Abbe R. Gluck et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L. MED. & ETHICS 351, 351 (2018) (exploring the history of and legal issues implicated by the opioid litigation); Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2301 (2017) (analyzing the legal theories being advanced in the lawsuits against opioid manufacturers).

10 *See, e.g.*, Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018).

11 *See, e.g.*, Management of Quotas for Controlled Substances and List I Chemicals, 84 Fed. Reg. 56,712 (Oct. 23, 2019) (to be codified at 21 C.F.R. pt. 1303, 1315).

12 The U.S. Department of Health and Human Services declared the opioid crisis a public health emergency in October 2017. *HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis*, U.S. DEP'T. HEALTH & HUM. SERVS. (Oct. 26, 2017), https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html; *see also* Rebecca L. Haffajee & Richard G. Frank, *Making the Opioid Public Health Emergency Effective*, 75 JAMA PSYCHIATRY 767, 767 (2018).

13 Terry, *supra* note 8, at 656–57; *see generally, e.g.*, Conditional Transfer Order No. 178, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio Oct. 27, 2020), ECF No. 3543 (identifying over two thousand cases consolidated for pretrial proceedings in federal court).

14 Rebecca L. Haffagee, *The Public Health Value of Opioid Litigation*, 48 J.L. MED. & ETHICS 279, 279 (2020).

interests of these respective plaintiffs overlap, the ongoing litigation raises the possibility of competition and tension between state and local governments over strategic, legal, and resource decisions.

This tension arises from the nature and complexity of the opioid-related lawsuits. The sheer number of individual lawsuits creates an inherently complicated and unwieldy landscape upon which to proceed. The multiplicity of parties raises the explicit potential for jurisdictional conflict and competition as state and local governments bring separate legal claims in different courts.[15] Consequently, the litigation spans multiple judicial jurisdictions, with forty-eight state-level lawsuits advancing in their respective state courts, while thousands of local lawsuits are concurrently proceeding in federal court.[16] The local opioid lawsuits have been consolidated into a multidistrict litigation (MDL) headed by Judge Dan Aaron Polster in the Northern District of Ohio.[17] MDLs are inherently complex,[18] but the size and scope of this MDL exceed even the normal challenges that face a court attempting to coordinate such a large and disparate group of cases.

Another challenging factor arises from the variety of legal theories being advanced in the lawsuits and in the potentially overlapping damages claims being pursued. State and local governments have spent substantial sums to address the consequences of the opioid overdose epidemic and have incurred distinct economic harms that they seek to recover in court.[19] Nevertheless, there will likely be disagreements over the applicability and relative severity of harms, and parsing these distinctions will be very difficult, whether across multiple hearings or in a large consolidated settlement. The resolution of these potential disagreements and disputes has important implications for which jurisdictions will receive any damages generated

15 *See* Gluck et al., *supra* note 9, at 355.

16 Molly Stubbs, *States Claim $2 Trillion+ in Damages from OxyContin Maker Purdue Pharma*, Expert Inst. (Sept. 1, 2020), https://www.expertinstitute.com/resources/insights/states-claim-2-trillion-in-damages-from-oxycontin-maker-purdue-pharma/#:~:text=The%20filings%2C%20which%20were%20made,risk%20of%20addiction%20or%20overdose; Tom Hals, *U.S. Regions Hard Hit by Opioids to Ditch Class Action, Pursue Own Lawsuits*, Reuters (Dec. 3, 2019), https://www.reuters.com/article/us-usa-opioids-litigation/u-s-regions-hard-hit-by-opioids-to-ditch-class-action-pursue-own-lawsuits-idUSKBN1Y72C6.

17 *See, e.g.*, Transfer Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (J.P.M.L Dec. 12, 2017), ECF No. 1.

18 Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 Cornell L. Rev. 1445, 1526 (2017). *See generally* Elizabeth Chamblee Burch, Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation (2019).

19 Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 U. Kan. L. Rev. 1061, 1061–62 (2019).

by lawsuit judgments or settlements in these cases. Likewise, the outcome of state/local conflicts over this litigation may affect the balance of power between state and local governments and set influential precedents for future attempts of governments to use civil litigation as a tool to protect public health.

While many aspects of the opioid litigation are indeed unique, the potentially rivalrous position that state and local governments find themselves in has parallels in other situations that arise when governments have conflicting priorities related to public health challenges and other policies.[20] The inter-jurisdictional struggles playing out within the opioid litigation mirror the debates over preemption and privatization that often divide state and local governments when addressing other public health issues.[21]

This article explores the implications of conflict between state and local governments as the opioid lawsuits proceed. Some state attorneys general have already tried to halt or take control of local government claims, although without much success.[22] Understanding the dynamics of this situation requires an analysis of how preemption and privatization shape the relationship between state and local governments. The use of state authority to preempt local government powers—a strategy increasingly employed to constrain local public health initiatives—may form the basis for state efforts to intervene, take over, and/or extinguish local opioid lawsuits. Likewise, the increasing privatization of public health functions—and the fact that most of the local government opioid lawsuits are being handled by private trial attorneys—creates political and strategic concerns about incentives, resource allocation, and legal authority.

Part I of the article traces the history of public health litigation and situates the current opioid litigation within this complicated and growing history. The opioid litigation builds on legal theories, practices, and strategies from the successful tobacco Master Settlement Agreement from the 1990s,[23] but the contemporary opioid cases differ from the tobacco cases in some important ways. This discussion highlights how the complexity inherent in the opioid litigation renders the resolution of these lawsuits even more challenging than previous mass tort litigation.

20 *See infra* Part I.

21 *See infra* Parts II and III.

22 Sara Randazzo, *In the Opioid Litigation, It's Now States v. Cities*, WALL ST. J. (Aug. 6, 2019), https://www.wsj.com/articles/in-the-opioid-litigation-its-now-states-v-cities-11565123075.

23 Derek Carr et al., *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars*, 133 PUB. HEALTH REP. 207, 207–13 (2018).

Part II of the article analyzes the differential role that privatization of government services plays in the context of the opioid litigation as opposed to other contexts. The increasing privatization of public health functions—and government functions more broadly—is an accepted reality of modern governance.[24] Privatization of government services raises many potential concerns, including the concern that private entities performing government functions may not have the best interests of the public as their foremost goal and will not be democratically accountable for their actions and decisions. Many of the opioid lawsuits filed on behalf of local governments are handled by private trial attorneys, a fact that has generated scrutiny and criticism.[25] Entrusting these public lawsuits to private attorneys presents multifaceted legal, political, and strategic concerns about incentives, resource allocation, and legal authority. Ultimately, though, these concerns are balanced by the opportunities they present for local governments to hold defendants responsible for the harm they caused through their actions.

Part III of the article examines how the developing landscape of the opioid litigation reveals interesting parallels between state preemption of local public health initiatives in the legislative and judicial settings. State governments often try to limit the discretion of local jurisdictions to enact laws and policies that conflict with the preferences of state-level officials. The opioid litigation has given rise to state preemption of a different sort—in the context of litigation rather than legislation or executive orders. As the following discussion demonstrates, while state preemption of local litigation is motivated by many of the same goals as state preemption of local law or policymaking in other contexts, the authority of state governments to intervene and preempt local government lawsuits is less clear and less likely to be pursued. Indeed, collaborative strategies between state and local government plaintiffs could be mutually beneficial.

The opioid litigation provides an opportunity for state and local governments to reclaim some of the losses incurred from the opioid crisis and to attempt to hold some of those who've contributed to this harm to account. Yet the complexity of these lawsuits and the adversarial incentives between plaintiffs create an unprecedented situation that has the potential to cause divisions and disputes between state and local governments.

24 Sarah E. Gollust & Peter D. Jacobson, *Privatization of Public Services: Organizational Reform Efforts in Public Education and Public Health*, 96 Am. J. Pub. Health 1733, 1734 (2006).

25 Daniel Fisher, *Latest Wave of State Opioid Lawsuits Shows Diverging Strategies and Lawyer Pay Scales*, Forbes (May 29, 2018), https://www.forbes.com/sites/legalnewsline/2018/05/29/latest-wave-of-state-opioid-lawsuits-shows-diverging-strategies-and-lawyer-pay-scales/#374c88a86d1d.

I. THE OPIOID LITIGATION

Public health problems like the opioid crisis defy easy fixes, in part, because direct interventions through legislative or regulatory changes often encounter structural or political obstacles. Public health is historically underfunded, and policies to address drug dependency are often framed as issues of individual responsibility and criminalized behavior.[26] The fact that programs to reduce opioid dependency have gained as much political support as they have in recent years is somewhat astonishing given these historical obstacles. But many of the policies in place to address the opioid crisis remain problematic, inappropriately criminalizing drug use and disincentivizing harm reduction strategies.[27]

Nevertheless, the political will to intervene and support people with opioid and polysubstance dependency, as well as the scale of resources needed to adequately fund such programs, falls far short of the need.[28] Litigation can serve as a tool to move public policy forward and simultaneously procure resources to support a more robust set of interventions to address the opioid crisis. Still, litigation for public health comes with its own shortcomings, limitations, and challenges.

A. *Public Health Litigation as a Public Policy Tool*

It is indisputable that public health litigation can be a powerful tool to achieve some measure of accountability for industries that produce harmful products. Litigation—whether brought by individuals, classes, organizations, or government entities—can advance the traditional tort law goals of providing a means to pursue compensation for those injured by harmful products and to achieve deterrence against future harm by incentivizing the makers and distributors of such products to make them safer.[29] In some circumstances, tort litigation can be democratizing when private individuals or entities bring civil claims to redress harms that the government won't address.[30] In other cases, the government itself can be the

26 Matthew D. Lassiter, *Impossible Criminals: The Suburban Imperatives of America's War on Drugs*, 102 J. AM. HIST. 126, 126–29 (2015); Terry, *supra* note 8, at 652–55.

27 *See* Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. DRUG POL'Y 156, 158 (2017).

28 Brendan Saloner et al., *A Public Health Strategy for the Opioid Crisis*, 133 PUB. HEALTH REP. 24S, 31S (2018).

29 *See* Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, 32 J.L. MED. & ETHICS 556, 556–59 (2004).

