NORTHEASTERN UNIVERSITY
LAW REVIEW

VOLUME XIV, ISSUE 1

Northeastern University School of Law
416 Huntington Avenue
Boston, Massachusetts 02115

Cite as 14 Ne. U. L. Rev. ____ (2022).

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† Masters of Legal Studies Faculty

Editors' Introduction

The first Issue of Volume 14 of the *Northeastern University Law Review* grew out of a year filled with challenge and reflection. Persevering through the second year of the coronavirus pandemic and witnessing the imminence of the climate crisis has put the fragility of life at front of mind. Consequently, people around the world are facing political and personal instability that threatens to disrupt their livelihoods. Notably, we must not forget that in this challenging time, marginalized peoples, both globally and in the United States, continue to face the greatest hardships, yet receive the least attention and support.

Against this backdrop, the *Law Review* has continued to hold steadfast to our mission to publish articles focused on serving the public interest. We continue to center academic scholarship that approaches the law from a social justice lens, and further grounds our work in our diversity, equity, and inclusion mission to elevate the voices and experiences of the BIPOC, LGBTQIA+, and other marginalized communities.

In line with this mission, Volume 14, Issue I is comprised of five articles and two student notes that reflect on health, domestic policy, and international relations. Specifically, the articles in this issue highlight the importance of Tribal consultation for effective American Indian and Alaska Native health policy; urge legislators to recognize and address the health impacts Black and Brown activists face; call for the democratization of gubernatorial selection; use COVID-19 litigation to expose gaps in, and propose solutions to workplace safety for employees in the meatpacking industry; examine the need for countries to apologize to wrongfully convicted terror detainees; advocate for the equitable return practice of the Iraqi Jewish archive; and outline the illegality of Title 42 and recommend policy changes to undo the harm caused to immigrants. In partnership with the Northeastern Center for Health Policy and Law, two articles in this issue were presented at the Center's 2021 conference, *Health and the Body Politic: Undermining Democracy, Undermining Health*.

As Issue I developed, the *Law Review's* online publications, *Extra Legal* and the Forum, continued to publish timely articles to shed light on a variety of legal developments. Specifically, the Forum has published pieces relating to abortion access, cannabis legalization, criminal justice reform in the clemency context, and free speech doctrine. The online publications remain core pillars of the *Law Review* by supporting our goal to make current legal scholarship accessible to all.

The long-term effects of the pandemic and on-going social and political turmoil have also been felt by our own staff. As we began work on Issue I, we placed special emphasis on providing our staff with the support they needed to continue to navigate changing pandemic conditions and feel empowered in their work. To do this, we instituted the *Law Review's* first kick-off and training weekend, established new procedures for providing feedback to staff members, provided additional opportunities for training, and worked to adjust article timelines to allow for lighter workloads. With virtual meetings as the main platform for collaboration, intentional outreach at all levels of the publication has helped build community and ensure high-quality work.

The *Law Review* has continued to build on the work of our predecessors in centering diversity, equity, and inclusion (DE&I) in our own organization-wide processes. This year, the write-on application included its first Diversity Statement that asked applicants to reflect on recent events, their own positionality and privileges, and the role of the *Law Review* in addressing social justice issues. Our inaugural Chief Diversity Editor has driven this work through building in review of articles in both the submissions review and final review processes, facilitating trainings and workshops, instituting a DE&I speaker series, and establishing connections with Law Reviews across the country who share in our commitment. The DE&I committee also continues to think critically about ways in which the organization can recruit and maintain diverse authors and editors.

This year, in witnessing on-going threats to democracy on a global scale and reflecting on our own commitment to the missions and goals that guide our publication, the *Law Review* has internalized the importance of democratization, informing one of this year's biggest institutional changes: democratizing the *Law Review's* Editorial Board selection process. All editors on the *Law Review* now have a vote in who leads the organization. This change not only builds transparency but creates the opportunity for all editors to have greater ownership over the organization and the pieces we publish.

Implementing this institutional growth has not been easy. With the consequences of the pandemic, continued assaults on the civil rights of Black and Brown individuals, and the climate crisis heightening before our eyes, our editors are experiencing emotional and mental exhaustion. Yet, despite these intense events, our editors have stayed committed to the publication and the mission of the *Law Review*. We are grateful for their work.

In addition to the editors of the *Law Review*, we would like to extend our deepest gratitude to the individuals and groups who have helped make Issue I possible. We would like to thank our faculty advisors, Director Sharon Persons and Dean Kara Swanson, for offering their invaluable advice as we navigated expected and unexpected challenges. Next, we would like to thank Dean James Hackney and the entire faculty and staff of Northeastern University School of Law for their unwavering support of the *Law Review* as we continue to grow. We would also like to thank our authors for trusting us with their work. Finally, we would like to thank our subscribers and readers. With your engagement, we can work towards our goal to make academic legal scholarship accessible for all.

Editorial Board
Northeastern University Law Review

DEMOCRATIZING GUBERNATORIAL SELECTION

*By T. Quinn Yeargain**

* Lecturer, Yale School of the Environment. This Article serves as a sister article to *Democratizing Gubernatorial Succession*, 73 Rutgers U. L. Rev. (forthcoming Summer 2021).

ABSTRACT

At the time of American Independence in 1776, most state constitutions created governors in a form unrecognizable today. In virtually every state, governors were indirectly elected in some capacity. Over the nineteenth century, as American political institutions underwent significant democratic reforms, most of these methods of indirect election were eliminated outright. But some still exist today—either because the original methods were kept intact or because new methods were adopted during the Jim Crow era in the pursuit of Black suppression. In recent years, states (and cities) around the country have started experimenting with different, sometimes radically democratic, methods of conducting elections. These efforts suggest that gubernatorial elections could be significantly reformed and made more democratically legitimate. This Article chronicles the untold history of gubernatorial elections—their initial character and their modification over time—and surveys how reform efforts currently underway could reshape their character today.

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INTRODUCTION

A Jim Crow-era spectre haunted the 2019 Mississippi gubernatorial election—and not *just* the continued resistance to the Voting Rights Act of 1965,[1] felon disenfranchisement,[2] the potential diminished voter participation because of the off-year election,[3] racial and partisan gerrymandering, and other miscellaneous voter suppression. This particular spectre set a high threshold for actually *winning* the election. Under the 1890 Mississippi Constitution, the person who received both a majority of the popular vote and the electoral vote would be elected; if no person received both majorities, the house of representatives would choose a governor from the two candidates with the highest number of of popular votes.[4]

This provision has rarely come into effect, though it did several times during the 1990s,[5] yet it stood to disproportionately harm Jim Hood, the Democratic nominee in the race. Because the state's legislative districts were gerrymandered to favor Republican candidates, Hood would've been required to win about 55 percent of the statewide vote to translate his support into a majority in Mississippi's quasi-electoral college.[6]

In the end, the concerns about the constitutional provision proved

1 *See* Gloria J. Billingsley & Sylvester Murray, *Redistributing Power in Mississippi: The Reversal of Section 4 of the Voting Rights Act*, 4 RALPH BUNCHE J. PUB. AFFS. 211, 226 (2015) (explaining that Mississippi's failure to correct past mistakes pertaining to voters' rights negatively impacts future elections and progress); *see also* Max Feldman, *Voting Rights in America, Six Years After* Shelby v. Holder, BRENNAN CTR. FOR JUST. (June 25, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voting-rights-america-six-years-after-shelby-v-holder.

2 *See Felony Disenfranchisement in Mississippi*, SENT'G PROJECT (Feb. 13, 2018), https://www.sentencingproject.org/publications/felony-disenfranchisement-mississippi/.

3 *See* Paul Braun et al., *Why These 5 States Hold Odd-Year Elections, Bucking the Trend*, NPR (Nov. 4, 2019), https://www.npr.org/2019/11/04/767959274/why-these-5-states-hold-odd-year-elections-bucking-the-trend.

4 *See generally* MISS. CONST. art. V, § 140 (amended 2020); *id.* § 141 (repealed 2020).

5 Bobby Harrison, *Lawsuit Targets Jim Crow-Era Provision in State Constitution that Governs How Statewide Officeholders Are Chosen*, MISS. TODAY (May 31, 2019), https://mississippitoday.org/2019/05/31/lawsuit-targets-jim-crow-era-provision-in-state-constitution-that-governs-how-statewide-officeholders-are-chosen/. The first time that the provision came into effect was in the 1903 election for Clerk of the Mississippi Supreme Court. *See* H.R. JOURNAL at 95–98 (Miss. 1904); *see also* Quinn Yeargain (@yeargain), TWITTER (July 15, 2021), https://twitter.com/yeargain/status/1415707970827079688?s=20.

6 *See* Declaration of Jonathan Rodden at 41, McLemore v. Hosemann, 414 F. Supp. 3d 876 (S.D. Miss. 2019) (No. 3:19-cv-00383-DPJ-FKB), 2019 WL 8301448; *see also* Jeff Singer, *A Jim Crow Law Stacks the Deck Against Mississippi Democrats. Our New Data Set Shows Just How Badly*, DAILY KOS (Feb. 4, 2019), https://www.dailykos.com/stories/2019/2/4/1832206/-A-Jim-Crow-law-stacks-the-deck-against-Mississippi-Democrats-Our-new-data-set-shows-just-how-badly.

largely academic. The Republican nominee, Tate Reeves, won a majority of the vote over Hood;[7] the legal challenge to the provision was effectively rendered moot;[8] and the state legislature approved a constitutional amendment abolishing the double-majority requirement and implementing runoff elections rather than legislative selection, which the voters approved in 2020.[9]

But even under this revised regime, Mississippi still deviates from how modern-day governors are usually selected. Generally, popular elections are scheduled and the candidate with the most votes wins the election. But the usual case is not *every* case. Beyond Mississippi, three other states—Georgia, Louisiana, and Vermont—along with four territories—Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands—similarly impose majority-vote requirements. If no candidate wins a majority, a runoff election is held in Georgia, Guam, Louisiana, Mississippi, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands. And in Vermont, in the absence of a majority winner, the legislature selects the winning candidate.

Even with this significant amount of variation from the norm, the current state of gubernatorial selection is simpler and more uniform than at any other point. For much of early American history, governors were selected by legislatures or were elected in procedures that were deliberately removed from the people. Indeed, a full history of gubernatorial selection reveals a complicated, messy, frequently undemocratic process that lasted well past its expiration date—and these effects linger today in many state constitutions.

This Article tells the story of how states have selected governors

7 Luke Ramseth & Giacomo Bologna, *Republican Tate Reeves Wins Mississippi Governor Race*, Clarion Ledger (Nov. 5, 2019) (updated Nov. 6, 2019), https://www.clarionledger.com/story/news/politics/2019/11/05/tate-reeves-wins-mississippi-governor-race-defeats-jim-hood/4159647002/.

8 *See McLemore*, 414 F. Supp. 3d at 887–88 (denying plaintiffs' motion for a preliminary injunction against the double-majority requirement prior to the election, noting that "[a]bsent some impact on the election results, the constitutional injury caused by discarded votes is outweighed by the harm a preliminary injunction would cause when the Court attempts to craft a new method for electing statewide officers on the eve of the election").

9 Miss. Const. art. V, § 140 ("The person receiving a majority of the number of votes cast in the election for these offices shall be declared elected. If no person received a majority of the votes, then a runoff election shall be held under procedures prescribed by the Legislature in general law."); Ashton Pittman, *Mississippi Votes to End Jim Crow Electoral College-Like System; Popular Vote to Choose Governor*, Miss. Free Press (Nov. 3, 2020), https://www.mississippifreepress.org/6733/mississippi-votes-to-end-jim-crow-electoral-college-like-system-popular-vote-to-choose-governor/.

and extracts from that story lessons about how contemporary gubernatorial elections ought to be reformed. It begins in Part I by laying out the original history of gubernatorial elections—specifically detailing the history of legislative election and majority-vote requirements in early state constitutions. Part II then explores how majority-vote requirements have re-emerged in more modern constitutions, both as a cudgel to wield against voters of color and, less maliciously, to reflect specific political realities. Finally, Part III concludes the Article by reviewing the contemporary reforms to gubernatorial elections that have developed, like the top-two primary and ranked-choice voting, as well as some that haven't (yet), like the adoption of parliamentary democracies. It also suggests fertile ground for some of the most forward-thinking and innovative reforms in places such as the Northern Mariana Islands and Puerto Rico.