30 For example, tort claims can provide recourse for people harmed in under-regulated

plaintiff, using its *parens patriae* power and bringing suit to redress harms on behalf of the public.[31]

Civil litigation can bolster additional public health policy goals by facilitating the disclosure of important information through the discovery and trial processes. Litigation can shed light on how defendants have acted to prioritize economic gain over protecting people from potential harm.[32] The information gleaned from and publicity given to pending litigation can highlight the risks of products or the behaviors of people using those products and can result in altered product design or drive behavior modifications among manufacturers or consumers. For example, evidence suggests that the widespread publicity given to tobacco company documents revealed during tobacco litigation in the 1990s solidified the public perception of the harm posed by cigarette smoking and helped to reduce smoking rates.[33] In addition, litigation can serve as a catalyst for political change, providing support for future legislative or regulatory interventions.[34] Indeed, some legislative and regulatory responses to the opioid crisis arguably stem from the ongoing opioid litigation, including the expanded use of prescription drug monitoring systems to track opioid prescriptions.[35]

The tort system has many limitations as a means to advance public policy. Monetary remedies are often inadequate in amount or in-

fields and later spur the government to regulate. Litigation related to motor vehicle injuries was a major driver in changes to vehicle design and the subsequent adoption of regulatory standards for vehicle safety. *See* Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 Epidemiologic Reviews 90, 91–93 (2003); *see also* Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 Ariz. L. Rev. 929, 975 (2015).

31 The *parens patriae* doctrine allows a state to sue on behalf of its citizens. *See* Alexander Lemann, *Sheep in Wolves' Clothing: Removing* Parens Patriae *Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122 (2011).

32 Jon S. Vernick et al., *How Litigation Can Promote Product Safety*, 32 J.L. Med. & Ethics 551, 553–54 (2004). *But see* Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 Ohio St. L.J. 663, 664–65 (2019) (describing how, so far, the MDL court has kept discovery under seal, effectively "undermin[ing] the public health promoting outcomes such litigation aims to achieve").

33 Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality*, 30 J.L. Med. & Ethics 224, 234 (2002); Walter J. Jones & Gerard A. Silvestri, Commentary, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later: Lessons for Physicians About Health Policy Making*, 137 Chest J. 692, 693 (2010).

34 *See, e.g.*, Stephen P. Teret & Michael Jacobs, *Prevention and Torts: The Role of Litigation in Injury Control*, 17 L. Med. & Health Care 17, 17 (1989); Tom Christoffel, *The Role of Law in Reducing Injury*, 17 L. Med. & Health Care 7, 9 (1989).

35 *See generally* Leo Beletsky, *Deploying Prescription Drug Monitoring to Address the Overdose Crisis: Ideology Meets Reality*, 15 Ind. Health L. Rev. 139 (2018); Jennifer D. Oliva, *Prescription Drug Policing: The Right to Protected Health Information Privacy Pre- and Post-Carpenter*, 69 Duke L.J. 775 (2019).

commensurate to the actual harm caused, particularly if the harm is death.[36] Further, tort litigation requires harm as a precondition of finding fault.[37] Consequently, tort claims provide retrospective remedies in most cases and, therefore, have limited potential for anticipatory interventions to prevent harm. In the opioid context, the retrospective approach of tort litigation means that lawsuits geared toward holding opioid manufacturers and distributors accountable for their marketing practices and callous indifference to the widespread overuse of prescription opioid medications occur after many of those practices have already ceased as a response to media or litigation pressure.[38] The locus of the opioid epidemic, while initially driven by the challenged practices of the opioid litigation defendants, has evolved to now primarily involve overdose deaths from illicit heroin and fentanyl.[39] Plaintiffs in public health tort claims often struggle to overcome the evidentiary thresholds of causation in making their cases or are overwhelmed by the sophisticated and well-financed strategic defenses raised by corporate defendants.[40] Complex litigation like the opioid lawsuits generates additional challenges, such as the calculation and disposition of damages that may be awarded through adjudication or settlement of a civil claim.[41]

Public health law scholars have robustly debated how public health litigation can or should contribute to advancing public health policies or goals.[42] While litigation can support public health policy change and will occasionally drive this change, the effectiveness of litigation is often context-specific and constrained by structural and practical limitations. Litigation is usually retrospective and applies to specific cases and controversies rather than prospective policy development, relegating most policy changes to the political branches.[43] Other commentators demonstrate significant resistance to the notion of litigation becoming a driver of public health policy, expressing concerns about judicial activism and the lack of democratic accountability.[44]

36 *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 709 (1990).

37 DAN B. DOBBS ET AL., HORNBOOK ON TORTS 311 (2d ed., 2016).

38 *See* Terry, *supra* note 8, at 649–52.

39 *Id.* at 651.

40 Peter D. Jacobson & Soheil Soliman, *supra* note 33, at 231–34.

41 *See* Weeks & Sanford, *supra* note 19, at 1063.

42 *See* Lytton, *supra* note 29, at 556; *See also* Wendy E. Parmet & Richard A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437,441–43 (2000).

43 Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL'Y & L. 769, 795–97 (1999).

44 *See, e.g.*, Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. LEGIS. 433, 436–37 (2000); R. Shep Melnick, *Tobacco Litigation: Good for the Body but Not the Body Politic*, 24 J. HEALTH POL. POL'Y & L. 805, 807–08 (1999).

Despite the evident limitation and scholarly critiques, public health litigation has—and should—play an important role in advancing public health policy. Litigation can be particularly impactful to push back against powerful industries that are less susceptible to legislative and regulatory constraints due to their political influence. Moreover, public health litigation can meaningfully influence the broader public policy conversation by shedding light on factors driving public health crises. Both of these functions have appeared as the opioid litigation has unfolded.

B. *Governments as Plaintiffs*

The use of public health litigation by state and local governments raises additional issues. For example, when should governments use litigation to pursue public health goals as opposed to regulating directly? Often the circumstances and politics surrounding the public health concern at issue dictate the answer to this question. Litigation may be a particularly preferred approach when governments have sustained a clearly identifiable injury from the defendants' activities or when political gridlock or preemption prevents direct legislative or regulatory action.

The 1998 tobacco Master Settlement Agreement (MSA) provides the most prominent example of state government plaintiffs successfully using litigation to address a major public health concern and also provides an interesting—if not completely analogous—template for the pending opioid litigation.[45] State governments had been severely restricted in regulating tobacco products due to judicial interpretations of federal tobacco legislation that preempted most state tobacco regulation and litigation.[46] In *Cipollone v. Liggett Inc*., however, the Supreme Court ruled that claims against tobacco companies on some state law tort theories were not preempted.[47] This case provided a turning point and opened the door for additional state litigation. The state lawsuits that followed sought damages for medical expenses incurred by the state related to smoking-induced illnesses.[48] After substantial

45 *See generally* Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 Kan. L. Rev. 1029 (2019).

46 *See, e.g*., Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1190 (E.D. Tenn. 1985) (holding that the common law claim of failure to warn was preempted by federal legislation); *see also* Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92 §§ 4-5, (1965); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 5, 84 Stat. 87 (1970) (codifying labeling requirements and imposing restrictions on cigarettes in federal law while preempting more stringent state standards and restrictions).

47 Cipollone v. Liggett Grp., 505 U.S. 504, 530–31 (1992).

48 *See, e.g*., Jon S. Vernick et al., *Public Health Benefits of Recent Litigation Against the Tobacco*

negotiation between the plaintiff states and the tobacco industry, the MSA resolved all of the pending litigation between forty-six states and the major tobacco companies, providing billions of dollars to states while imposing significant restrictions on tobacco advertising, marketing, and other conduct.[49]

Several public health litigation lessons can be taken from the MSA. First, it demonstrated that states could push for public health change through litigation against major industries producing harmful products—and could potentially obtain a significant amount of money in damages through such litigation. Government plaintiffs, including those currently pursuing opioid litigation, have since adopted many of the same legal arguments and strategies that succeeded in the tobacco litigation. Second, though the funds from the MSA were meant to reimburse the plaintiff states for medical expenses related to smoking and to underwrite future programs to reduce tobacco use, very little of the settlement money seems to have gone to tobacco cessation programs or public health initiatives.[50] Consequently, public health advocates have recommended that future mass tort settlements be more directive as to how settlement funds are used to improve public health.[51] Third, in some respects, the tobacco companies represented the perfect defendant for a substantial tort settlement: a huge, profitable industry making a clearly harmful product with a strong incentive to settle once their decades-long record of success against lawsuits began to fracture. Other industries—including the opioid manufacturers and distributors currently facing thousands of civil claims—do not have the same magnitude of resources for a large enough settlement to satisfy thousands of claimants or a similarly clear set of inducements to enter into an analogous settlement agreement.[52]

Another important issue pertaining to governments as plaintiffs in public health litigation arises when state and local government plaintiffs

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Industry, 298 JAMA 86, 87 (2007).

49 *Master Settlement Agreement*, PUB. HEALTH L. CTR., https://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf (last visited Nov. 19, 2020).

50 Most states used the MSA funds for initiatives other than tobacco prevention, with some rare exceptions. A report from the Campaign for Tobacco-Free Kids estimated that in fiscal year 2020, states will spend only 2.7% of the MSA revenue on tobacco-related programming. *A State-by-State Look at the 1998 Tobacco Settlement 21 Years Later*, CAMPAIGN FOR TOBACCO-FREE KIDS, https://www.tobaccofreekids.org/what-we-do/us/statereport (last updated Jan. 16, 2020); Terry, *supra* note 8, at 656.

51 Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. KAN. L. REV. 1029, 1052–58 (2019).

52 *See* Terry, *supra* note 8, at 655–64.

bring public health lawsuits simultaneously. State governments have the authority, resources, and standing to bring claims in their own states' courts, while the capacity of local governments to act as plaintiffs is much more varied and limited.[53] The authority of cities and counties to bring lawsuits on behalf of their residents varies by state, and the resources available to support litigation will almost always be greater at the state level.[54]

This would tend to suggest that public health litigation initiated and pursued by state attorneys general is more likely to succeed. Indeed, the two most successful public health mass-tort lawsuits brought by government plaintiffs—related to harms from tobacco and asbestos—were led primarily by state governments.[55] Public health litigation efforts initiated by local governments against manufacturers and sellers of firearms and lead paint have had much less success due to procedural, substantive, and political factors, including preemption by federal and state law.[56] Nevertheless, local governments may suffer distinct harms that lend themselves to redress, and not all of these claims can, or will, be pursued at the state level. Moreover, state-level settlements will rarely be shared with local jurisdictions, a lesson that local governments learned well after the tobacco MSA.[57] If local governments rely on states to pursue litigation on their behalf, local interests are likely to be neglected and local damages ignored. Therefore, it is imperative that local governments continue to pursue litigation when possible to vindicate the harms incurred by those local governments and their residents.

C. *Opioid Lawsuits: An Evolving Landscape*

The opioid crisis has generated thousands of lawsuits.[58] The earliest of these were largely filed by individuals seeking damages from opioid manufacturers for marketing their product in fraudulent and misleading ways or from individual physicians for prescribing opioids in the first place.[59] In these lawsuits, dubbed the "first wave" by Gluck and others, plaintiffs were nearly uniformly unsuccessful.[60] Manufacturers and physician defendants

53 *See* Sarah L. Swan, *Plaintiff Cities*, 71 Vand. L. Rev. 1227, 1271–76 (2018).
54 *Id.* at 1271, 1275.
55 *Id.* at 1233–34.
56 *Id.* at 1234–39.
57 *See* Jones & Silvestri, *supra* note 33, at 695–97.
58 Terry, *supra* note 8, at 656–57.
59 Gluck et al., *supra* note 9, at 353.
60 *Id.* at 353 (exploring the history of and legal issues implicated by the opioid litigation); *see also*, Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. Va. L. Rev. 1117, 1122 (2014).

were able to portray the fact that plaintiff consumers were continuing to take excess opioids and that other physicians were continuing to prescribe them to patients as intervening illegal conduct, obviating any liability on the part of the defendants.[61] These defenses mirrored the strategy used successfully by tobacco defendants for decades against individual tort claims.[62]

Federal and state officials also began to pursue civil and criminal actions against opioid manufacturers, which culminated in a 2007 Purdue Pharma agreement to pay a $600 million settlement to the federal government plus approximately $20 million to twenty-six states and the District of Columbia for violating the Food, Drug, and Cosmetic Act[63] by introducing a misbranded drug.[64] As in the earlier tobacco litigation, state governments acting as plaintiffs were able to reach a settlement, although a fairly limited one. Whether any of the settlement money that went to the states actually funded programs related to the opioid crisis is unclear.[65] As a result, the first wave of litigation had a modest effect on the overall dynamics of the prescription opioid industry.

The success of the federal and state settlements provided a roadmap for future government litigants, however. Subsequent lawsuits, primarily filed by state and local governments, have adopted and expanded the legal theories and strategies of the earlier opioid cases and have also drawn from the successful litigation strategies and tort theories that led to the tobacco MSA.[66] The government plaintiffs allege that the effects of opioid dependency and overuse have imposed substantial costs on their budgets.[67] The lawsuits contain a wide variety of legal theories, ranging from public nuisance, negligence, unjust enrichment, violations of state consumer protection, racketeering, and Medicaid fraud to failure to follow Drug Enforcement Administration (DEA) regulations under the Controlled Substances Act[68] and analogous state regulations to "monitor, detect, investigate, refuse and

61 Gluck et al., *supra* note 9, at 353.

62 Berman, *supra* note 45, at 1032–33.

63 21 U.S.C. § 301 (2018).

64 United States v. Purdue Frederick Co., 495 F. Supp. 2d 570, 570–73 (W.D. Va. 2007); Gluck et al., *supra* note 9, at 353.

65 Gluck et al., *supra* note 9, at 353–54 (noting that in Connecticut most of the settlement money apparently went to cover attorneys' fees and general fund expenditures).

66 Berman, *supra* note 45, at 1033–34.

67 *See* Weeks & Sanford, *supra* note 19, at 1064–66. Claims using unjust enrichment and statutory consumer protection provisions to recover health care costs were first used successfully by states in the tobacco MSA. *See* Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 337 (2001).

68 21 U.S.C. § 801 (2018).

report suspicious orders of prescription opioids."[69] Fundamentally, though, the lawsuits center on claims that the defendant manufacturers excessively and inappropriately marketed and promoted opioid medications, and defendant distributors and sellers did not appropriately keep track of or report excessive orders.[70]

The number of government lawsuits quickly expanded and continued to grow. As of September 2020, forty-nine states had filed claims against opioid manufacturers.[71] State-level claims were brought, for the most part, by state attorneys general in lower courts, alleging violations of state law and invoking the states' *parens partriae* powers.[72] The multiplicity of claims presented jurisdictional and practical challenges for the parties and the courts. Among other things, states have sought damages to compensate for expenditures on opioid-related harms under Medicaid and other programs.[73] While there has been coordination among states in their settlement negotiations with opioid manufacturers and other defendants, the state-level opioid cases have proceeded independently and at varying speeds.[74]

As the state lawsuits were emerging, local jurisdictions simultaneously began to file distinct opioid-related lawsuits.[75] The proliferation of local suits has many causes. Many cities and counties—and their residents—were suffering significant harm from opioid-related deaths and dependency.[76] In times of inadequate local budgets, seeking redress for these harms through

69 *See* Gluck et al., *supra* note 9, at 355–56. Some pending lawsuits also include claims against the Joint Commission—the independent entity that accredits hospitals—for collusion with manufacturers in developing accreditation standards that favored opioid overprescribing. *Id.* at 356–57.

70 *See* Terry, *supra* note 8, at 639 (helpfully categorizing the pending lawsuits into claims of "overpromotion" and "diversion").

71 Stubbs, *supra* note 16.

72 Michelle L. Richards, *Pills, Public Nuisance, and* Parens Patriae*: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. Rich. L. Rev. 405, 440, 443, 445 (2020).

73 *Id.* at 453.

74 Most of these state cases are still pending and moving forward slowly. State litigation against Purdue Pharma has been halted while federal bankruptcy proceedings occur. *See generally* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Purdue Pharma, Inc., No. 19-23649 (Bankr. S.D.N.Y. Sept. 15, 2019), ECF No. 1. The state of Oklahoma is an exception to this trend, having negotiated a $270 million settlement with Purdue Pharma in 2019 and winning a favorable verdict against Johnson & Johnson for $572 million after the court found that the company had engaged in misleading marketing and created a public nuisance. *See* State *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486 (Okla. Dist. Ct. Aug. 26, 2019) (entering judgment after non-jury trial).

75 *See* Richards, *supra* note 72, at 405–06.

76 *See* Dasgupta et al., *supra* note 3, at 182–83.

the tort system provided an opportunity to recoup local expenditures related to opioid use and to fund future efforts to respond to the crisis. Damages sought by local jurisdictions were distinct from state harms, and therefore not likely to be covered in a state settlement with opioid manufacturers or distributors.[77] Moreover, local governments had not shared in the settlement money from the tobacco MSA, which further incentivized local governments to pursue their own lawsuits related to opioids rather than to rely on the states to look out for their interests.[78]

Local government opioid lawsuits also received strong support and encouragement from private sector attorneys, many of them experts at representing plaintiffs in mass tort litigation.[79] These litigators offered more than just their expertise, sophistication, and connections; they also brought local officials the promise of a contingency fee arrangement.[80] Local governments typically do not have the capacity—in terms of money or personnel—to bring complex litigation against well-funded industries. But with assistance from outside counsel working on contingency, there was nothing for the local governments to lose in filing an opioid claim.

The Judicial Panel on Multidistrict Litigation consolidated forty-six local opioid litigation claims pending in federal courts into a single multidistrict litigation (MDL) on December 12, 2017, and appointed Judge Dan Aaron Polster of the Northern District of Ohio to preside over the case.[81] MDLs are a procedural mechanism authorized under federal law that allows for the consolidation and coordination of pretrial proceedings in cases with similar claims, as determined by the Judicial Panel on Multidistrict Litigation.[82] MDLs are often touted as a procedural mechanism that is both flexible and efficient, allowing for the collected plaintiffs and defendants

77 *See* Weeks & Sanford, *supra* note 19, at 1111–13.

78 *See generally* Berman, *supra* note 45, at 1035.

79 Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 75, 94 (2019); Tom Hals & Nate Raymond, *Opioid Companies Say Lawyers' Fee Demand Threatens Settlement Talks,* REUTERS (Feb. 27, 2020), https://www.reuters.com/article/us-usa-opioids-litigation/opioid-companies-say-lawyers-fee-demand-threatens-settlement-talks-idUSKCN20L2PK.

80 BURCH, *supra* note 18, at 20.

81 Transfer Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (J.P.M.L Dec. 12, 2017), ECF No. 1.

82 While MDLs are a mechanism for consolidating multiple similar tort claims, they are not the same as class actions. The court overseeing the MDL cannot resolve the individual claims, which must be remanded back to the federal district court where they were filed. MDLs also do not have the requirements or plaintiffs' protections that are built into class actions. *See* BURCH, *supra* note 18, at 12–17.

to work out common issues across cases in a consolidated format.[83] Critics have argued, however, that the MDL mechanism prioritizes efficiency over fairness and transparency, incentivizes settlement over adjudication, and forces individual litigants to cede their control over their claims to a centralized process headed by a small set of representative counsels.[84]

While initially encompassing only a few hundred cases, the opioid MDL has grown to include approximately 2,500 opioid lawsuits from local and tribal jurisdictions.[85] These suits propose a range and diversity of legal theories, as well as a wide range of defendants named in the suits.[86] This may pose a challenge to finding a common resolution for damages in settlement negotiations, although the consolidation of claims in the MDL could have the opposite effect and streamline the negotiation process. Moreover, the breadth and scope of the legal theories give rise to a different challenge: calculating damages that can reasonably approximate the losses that the plaintiffs are claiming.[87]

Litigation initiated by state and local government plaintiffs changes the nature of the applicable tort claims in some important ways. These claims have more likelihood of success compared with earlier claims filed by individuals against opioid manufacturers because government plaintiffs can avoid defenses that successfully cast blame and responsibility on consumers and prescribers for misuse in the earlier suits filed by individual plaintiffs.[88] Additionally, by focusing on the population-level effects of the defendants' actions, the government plaintiffs can better measure the scope of harm allegedly caused by these actions. If pursued in coordination, these government lawsuits could create a stronger position from which to negotiate a substantial settlement, as was done with the tobacco MSA. Finally, the availability of different causes of action may facilitate government plaintiffs' success. Public nuisance claims, for example, have "standards of fault and causation that are less rigorous than those applied in personal

83 *See generally*, Burch, *supra* note 18.

84 *See, e.g.*, *id.* at 24–30; Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 Ga. L. Rev. 1287, 1289 (2019); Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 Am. U. L. Rev. 175, 213–14, 227–29 (2019); David L. Noll, *MDL as Public Administration*, 118 Mich. L. Rev. 403, 426, 452, 454–56 (2019).