I. THE EARLY HISTORY OF GUBERNATORIAL ELECTIONS

Governors today bear little resemblance to the governors that were created in Revolutionary-era state constitutions. Modern governors have substantially more executive power—including the power to veto, make appointments, and convene the legislature, which are probably the most prototypically executive powers—than governors more than two centuries ago. These differences extended beyond powers, however. Revolutionary-era governors were also selected by entirely different procedures. At the time the Revolutionary War began, most state governors were elected by state legislatures; many others were elected by state legislatures under certain conditions. But as a wave of democratization swept the country during the nineteenth century, many of these provisions were eliminated and this opened gubernatorial selection to public input.

Part I discusses the initial landscape of gubernatorial selection at the time the Revolutionary War commenced, as well as how gubernatorial selection was affected by nineteenth-century trends toward democratization in state constitutional law. Section A begins with the initial adoption of gubernatorial selection procedures in the late eighteenth century. Section B then discusses how these procedures were revised in the century that followed.

A. *Revolutionary War Period*

In 1776, the Declaration of Independence was signed. It was accompanied by the quick adoption of state constitutions that were intended to function as provisional governing documents—though many lasted well

beyond that provisional period. Other states didn't adopt official constitutions until much later, instead operating under their colonial charters, in some cases, with some significant modifications. The governments created in the wake of declared independence look unrecognizable today. Looking back on these governments now shows that organization of state governments could well have taken a different path were it not for the sudden dominance of one particular form of government.

When the original thirteen colonies declared their independence and established temporary state governments, they did so in radically inconsistent ways. For starters, post-independence Massachusetts and New Hampshire did not have governors; instead they delegated executive authority to the legislature. In Massachusetts, this was because the state continued to operate under its charter, but had no "constitutional means" of selecting a governor. Accordingly, through the impossibility of the governor's existence, the state forced executive power to reside in the legislature.[10] In other instances, like in New Hampshire, this was because its provisional 1776 constitution opted out of having a governor.[11] However, this state of affairs did not last for long—Massachusetts adopted a constitution in 1780 providing for an elected governor, and New Hampshire's second constitution, which took effect in 1784, did as well.[12]

When Massachusetts and New Hampshire created their first post-colonial governors, they were in the minority of states that provided for directly elected governors. At the time of the thirteen original colonies, only three other states—Connecticut, New York, and Rhode Island—had directly elected governors.[13] Delaware, Georgia, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia all had governors who were elected by their state legislatures.[14]

10 Lawrence Friedman & Lynnea Thody, The Massachusetts State Constitution 8–9 (2011).

11 Susan E. Marshall, The New Hampshire State Constitution: A Reference Guide 6–7 (2004); *see also* N.H. Const. of 1776, para. 3 (providing for a bicameral legislature, but no governor).

12 Friedman & Thody, *supra* note 10, at 10–11; Marshall, *supra* note 11, at 11–12.

13 *Charter of Connecticut*, *in* 2 The Public Records of the Colony of Connecticut, From 1665 to 1678: With the Journal of the Council of War, 1675 to 1678, at 3, 4–5 (J. Hammond Trumbull ed., Hartford, F.A. Brown 1852); N.Y. Const. of 1777, art. XVII; *Charter of Rhode Island and Providence Plantations - July 15, 1663*, Yale L. Sch.: Avalon Project, https://avalon.law.yale.edu/17th_century/ri04.asp (last visited Oct. 15, 2021) [hereinafter *R.I. Royal Charter of 1663*].

14 Del. Const. of 1776, art. 7; Ga. Const. of 1777, art. II; Md. Const. of 1776, art. XXV; N.J. Const. of 1776, art. VII; N.C. Const. of 1776, § 15; Pa. Const. of 1776, ch. II, § 19; S.C. Const. of 1776, art. III; S.C. Const. of 1778, art. III; Va. Const. of 1776; Va. Const. of 1830, art. IV, § 1.

The method of elections used in Connecticut and Rhode Island, which was later adopted by Maine, Massachusetts, New Hampshire, and Vermont, required that a successful gubernatorial candidate win a majority of the vote.[15] Connecticut and Rhode Island continued to operate under their colonial charters until well into the nineteenth century, only adopting constitutions in 1818 and 1842, respectively.[16] New York was the only of the original thirteen colonies that provided for a directly elected governor, but did not require that the governor receive a majority of the vote to be elected.[17]

But the majority requirement didn't originate in either the Connecticut or Rhode Island charters; it functioned in both states as a common, loosely codified practice. In Connecticut, for example, the applicable state statutes simply provided that "if there be any want of any of the [Governor and Lieutenant Governor], by reason of death or otherwise, after the election, such want shall or may be supplied and made up by the general court's election, or appointing some suitable person or persons to supply such vacancy."[18] This provision was construed as empowering the legislature to elect a governor when no candidate won a majority, despite not saying so explicitly.[19]

The process in Rhode Island was similarly opaque. Neither the 1663 Royal Charter nor the state's election law explicitly required a majority, defined a failure to win a majority as a failure to elect, or set out a procedure for resolving such a contingency.[20] The majority requirement instead operated as a sort of implicit requirement of the royal charter. Accordingly, in the three gubernatorial elections that failed to produce a majority winner, each was resolved differently. The 1806 gubernatorial election was the first one in the state's history to not produce a majority winner. To deal with this unprecedented situation, the state essentially opted to do nothing at all;

15 CONN. CHARTER of 1662; ME. CONST. art. V, pt. 1, § 3; MASS. CONST. pt. 2, ch. II, § 1, art. III (amended 1831); N.H. CONST.; N.H. CONST. pt. II (amended 1792); *R.I. Royal Charter of 1663*, *supra* note 13; *see* VT. CONST. ch. II, § X (amended 1836); *see also* VT. CONST. ch. II, § X (amended 1870).

16 PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 24–26 (2011). WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION 8–10, 16–19 (2011).

17 *See* N.Y. CONST. of 1777, art. XVII.

18 1808 Conn. Pub. Acts 202.

19 *See, e.g.*, Simeon E. Baldwin, *The Three Constitutions of Connecticut*, 5 NEW HAVEN COLONY HIST. SOC'Y PAPERS 179, 216 (1894) ("[I]f no person had a majority of the ballots for Governor, the Assembly proceeded to elect whom they would for that office") (citing *id.*).

20 *See generally R.I. Royal Charter of 1663*, *supra* note 13.

the elected Lieutenant Governor served as acting governor for the term.[21] Several decades later, in 1832, the legislature amended the election code, likely in anticipation of the competitive gubernatorial election taking place that year, to provide for additional elections if no candidate won a majority.[22] That year, it took *four* additional elections to finally produce a majority winner.[23] The legislature quickly repealed this provision,[24] but didn't replace it with anything else,[25] effectively reverting to the do-nothing method. As a result, because the 1839 election produced majority winners in neither the gubernatorial nor lieutenant-gubernatorial elections and the re-do election requirement had been repealed, the senior-most state senator, Samuel W. King, served as Governor.[26]

Accordingly, the constitutionalization of the majority requirement in Massachusetts and New Hampshire in the early 1780s, along with the procedure for resolving a gubernatorial election in which no candidate won a majority, set the stage for Connecticut and Rhode Island to do so in their first state constitutions. When Vermont was admitted as a state in 1791, it too had an identical requirement, which originated in its 1777 constitution.[27] And when Maine broke off from Massachusetts and was admitted as a state in 1819, it heavily borrowed from the Massachusetts constitution, including the gubernatorial election provision.[28]

The operation of these provisions is worth discussing, given the frequency with which they were used.[29] In Connecticut, New Hampshire

21 This considerably simplifies the matter. Following the gubernatorial election, the legislature seemed mystified as to what to do. One member of the legislature moved that Richard Jackson, Jr., the Federalist nominee for Governor, "be declared Governor, since he had received a large plurality of the votes cast, since the charter required a choice to be made, and since in 1780 the assembly had elected a delegate to Congress by plurality vote." But the motion failed and Isaac Wilbour, who was elected Lieutenant Governor that same year, ended up serving as acting governor for the term. *See* Clarence Saunders Brigham, *The Administration of the Fenners, 1790-1811*, *in* 1 State of Rhode Island and Providence Plantations at the End of the Century: A History 272, 292 (Edward Field ed., 1902).

22 *See* Clarence Saunders Brigham, *From 1830 to the Dorr War*, *in* 1 State of Rhode Island and Providence Plantations at the End of the Century: A History, *supra* note 21, at 318, 321–22.

23 *See id.* at 323.

24 *See* 1833 R.I. Pub. Laws 11.

25 *See* Brigham, *supra* note 22, at 331.

26 *Id.*

27 *See* Vt. Const. of 1777, ch. II, § XVII; Vt. Const. of 1786, ch. II, § X; *see also* Vt. Const. ch. II, § X (amended 1836).

28 *See* Marshall J. Tinkle, The Maine State Constitution 4–5 (1992). *Compare* Me. Const. art. V, pt. 1, § 3, *with* Mass. Const. pt. 2, ch. II, § 1, art. III (amended 1831).

29 In Connecticut, 16 gubernatorial elections failed to produce a majority winner and

(following the ratification of its 1792 constitution), and Rhode Island, the legislatures were restricted to selecting from among the top two finishers, and it elected the governor in a joint convention.[30] In Maine and Massachusetts, and in New Hampshire from 1784 to 1792, the house of representatives would vote for two of the top four finishers, and the senate would select from among the two names sent to it by the house.[31] Vermont established no such numerical requirements in its first three constitutions, instead just providing for a joint convention,[32] but an 1836 amendment restricted the legislature to picking from among the top three finishers.[33]

But in 1776, the direct election of governors was by far a minority position; everywhere else in the country, governors were indirectly elected.[34] In all of these states except Pennsylvania, the legislature was tasked with electing the governor.[35] In Pennsylvania, the voters of the state elected a twelve-member supreme executive council, which then elected one of its members as "president" of the state.[36] Few limitations were placed on state legislatures in picking governors. For example, South Carolina's 1776 and 1778 constitutions suggested, but did not require, that the legislature would

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were resolved by the legislature prior to the abolition of the requirement; in Maine, 10 elections; in Massachusetts, 11 elections; in New Hampshire, 18 elections; in Rhode Island, 7 elections; and in Vermont, the only state where the practice is ongoing, 23 elections. *See* GUIDE TO U.S. ELECTIONS 1639–40 (Deborah Kalb ed., 7th ed. 2016).

30 CONN. CONST. of 1818, art. IV, § 2; N.H. CONST. pt. II (amended 1792); R.I. CONST. of 1842, art. VIII, § 7. In an interesting distinction from other states in New England, Rhode Island's constitution barred its legislature from disqualifying votes to effectively engineer a no-majority-winner election, instead requiring that a do-over election take place when a lack of majority "is produced by rejecting the entire vote of any town, city or ward for informality or illegality." *See* R.I. CONST. of 1842, art. VIII, § 7.

31 ME. CONST. art. V, pt. 1, § 3; MASS. CONST. pt. 2, ch. II, § 1, art. III. *Compare* N.H. CONST. pt. II ("[I]f no person shall have a majority of votes, the house of representatives shall by ballot elect two out of the four persons who had the highest number of votes . . . ."), *with* N.H. CONST. pt. II (amended 1792) ("[I]f no person shall have a majority of votes, the senate and house of representatives shall by joint ballot elect one of the two persons having the highest number of votes . . . .").

32 VT. CONST. of 1777, ch. II, § XVII; VT. CONST. of 1786, ch. II, § X; VT. CONST. ch. II, § X (amended 1836).

33 VT. CONST. ch. II, § X (amended 1836).

34 DEL. CONST. of 1776, art. 7; GA. CONST. of 1777, art. II; MD. CONST. of 1776, art. XXV; N.J. CONST. of 1776, art. VII; N.C. CONST. of 1776, § 15; PA. CONST. of 1776, ch. II, § 19; S.C. CONST. of 1776, art. III; S.C. CONST. of 1778, art. III; VA. CONST. of 1776, para. 7; VA. CONST. of 1830, art. IV, § 1.

35 DEL. CONST. of 1776, art. 7; GA. CONST. of 1777, art. II; MD. CONST. of 1776, art. XXV; N.J. CONST. of 1776, art. VII; N.C. CONST. of 1776, § 15; S.C. CONST. of 1776, art. III; S.C. CONST. of 1778, art. III; VA. CONST. of 1776, para. 7. *See generally* VA. CONST. of 1830, art. IV, § 1.