85 Sara Randazzo, *Last-Minute Opioid Deal Could Open Door to Bigger Settlement*, Wall St. J. (Oct. 21, 2019), https://www.wsj.com/articles/four-drug-companies-reach-last-minute-settlement-in-opioid-litigation-11571658212 (noting that there are 2500 pending lawsuits consolidated in the MDL).

86 Gluck et al., *supra* note 9, at 353–57.

87 *See generally* Weeks & Sanford, *supra* note 19 (discussing the challenges with calculating damages incurred by local jurisdictions from the opioid crisis).

88 *See* Haffajee & Mello, *supra* note 9, at 2304 (analyzing the legal theories being advanced in the lawsuits against opioid manufacturers).

injury claims[,]"[89] which could increase their likelihood of success vis-à-vis individual negligence claims.

Judge Polster has adopted an aggressive approach to managing the MDL, stating at the outset that he intended to urge the parties to agree to a rapid global settlement agreement that prioritized forward-looking initiatives that would help address the ongoing toll of the opioid crisis. In his initial comments to the litigants, he indicated that the federal court needed:

> to try and tackle [the opioid crisis, since] the other branches of government, federal and state, have punted. . . . So my objective is to do something meaningful to abate this crisis and to do it in 2018. . . . [W]hat I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly. . . . [W]e don't need a lot of briefs and we don't need trials. They're not going to—none of them are—none of those are going to solve what we've got.[90]

This approach explicitly seeks to influence national opioid policy, using litigation procedure in a prescriptive—rather than retrospective and reactive—way.[91]

Judge Polster's ambition for a rapid and prescriptive settlement for the opioid MDL has not come to fruition. Shepherding so many disparate plaintiffs and defendants through such a large and varied number of claims has presented an impossibly complex task, and with thousands of motions filed over the past two and a half years, a global settlement remains elusive. Two "bellwether" trials—selected initial trials meant to test the parties' legal theories in court and to set precedent and standards for the other pending cases—were settled just before these cases were scheduled to proceed in October 2019.[92]

Judge Polster continued to push the procedural envelope to pursue

89 Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 236–37 (2012).

90 *See* Transcript of Proceedings of January 9, 2018 at 4, 9, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio Jan. 12, 2018), ECF No. 71.

91 Gluck et al., *supra* note 9, at 359–60. Scholars of MDL procedure have noted the inherent flexibility of this model to allow for judicial innovation in resolving complex, multiparty cases, but Judge Polster's approach is unique even by MDL standards. *See* Noll, *supra* note 84, at 412–13, 440–42; Burch & Williams, *supra* note 18, at 1447–48.

92 Brian Mann & Colin Dwyer, *Opioid Trial: 4 Companies Reach Tentative Settlement With Ohio Counties*, NPR (Oct. 21, 2019), https://www.npr.org/sections/health-shots/2019/10/21/771847539/opioid-trial-4-companies-reach-tentative-settlement-with-ohio-counties.

a global settlement by certifying a negotiation class.[93] The negotiation class is a "novel" use of class action procedures that creates a class that encompasses all of the cities and counties across the United States for purposes of negotiating a "global" opioid settlement that would apply to all potential local government claims against the opioid defendants.[94] This class certification would have allowed the plaintiffs' leadership team to negotiate settlement terms with opioid litigation defendants on behalf of all of these jurisdictions,[95] even though only about ten percent of the 34,000 potentially eligible jurisdictions have brought claims that have been consolidated in the MDL. Like with other class action lawsuits, state and local officials who do not want to participate in the class—whether they may want to preserve a right to pursue a trial or settlement separately in the future or not—can opt out.[96] This ruling, issued by Judge Polster in September 2019, was both innovative and controversial; indeed, both state government plaintiffs and many of the defendants opposed the formation of the negotiation class.[97] The negotiation class could have had implications for the likelihood of a global opioid settlement. The opposition of both defendants and rival state plaintiffs indicates that the existence of a negotiation class potentially puts local government plaintiffs (or potential plaintiffs) in a stronger position to negotiate favorable settlement terms. However, in September 2020, the Sixth Circuit Court of Appeals reversed Judge Polster's negotiation class certification and remanded this issue back to the lower court for further proceedings, likely reducing the leverage of local jurisdictions in ongoing settlement negotiations.[98]

MDL proceedings have also been delayed by bankruptcy filings by some of the larger defendants, including Purdue Pharma and members of the Sackler family who own Purdue Pharma.[99] The United States Bankruptcy

93 *See In re* Nat'l Prescription Opiate Litig., 332 F.R.D. 532, 537 (N.D. Ohio 2019) (granting parties' motion for certification).

94 *Id.* at 537, 543.

95 *Id.* at 547, 551, 556.

96 *Id.* at 540–41, 551.

97 *See* Memorandum of Certain Defendants in Opposition to Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio July 23, 2019), ECF No. 1949; Letter from National Association of Attorneys General as Amici Curiae Opposing Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio July 23, 2019), ECF No. 1951.

98 *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 667 (6th Cir. 2020).

99 *See* Notice of Eighth Amended Bankruptcy Court Order Granting Injunction Against Continuation of Proceedings as to Related Parties to Debtor Purdue Pharma L.P. & Affiliated Debtors, *In re* Nat'l Prescription Opiate Litig., No.1:17-md-2804 (N.D. Ohio

Court for the Southern District of New York has enjoined the MDL claims and other litigation pending the resolution of the bankruptcy.[100]

The immense size and novelty of the opioid litigation provide an unwieldy situation, the outcome of which remains uncertain. Yet, even as the story of these lawsuits continues to unfold, we are faced with the unusual inter-jurisdictional dynamics that have arisen from so many state and local jurisdictions simultaneously bringing overlapping lawsuits against the same set of defendants. The tension between government plaintiffs—especially between state and local governments within the same state—can give rise to unexpected and competing interests. Driven by the legacy of the tobacco MSA and concern about the influence of sophisticated plaintiffs' attorneys at the local level, states have contemplated using preemption authority to limit local litigation, as the underlying dynamics of privatization play out through litigation strategy and incentives.

Apr. 2, 2020), ECF No. 3251.

100 *Id.* In October 2020, Purdue Pharma agreed to plead guilty to federal criminal charges related to opioid sales and marketing tactics and to pay an $8.3 billion settlement of criminal and civil penalties to the federal government. This settlement does not include the MDL cases or other pending state litigation. *See* Katie Benner, *Purdue Pharma Pleads Guilty to Role in Opioid Crisis as Part of Deal with Justice Dept.*, N.Y. TIMES (Nov. 24, 2020), https://www.nytimes.com/2020/11/24/us/politics/purdue-pharma-opioids-guilty-settlement.html.

II. Privatization and Public Health Litigation

The expansion of opioid lawsuits filed by both state and local governments created more than just logistical complexity. These suits created the potential for conflicting interests between states and local governments. Once the local government lawsuits were consolidated into the MDL, the potential for conflict became even more pronounced. The MDL mechanism gave the local government plaintiffs a much stronger bargaining position against the defendants by aggregating their negotiating power and providing a coordinated and expedited procedure designed to advance settlement talks quickly. The state plaintiffs, concerned that the local plaintiffs were now on the fast track to settlement with the assistance of Judge Polster, faced the possibility that the defendants would be depleted of resources by a global MDL settlement, leaving no money to cover the states' claims against them.[101] But states retain a great deal of power and control over the activities of local governments, and some states have sought to use that authority to preempt local opioid lawsuits or to limit efforts by local government to utilize private attorneys to assist with their opioid-related legal claims.[102]

This part discusses the issues that arise when governments privatize public health services and activities generally. It also addresses the analogous contemporary conversations surrounding the use of private attorneys to bring public lawsuits on behalf of government plaintiffs. The politics underlying these two types of privatization often generate controversy and may give rise to positions that are diametrically opposed. Progressive advocates and policymakers often offer a trenchant critique of the principles that underlie privatization of government services, while conservative advocates and policymakers often suggest a similarly strong critique of the privatization of litigation practice.[103] Privatization—and specifically the role of private attorneys as key players in the local government opioid lawsuits—has exacerbated some of the tensions between state and local governments related to opioid litigation and provided a convenient target for states interested in criticizing—or intervening in—local litigation. And while privately led public litigation poses concerns about accountability, incentives, and contingency fees, all of these concerns can be adequately addressed through the application of existing legal mechanisms. Moreover, the downsides of private involvement in public litigation are outweighed by the benefits of allowing private counsel to be involved in opioid litigation.

101 Randazzo, *supra* note 22.

102 See *infra* Sections II(B) and III(B).

103 *See generally* Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 Marq. L. Rev. 449 (1988).

A. *Privatization and Public Health*

The privatization of government responsibilities and services represents a longstanding trend in the United States, although one that has ebbed and flowed over time.[104] The substantial expansion of government, beginning with the New Deal in the 1930s through World War II and then the Great Society programs of the 1960s, gave way to the deregulatory and small government-oriented policies of the Reagan Administration in the 1980s.[105] The deregulatory movement that gained prominence during the Reagan era and has remained salient since then has provided a template for reducing the size of government as well as loosening regulations on the private sector, not only at the federal level but also across state and local jurisdictions.[106] Outsourcing governmental responsibilities and services to private contractors has become commonplace, especially in areas such as private schools and private prisons,[107] raising concerns about whether privatized public services can remain accountable to the public.[108]

"Privatization, [broadly speaking,] is the transfer of decision-making authority, delivery, or financing from a public to a private entity."[109] Privatization often merely involves contracting with private organizations to provide government services, but it may involve more extensive delegation of responsibility and even government powers.[110] It also encompasses public-private partnerships and external funding programs that frequently support state and local public health initiatives.[111] Several factors drive privatization: a desire for smaller government operations and responsibility; an interest in efficiency, flexibility, competition, or innovation; and an ideological commitment to private sector or market-based mechanisms in certain areas

104 *See generally* Jeffrey R. Henig, *Privatization in the United States: Theory and Practice*, 104 POL. SCI. Q. 649 (1989–1990).

105 *Id.* at 649.

106 Florencio López-de-Silanes et al., *Privatization in the United States*, 28 RAND J. ECON. 447, 448–53, 468 (1997).

107 Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 165, 185–86 (2000).

108 *See* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003). *But see* Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1422 (2003).

109 Gollust & Jacobson, *supra* note 24, at 1734.

110 *See* David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 647–48 (1986).