36 PA. CONST. of 1776, ch. II, § 19.

select a governor from among their members.[37] While at first glance this may have created a pseudo-parliamentary state government, these arrangements didn't resemble Westminster-style parliaments in the ways that mattered most.[38] Despite the indirect elections of governors in the states, elections were still scheduled on fixed, immovable dates; governors were elected to fixed terms; and not only did the legislature lack the ability to prematurely remove the governor but, in case of a vacancy, the successor was predetermined.[39]

B. *Changes Following Nineteenth Century Democratization*

Over time, both majority requirements and indirect election provisions were slowly repealed. This process unfolded considerably faster for indirectly elected governors. By 1850, all states but South Carolina had provided for directly elected governors, but by this point, no majority requirement had been repealed. At the same time, the vast majority of the states admitted to the Union ratified constitutions with governors who were directly elected, and who could be elected by simply winning the most votes. This section addresses how both kinds of provisions were repealed in the nineteenth century during a time of democratization.

1. Majority Requirements

In the nineteenth century, every state in New England had codified a majority-vote requirement for governors, along with all other state officers.[40] Only one state outside of New England had a majority-vote requirement: Georgia. But despite adopting the provision in its 1824 constitutional

37 S.C. Const. of 1776, art. III ("That the general assembly and the said legislative council shall jointly choose by ballot from among themselves, or from the people at large, a president and commander-in-chief and a vice-president of the colony."); S.C. Const. of 1778, art. III (quoting S.C. Const. of 1776, art. III).

38 The Westminster system of government is that used in the United Kingdom and in most countries colonized by the British Empire. Scholars disagree on what the "essence" of the Westminster system is. Some see it "as a set of relationships between the executive government and parliament"; "[t]he key feature here is that the parliament determines *who* is the government and for *how long* they are in [power], and parliament limits a great deal of what the executive can do." R.A.W. Rhodes et al., Comparing Westminster 3 (2009).

39 *See generally* T. Quinn Yeargain, *Democratizing Gubernatorial Succession*, 73 Rutgers U. L. 1145 (2021) (discussing gubernatorial succession).

40 Conn. Const. of 1818, art. IV, § 2; Me. Const. art. V, pt. 1, § 3; Mass. Const. pt. 2, ch. II, § 1, art. III; N.H. Const. pt. II, art. XLII; R.I. Const. of 1842, art. VIII, § 7; Vt. Const. ch. II, § X (amended 1836).

amendment that made its governor directly elected,[41] Georgia didn't actually encounter a gubernatorial election lacking in a majority winner until *1966*.[42] By the mid-nineteenth century, only Massachusetts had abolished the majority-vote requirement, which it did in 1860[43]—but the tide had started to turn against these requirements. By 1912, Connecticut, Maine, New Hampshire, and Rhode Island had each abolished the requirements. Today, only in Vermont has the provision remained intact,[44] and indeed it still comes into play today; the 2014 Vermont gubernatorial election was ultimately resolved by the legislature when no candidate won a majority.[45]

The factors that have led to the abolition of the majority requirement, and the substitution of the plurality requirement, have not been discussed at great length in the historical or legal literature. This omission is somewhat surprising, given the rich history in each state that led to these constitutional changes throughout New England. While this Article does not voluminously recount the details of how these changes took place, two themes are worth noting: (1) the extent to which informal coalition-building and log-rolling occurred while majority-vote requirements were applicable, and (2) that states frequently experienced contentious and controversial gubernatorial elections—which frequently involved incumbent governors attempting to stay in power—immediately preceding the repeal of the majority-vote requirement.

First, majority-vote requirements incentivized informal, *ad hoc* coalition building. In the mid-nineteenth century, the United States was undergoing significant political changes. As the Whig Party began to die out, several third parties—like the Liberty Party, the Free Soil Party, and the Know-Nothing (or American) Party—achieved some measure of success in several Northern states.[46] These parties' gubernatorial nominees won enough votes to deprive the major-party nominees of a majority, therefore tossing elections to the legislature in Maine, Massachusetts, and New Hampshire.[47] Moreover, these states *also* imposed a majority-vote requirement for *state senate* elections.[48] In these states, if no candidate for the state senate won

41 GA. CONST. of 1798, art. II, § 2 (amended 1824).

42 GUIDE TO U.S. ELECTIONS, *supra* note 29, at 1639–40.

43 Tyler Quinn Yeargain, *New England State Senates: Case Studies for Revisiting the Indirect Election of Legislators*, 19 U.N.H. L. REV. 335, 362–63 (2021).

44 *See* D. Gregory Sanford & Paul Gillies, *And If There Be No Choice Made: A Meditation on Section 47 of the Vermont Constitution*, 27 VT. L. REV. 783, 787, 789, 799 (2003).

45 Neal P. Goswami, *Lawmakers Re-Elect Shumlin*, RUTLAND DAILY HERALD, Jan. 9, 2015, at A1.

46 *See* Yeargain, *supra* note 43, at 362–63, 380.

47 *Id.* at 380–81.

48 *See id.*

a majority, that election was also tossed to the legislature.[49] With so many offices up for grabs—governor, state senate, members of the state executive council, and other offices normally elected by the legislature—there was plenty of opportunity for coalition building.[50]

However, even outside those three states, similar deal-making developed as a result of majority-vote requirements in gubernatorial elections. For example, in Connecticut in 1849, when no candidate won a majority in the gubernatorial, lieutenant-gubernatorial, secretary of state, comptroller, or treasurer elections, a loose and imperfect coalition formed among the Democrats and the Free Soil Party. A Democrat was elected Speaker of the House with Free Soil support;[51] Whigs were elected as governor, lieutenant governor, secretary of state, and comptroller;[52] a Democrat was elected as treasurer;[53] a Free Soiler was elected as State Printer;[54] and the remaining offices in the State House were "divided" among Democrats and Free Soilers.[55] A similar split took place in 1851, primarily because of intra-party differences on temperance.[56]

In Rhode Island similar coalitions occurred. In the 1875 gubernatorial election, the Republican Party was split, with two candidates running over the issue of alcohol prohibition. No candidate won a majority, with both Republican candidates—Henry Lippitt, opposed to prohibition, and Rowland Hazard, in support of it—emerging as the top two finishers.[57] A similar split happened in the lieutenant-gubernatorial election, with temperance Republican Daniel Day and anti-Prohibition Republican Henry Sisson finishing as the top two candidates.[58] Accordingly, Democrats

49 *Id.*

50 *Id.* at 380–86.

51 *See generally Connecticut*, Vt. Patriot & State Gazette, May 10, 1849, at 2.

52 *Election of State Officers*, Hartford Courant, May 4, 1849, at 2.

53 *Connecticut*, *supra* note 51.

54 *Coalition in the Connecticut Legislature*, Bangor Daily Whig & Courier, May 12, 1849, at 2. The same paper noted, "Such coalitions may answer for a while but they breed a brooding of monsters that will devour their parents." *Id.*

55 Lewisburg Chron., May 9, 1849, at 2 ("All the other State officers except Treasurer are Whigs. In the House, the Free Soilers and Democrats divided the offices.").

56 *See Connecticut*, Brooklyn Daily Eagle, May 9, 1851, at 2 ("It will be remembered that no choice was made for Governor and State officers, and that the duty of choosing was devolved upon the Legislature, in joint ballot . . . . [This] resulted in the re-election of Thomas H. Seymour, (Dem) by three majority . . . . After this, Green Kendrick, (Whig) was chosen Lieutenant Governor, and Thomas Clark, (Whig) was chosen Treasurer, by one majority, each.—The scale was turned in their favor, by Temperance votes. The Democratic candidates for Secretary, John P. C. Mather, and for Comptroller, Rufus G. Pinney, were elected by two majority.").

57 *Personal and Political*, Brooklyn Union, May 26, 1875, at 2.

58 *Id.*; *Summary of News in Brief*, Daily Rec. Times (Wilkes-Barre, Pa.), May 26, 1875, at 2.

joined with anti-Prohibition Republicans in the legislature to elect Lippitt as governor and Sisson as lieutenant governor.[59]

But while this coalition-building was frequently unseemly—it seemingly incentivized state legislators to effectively "trade" elected positions with each other—a far more egregious consequence of majority-vote requirements was its effect during close and contentious elections. The states that ultimately abolished their majority requirements experienced controversial elections in the years immediately preceding the changes.

The most well-known controversy took place in Maine in the 1879 gubernatorial election.[60] No candidate won a majority, but the Republican candidate, Daniel Davis, won a significant plurality.[61] Given that unofficial election returns showed that Republicans would have a sizable majority in both chambers of the legislature, it was likely that Davis would be elected.[62] But incumbent Democratic Governor Alonzo Garcelon and the Democratic-controlled state executive council sought to eliminate the likely Republican majority by invalidating votes and issuing certificates to Democratic and Greenback candidates.[63] When Garcelon refused to comply with the state supreme court's ruling that he had no authority to invalidate votes, and when two competing legislatures organized, a state constitutional crisis developed that nearly engulfed the state in armed violence.[64] Joshua Chamberlain, a Union General in the Civil War and a former Republican Governor of Maine, was brought in to keep the peace, and the Democratic–Greenback legislature eventually conceded to the Republican legislature's authority and Davis was elected.[65] That year, the legislature amended the constitution to eliminate the majority requirement for gubernatorial elections.[66]

Similar events took place in Connecticut and Rhode Island. Following a series of gubernatorial elections in which no candidate won a majority and the legislature had to step in,[67] two gubernatorial elections took place in which the legislature was unable to decide a winner, resulting in the incumbent governor continuing to serve. In the 1890 Connecticut

59 *Personal and Political*, *supra* note 57.

60 EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 163–69 (2016).

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *See* Clarence Saunders Brigham, *The Last Four Decades*, *in* 1 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AT THE END OF THE CENTURY: A HISTORY, *supra* note 21, at 375, 387; MELBERT B. CARY, THE CONNECTICUT CONSTITUTION 36 (1900).

gubernatorial election, no candidate won a majority and the two chambers of the legislature were controlled by different parties.[68] "The Democratic-controlled Senate voted for [Democratic nominee Luzon] Morris's election, but the Republican-controlled House refused to vote for anyone."[69] Morris filed a writ of *quo warranto* with the state supreme court of errors, but the court, noting that the situation could still be resolved by the legislature, refused to grant the writ and recognized incumbent Republican Governor Morgan Bulkeley as the *de jure* governor of the state.[70] Following the debacle, a statewide movement to abolish the majority requirement developed.[71] The 1899 and 1901 legislatures approved a constitutional amendment providing for plurality elections over the objection of prominent Republicans like Bulkeley.[72] The *Hartford Courant* endorsed the amendment, noting the value of a majority requirement while also recognizing that it was inoperable in practice.[73] The amendment was overwhelmingly adopted at the 1901 general election, which saw comparatively low turnout.[74]

Just three years later, a similar situation developed in Rhode Island. Incumbent Republican Governor Russell Brown ran for re-election in the 1893 gubernatorial election against Democratic nominee David Baker, and the result was a close election in which no candidate won a majority—depending on how selectively vote totals were calculated, either party had

68 Kevin Murphy, Crowbar Governor: The Life and Times of Morgan Gardner Bulkeley 120 (2011).

69 Wesley W. Horton, *Law and Society in Far-Away Connecticut*, 8 Conn. J. Int'l L. 547, 555 (1993); *see* Murphy, *supra* note 68, at 121; *see also* Kevin Alexander, *The Key to a Successful Democracy: Crowbars*, Yale Daily News (Oct. 7, 2004), https://yaledailynews.com/blog/2004/10/07/the-key-to-a-successful-democracy-crowbars/.

70 *See* State *ex rel.* Morris v. Bulkeley, 23 A. 186, 192–93 (Conn. 1892).

71 Cary, *supra* note 67, at 36–40.

72 *E.g.*, *For State Reform: Hartford Hearing*, Meriden Daily J., Apr. 3, 1901, at 8; *The Plurality Amendment*, Hartford Courant, Apr. 4, 1901, at 10; *The Amendments on Monday*, Hartford Courant, Oct. 3, 1901, at 10.

73 *See The Amendments on Monday*, *supra* note 72 ("The present requirement of a clean majority to elect state officers has long been the subject of attack and the fact that members of Congress and of the Legislature are elected by plurality has been so loudly presented that the feeling has become widespread that the majority rule must go. Now its time has come. It could be defended, but in the hurry of these hustling times it is not wanted and it can be spared."); *see also Plurality Elections in Connecticut*, Hartford Courant, Nov. 10, 1900, at 10 ("The logic of the majority rule is invincible. It prevails in caucuses and can be defended all day in argument. But in regular use it is inconvenient, takes up valuable time, and is not necessary; and so it should move off among the things that have been.").