111 *See generally* JONATHAN H. MARKS, THE PERILS OF PARTNERSHIP, INDUSTRY INFLUENCE, INSTITUTIONAL INTEGRITY, AND PUBLIC HEALTH (2019) (using one example of a privatized public health initiative—federal food and nutrition policies—to examine the inherent ethical questions and potential risks to the public of systemic privatization at this scale).

of society, among others.[112] While both state and local governments under leadership from both political parties have supported privatization, the delegation of government functions to non-governmental entities is more commonly pursued by small government-favoring conservative politicians and advocates.[113]

State and local governments are the primary drivers of public health governance, and the privatization of public health has followed contemporary trends in government privatization. However, while the scholarly literature and analysis of privatization generally are quite robust, the study and analysis of public health sector privatization specifically are sparse. A detailed study done approximately 20 years ago determined that nearly three-quarters of local health departments had privatized some of their public health services.[114] It is likely that the current scope of public health privatization is even higher, as state and local budgets have not recovered to prior levels after the 2008 economic downturn.[115] Privatization of public health services is often driven by a desire to achieve efficiency and flexibility, as well as to obtain expertise and capacity ordinarily not available to public health departments internally.[116] This latter incentive is especially important as a factor in local health department decisions to outsource services and functions.[117] Services may also be privatized in response to state law or policy requiring privatization.[118]

From a public health perspective, the policy and functional impact

112 *See* Cass, *supra* note 103, at 466–68.

113 Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 567–68, 594 (2000).

114 Christopher Keane et al., *Privatization and the Scope of Public Health: A National Survey of Local Health Department Directors*, 91 Am. J. Pub. Health 611, 612 (2001).

115 *See, e.g.*, *A Funding Crisis for Public Health and Safety: State-by-State Public Health Funding and Key Health Facts*, Trust for America's Health 14–15 (Mar. 19, 2019), https://www.tfah.org/report-details/a-funding-crisis-for-public-health-and-safety-state-by-state-and-federal-public-health-funding-facts-and-recommendations/ (outlining trends and challenges in public health budgeting); Karen DeSalvo et al., *Developing a Financing System to Support Public Health Infrastructure*, 109 Am. J. Pub. Health 1358, 1359–60 (2019) (providing recommendations for expanding financing for public health infrastructure). State health agency expenditures have decreased by 15.6% since 2016. *See State Public Health Resources and Capacity*, Ass'n St. & Territorial Health Officers 1 (Mar. 23, 2020), https://www.astho.org/Research/Data-and-Analysis/Data-Brief-on-State-Public-Health-Resources-and-Capacity/. The COVID-19 pandemic will have a substantial effect on constraining state and local health department budgets for the foreseeable future.

116 Keane et al., *supra* note 114, at 613.

117 *Id.*; *see also* Christopher Keane et al., *Perceived Outcomes of Public Health Privatization: A National Survey of Local Health Department Directors*, Milbank Q., March 2001, at 115.

118 Keane et al., *supra* note 114, at 613.

of privatization are mixed. Privatization may have both positive and negative implications for public health and the functioning of government entities charged with the protection of public health. Privatization may allow public health agencies to expand capacity or to address public health problems or provide services that are outside the capability of their permanent workforces.[119] However, privatization raises concerns about oversight, accountability, priorities, and resource allocation.[120] Will private contractors and partners feel accountable, and can they be held accountable, either to government agencies or to the public at large? Will private contractors adequately uphold public health goals or reject these goals for other values, specifically economic and profit considerations? In other words, will the best interests of the public or their own interests take precedence in their actions? Will bringing in private contractors to conduct public health work be effective and efficient? Will the work done by these private contractors be worth the financial costs, opportunity costs, and trade-offs with direct democratic accountability?

The trend of privatization has engendered much debate, critique, and analysis. Frequently, opponents of privatization come from the political left.[121] Progressives and left-leaning public health advocates often raise well-founded concerns that with privatization comes an intermingling of market approaches and public health goals, which can only serve to dilute those goals and undermine the values and mission of public health.[122] The incorporation of profit-seeking motives into public health could result in initiatives less consistent with public health goals, expectations, and outcomes. In addition, privatizing public services can undermine the possibility of democratic accountability for the actions of private actors operating in lieu of the government. Alternatively, however, the debate over privatization can spur more attention for the need to support public sector capacity.[123]

As state and local budgets have decreased, privatized approaches to litigation have become integral to government lawsuits, particularly at the local level.[124] While government agencies have historically brought in outside legal expertise for a variety of reasons, state and local governments partnering with plaintiff-side attorneys in mass tort litigation has become

119 Gollust & Jacobson, *supra* note 24, at 1734.

120 *Id.* at 1736.

121 *See* Cass, *supra* note 103, at 453–54 (describing the models of privatization advanced by conservative political leaders).

122 *See* Gollust & Jacobson, *supra* note 24, at 1735 (discussing public health goals in the context of privatization).

123 *Id.* at 1736–37.

124 Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 532–33 (2016).

more frequent over the last thirty years.[125] The use of private attorneys for public litigation shares many of the potential benefits and raises some of the same concerns about practicality, accountability, and legitimacy that occur in discussions about the privatization of public services more generally. The opioid litigation provides a meaningful contemporary example of how these concerns also can lead to disputes between government plaintiffs over the use of outside counsel to support public litigation.

B. *Privatization and the Opioid Litigation*

The opioid litigation provides an enticing landscape for representation by private attorneys for several reasons. First, state and local governments do not typically have the legal expertise or resources to staff, formulate, or develop complex tort litigation on behalf of the state or the city or county.[126] Consequently, private plaintiffs' attorneys offer an attractive alternative. Outside counsel can promise experience and expertise in complex litigation generally and in cases against industry defendants representing government plaintiffs specifically. These attorneys possess sophisticated understandings of court procedure and strategy, as well as a track record of success in similar cases.[127] Many of the plaintiffs' attorneys involved in the opioid litigation have participated in prior large-scale mass tort litigation on behalf of government plaintiffs.[128] Local government plaintiffs in the opioid litigation have a particularly strong incentive to retain experienced outside counsel to navigate the complexities of an unprecedentedly-large MDL.[129]

Second, government plaintiffs face significant resource limitations in terms of both personnel and expenditures. Budgets and staff capacity are limited, and gaining access to the additional resources needed to mount a complex, multi-year lawsuit is often difficult or impossible.[130] Contingency fee arrangements—in which the private attorneys do not take payment for their legal work unless and until the case is favorably concluded with a judgment for the plaintiffs or a settlement—allow for mass tort lawsuits like those in the opioid litigation to proceed without resources being allocated

125 *See generally* David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DePaul L. Rev. 315 (2001) (examining the rise of private counsel support for state attorneys general during the tobacco litigation); Swan, *supra* note 53, at 1244–46, 1280–84 (noting the increased use of private counsel by local government plaintiffs in cases related to public health).

126 Lemos, *supra* note 124, at 532–33, 539, 555.

127 *Id.* at 532–33.

128 Bradt & Rave, *supra* note 79, at 75.

129 *See id.* at 94–98.

130 *See id.* at 95.

up front by government plaintiffs.[131] This approach, in turn, gives executive officials more flexibility in pursuing litigation without the explicit sanction of legislators[132] who may be reticent to acquiesce to litigation for economic or political reasons. Thus, contingency fee arrangements pose a minimal economic risk to local officials and the communities they represent and may be politically advantageous.

Both of these justifications—capacity building and expertise bolstering—provide strong positive incentives to both state and federal governments considering the retention of private counsel in relation to mass torts like the opioid litigation. Indeed, many governments at both levels have retained private counsel to support their lawsuits against the opioid defendants.[133] Private attorneys have become especially integral to the local governments' opioid claims. Many of the local government plaintiffs have retained outside counsel, while only some of the state government plaintiffs have done so.[134]

The proliferation of outside counsel representing local governments can be explained, in part, by a third potential benefit of private attorney representation in the opioid litigation: the fact that private attorneys are representing thousands of jurisdictions simultaneously in the MDL proceedings[135] and that this coordinated effort provides local government plaintiffs with greater clout to negotiate a better settlement from the opioid defendants than they would have alone. Indeed, private plaintiffs' attorneys actively sought additional local government clients to represent in opioid lawsuits, and the core group of private attorneys representing the plaintiffs in the MDL were instrumental in filing the motion that led to Judge Polster's approval of the negotiation class, which has since been overturned.[136]

131 *See* Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 425–26 (1998). *See also* Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 830 (1989) (noting that "asbestos cases closed between 1980 and 1982 had average fees and costs of 39%"); Daniel Capra & Lester Brickman, *The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827, 2828 (1999) (noting that plaintiffs' attorneys involved in the tobacco litigation in Texas, Mississippi, and Florida received around one quarter of the total settlement).

132 Dana, *supra* note 125, at 319–20 (speculating that state attorneys general retained private counsel on a contingency basis during the tobacco litigation, in part, to avoid legislative funding limits).

133 Fisher, *supra* note 25.

134 *Id.*

135 Daniel Fisher, *Cities vs. States: A Looming Battle for Control of High-Stakes Opioid Litigation*, FORBES (Mar. 28, 2018), https://www.forbes.com/sites/legalnewsline/2018/03/28/cities-vs-states-a-looming-battle-for-control-of-high-stakes-opioid-litigation/#35da8d3e4b5d.

136 *See In re* Nat'l Prescription Opiate Litig., 332 F.R.D. 532, 556 (N.D. Ohio 2019)

Government plaintiffs that have retained outside private counsel for the opioid litigation have received some criticism, particularly on the issues of contingency fees and accountability. Two state attorneys general sought to intervene in local opioid lawsuits in their states and invoked the involvement of private attorneys in these local suits as a justification for their need to intervene.[137] The Arkansas Attorney General filed for a writ of mandamus, citing the potential for damages to go to private attorneys rather than the state as the basis for this attempted intervention, as well as the concern that "out-of-state attorneys . . . stand to claim *significant* damages (in excess of the contingency fee caps set forth in Arkansas law) that would otherwise go to the State to address the opioid epidemic."[138] Further, the petition argued that private attorneys were not accountable, and their participation violated "principles of good government and public policy."[139] Similarly, in an effort to stop local government litigation against opioid defendants, Tennessee's Attorney General alleged that local governments had retained outside counsel inappropriately, without first receiving permission from the state.[140]

Contingency fees represent a vexing ethical issue in this ongoing litigation. Contingency fee arrangements have been vehemently criticized in the past, particularly in cases where large class action or multidistrict litigation awards ended up significantly enriching the plaintiffs' attorneys—some would say at the expense of the actual plaintiffs.[141] In response to this perception, some state legislatures—including those in Arkansas and Tennessee—have separately passed legislation to limit when private attorneys are allowed to bring claims on behalf of public sector entities, imposed approval requirements to limit the discretion of government officials, or capped fees for outside representation.[142]

(certifying negotiation class); *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 667 (6th Cir. 2020) (reversing certification of negotiation class).