74 Antonia C. Moran, *The Period of Peaceful Anarchy: Constitutional Impasse, 1890–1892*, 29 Conn. Hist. Rev. 91, 103–06 (1988); *Vote Is Light—Opposition to Constitutional Changes*, Journal (Meriden, Conn.), Oct. 7, 1901, at 3.

a valid claim that their nominee had won a plurality of the vote[75]—and so the election was thrown to the legislature. However, like in Connecticut, control of the legislature was split between the two parties, with Democrats controlling the House and Republicans controlling the Senate, and the legislature did not meet in joint convention.[76] Accordingly, Governor Brown continued in office until the next election.[77] The controversy over the move, which effectively allowed Rhode Island Republicans to stonewall the process and install their nominee as governor through extra-constitutional means, gave greater force to a proposed constitutional amendment to switch to plurality elections.[78] Accordingly, in that year's legislative session, the two chambers agreed to put a constitutional amendment on the November 1893 ballot to repeal the majority requirement.[79] Scheduled at the end of November, when Providence held its municipal elections, the amendment attracted little attention.[80] Rumors abounded that prominent Republicans secretly opposed it—that higher-ups in the party were furtively campaigning against it,[81] and that the Republican legislative leaders had only agreed to put it up for a vote because of internal pressure in their caucus[82]—but little

75 HERMAN F. ESCHENBACHER, THE UNIVERSITY OF RHODE ISLAND: A HISTORY OF LAND-GRANT EDUCATION IN RHODE ISLAND 63 (1967).

76 *See* MICHAEL J. DUBIN, PARTY AFFILIATIONS IN THE STATE LEGISLATURES: A YEAR BY YEAR SUMMARY, 1796-2006, at 162–69 (2007).

77 *See* Brigham, *supra* note 67, at 387.

78 *Rhode Islanders See Light: Anxious to Get Rid of the Majority Election System*, N.Y. TIMES (May 17, 1893), https://timesmachine.nytimes.com/timesmachine/1893/05/17/106824145.html?pageNumber=1.

79 *See Favor a Plurality*, BOS. GLOBE, Mar. 30, 1893, at 2; Editorial Notes, NEWPORT MERCURY, Nov. 4, 1893, at 4.

80 *See* Editorial Notes, *supra* note 79 ("The date is that of the regular municipal election in Providence, but to all the rest of the state it will be a special."); *The Plurality Amendment*, NEWPORT MERCURY, Dec. 2, 1893, at 1.

81 *Rhode Island Elections to Come on 28th—Constitutional Amendment Will Be Put to Popular Test*, BOS. GLOBE, Nov. 13, 1893, at 4 [hereinafter *Popular Test*] ("Secretly, it is said, the great majority of the republican party leaders, including US Senators Aldrich and Dixon, and Gen[eral] P. R. Brayton, are opposed to the adoption of the constitutional amendment of plurality in elections."); *see also Reform Triumph: Rhode Island Adopts the Plurality Amendment*, BOS. GLOBE, Nov. 29, 1893, at 2 ("The republican effort to secretly organize and defeat the amendment was a flat failure . . . .").

82 *See Popular Test*, *supra* note 81 ("The leaders in the legislature which decided to submit the question to the people were also against the change, but the rank and file of the general assembly believed differently and voted according to their own wishes, irrespective of the leading members, and regardless of the wishes of the US senators.").

evidence exists for these claims.[83] In the end, in a low-turnout election,[84] the amendment overwhelmingly passed.[85]

The change in New Hampshire, which took place in 1912, was not so dramatic. Though the state had endured many elections in which no candidate won a majority,[86] the most recent such election in 1906 resulted in the plurality winner being elected.[87] Nonetheless, at the 1912 constitutional convention, the committee on the executive branch recommended that the provision be abolished, with one of the delegates on the committee noting that when "the spectacle is presented to us . . . and the election is thrown into our legislature," there is "the chance of a partisan advantage being taken there, one way or another."[88] The convention approved the amendment and it was overwhelmingly approved by the voters that year.[89] However, a controversy developed over the application of the amendment to that year's gubernatorial election, in which Democratic nominee Samuel Felker had won a convincing plurality, but fell far short of a majority because of the presence of a Progressive candidate on the ballot.[90] Democrats contended that the amendment took effect immediately, but Republicans argued that, for one last time, the election needed to be decided by the legislature, which they expected to control.[91] But though the governor was ultimately elected by the legislature, a last-minute coalition between Democrats and Progressive Republicans nonetheless allowed Felker to win.[92]

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83 For example, at a meeting of the Republican Party of Rhode Island, the members adopted a resolution endorsing the amendment: "We sincerely believe that its adoption is necessary to the material interests of the state, and unhesitatingly and earnestly urge the Republican voters to support at the polls the adoption of this amendment to the constitution." *Rhode Island Republicans*, Newport Daily News, Nov. 18, 1893, at 3.

84 *See The Plurality Amendment*, *supra* note 80.

85 Brigham, *supra* note 67, at 387.

86 *See supra* note 29 and accompanying text; *see also* Yeargain, *supra* note 43 at 344, 360–63.

87 *See, e.g.*, *New Hampshire's Governor: Charles M. Floyd, Republican, Elected by the Legislature*, N.Y. Times, Jan. 3, 1907, at 1; *No Election in N. H.: Charles M. Floyd Lacks 10 Votes—Rumor of Coalition*, N.Y. Trib., Nov. 9, 1906, at 2.

88 N.H. Const. Convention, Journal of the Convention to Revise the Constitution: June, 1912, at 445 (1912).

89 State of N.H., Manual for the General Court: 1913, at 281, 311 (1913).

90 *See id.* at 130.

91 *Claim Cannot Be Maintained: Edwin Jones Says Amendment Adoption Doesn't Elect Felker*, Portsmouth Herald, Nov. 16, 1912, at 2; *Col. Bartlett Gives Opinion: Says Legislature Must Make Selection of Candidates for Governor*, Portsmouth Herald, Dec. 30, 1912, at 8; *see Think Felker Legally Chosen Governor: Opinions of Legal Lights Favorable to Plurality Election of Democratic Candidate*, Portsmouth Herald, Dec. 30, 1912, at 3.

92 James Wright, The Progressive Yankees: Republican Reformers in New Hampshire, 1906–1916, at 143 (1987).

2. Indirect Elections

Unlike the majority-vote requirements, indirect gubernatorial elections were repealed much more quickly—and none exist today. The first round of repeals followed the ratification of the U.S. Constitution and may well have been inspired by the (mostly) direct manner in which the President was elected. Pennsylvania was the first to transition to direct elections. Its 1790 constitution, adopted shortly after the U.S. Constitution was ratified, abandoned its unique Supreme Executive Council and instead provided for a bicameral legislature and a directly elected governor.[93] Delaware followed shortly thereafter in 1792.[94]

Georgia modified its method of indirect election considerably before abolishing it in 1824. The state had originally created a unicameral legislature under its 1777 constitution, which was solely responsible for electing the governor.[95] When the 1789 constitution added a second chamber,[96] the gubernatorial selection process was changed—under this constitution, the House of Representatives would nominate three candidates for governor, one of whom was selected by the Senate.[97] This process didn't last long; a 1795 amendment, which was continued in the 1798 rewrite of the constitution, required all legislative elections to be by joint ballot. [98] Then, an 1824 amendment eliminated the process altogether and provided for direct election.[99]

Beginning in the 1830s, in response to a growing national movement in favor of democratization, state constitutions were amended to eliminate indirect election altogether.[100] North Carolina and Maryland both did so in the 1830s,[101] with Maryland's transition occurring following popular discontent at the state's undemocratic institutions, as part of a broader, significant constitutional change.[102] Following similar discontent, New Jersey

93 PA. CONST. of 1776, ch. II, § 3; PA. CONST. of 1790, art. I, § 1; *id.* art. II, § 2.

94 *See* DEL. CONST. of 1792, art. II, § 1; *id.* art. III, § 2.

95 GA. CONST. of 1777, art. II.

96 GA. CONST. of 1789, art. I, §§ 1, 6.

97 *Id.* art. II, § 2.

98 GA. CONST. of 1789, art. II (amended 1795); *see* GA. CONST. of 1798, art. II, § 2.

99 GA. CONST. of 1798, art. II, § 2 (amended 1824).

100 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 883–85 (2021).

101 *See* Harold J. Counihan, *The North Carolina Constitutional Convention of 1835: A Study in Jacksonian Democracy*, 46 N.C. HIST. REV. 335, 335, 354–55, 361 (1969).

102 Yeargain, *supra* note 43, at 338–39. *See generally* A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346, 347 (1962) (discussing the 1836 election as a precipitating cause for the 1837 constitutional amendment).

and Virginia followed in 1844 and 1850, respectively.[103] South Carolina transitioned to a directly elected governor only in 1865, after the Civil War concluded, and with strong Northern influence in drafting its re-admission constitution.[104]

But even these changes occurred unevenly. *Direct* election didn't always translate to guaranteeing a *democratic* election. In Maryland, for example, the 1837 constitutional amendment providing for a directly elected governor also severely restricted the manner in which the election took place. The amendment created three "gubernatorial districts," and provided that each district would take turns in electing the governor, who would be from the district voting for governor that year.[105] The provision was incorporated into the 1851 constitution[106] and lasted until the 1864 Civil War-era constitution.[107] The impact was felt beyond Maryland's borders, however. At the 1850 Virginia Constitutional Convention, delegates proposed splitting the state into two gubernatorial districts—which roughly reflect the modern-day boundaries of Virginia and West Virginia—and providing for a similar mode of election, but the measure wasn't ultimately adopted.[108]

Only two states that joined the Union after the ratification of the Constitution provided for indirectly elected governors. The first was Kentucky. Its first constitution, adopted in 1792, provided for an indirectly elected governor,[109] but widespread public dissatisfaction with the indirectly elected governor *and* the indirectly elected senate resulted in the adoption of its second constitution in 1799, which made both the governor and the state senate directly elected.[110] Louisiana, the second state, adopted a bizarre, indirect election–direct election hybridized system when it became a state in 1812. Under its first constitution, the state's voters ostensibly cast ballots

103 *See* John J. Dinan, The Virginia State Constitution 11–12 (2011); *see also* Leonard B. Irwin & Herbert Lee Ellis, New Jersey: The Garden State 94–95 (1962).

104 Paul E. Herron, Framing the Solid South: The State Constitutional Conventions of Secession, Reconstruction, and Redemption, 1860–1902, at 145 (2017).

105 Md. Const. of 1776, §§ 18, 20 (amended 1837).

106 Md. Const. of 1851, art. II, § 5.

107 *See* Md. Const. of 1864, art. II, § 3 ("[T]he person having the highest number of votes, and being Constitutionally eligible, shall be the Governor . . . ."); *Governor: Origin & Functions*, Md. State Archives: Md. Manual On-Line, https://msa.maryland.gov/msa/mdmanual/08conoff/html/01govf.html (last visited Oct. 15, 2021).

108 Va. Const. Convention, Journal, Acts and Proceedings of a General Convention of the State of Virginia, Assembled at Richmond on Monday the Fourteenth Day of October, 1850, at 295–96 (1850) [hereinafter 1850 Virginia Constitutional Convention Journal].

109 Ky. Const. of 1792, art. II, § 2.

110 Robert M. Ireland, The Kentucky State Constitution 7–8 (2011).

in a gubernatorial contest—but the results of the contest merely served to *nominate* candidates for governor. After canvassing the votes, the legislature would choose between the top two candidates, regardless of whether either of them won a majority.[111] Somewhat surprisingly, during the period of time in which this provision was in effect, the legislature *always* elected the gubernatorial candidate who had received the most votes.[112] The system was ultimately abolished in 1845 in favor of a directly elected governor.[113] With the exception of these two states, every other state since admitted to the Union has provided for the direct election of governors.

II. THE MODERN RE-EMERGENCE OF MAJORITY-VOTE REQUIREMENTS

As mentioned previously, the imposition of majority-vote requirements in early American history almost exclusively took place in New England. While most of these requirements have since been largely abolished, they were resurrected in various forms beginning in the late nineteenth century.[114] This Section addresses the contemporary use of majority-vote requirements (a) in Southern states as a means of disenfranchising Black voters; (b) in Vermont, where the provision remains in full force; (c) in U.S. territories, where majority vote requirements have been imposed by congressional directives and by discrete constitutional amendments; and (d) in the adoption of "top-two" primaries in three states. This Section addresses the use of majority-vote requirements.

111 LA. CONST. of 1812, art. III, § 2 ("[T]he members of the two houses shall meet in the House of Representatives, and immediately after the two candidates who shall have obtained the greatest number of votes, shall be balloted for and the one having a majority of votes shall be governor.").

112 *See* Yeargain, *supra* note 43, at 365–66.

113 LA. CONST. of 1845, tit. III, art. 38 ("The qualified electors for representatives shall vote for a governor and lieutenant-governor, at the time and place of voting for representatives . . . . The person having the greatest number of votes for governor shall be declared duly elected . . . .").

114 It is relevant to note that Arizona briefly adopted a majority-vote requirement, coupled with a runoff election if no candidate won a majority, in 1988 after the impeachment of Governor Evan Mecham. *See generally* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 150 (2011). Mecham had won the 1986 gubernatorial election with just 40% of the vote, so the effort was likely meant to prevent candidates like him from sneaking into office again. *Id.* When the majority-vote requirement was applied for the first time in the 1990 gubernatorial election, the leading candidate narrowly fell short of a majority and a runoff election took place a few months later. *Id.* The delay in the final election result delayed the transition (at significant cost), resulting in the repeal of the majority-vote requirement in 1992. TONI MCCLORY, UNDERSTANDING THE ARIZONA CONSTITUTION 113 (2d ed. 2010).

A. *Majority-Vote Requirements as Disenfranchisement*

Following Reconstruction, the emergence of Jim Crow-era laws in the South saw the recreation of majority-vote requirements—with the explicit goal of disenfranchising Black voters and perpetuating white supremacy.[115] These statutory and constitutional provisions, as adopted in the usual case, required majorities in party primaries, not general elections.[116] In the absence of a majority-vote winner, state election law in the South required a runoff primary election.[117] The purpose of this requirement was primarily to prevent a Black candidate from winning the Democratic Party's nomination with a plurality of the vote; requiring a majority of the vote allowed (fully enfranchised) white voters to artificially outnumber (mostly disenfranchised) Black voters.[118]

Very few southern states enacted majority requirements for general elections.[119] On a practical level, they didn't need to—with the Republican Party virtually nonexistent in the South, prior to the mid-twentieth century, the real contests were Democratic primaries.[120] For most of the twentieth century, so long as Black residents in the South were disenfranchised, general-election majority-vote requirements would have been dead letters.[121]

Nonetheless, Georgia has continued its majority-vote requirement since 1824. From 1824 to 1976, the failure to win a majority of the vote meant that the legislature was tasked with electing the governor.[122] However, this method of legislative election was only used once, in 1966, when the Democratic General Assembly elected Lester Maddox, the Democratic nominee, the plurality-vote loser, and a staunch segregationist, over Bo Callaway, the Republican nominee, the plurality-vote winner, also a staunch

115 Laughlin McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 Urb. Law. 429, 430–32 (1985); *see also* Graham Paul Goldberg, Note, *Georgia's Runoff Election System Has Run Its Course*, 54 Ga. L. Rev. 1063, 1069–73 (2020).

116 *See* McDonald, *supra* note 115, at 431 ("With the demise of two-party politics in the South and the general disenfranchisement of blacks, the system further insured that the Democratic nominee, almost always white, would invariably win in the general election.").

117 *See id.*

118 *See id.* at 431–33.

119 *See infra* notes 122–34 and accompanying text.

120 *See* McDonald, *supra* note 115, at 430–32.

121 During this period of time, the Republican Party was all but dead in the South, and Democratic primary elections were usually tantamount to election.

122 Ga. Const. of 1798, art. II, § 2 (amended 1824); Ga. Const. of 1865, art. III, § 2; Ga. Const. of 1868, art. IV, § II; Ga. Const. of 1877, art. V, § 1, para. V; Ga. Const. of 1945, art. V, § 1, para. IV; Ga. Const. of 1976, art. V, § 1, para. IV.

segregationist.[123] The 1976 constitution maintained the majority-vote requirement, but eliminated the legislative-election component, instead opting for a runoff election where no candidate won a majority.[124] Though obviously adopted in 1824, before the idea of Black suffrage was taken seriously in the South, it is difficult to wash away the role that disenfranchising Black voters likely played in the majority-vote requirement's perpetuation.[125]

Outside of primary runoff elections and Georgia's perpetuation of its 1824 majority-vote requirement, Mississippi serves as the strongest example of how the requirement served to perpetuate white supremacy. At Mississippi's 1890 constitutional convention, the ultimate constitution established a majority-vote requirement for statewide offices, but conditioned the majority requirement not just on winning a majority of the statewide vote, but a majority of state house districts,[126] which effectively operates as an electoral college at the state level.[127] If no candidate won majorities under both criteria, the legislature would pick the winner.[128]

Though this Article is not about the efforts of Jim Crow-era, southern state constitutional conventions to entrench white supremacy, the extent to which Mississippi's 1890 constitution was perpetuated specifically to disenfranchise Black voters is worth highlighting—not least because its most pernicious provisions are still in effect today—and should not be relegated to a footnote. Soloman Saladin Calhoon, the President of the 1890 Convention, published a pamphlet outlining, quite explicitly, his opposition to Black suffrage.[129] At the convention, Calhoon noted that the "ballot system must be so arranged as to effect one object": minority-white rule.[130] For all of Calhoon's bluster, however, the bigger cudgel wielded by white voters as they dominated the state's politics were the runoff elections and disenfranchisement provisions. Mississippi's double-majority-vote requirement operated more

123 ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944–1972, at 330 (2015); JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975, at 232 (2006); *see also* GUIDE TO U.S. ELECTIONS, *supra* note 29, at 1639–40 (noting that the 1966 election was the first one in which no candidate won a majority of the vote).

124 *See* GA. CONST. of 1976, art. V, § 1, para. IV.

125 *See, e.g.*, LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 206–08 (2003).

126 MISS. CONST. art. V, § 140 (amended 2020).

127 Akhil Reed Amar, *America's Constitution, Written and Unwritten*, 57 SYRACUSE L. REV. 267, 283 n.17 (2007).

128 MISS. CONST. art. V, § 141 (repealed 2020).

129 CHRISTOPHER WALDREP, JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI 223 (2010).

130 *See* William Alexander Mabry, *Disenfranchisement of the Negro in Mississippi*, 4 J.S. HIST. 318, 324 n.16 (1938).

as a symbolic threat to Black voters electing the candidate of their choice more than it represented an actual one. It theoretically came into play in the state's 1991 and 1995 lieutenant-gubernatorial elections, but the second-place finisher conceded to the plurality winner.[131] In 1999, the provision was triggered for the first time in a gubernatorial election—no candidate won a majority and the Republican nominee, Mike Parker, who placed second to Ronnie Musgrove, the Democratic nominee, refused to concede.[132] However, the Democratic-dominated legislature ended up voting in favor of Musgrove.[133] Despite the repeated close calls, however, the perceived closeness of the 2019 gubernatorial election suggested that this provision might well have affected the outcome of the 2019 election,[134] even though it ultimately did not.

Elsewhere in 2019, Democratic nominee Andy Beshear narrowly defeated incumbent Republican Governor Matt Bevin in Kentucky's gubernatorial election.[135] Bevin initially, and baselessly, claimed that there was widespread fraud in the election and Republican State Senate President Robert Stivers suggested that the legislature could install Bevin as governor despite his apparent loss.[136] After Republican legislative leaders distanced themselves from the idea,[137] Bevin backed off, eventually conceding.[138] But the closeness of the election—along with the extent to which Beshear's support in Kentucky was hyper-concentrated in just a few counties and metropolitan areas—led some to suggest an alternative method of election. Kelli Ward, the Chair of the Arizona Republican Party, tweeted out maps of the Kentucky gubernatorial election, along with the Virginia State Senate elections that simultaneously took place, and asked, "Should we look toward

131 Harrison, *supra* note 5.

132 *See id.*

133 *Id.*

134 *See, e.g.*, Ian Millhiser, *How a Jim Crow Law Still Shapes Mississippi's Elections*, Vox, https://www.vox.com/2019/10/11/20903401/mississippi-jim-crow-law-rig-election-electoral-college-jim-hood-tate-reeves (Nov. 5, 2019).

135 Tara Golshan & Li Zhou, *Kentucky's Republican Governor Matt Bevin Lost Reelection, but Isn't Conceding Just Yet*, Vox (Nov. 6, 2019), https://www.vox.com/policy-and-politics/2019/11/6/20952144/kentucky-republican-governor-matt-bevin-recanvass-concession.

136 *See id.*

137 *See, e.g.*, Joe Sonka & Deborah Yetter, *Senate President Says Bevin Should Concede Election if Recanvass Doesn't Alter Vote Totals*, Courier J. (Nov. 8, 2019) (updated Nov. 9, 2019), https://www.courier-journal.com/story/news/politics/elections/kentucky/2019/11/08/kentucky-senate-president-bevin-should-concede-if-votes-unchanged/2530822001/.

138 Ed Kilgore, *Bevin Concedes After Republicans Decline to Help Him Steal the Election*, N.Y. Mag. (Nov. 14, 2019), https://nymag.com/intelligencer/2019/11/bevin-concedes-after-republicans-wont-overturn-his-defeat.html.

an #ElectoralCollege type system at the state level?"[139] It's not difficult to see Ward's "suggestion" as an argument that popular vote systems should be restructured to provide greater representation to land than people—which is a fairly explicit argument that indirect election should be used to counter the will of the electorate.

B. *The Majority-Vote Requirement in Vermont*

Since the adoption of Vermont's first constitution in 1777, the state has imposed a majority-vote requirement in gubernatorial elections—and elections for all other state executive offices—with the legislature picking the winner if no candidate wins a majority.[140] This requirement has been triggered with some amount of frequency. According to a 2003 estimate, 70 different elections have resulted in no majority winner: "twenty-two races for Governor, twenty-six for Lieutenant-Governor, and seventeen for state Treasurer," and five other races, including the Secretary of State, Auditor of Accounts, and Attorney General.[141] Since 2003, there have been two gubernatorial elections and one lieutenant-gubernatorial election that have produced no majority winner.[142]

Though historically the Vermont Legislature frequently elected

139 Kelli Ward (@kelliwardaz), TWITTER (Nov. 6, 2019), https://twitter.com/kelliwardaz/status/1192279093909192704; *see also* Chris Cillizza, *Debunking Two Viral (and Deeply Misleading) 2019 Maps*, CNN, https://www.cnn.com/2019/11/07/politics/kentucky-map-electoral-college/index.html (Nov. 7, 2019).

140 Sanford & Gillies, *supra* note 44, at 786–90.

141 *See id.* at 784.

142 Terri Hallenbeck, *Milne Not Ready to Concede*, BURLINGTON FREE PRESS, Nov. 7, 2014, at C1; Nancy Remsen, *'Regular Guy' Phil Scott Sworn in as Lt. Governor*, BURLINGTON FREE PRESS, Jan. 7, 2011, at 4 (noting that, in the 2010 election, "[t]he final decision about [governor and lieutenant governor] bounced to the Legislature after neither Shumlin nor Scott received more than 50 percent of the votes cast on Election Day"). Of note, elections for auditor have resulted in plurality winners thrice in recent decades—in 1990, 1996, and 2006. *Election Results Archive*, VT. SEC'Y STATE: ELECTIONS DIV., https://electionarchive.vermont.gov/elections/search/year_from:1989/year_to:2020/office_id:13/stage:General (last visited Aug. 4, 2021). However, an opinion from the Vermont Attorney General concluded that the Constitution "specifies that a majority is required to elect only the Governor, Lieutenant Governor, and the Treasurer[,]" and that the *statute* requiring the "[Auditor win] a majority of the votes cast . . . was repealed in 1978" and was not replaced. Memorandum from Andrew W. MacLean, Vt. Assistant Att'y Gen., to Paul Gillies, Vt. Deputy Sec'y of State (Jan. 4, 1990); *see also* Susan Allen, *Legislature Won't Decide Auditor Race*, BRATTLEBORO REFORMER, Jan. 8, 1991, at 3. Shortly thereafter, the Attorney General's opinion as to the inapplicability of majority-vote requirements was extended to elections for Attorney General and Secretary of State. Sanford & Gillies, *supra* note 44, at 794.

second-place finishers—and in the case of the 1837 state treasurer election, it actually selected a *third*-place finisher—this habit has largely been broken in the modern era.[143] During the last hundred years, only in the 1976 lieutenant-gubernatorial election did the legislature choose a second-place finisher over a plurality winner. And in that election, the legislature had good reason to do so—Democrat John Alden, the plurality winner, was suspected of insurance fraud, and so the legislature instead elected Republican T. Garry Buckley. Alden was convicted shortly thereafter.[144]

Accordingly, the legislature has increasingly viewed its constitutional power to elect the governor if no candidate receives a majority as a formality. This has led to the legislature electing the plurality winner as a matter of course—even if the plurality winner is of a different party. In 2010, for example, a Democrat was the plurality winner of the gubernatorial election and a Republican was the plurality winner of the lieutenant-gubernatorial election. Both were selected by the legislature with bipartisan majorities in favor of each—and without any controversy.[145] The implication of this common practice has been that second-place finishers in elections with no majority winner have largely refused to campaign before the state legislature. The most notable exception remains Scott Milne, the 2014 Republican nominee for governor. Governor Peter Shumlin narrowly edged out Milne in the race but remained thousands of votes short of a majority. Milne refused to concede and instead openly campaigned for the legislature to elect him[146]—which it didn't.[147]

Milne notwithstanding, the common practice of the second-place finisher conceding to the plurality winner, thereby rendering the legislature's vote a formality, has likely prevented any serious movement to revise the state constitution. The legislature's selection of Buckley over Alden, because of genuine concerns about Alden's competence and ability to serve, might even be seen as comparable to the role that the Electoral College *theoretically* plays in presidential elections when an unqualified, objectionable candidate would otherwise win the election.[148] Nonetheless, Milne's rejection of the common practice, as well as growing partisan polarization nationally, may suggest that the practice is eroding—which may well mean that the constitutional provision is either eliminated altogether or used for partisan gain.