137 *See infra* Section III(B) for a detailed discussion of these state attempts to preempt local government opioid lawsuits.

138 Emergency Petition for Writ of Mandamus at 2–3, Arkansas v. Ellington, No. CV-18-296 (Ark. Apr. 2, 2018) (emphasis in original).

139 *Id.* Ironically, perhaps, the state of Arkansas is also using private attorneys to oversee their state-level opioid lawsuits. Response to Emergency Petition for Writ of Mandamus at 3, Arkansas v. Ellington, No. CV-18-296 (Ark. Apr. 4, 2018).

140 Letter from Herbert Slatery III, Attorney Gen. of Tenn., to Tenn. Dist. Attorneys Gen. (Mar. 15, 2018), https://jnswire.s3.amazonaws.com/jns-media/06/5c/792254/FromSlatery.pdf.

141 *See* Burch, *supra* note 18, at 60–71 (explaining plaintiffs' attorneys' incentives in mass tort litigation).

142 *See* Fisher, *supra* note 25. *See, e.g.*, Ark. Code Ann. § 25-16-714 (2015) (establishing a contingency fee cap for private counsel working with the attorney general); Tenn. Code Ann. § 8-6-106(a) (2016) (requiring approval of the governor or attorney general

Moreover, state attorneys general also raised the issue of private attorneys' fees in their letter opposing the negotiation class. While recognizing that outside counsel has the right to seek fair compensation for their work, they note that "it is also a reality that Defendants will likely provide a finite amount of money to resolve all the cases, and any grant of excess compensation to Plaintiffs' counsel would unnecessarily lessen the funds available to abate the crisis."[143]

Another relevant concern is that the centralization of these hundreds of local government cases in the hands of a small number of private attorneys could lead to pressure to agree to a premature settlement that works toward the interests of private counsel but not, ultimately, the best interest of the local governments.[144] However, the interests of outside counsel and local governments will not necessarily diverge, especially when plaintiffs are seeking monetary rather than injunctive remedies as they are in the opioid litigation.[145] Given the dynamics of the case and the looming bankruptcy proceedings for some of the more prominent defendants, a more rapid settlement may be preferable for all parties.

On balance, the arrangement between local governments and outside counsel is justifiable in the opioid lawsuits. Without the assistance of outside counsel, local governments would not be able to pursue opioid claims. Most local jurisdictions have neither the subject matter expertise nor the capacity to pursue these claims without outside assistance. By contrast, private attorneys provide a means to allow local governments to advance their claims against the opioid defendants and have a chance to recover some of their damages. Even though their ultimate damage award will be reduced by contingency fees paid to these outside counsels upon victory—likely to be between 20% and 35% of the total award—the remaining amount will be far in excess of what they could have won without the assistance of outside counsel.

Representation of local governments by outside counsel in the opioid litigation has a distinct advantage in fostering greater coordination among the various litigants, which offers strategic benefits as well as efficiency, although such benefits may come at the expense of the state government plaintiffs. If local governments are able to recoup any of their losses through a settlement facilitated by the MDL process, it will largely be the doing of these private attorneys.

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before retaining outside counsel to represent the state).

143 Letter from National Association of Attorneys General, *supra* note 97, at 9.

144 Burch & Williams, *supra* note 18, at 1445–46.

145 *See* Lemos, *supra* note 124, at 548–49.

III. Preemption and Public Health Litigation

This section examines the parallels between state actions to preempt local public health initiatives through legislation—which is common—and state attempts to preempt local government lawsuits—which is much rarer. The paucity of litigation preemption by states stems from the political comity between government plaintiffs that often accompanies mass tort lawsuits like the opioid litigation.

A. *State Preemption of Local Public Health Initiatives*

Preemption has become an increasingly popular approach for states to exert control and influence over local regulation and public policy. State legislatures generally have the authority to determine the scope of power granted to local governments and the power to override local laws by enacting general or specific limitations.[146] The historical default rule governing the power relationship between state and local governments was Dillon's Rule (named after an influential 19th Century judge), which only allowed local jurisdictions to govern in topical areas expressly granted by the state.[147] Over time, some states enacted a "home rule" through legislation or constitutional amendments, which gave local jurisdictions more control to enact laws without prior approval from the state.[148] States, however, can legislatively preempt local laws in most cases, even in home rule jurisdictions.[149]

Preemption of local laws and policies has become especially common in circumstances when state officials want to limit the authority of cities or counties that are intent on implementing progressive policies that state-level leaders oppose.[150] Local public health departments have

146 David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2257, 2261 (2005).

147 Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 Chi.-Kent L. Rev. 959, 963 (1991); Barron, *supra* note 146, at 2285.

148 *See, e.g.*, Barron, *supra* note 146, at 2290, 2292; Jesse J. Richardson, Jr. et al., Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management 10–12 (2003), https://perma.cc/EP5E-MD65.

149 Richardson et al., *supra* note 148, at 25. In some jurisdictions with strong home rule provisions, state legislative preemption of local regulations may be disallowed if the state isn't itself regulating the issue but merely prohibiting the local government from doing so. *See, e.g.*, Cleveland v. State, 2013-Ohio-1186, 989 N.E.2d 1072, 1082 (2013) (overturning a state law prohibiting local governments from banning trans fats in restaurant food). But most states have less robust home rule provisions than Ohio and would not similarly be limited in imposing this type of restriction on local governments. Richardson et al., *supra* note 148, at 17–25.

150 *See* Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995, 1997–98

been active in pushing public health initiatives and innovations, recognizing that many public health concerns are best understood and addressed at the local level.[151] In response, some state legislators have employed preemption vigorously to limit the authority of local government to enact public health laws or policies. Evidence suggests that state preemption of local government through legislation has become increasingly common, particularly in response to local government public health efforts.[152] State legislators in numerous states, often prompted by lobbying from industry groups, have passed laws that preempt local regulation of a variety of areas that impact public health, including firearm safety, fracking, environmental protections, increased minimum wage laws, and paid sick leave.[153] Preemption initiatives may draw support from state legislators seeking to protect influential business interests who may oppose the local regulations that would impose costs on business operations or otherwise reduce profitability.[154] Businesses also may advocate for state preemption of local regulation on the basis of efficiency and convenience, for example, to avoid having to comply with multiple standards across local jurisdictions.[155]

Another area where states have pursued preemption against local governments is in the protection of rights for sexual orientation and gender identity minority groups, with several states preempting local law providing protection from discrimination for LGBTQ+ individuals.[156] These preemption efforts—initiated by state governments controlled by conservative politicians—can undermine important civil rights protections and have been linked to hate crimes and negative health outcomes.[157]

(2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1165 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State and Local Relationship?*, 106 GEO. L.J. 1469, 1471–73 (2018).

151 Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1221, 1256–57, 1265–66 (2014).

152 *See* James G. Hodge, Jr. et al., *Public Health "Preemption Plus,"* 45 J.L. MED. & ETHICS 156, 156 (2017).

153 Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH 900, 901 (2017); *see also* Jennifer L. Pomeranz et al., *State Preemption: Threat to Democracy, Essential Regulation, and Public Health*, 109 AM. J. PUB. HEALTH 251, 251 (2019).

154 *See* Diller, *supra* note 151, at 1233, 1268–69, 1280.

155 Similarly, justifications of efficiency and consistency are used to support federal preemption of state law.

156 *See* Jennifer L. Pomeranz, *Challenging and Preventing Policies That Prohibit Local Civil Rights Protections for Lesbian, Gay, Bisexual, Transgender, and Queer People*, 108 AM. J. PUB. HEALTH 67, 67 (2018).

157 *Id.* at 67–68; *see also* Mark L. Hatzenbuehler et al., *State-level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 AM. J. PUB. HEALTH 2275, 2275 (2009). While the U.S. Supreme Court concluded that employment discrimination

Some state governors have also tried using executive orders to control local responses to public health emergencies. During the initial stages of the COVID-19 outbreak, many local jurisdictions acted quickly to impose limitations on social interactions, closing non-essential businesses and asking people to stay at home to reduce the spread of the disease.[158] In Mississippi, Governor Tate Reeves issued an executive order that broadly defined essential activities to include all offices and departments stores and explicitly preempted local government orders from enacting more stringent limitations.[159] Similarly, Florida's governor enacted an executive order designed to override local restrictions on religious services, defining "essential activities" to include "[a]ttending religious services conducted in churches, synagogues and houses of worship" and explicitly superseding contradictory local restrictions.[160] These preemptive state actions directly undermine public health.

Notably, state preemption of local regulation need not be anti-public health.[161] Some states responded to COVID-19, for example, by suspending state laws that would allow preemption of local public health efforts or imposing state-mandated minimum protections, allowing localities to implement greater, but not lesser, protections.[162] The proliferation of states using preemption to undercut local public health policy innovation remains a significant concern for public health advocates.

The rise of state preemption of local government action has

based on LGBTQ+ status violates Title VII, other forms of discrimination may still persist. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1734 (2020).

158 *Coronavirus State Actions*, Nat'l Governors Ass'n, https://www.nga.org/coronavirus-state-actions-all/ (last visited Nov. 1, 2020).

159 Miss. Exec. Order No. 1463 at 2–3 (Mar. 24, 2020); *see also* Bob Moser, *How Mississippi's Governor Undermined Efforts to Contain the Coronavirus*, New Yorker (Apr. 7, 2020), https://www.newyorker.com/news/news-desk/how-mississippis-governor-undermined-efforts-to-contain-the-coronavirus.

160 Fla. Exec. Order No. 20-91 at 4–5 (Mar. 19, 2020). Texas pursued a similar policy. *See* Tex. Exec. Order No. GA-18 at 5 (Apr. 27, 2020) (lifting statewide restrictions on movement and activities, stating that the order "shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services or reopened services allowed by this executive order. . .").

161 *See* Derek Carr et al., *Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health*, 98 Milbank Q. 131, 131 (2020).