143 Sanford & Gillies, *supra* note 44, at 795–96.

144 *Id.* at 795.

145 *See* Remsen, *supra* note 142.

146 *See* Dave Gram, *Milne Claims His Chances at Governorship 'Getting Better,'* Rutland Daily Herald, Jan. 4, 2015, at A1.

147 Goswami, *supra* note 45.

148 *See, e.g.*, The Federalist No. 68, at 346 (Alexander Hamilton) (Ian Shapiro ed., 2009).

C. *Majority-Vote Requirements in American Territories*

The governments of the territories currently incorporated[149] under the jurisdiction of the United States are frequently omitted from state constitutional scholarship. Taken literally, this makes sense—territories aren't states and their system of government is imposed on them by an affirmative act of Congress.[150] But instead of being a shortcoming that justifies their omission from the discussion, they instead provide a unique insight into the dominant theories motivating state constitutional changes. If territorial organic acts are drafted and modified by Congress, and if Congress acts conservatively in approving territorial constitutions, then we might reasonably view the systems of government either created or approved by Congress as frozen-in-time reflections of the dominant view of state governments.

In this light, it is significant to note the extent to which majority-vote requirements have proliferated in American territories. Of the six current territories, four have majority-vote requirements for their gubernatorial elections, with runoff elections conducted in the event that no candidate wins a majority.[151] Originally, territories had unelected, presidentially appointed, governors,[152] but beginning in the mid-twentieth century, Congress began amending territorial organic acts to provide for directly elected governors.[153] It began in 1947 with Puerto Rico, but established no majority-vote

149 "Incorporated" is an overly formal word to use in this context, but "organized" is, in the territorial context, something of a term of art. The U.S. Department of the Interior reasonably refers to an "organized territory" as an "insular area for which the United States Congress has enacted an organic act." *Definitions of Insular Area Political Organizations*, U.S. DEP'T INTERIOR, OFF. INSULAR AFFS., https://www.doi.gov/oia/islands/politicatypes (last visited May 24, 2021).

150 *See Developments in the Law, Territorial Federalism*, 130 HARV. L. REV. 1632, 1632 (2017); *see also* Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1634 (2019).

151 *See* N. MAR. I. CONST. art. III, § 4; *see also* Guam Elective Governor Act, Pub. L. No. 90-497, § 1, 82 Stat. 842, 842–43 (1968) (codified as amended at 48 U.S.C. § 1422); Virgin Islands Elective Governor Act, Pub. L. No. 90-496, § 4, 82 Stat. 837, 837 (1968) (codified as amended at 48 U.S.C. § 1591); AM. SAMOA CODE ANN. § 4.0104 (2020). *But see* P.R. CONST. art. IV, § 1 (establishing no majority-vote requirement for governor); D.C. CODE § 1-204.21(a) (2021) (establishing no majority-vote requirement for mayor). The District is a defined administrative division of the United States government, superseded only by the federal government, and organized under an organic act. Though it may nominally be a city, it operates as a municipality–state (or municipality–territory) hybrid—and as a territory in the ways that matter most for this discussion.

152 Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 877 (1990).

153 *Id.* at 868–70.

requirement for the governor.[154] The Puerto Rican Constitution, adopted in 1952, similarly didn't require majority votes in statewide elections.[155] The majority-vote requirement was similarly omitted from mayoral elections for the District of Columbia.[156]

But in the decades that followed, with respect to the remaining territories—Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands—majority-vote requirements were imposed, either by Congress or by territorial constitutions. In 1968, the Elective Governor Acts, which amended the organic acts for Guam and the Virgin Islands, were passed. They served the dual purpose of providing both territories with democratically elected governors and imposing a majority-vote requirement in territorial gubernatorial elections. Because neither territory has adopted a constitution, the organic acts remain the source of government in both cases.[157] In the Commonwealth of the Northern Mariana Islands and American Samoa, which do have constitutions, majority-vote requirements were added to their constitutions in 2007 and 1977, respectively.[158]

The near-uniform imposition of majority-vote requirements in American territories lacks a clear explanation. For example, the Guam and Virgin Islands Elective Governor Acts were approved in tandem by Congress in 1968, and both imposed majority-vote requirements with runoffs if no candidate won a majority.[159] But both bills were adopted with only a thin legislative record. At the House Committee on Interior and Insular Affairs'

154 *See* Act of Aug. 5, 1947, Pub. L. No. 80-362, § 1, 61 Stat. 770, 770–71 ("At the general election in 1948 and each such election quadrennially thereafter the Governor of Puerto Rico shall be elected by the qualified voters of Puerto Rico . . . .").

155 *See* P. R. Const. art. IV, § 1 ("The executive power shall be vested in a Governor, who shall be elected by direct vote in each general election.").

156 *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 421, 87 Stat. 774, 789–90 (1973) (codified as amended at D.C. Code § 1-204.21).

157 The incorporation of these provisions as amendments to territorial organic acts—as opposed to voter-initiated and approved amendments to their territorial constitutions—deprives them of any democratic legitimacy. Organic acts function as constitutional equivalents, but unlike voters in virtually every other state, voters in Guam and the U.S. Virgin Islands have no meaningful say in how their territory's governing document is constructed. It may be the case that the voters of both territories *want* majority-vote requirements. Indeed, in the U.S. Virgin Islands' case, it has embraced the majority-vote requirement and kept it in its latest proposed constitution. *See* V.I. Const. art. VI, § 2 (proposed 2009). The absence of any meaningful expression of the voters' democratic will—and support for these provisions—is worth noting.

158 Am. Sam. Const. art. IV, § 2 (amended 1977); N. Mar. I. Const. art. III, § 4 (amended 2007).

159 Guam Elective Governor Act § 1; Virgin Islands Elective Governor Act, Pub. L. No. 90-496, § 4, 82 Stat. 837, 837 (1968) (codified as amended at 48 U.S.C. § 1591).

hearing on the Guam Elective Governor Act, Alberto Lamorena, a former member of the Guam Legislature, testified in support of the majority requirement. Lamorena argued that, because "there seems to be three parties here in the island of Guam" and the risk of a governor winning with a small plurality was high, a majority-vote requirement was wise.[160]

But that logic—that, in a multiparty democracy, a majority-vote requirement ought to be imposed—was entirely inapplicable in the U.S. Virgin Islands. There, the same House committee heard uncontroverted testimony that the Virgin Islands was, politically, "a monolithic society," with "one strong Democrat[ic] Party that is divided into two factions, locally and vocally known as the Unicrats, Donkey Democrats, or Independent Democrats," and a Republican Party that only "exist[s] on paper[.]"[161] Yet despite the different political realities, Congress approved Elective Governor Acts for both territories that imposed identical majority-vote requirements.

Meanwhile, in the CNMI and American Samoa, change came from the territories themselves. The Secretary of the Interior approved a 1977 amendment to the Constitution of American Samoa, which made the governor directly elected.[162] Though the text of the amendment didn't itself specify how the governor would be elected,[163] its approval triggered the enactment of an act passed by the territorial legislature that imposed a majority-vote requirement.[164]

And when the Northern Mariana Islands joined the United States, its original constitution did not include a majority-vote requirement.[165]

160 *Guam Elective Governor Act: Hearing on H.R. 7329 and Related Bills to Provide for the Popular Election of the Governor of Guam, and for Other Purposes Before the Subcomm. on Territorial & Insular Affs. of the H. Comm. on Interior & Insular Affs.*, 90th Cong. 12 (1968) (statement of Alberto Lamorena, former Guam State Legislator).

161 *Election of Virgin Islands Governor: Part I: Hearings on H.R. 7330 and Related Bills and Matters Relating to Election Procedure and Economic Affairs in the Virgin Islands Before the Subcomm. on Territorial & Insular Affs. of the H. Comm. on Interior & Insular Affs.*, 90th Cong. 16 (1967) (statement of C. Lloyd W. Joseph, Chairman, St. Croix District Republican Club).

162 AM. SAM. CONST. art. IV, § 2 (amended 1977) ("The Governor and the Lieutenant Governor of American Samoa shall, commencing with the first Tuesday following the first Monday of November 1977, be popularly elected and serve in accordance with the laws of American Samoa."); Elected Governor and Lieutenant Governor of American Samoa, 42 Fed. Reg. 48,398 (Sept. 23, 1977); *see also* Lawson, *supra* note 152, at 869 n.89.

163 *See* AM. SAM. CONST. art. IV, § 2 (amended 1977).

164 S.20, 15th Leg., 2d Spec. Sess. (Am. Sam. 1977) (codified at AM. SAMOA CODE ANN. § 4.0104 (2020)).

165 N. Mar. I. Const. art. III, § 4 (amended 2007); *see also* N. MAR. I. CONST. CONVENTION, ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 75–76 (1976), www.nmhcouncil.org/nmhc_archives/NMI%20Constitutional%20Conventions/1st%20Con-Con%20Directory/1976%2012%20

Briefing papers provided to delegates at the 1976 constitutional convention only briefly discussed the issue, primarily pointing out that the Hawaiian and Puerto Rican constitutions did not impose such a requirement.[166] In the decades that followed, however, the need for a majority-vote requirement became apparent. Between 1997 and 2005, gubernatorial elections in the commonwealth were decided by smaller and smaller pluralities,[167] with the winner of the 2005 election winning just shy of 28% of the vote, trailed closely by his opponents with 27%, 26%, and 18% of the vote.[168] In the next legislative session, the legislature approved an amendment to the constitution requiring a runoff election if no candidate won a majority, which the voters ratified in 2007.[169]

D. *Majority-Vote Requirements and Top-Two Primaries*

Outside of these majority-vote requirements, which largely applied to primary elections, not general elections, several states have adopted new statewide election regimes that have partially adopted majority-vote requirements. California, Louisiana, and Washington have all adopted blanket primaries, in which all candidates of all parties run on the same ballot, and a runoff election takes place among the top two candidates.[170] Under Louisiana law, if a candidate wins a majority of the vote in the

06%20Analysis%20of%20the%20Constitution-A.pdf ("There is no requirement that a ticket receive a majority of the votes cast to be elected.").

166 N. Mar. I. Const. Convention, Briefing Paper No. 8: Eligibility to Vote and Election Procedures 34 (1976).

167 *2005 Election Results*, Commonwealth Election Comm'n, https://www.votecnmi.gov.mp/archive/97-archive/election-results/138-2005-election-results (last visited Oct. 6, 2020); Edith G. Alejandro, *GOP in Landslide CNMI Victory: Babauta Governor*, Pac. Islands Rep. (Nov. 6, 2001), http://www.pireport.org/articles/2001/11/06/gop-landslide-cnmi-victory-babauta-governor (summarizing results of 1991 gubernatorial election); Zaldy Dandan, *'It's Teno-Pepero!*,' Marianas Variety (Nov. 4, 1997), https://evols.library.manoa.hawaii.edu/bitstream/10524/51064/Marianas%20Variety%20Vol.%2025%2c%20No.%20162%2c%201997-11-04.pdf (summarizing results of 1997 gubernatorial election).

168 *2005 Election Results*, *supra* note 167.

169 *2007 Election Results*, Commonwealth Election Comm'n, https://www.votecnmi.gov.mp/archive/97-archive/election-results/118-2007-election-results (last visited Oct. 6, 2020); Marconi Calindas, *Modest Turnout for CNMI Elections*, Pac. Daily News (Agana Heights, Guam), Nov. 4, 2007, at 3 ("Residents will also decide on two legislative initiatives . . . . The other proposes to require a runoff election if no gubernatorial team obtains a majority vote — 50 percent plus one — in an election.").

170 *See, e.g.*, Chenwei Zhang, Note, *Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races*, 73 Ohio State L.J. 615, 624–33 (2012).

blanket primary, no runoff election is held,[171] but runoffs in California and Washington take place regardless.

Louisiana's blanket primary was adopted with a multi-fold purpose in mind—with Republicans becoming increasingly competitive in the state, Democrats reasoned that it was unduly expensive to have their statewide nominees endure *three* election contests (namely, a primary, primary runoff, and general election), so a blanket primary with a potential runoff eased the burden.[172] Moreover, the blanket primary cut costs significantly.[173] At the time, there were few voices arguing that the blanket primary would increase public participation in the political process, though it undoubtedly served to do so.

In California, meanwhile, the adoption of a top-two primary with a mandatory runoff was more explicitly predicated on allowing independent and unaffiliated voters to more actively participate in state elections; Washington also implemented a top-two primary.[174] The practical benefits conferred by the top-two primary system are dubious,[175] and at least more

171 This wasn't always the case, however. Under the 1975 version of the law, a second election, called a "general" election, was *always* held. Act of May 30, 1975, 1975 La. Acts 1, 24. In effect, if a candidate won a majority of the vote in the primary, they were declared the winner, but nonetheless ran again as a formality in the general election. *See id.* ("Any person who, in a primary election held under this Part, receives a majority of the votes cast for the office for which he was a candidate shall be declared the sole and only nominee elected for that office, and his name shall be listed on the ballot in the general election as the candidate or nominee for such office."). In 1975, that meant that incumbent Democratic Governor Edwin Edwards appeared as the only gubernatorial candidate in the general election. *See Election to Fill Two Top Offices*, SHREVEPORT TIMES, Dec. 7, 1975, at 8 (noting that Edwin Edwards, along with several other statewide candidates, won "new four-year terms without a runoff"). The costliness and inefficiency of this process led the next year's legislature to change the primary's operation to the current system.

172 Stella Z. Theodoulou, *The Impact of the Open Elections System and Runoff Primary: A Casestudy of Louisiana Electoral Politics, 1975–1984*, 17 URB. LAW. 457, 459 (1985); John R. Labbé, Comment, *Louisiana's Blanket Primary After* California Democratic Party v. Jones, 96 NW. U. L. REV. 721, 743–45 (2002).

173 *See* Theodoulou, *supra* note 172, at 459; *see also* Labbé, *supra* note 172, at 743.

174 *See, e.g.*, Zhang, *supra* note 170, at 624–33.

175 There is limited support for the proposition that the top-two primary has resulted in more moderates being elected to office, *see* Seth Masket, *Polarization Interrupted? California's Experiment with the Top-Two Primary*, *in* GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE 1 (Ethan Rarick ed., 3d ed. 2013); Eric McGhee & Boris Shor, *Has the Top Two Primary Elected More Moderates?*, 15 PERSPS. ON POL. 1053, 1062–64 (2017), and some support for the idea that it may, combined with other changes, affect voter turnout, *see* Seth J. Hill & Thad Kousser, *Turning Out Unlikely Voters? A Field Experiment in the Top-Two Primary*, 38 POL. BEHAV. 413, 429 (2016).

than occasionally tend to penalize parties when too many of their candidates run in a given election and "split" the vote.[176] Nonetheless, in both states, the top-two primary has radically altered the method in which gubernatorial elections take place. The 2018 California gubernatorial election—the first open seat since the adoption of the top-two primary—was close to being a one-party affair in the general election. Democrats were optimistic that two of their candidates would finish in the top two, depriving Republicans of a robust statewide campaign that would encourage down-ballot participation.[177] However, a timely intervention by national Republicans enabled one of their candidates to win a spot in the runoff.[178]

E. *Conclusion*

The methods through which governors were selected at planned events—namely, elections—have undergone significant transformation since the United States' independence in 1776. The governorship has been converted from a position largely filled by the legislature, either explicitly or when there was a failure to elect, to a position elected and chosen by the voters of their state. The constitutional changes in the composition and selection of governors run hand in hand with the equally significant constitutional changes in the powers of governors. The expansion of gubernatorial appointment powers, the veto, and countless other constitutional and statutory powers, makes sense in the context of the role's transformation from a mere appendage of the legislature to a fully independent state official elected to implement the electorate's desires.

176 *See, e.g.*, Russell Berman, *The Democrats Barely Pull It Off in California*, Atlantic (June 6, 2018), https://www.theatlantic.com/politics/archive/2018/06/the-democrats-close-call-in-california/562178/; Li Zhou, *Washington Has a Top-Two Primary. Here's How It Works.*, Vox (Aug. 7, 2018), https://www.vox.com/2018/8/7/17649564/washington-primary-results.

177 *See* Alexei Koseff, *California Republicans Confront a Dire Election Scenario: No GOP Choice for Governor*, Sacramento Bee (Apr. 16, 2018) (updated Apr. 21, 2018), https://www.sacbee.com/latest-news/article208854384.html; Alejandro Lazo, *California Gubernatorial Primary Eyed for Its Impact on House Races*, Wall St. J., https://www.wsj.com/articles/california-gubernatorial-primary-eyed-for-its-impact-on-house-races-1527854401 (June 1, 2018).

178 *See* Adam Nagourney & Alexander Burns, *Gavin Newsom and John Cox to Compete in California Election for Governor*, N.Y. Times (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/california-primary.html.

III. Modern Reforms (and the Possibility for More)

The current state of gubernatorial selection reflects two centuries' worth of constitutional changes that largely standardized gubernatorial elections around the country. Today, no state has an indirectly elected governor—and only four states (Georgia, Louisiana, Mississippi, and Vermont) and four territories (American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands) impose majority-vote requirements, with all but Vermont requiring runoff elections if no candidate wins a majority. While these state constitutional revisions occurred in the specific context of local politics and concerns, they have also created an unprecedented degree of uniformity in gubernatorial selection.

But still, many states take their license to serve as laboratories of democracy quite seriously. The continued existence of majority-vote requirements in the eight states and territories mentioned above reflect some amount of local innovation—for good *and* bad. But this degree of innovation extends beyond merely imposing majority-vote requirements. In recent decades, an increasing number of states have adopted—or have *considered* adopting—additional electoral reforms, primarily top-two primaries and ranked-choice voting.

These innovations, coupled with similar governmental and electoral reforms and the universal presence of explicit constitutional amendment procedures, suggest that state political systems exist in a constant state of flux. Accordingly, in laying out the full history of gubernatorial selection, it is appropriate to consider what the next era of gubernatorial election should look like.

This Article commits to that ambitious undertaking here, in Part III, by considering some of the recently proposed reforms and how state constitutions might revise how they organize their systems of government. In so doing, it does not specifically advocate for the adoption of any one particular method of election, instead discussing the potential merits of different approaches.

Section A begins by elaborating on the movements toward top-two primaries and ranked-choice voting at the statewide level. Section B then considers how current state constitutions—especially the eight that still maintain majority-vote requirements—should treat gubernatorial elections. Section C then identifies several reforms, like a move to state-level parliamentary governments or commission-style governments, that have not been (recently) proposed, but may warrant merit.

A. *Modern Reforms*

As noted in the previous Section, in the past two decades, California and Washington have adopted "top-two" primaries. In a top-two primary, all candidates from all parties run in the same primary, with the top two candidates—regardless of party, and regardless of whether the leading candidate won a majority—advancing to the general election.

In both states, the top-two primary is rooted in the blanket primary that both states previously used. In the early twentieth century, as states began adopting primary elections, Washington enacted a blanket primary.[179] Under this system, all candidates from all parties ran in the same primary, with the top candidate from each party advancing to the general election.[180] California adopted a similar system in 1996.[181] However, the California Democratic Party challenged the constitutionality of the state's blanket primary on First Amendment grounds, arguing that its constitutional right to associate was infringed. In *California Democratic Party v. Jones*, the Supreme Court agreed, striking down the state's primary system.[182]

After *Jones*, the Washington State Democratic Party challenged the blanket primary in its state, which the Ninth Circuit struck down in 2003 on the same grounds.[183] Following the Ninth Circuit's ruling in *Democratic Party of Washington State v. Reed*, Washington reverted to partisan primaries—which it hadn't experienced since 1934.[184] Popular dissatisfaction with this outcome led to the adoption of the top-two primary in 2004,[185] which has been in place since. And in 2010, California once again joined Washington, adopting a top-two primary.

Since the adoption of top-two primaries in California and Washington, other states have considered adopting similar procedures, but none has successfully done so. The closest that any other state has gotten was Florida, where Amendment 3, on the ballot in 2020, would have created a top-two primary for state offices, but it was defeated in the general election.[186]

179 Zhou, *supra* note 176.

180 Deidra A. Foster, Comment, *Partisanship Redefined: Why Blanket Primaries Are Constitutional*, 29 Seattle U. L. Rev. 449, 452, 463 (2005).

181 *Id.*

182 Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000).

183 *See* Democratic Party of Wash. v. Reed, 343 F.3d 1198, 1207 (9th Cir. 2003).

184 Foster, *supra* note 180, at 449, 460, 466–70.

185 *Id.* at 466–70; *see also* Sally Ousley, *Primary Ballots Prompt Flurry of Angry Calls*, Daily News (Longview, Wash.), Aug. 28, 2004, at A1.

186 *See Florida Amendment 3 Election Results: Establish Top-Two Open Primary System*, N.Y. Times, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-florida-amendment-3-establish-top-two-open-primary-system.html (Nov. 17, 2020); Zhang,

The movement in favor of ranked-choice voting is far more interesting, however, because it represents a potentially seismic shift in how American elections are conducted. Though many cities have used ranked-choice voting[187] in local elections for decades,[188] no states have followed suit until recently. In 2016, Maine became the first state to adopt ranked-choice voting when its voters approved Question 5, a ballot initiative.[189] The path following the initiative's vote of approval was rocky.[190] Following an advisory opinion of the state supreme court as to its permissibility under the state constitution, the initiative was only partially implemented in 2018—it was largely restricted to primaries for all offices and general elections for district offices. But in 2020, it was implemented in all elections, making it the first time in history that a presidential election at the state level used ranked-choice voting.

Several other states considered adopting electoral forms that merged together the idea of a top-two primary and ranked-choice voting. Alaska, Arkansas, and North Dakota all saw voter-initiated constitutional amendments that sought to implement top-*four* primaries. As the proposals were written, all candidates of all parties would appear on the same primary ballot. The top four candidates would advance to the general election, where voters would vote a ranked-choice ballot. The effort ended up passing in Alaska,[191] but it was removed from the ballot in Arkansas and North Dakota by their state supreme courts on largely technical grounds.[192] The implementation of the top-four primary in Alaska was unsuccessfully

supra note 170.

187 For an explanation of how ranked-choice voting works, see generally Sarah Almukhtar et al., *How Does Ranked-Choice Voting Work in New York?*, N.Y. TIMES (Apr. 22, 2021), https://www.nytimes.com/interactive/2021/nyregion/ranked-choice-voting-nyc.html.

188 Amanda Zoch, *The Rise of Ranked-Choice Voting*, NAT'L CONF. STATE LEGISLATURES (Sept. 2, 2020), https://www.ncsl.org/research/elections-and-campaigns/the-rise-of-ranked-choice-voting.aspx.

189 *Ranked Choice Voting in Maine*, ME. STATE LEGISLATURE (Oct. 7, 2020), https://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509.

190 *See, e.g.*, Matthew R. Massie, Note, *Upending Minority Rule: The Case for Ranked-Choice Voting in West Virginia*, 122 W. VA. L. REV. 323, 337–43 (2019); *see also Ranked Choice Voting in Maine*, *supra* note 189.