162 *See, e.g.*, Cal. Exec. Order No. 28-20 (Mar. 16, 2020) (suspending state law provisions that would preempt local government powers to impose limitations on residential or commercial evictions); N.C. Exec. Order No. 138 § 8 (May 5, 2020) (prohibiting local governments from disregarding the minimum standards of protection against COVID-19 required by the state, while allowing additional, but not lesser restrictions to be imposed at the local level).

primarily focused on legislative and regulatory activity. The use of preemption by states to influence or undermine local litigation has been much less common.[163] When preemption of local litigation does occur, it takes the form of preemptive settlements of ongoing lawsuits initiated by local jurisdictions, legislative action at the state level to ban local suits, or the use of state powers to intervene in local lawsuits.[164] Preemptive settlements—usually at the initiation of the state attorney general—preclude subsequent similar claims by local entities based on the theory that the state has already resolved the issue on behalf of the local government entity. Tobacco company defendants successfully invoked this theory to dismiss county and city lawsuits filed after the tobacco MSA was completed.[165] From a local perspective, such preemption was devastating. Local jurisdictions were deprived of bringing claims for their own tobacco-related damages and not allocated any of the resources procured by the states in the MSA.[166] Targeted legislation passed by a state legislature can explicitly end ongoing litigation and can even prohibit future claims, as some states have done related to lead paint and gun lawsuits.[167] The final approach—direct intervention in local government-initiated litigation by state government—has been the model of litigation preemption used by states related to the opioid lawsuits so far.

B. *State Attempts to Preempt Local Opioid Lawsuits*

Most state governments that have pending lawsuits against opioid-related defendants have not taken overt actions to influence local government lawsuits concurrently pending against the same defendants. As the opioid litigation has proceeded, however, at least two states—Tennessee and Arkansas—have explicitly attempted to stop local governments from proceeding with lawsuits against opioid manufacturers and other related defendants.[168]

In March 2018, Tennessee Attorney General Herbert Slatery moved to intervene in lawsuits filed by forty-seven Tennessee counties

163 Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241, 1241 (2018) (examining preemption of local government litigation by states).

164 *See id.* at 1246–57.

165 *Id.* at 1247–48. A Wayne County, Michigan lawsuit against tobacco companies was dismissed in 2002 on these grounds. *In re* Certified Question from U.S. Dist. Court for E. Dist. of Michigan, 638 N.W.2d 409, 409, 411, 415 (Mich. 2002).

166 *See* Fisher, *supra* note 25.

167 Swan, *supra* note 163, at 1250–56.

168 *Id.* at 1249–50, 1259. It is worth noting that some commentators have argued that state and local lawsuits could be preempted by federal law. *See* Catherine M. Sharkey, *The Opioid Litigation: The FDA is MIA*, 124 DICK. L. REV. 101, 101 (2020).

against opioid manufacturers.[169] The counties, represented by a group of local district attorneys who collaborated on the filings, had brought claims in state court against opioid manufacturers on theories of public nuisance and violation of a state statute meant to create liability for drug dealers. The lawsuits alleged that defendants "knowingly participated in the diversion of opioids."[170] Attorney General Slatery objected to the district attorneys bringing claims on behalf of the state, stating that "the Office of the Attorney General is in the best position both to represent the interests of the State *and* to obtain the best possible monetary recovery for key governmental stakeholders."[171] Further, the Attorney General argued that these local claims impeded his "ability to prosecute all of the opioid litigation implicating the State's interests" and complicated the State's efforts to "seek relief for the State and its political subdivisions through a global resolution" as part of a "larger multistate effort."[172] Once Slatery formally moved to intervene in the case, the local district attorneys voluntarily dismissed the nuisance claims and statutory claims on behalf of the state but moved ahead with other claims that are still pending.[173] A Tennessee state appellate court later found that the local district attorneys did have standing to pursue statutory claims against the opioid manufacturers on behalf of the political subdivisions they represent.[174]

In another example, the Arkansas Attorney General filed a writ of mandamus in April 2018 to attempt to invalidate local government lawsuits against opioid manufacturers.[175] The local lawsuits asserted a number of common law and statutory claims on behalf of the state.[176] As in Tennessee, the Arkansas Attorney General argued in the filing that the prosecuting attorney for the local jurisdiction did not have the authority to bring a lawsuit on behalf of the state and that the suit "impaired the State's sovereignty and threaten[ed] to hamstring our statewide, constitutional officers' ability to carry out the will of the people."[177] The local prosecutor defended his right

169 *Statement on Opioid Litigation*, Tenn. Att'y Gen. (Mar. 21, 2018), https://www.tn.gov/attorneygeneral/news/2018/3/21/pr18-09.html; Swan, *supra* note 163, at 1259.

170 Effler v. Purdue Pharma L.P., No. 16596, 2019 Tenn. App. LEXIS 452, at *1 (Tenn. Ct. App., Sept. 11, 2019); Drug Dealer Liability Act, Tenn. Code Ann. § 29-38-101-116 (2005).

171 Letter from Herbert H. Slatery III, Tenn. Attorney Gen., *supra* note 140, at 1 (emphasis in original).

172 *Id.*

173 *Effler,* 2019 Tenn. App. LEXIS 452, at *3.

174 *Id.* at *14.

175 Emergency Petition for Writ of Mandamus at 2–3, Arkansas v. Ellington, No. CV-18-296 (Ark. Apr. 2, 2018).

176 *Id.* at 8–11.

177 *Id.* at 3, 6.

to bring the claims, and the Arkansas Supreme Court denied the mandamus request, ruling that the local lawsuit could proceed.[178]

The most prominent attempt by state actors to thwart local lawsuits came along just as the potential for a formidable local negotiation bloc became a possibility. Throughout the initial stages of the MDL, contention between states and local governments with claims in the MDL was minimal. State lawsuits were largely proceeding through their state court systems, and consequently, state attorneys general seemed to have little initial overt concern with the MDL.[179] At least one state official, in fact, openly supported the MDL proceedings as complementary to state litigation efforts against opioid defendants.[180] As the MDL gathered a critical mass of thousands of plaintiffs and the settlement negotiations picked up momentum, this state-level ambivalence began to change.

A particularly relevant turning point came with the proposal to establish a negotiation class. In 2019, Ohio Attorney General Dave Yost led efforts of state attorneys general to challenge the creation of a nationwide local jurisdiction negotiating bloc, with Yost's office arguing that state legislatures and attorneys general are best suited to "ensure the money goes to where the harm really is."[181] This state effort sought to functionally preempt the ability of local jurisdictions to use their collective efforts to pursue a more favorable settlement position, based on the argument that local governments were usurping the states' *parens patriae* powers by bringing these lawsuits.[182] The states further argued that state-level actors—as opposed to local governments—were best positioned to represent the interests of the state effectively and efficiently and should, therefore, control the allocation of any settlement funds that are awarded against these common defendants.[183] Judge Polster rejected this challenge and moved forward with implementing

178 Wesley Brown, *AG Rutledge Loses 'Writ of Mandamus' Request, Second Opioid Lawsuit May Proceed with 'State Actor,'* TALK BUS. & POL. (April 6, 2018), https://talkbusiness.net/2018/04/ag-rutledge-loses-writ-of-mandamus-request-second-opioid-lawsuit-may-proceed-with-state-actor/. These local-initiated lawsuits are still proceeding in state court as of November 2020 and have not been removed to federal court and the MDL.

179 *See* Jef Feeley, *Opioid Judge's Settlement Push Praised by Ohio Attorney General*, BLOOMBERG NEWS (Jan. 31, 2018), https://www.bloomberg.com/news/articles/2018-01-31/opioid-judge-s-settlement-push-praised-by-ohio-attorney-general (describing then-Ohio Attorney General, now Governor, Mike DeWine's support for the MDL and Judge Polster's handling of local cases).

180 *Id.*

181 Randazzo, *supra* note 22.

182 *See* Letter from National Association of Attorneys General, *supra* note 97, at 2–3.

183 *Id.*

the negotiation class,[184] although his ruling was later overturned on appeal.[185]

It is difficult to draw any strong conclusions from these examples or to infer much from the fact that these attempts by states to intervene in local government opioid lawsuits have been rare. Yet even these sparse efforts indicate potential fault lines between state and local governments that could lead to conflict as these cases proceed and as settlements are considered. If these lawsuits reach the stage where a verdict or settlement is likely and money could be available, the pressure for states to again try to intervene will increase.

These explicit attempts by state officials to intervene by preempting or co-opting local government litigation can be analogized to legislative preemption efforts that have challenged local public health initiatives. Upon examination, however, the analogy is intriguing but imperfect.

State governments can make reasonable and defensible arguments to seek to control law and policy decisions that affect the residents of the entire state. Likewise, the potential benefits of coordination and strategic consistency may support a centralized approach at the state level. In light of these arguments, as well as the recognized legal authority that states retain over local powers, there are strong legal and practical arguments supporting states' interests in maintaining control over local government policy and resources related to public health. These arguments apply to both legislative preemption and litigation preemption.

Local government claims to greater autonomy—whether through regulatory action or litigation—rest on the notions that local concerns may not be consistent state-wide, and local actions and interventions are more likely to address these more targeted concerns than state-level action.[186] For example, local jurisdictions may have a greater interest than states to regulate or prohibit fracking due to the disproportionate health impacts and environmental harms posed by this activity on local residents.[187]

In the context of the opioid litigation, states' logistical and practical

184 *See In re* Nat'l Prescription Opiate Litig., 332 F.R.D. 532, 556 (N.D. Ohio 2019). The negotiation class uses a novel procedural theory, based on Rule 23 class action principles, that would allow any city or county in the United States to participate in the negotiation class, while retaining rights to bring separate claims against the MDL defendants before a class settlement is reached. *Frequently Asked Questions*, In re: National Prescription Opiates Litig., https://www.opioidsnegotiationclass.info/Home/FAQ.

185 *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 676–77 (6th Cir. 2020).

186 *See generally* Paul Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219, 1283–85 (2014).

187 *See* Shaun A. Goho, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, 64 Plan. & Envtl. L. 3, 3–5 (2012).

motivations for seeking to preempt local litigation can be explained by similar incentives. Centralized coordination of all opioid lawsuits within a particular state at the state level could have strategic value in managing lawsuits with this level of complexity. Allowing local jurisdictions the capacity and authority to bring these claims separately could undermine the hegemony of state-level officials in making policy decisions related to public health. Likewise, states may prefer to control and focus on the legal arguments and legal strategy being advanced in these cases, a goal that may be impeded by concurrent local litigation. However, these concerns may be less relevant in this instance because the state plaintiffs have mostly filed their claims in state court while the local plaintiffs' cases are primarily consolidated in the MDL and have been removed to federal court. Moreover, there is little distinction between the legal arguments and positions of the state and local government plaintiffs. They differ not on the legal basis of the harm caused by the defendants but rather on the questions of who was harmed, who deserves recovery, and what legal theories are applicable.

Another legal distinction must be made between legislation and litigation as well. While the lines of legal authority for state legislatures to preempt local ordinances and regulations are clear, the authority of state executive branch officials to exert authority over litigation filed by or on behalf of local governments is much less clear. Given this uncertainty and the relative cohesion of interests between state and local governments engaged as plaintiffs in opioid lawsuits, the parties may be better served by pursuing joint settlement negotiations with the defendants.

Public health litigation against corporate defendants, however, changes the balance of interests between state and local actors. For instance, the political incentives for state officials to try and intervene in local action differ between legislative and litigation preemption. Unlike the pro-corporate influence that often underlies state intervention by legislative preemption, state and local officials alike share the political interests of holding the opioid defendants accountable.[188] Similarly, litigation preemption is less common in mass tort public health cases compared with the more partisan patterns seen in many efforts at legislative preemption. Many examples of legislative preemption involve conservative state legislators rejecting attempts to expand progressive policies by more left-leaning localities. The opioid litigation is focused on obtaining resources to pursue public health goals, but the litigation itself does not necessarily pursue any progressive policies. This unusual comity between state and local jurisdictions that normally would have been at odds may come down to the potential for financial gain

188 Swan, *supra* note 163, at 1241.

by all parties involved. The potential for large damages awards may act as the "lubricant for this litigative flexibility,"[189] at least until the settlement proceeds need to be divided up between government plaintiffs.

Thus, the most significant factor influencing the dynamic between state and local governments is potential access to money, a resource in short supply for both state and local governments. Concerns by states about overriding local policy choices to limit variability predominate in examples of legislative preemption, while fiscal motivations—primarily the desire to control the resources that will arise from any settlement or ruling against the many defendants—underlie state efforts to preempt local litigation.

The stakes in the opioid litigation are unmistakable. All of the plaintiffs, whether state or local, recognize that there are limited resources available to be split between the many plaintiffs currently suing opioid defendants. Early movers through trial or settlement may end up being the only parties who actually receive damages, as the defendants may become insolvent or receive bankruptcy protection for their assets. Both local and state governments have reasonable concerns that they will be left out of any settlement agreed to by the other group of plaintiffs. Events in late 2019, including a court judgment and settlement by the state of Oklahoma, and the bankruptcy filing and October 2020 settlement agreement with the federal government by Purdue Pharma, have ratcheted up this pressure, as litigants see their chances of recovery diminishing.[190] These pressures may spur state-level efforts to maintain control over the resolution of these cases and to seek to minimize the influence of local government plaintiffs.

The overlapping interests between state and local government plaintiffs need not result in rivalry. State and local plaintiffs have common interests in procuring settlements for their overlapping communities. A strategic alliance between the state and local plaintiffs would be beneficial to both sets of parties, allowing them to coordinate settlement negotiations from a position of combined strength while simultaneously assuring that all

189 *Id.* at 1284.

190 After the Oklahoma Attorney General settled a case with Purdue Pharma that directed the majority of the proceeds to the creation of an addiction research center at a state university, the state legislature passed legislation that future state settlements must go into the state general fund. *See* Lenny Bernstein, *In Oklahoma, Opioid Case Windfall Starts Winners Squabbling*, Wash. Post (June 20, 2019), https://www.washingtonpost.com/health/in-oklahoma-opioid-case-windfall-starts-winners-squabbling/2019/06/20/92ce0f60-92bb-11e9-b570-6416efdc0803_story.html. *See* Notice of Eighth Amended Bankruptcy Court Order Granting Injunction Against Continuation of Proceedings as to Related Parties to Debtor Purdue Pharma L.P. & Affiliated Debtors, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio Apr. 2, 2020), ECF No. 3251. *See* Benner, *supra* note 100.

parties receive a part of any resulting settlement. Such an approach, while logistically complicated, would be strategically smart and could redound to the benefit of all government plaintiffs currently pursuing opioid litigation.

Conclusion

The opioid crisis remains a significant public health threat to the United States. The ongoing opioid litigation has the potential to hold some of the relevant actors accountable for worsening the epidemic of opioid overdoses that has plagued the country.[191] Yet concluding these lawsuits in a way that both holds the defendants accountable for their actions and provides sufficient compensation to the injured parties will require resolve and creativity. Judge Polster's controversial and innovative approach to the opioid MDL takes the opioid crisis seriously and attempts to move the many litigants steadily and inexorably toward settlement. But even this determined effort has yet to significantly advance a resolution to these issues for most of the parties to the case.

This article considered two previously under-examined facets of the opioid litigation landscape: how privatization and preemption factor into the incentives, relationships, and tactics used by various government plaintiffs, who have understandably approached these lawsuits as something of a zero-sum game. The realization that the defendants may not have sufficient resources to satisfy judgments or settlements on all of the outstanding claims would seem to create incentives for early settlements by individual plaintiffs.[192] Despite these dynamics, however, few jurisdictions have reached rapid settlements with, or judgments against, opioid manufacturers.[193]

The pressures facing government plaintiffs in such a large litigation also favor substantial rivalry between plaintiffs, as they position themselves vis-à-vis one another to procure what is sure to be a limited availability of the damages they are seeking. Yet this has not been uniformly the case. State attorneys general have collaborated with each other in settlement talks with opioid defendants while their individual cases proceed in state court.[194] While

191 Of course, even if the litigation is resolved to the satisfaction of the many plaintiffs involved, most of the factors driving the current contours of the opioid epidemic will remain unresolved. *See* Terry, *supra* note 8, at 651–53.

192 Defendants, however, would have a contrary incentive, similar to mass tort defendants in earlier cases, to delay the cases through procedural obstacles.

193 Aside from the state of Oklahoma's settlements and the two bellwether county settlements discussed *supra*, the rest of the thousands of pending lawsuits remain unresolved at the time of this writing.

194 Jan Hoffman, *Opioid Settlement Offer Provokes Clash Between Cities and States*, N.Y. Times (Mar. 13, 2020), https://nyti.ms/2W6iSCe; Jared S. Hopkins, *21 States Reject $18 Billion Offer From Drug Wholesalers to Settle Opioid Litigation*, Wall St. J. (Feb. 14, 2020), https://www.wsj.com/articles/21-states-reject-18-billion-offer-from-drug-wholesalers-to-settle-opioid-litigation-11581692527 (referring to a joint letter by 20 state attorneys general rejecting the settlement offer).

these negotiations continue, state plaintiffs have remained cohesive in these efforts. Similarly, local government plaintiffs and their attorneys have mostly presented a united front in advancing their negotiations with defendants through the MDL process, with the exception of Cuyahoga and Summit Counties, who settled with a number of the opioid defendants just before the MDL bellwether trials were scheduled to begin in October 2019.[195]

Nevertheless, the competition between state and local government plaintiffs persists, as competing settlement negotiations continue. With so much at stake, it is somewhat surprising that states have not more aggressively used their potential powers of preemption to usurp local control over litigation or to seek to dictate the dispersal of settlement agreement funds like the Oklahoma legislature attempted.[196] Perhaps this can be explained by the lack of success of previous preemption attempts, but given the scope of state power in this area, direct intervention remains an option.[197]

As the parties to the opioid litigation enter what is likely to be the final phase of the current lawsuits, several important issues should remain at the forefront as the parties seek to resolve the disputes. First, a fair global settlement, including all parties, with an opportunity for plaintiff opt-outs, would be the ideal outcome of settlement negotiations. This model could resemble the negotiation class model that looks out for the collective interests of local jurisdictions but would also include state litigants to ensure that all of the plaintiffs receive a fair share of the damages from the opioid litigation. Such a global settlement would need to account for the variety of damages suffered by the respective plaintiffs and would need to realistically and fairly allocate damages among the defendants without completely undermining access to their products, which still have legitimate and necessary uses. This approach, however, would face serious challenges in coming together given the multiple and complex issues that would have to be resolved.

Second, any settlement that results from the opioid litigation—whether global or piecemeal—should be structured to apply settlement monies prospectively to solve ongoing problems related to opioid use disorder and related public health conditions. A key lesson learned from the MSA was that unless the settlements are carefully structured, they will not be used as proposed and instead be diverted opportunistically to cover state budgetary items unrelated to public health.[198] This insight should drive efforts to ensure that clear expectations are built into any settlement to guarantee that the

195 Jan Hoffman, *Johnson & Johnson Reaches $20.4 Million Settlement in Bellwether Opioids Case*, N.Y. TIMES (Oct. 1, 2019), https://nyti.ms/2pcwWf5.

196 *See* Bernstein, *supra* note 190.

197 *See* Swan, *supra* note 163, at 1268–69.

198 *See* Berman, *supra* note 45, at 1042.

funds are used as intended and shared across state and local jurisdictions.

Third, while legitimate concerns exist about using private counsel to represent government plaintiffs in tort litigation, these concerns can be mitigated with deliberate policy decisions. Democratic accountability for outside counsel can be achieved by outlining expectations through contract and maintaining consistent government oversight of the performance of outside counsel. Strategic incentives for litigation settlements must be monitored by government officials to ensure that public goals are being pursued. Contingency fees should remain reasonable but sufficient to compensate outside counsel for their work. Ceding control of local public health litigation to private litigators is not ideal, but realistically it is the only way to reliably advance complex mass tort litigation for resource-limited jurisdictions.

Fourth, preemption of local litigation or efforts to divert the proceeds from opioid lawsuits filed by local jurisdictions should not be pursued even if the states arguably have the power to do so. Local jurisdictions have suffered real harm from the opioid crisis, and fairness dictates that their injuries are compensated through this process and not circumvented by state action. Furthermore, cooperation between state and local plaintiffs could yield a mutually beneficial settlement available to all parties.

Finally, all communities faced with the ongoing challenges of the opioid crisis need to face the reality that litigation proceeds will not solve the bulk of the problems the crisis created. As opioid manufacturers grapple with bankruptcy, the likelihood of large damages awards or settlement payouts decreases. The COVID-19 pandemic will decimate state and local budgets, further imperiling their capacity to provide public health services.

The opioid litigation only addresses some of the underlying causes of the opioid crisis, and the resolution of these lawsuits will not reverse the harm already caused. But litigation can do more than compensate for loss; it can also catalyze change and seed future efforts to build a better society. The road forward demands that any litigation proceeds be put to use to support people who continue to face opioid use disorder and similar health challenges while building and maintaining a robust public health infrastructure.