191 Kelsey Piper, *Alaska Voters Adopt Ranked-Choice Voting in Ballot Initiative*, VOX (Nov. 19, 2020), https://www.vox.com/2020/11/19/21537126/alaska-measure-2-ranked-choice-voting-results.

192 *See* Miller v. Thurston, 605 S.W.3d 255, 256, 260 (2020) (removing constitutional amendment from the ballot because the petition sponsors did not certify that their canvassers had passed background checks); Haugen v. Jaeger, 948 N.W.2d 1, 2, 4 (2020) (removing constitutional amendment from the ballot because the petition did not include the full text of the measure).

challenged in state court,[193] representing a potentially significant shift in how elections could be conducted.

B. *Rethinking the Majority Requirement*

At its core, requiring that a candidate for statewide office receive a majority of the vote makes sense. Allowing a mere plurality to be sufficient to win creates the possibility of minority rule, or a replay of the 2005 gubernatorial election in the Northern Mariana Islands, where the winning candidate received just *27 percent* of the vote.[194] Other elections in the past several decades have produced similar results—though none as extreme. Since 1990, nine gubernatorial elections have seen the plurality winner receive less than 40 percent of the vote.[195] In most of these elections, the circumstances giving rise to such a small plurality win were highly localized; a unique combination of personally popular independent candidates or the short-lived burst of success for third parties can explain most of these results.[196] Most states do not have strong third parties—though Alaska, Maine, and Minnesota are possible exceptions—and therefore only rarely confront the reality of plurality-winner gubernatorial elections.[197] The situation is slightly different in American territories, which either have more political parties or have a greater tradition of independent candidates, and therefore are likelier to have statewide elections where no candidate receives a majority. Indeed, in the 2020 Puerto Rico gubernatorial election, the winning candidate won with just 33 percent of the vote against a crowded field,[198] triggering some to suggest that Puerto Rico needed to adopt runoff

193 James Brooks, *Alaska Supreme Court Upholds Elections Ballot Measure, State Will Use Ranked-Choice Voting*, Anchorage Daily News (Jan. 19, 2022), https://www.adn.com/politics/2022/01/19/alaska-supreme-court-upholds-elections-ballot-measure-state-will-use-ranked-choice-voting-in-november/.

194 *2005 Election Results*, *supra* note 167.

195 Specifically, 1994 in Maine (35 percent); 2010 in Rhode Island (36 percent); 1994 in Connecticut (36 percent); 1994 in Hawai'i (37 percent); 1998 in Minnesota (37 percent); 2006 in Maine (38 percent); 2010 in Maine (38 percent); 1990 in Alaska (39 percent); and 2006 in Texas (39 percent). *See* Guide to U.S. Elections, *supra* note 29, at 1675–1743.

196 *See, e.g.*, Kevin B. Smith & Alan Greenblatt, Governing States and Localities 176–78 (6th ed. 2017).

197 *E.g.*, Russell Berman & Andrew McGill, *The States Where Third-Party Candidates Perform Best*, Atlantic (Aug. 2, 2016), https://www.theatlantic.com/politics/archive/2016/08/third-party-candidates-2016-clinton-trump-johnson/493931/.

198 Dánica Coto, *Pedro Pierluisi Wins Gubernatorial Race in Puerto Rico*, ABC News (Nov. 7, 2020), https://abcnews.go.com/International/wireStory/pedro-pierluisi-wins-gubernatorial-race-puerto-rico-74084001.

elections.[199]

Nonetheless, regardless of where it occurs, the possibility that a candidate could win a gubernatorial election with *less than 40 percent of the vote*, even as little as *27 percent*, is concerning. In hardly any other context is such a slim plurality—with a large majority voting for another candidate—sufficient to give the winner a true popular mandate. As the *Hartford Courant* noted in the early twentieth century, even as it endorsed the repeal of Connecticut's majority-vote requirement, "[t]he so-called 'majority rule' needs no defender in the absolute logic of it. When a man has not a majority for him[,] he has a majority against him. The man who has a majority of the votes against him is not the choice of the people."[200]

In the abstract, it makes sense to impose a majority-vote requirement. Such a requirement guarantees that the winner emerges with some semblance of a mandate from the electorate instead of representing just a narrow slice of it. But imposing a majority-vote requirement is only half of the equation.

If a majority is required, *what is done to enforce that requirement?* Under the systems currently in place, and that were in place in some states prior to the twentieth century, there are two possible enforcement mechanisms: a runoff election or legislative selection.[201] But, even compared to the ills of a thin plurality winner in a gubernatorial election, a runoff election isn't desirable, either—runoff elections frequently see lower turnout than the original election, have an altogether different electorate, and are frequently scheduled at times when voters aren't used to elections being held.[202] There's also no guarantee that the two candidates who advance to the runoff are the most palatable or popular candidates of the bunch.[203] Of course, legislative

199 *See, e.g.*, Natalia Rodríguez Medina, *Rochester's Puerto Rican Community Keeps Close Eye on Island Election*, DEMOCRAT & CHRON. (Nov. 7, 2020), https://www.democratandchronicle.com/story/news/2020/11/07/rochesters-puerto-rican-community-keeps-close-eye-island-election/6187502002/.

200 *Needed Constitutional Changes*, HARTFORD COURANT, May 10, 1899, at 10.

201 *Supra* Section I.B., Part II.

202 Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & POL'Y 564, 632–33 (2020); Nathaniel Rakich & Geoffrey Skelley, *The Case for Republicans in Georgia vs. the Case for Democrats*, FIVETHIRTYEIGHT (Jan. 4, 2021) https://fivethirtyeight.com/features/the-case-for-republicans-in-georgia-vs-the-case-for-democrats/.

203 *See, e.g.*, Laurent Bouton & Gabriele Gratton, *Majority Runoff Elections: Strategic Voting and Duverger's Hypothesis*, 10 THEORETICAL ECON. 283, 285–86 (2015) ("[R]egarding the idea that majority runoff elections should ensure a large mandate to the winner, we show that even when there are more than two serious candidates in the first round, *the Condorcet winner is not guaranteed to participate in the second*. Therefore, the fact that the eventual winner of the election obtains more than 50% of the votes in the second

selection is also a bad idea—it effectively just deputizes the legislative majority to select its candidate. If we had a greater degree of certainty that a legislature would exercise its power to elect a winner based on some objective set of criteria, we might have greater faith in that as an option. But, with the narrow exception of how the Vermont General Assembly has exercised its constitutional power in recent decades,[204] we have no such cause for certainty.

Of course, as explained in the previous section, these aren't the only two options. As laboratories of democracy, states are empowered to set up different methods of election. More states could set up ranked-choice (or instant-runoff) voting—as Maine has—or a system like Alaska's, which fuses together ranked-choice voting and a top-*four* primary.[205] These systems are both very new to statewide elections in the United States and there's reason to suspect that they will continue to face serious legal challenges as they're implemented.[206] Cities, however, have historically been the main innovators in rethinking electoral procedures, however, and in recent years, they have been increasingly creative. In 2018, Fargo, North Dakota, adopted an "approval voting" system, the first American city to do so.[207] In 2020, the voters of St. Louis, Missouri, approved a similar system,[208] which was used for the first time in the 2021 mayoral election.[209] And, most prominently of

round cannot be considered a strong proof of legitimacy. *This only ensures that a potential Condorcet loser never wins*." (emphases added)).

204 *See* Sanford & Gillies, *supra* note 44, at 794–95.

205 *E.g.*, Matthew Barakat, *Ranked-Choice Voting, Approved in Alaska and Maine, Gets a Look Nationwide*, Anchorage Daily News (Mar. 16, 2021), https://www.adn.com/nation-world/2021/03/16/ranked-choice-voting-in-effect-in-alaska-and-maine-gets-a-look-nationwide/.

206 *E.g.*, Brooks, *supra* note 193 (noting challenge to Alaska's top-four primary).

207 Kelsey Piper, *This City Just Approved a New Election System Never Tried Before in America*, Vox (Nov. 15, 2018), https://www.vox.com/future-perfect/2018/11/15/18092206/midterm-elections-vote-fargo-approval-voting-ranked-choice. Though the mechanics of approval voting differ depending on the jurisdiction in which it is used, in its purest form, "voters are allowed to vote for ('approve of') as many candidates as they wish," and "[t]he winner is the candidate with the greatest vote total." Steven J. Brams & Peter C. Fishburn, *Approval Voting*, 72 Am. Pol. Sci. Rev. 831, 831 (1978).

208 Mark Schlinkmann, *Overhaul of St. Louis Election System Passes, Residency Rule Repeal Fails*, St. Louis Post-Dispatch (Nov. 3, 2020), https://www.stltoday.com/news/local/govt-and-politics/overhaul-of-st-louis-election-system-passes-residency-rule-repeal-fails/article_d37f0b73-c0b6-56d7-b093-8d069c314813.html.

209 Nathaniel Rakich, *In St. Louis, Voters Will Get to Vote for as Many Candidates as They Want*, FiveThirtyEight (Mar. 1, 2021), https://fivethirtyeight.com/features/in-st-louis-voters-will-get-to-vote-for-as-many-candidates-as-they-want/. St. Louis's system of approval voting differs from the traditional model; as used in St. Louis, voters can "approve of" as many candidates as they want, with the two most approved-of candidates advancing to a runoff election. *See* Rachel Lippmann, *St. Louis Gears Up for*

all, New York City conducted its municipal primary elections in 2021 with a ranked-choice system—raising the issue to nationwide attention.[210]

But regardless of the specific reform in mind—as well as how any legal challenges to the reforms adopted in Alaska and Maine play out—the basic idea underlying all of them is worthy of consideration. These reforms would be particularly applicable in the states and territories that currently employ majority-vote requirements. Admittedly, the institutional opposition to such a radical shift shouldn't be understated in a state like Georgia, where the Republican establishment has traditionally benefitted from the runoff-election requirement.[211] In Guam and the U.S. Virgin Islands, gubernatorial elections are governed by organic acts approved by Congress—and any modifications to the majority-vote requirement would be required to come from *Congress*, not the territorial legislature. Similarly, in American Samoa, though the territory has its own constitution and isn't subject to an organic act, the Secretary of the Interior is required to approve any constitutional amendments.[212] There's good reason to doubt that Congress or the Secretary would approve these kinds of ambitious reforms.

But a reform like this wouldn't be unreasonable to implement in a territory like the Northern Mariana Islands (CNMI) or Puerto Rico. Both territories have their own constitutions and can approve any changes without approval from Congress or the Department of the Interior[213]—unlike American Samoa, Guam, or the U.S. Virgin Islands.[214] Relevantly, both territories already employ unusual and innovative methods of *legislative* elections. In Puerto Rico, the territorial legislature is composed of both district-level and at-large legislators;[215] in the CNMI, the territorial legislature

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First Election Using Approval Voting, ST. LOUIS PUB. RADIO (Mar. 1, 2021), https://news.stlpublicradio.org/government-politics-issues/2021-03-01/st-louis-gears-up-for-first-election-using-approval-voting.

210 Maya King & Zach Montellaro, *New York's 'Head-Swirling' Mistake Puts Harsh Spotlight on Ranked-Choice Voting*, POLITICO (July 6, 2021), https://www.politico.com/news/2021/07/06/new-york-ranked-choice-voting-498221.

211 *See, e.g.*, Rakich & Skelley, *supra* note 202 ("Outside of one 1998 runoff for a seat on the state's public service commission, Republicans have always gained at least a little ground in the runoff compared to the general election.").

212 *See* Exec. Order No. 10,264, 3 C.F.R. 765 (1949–1953); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 87–88 (2013); *see also* 48 U.S.C. § 1662a ("Amendments of, or modifications to, the constitution of American Samoa, as approved by the Secretary of the Interior pursuant to Executive Order 10264 as in effect January 1, 1983, may be made only by Act of Congress.").

213 *See* N. MAR. I. CONST. art. XVIII, §§ 1–5; *see* P.R. CONST. art. VII, §§ 1–2.

214 *Supra* notes 211–12 and accompanying text.

215 P.R. CONST. art. III, § 3.

has multi-member districts in which legislators are elected to rotating terms.[216] These procedures reflect forward-thinking, innovative philosophies in how to administer elections that suggest that both territories are fertile ground for reforms in their gubernatorial elections.

C. *A Return to Indirect Election?*

One of the most interesting, and underdiscussed, aspects of state constitutional law is the manner in which old ideas, once abolished, are refreshed and adopted anew. As this Article explains, majority-vote requirements were once fairly widespread in New England gubernatorial elections but were largely abolished by the early twentieth century.[217] But that didn't stop other states and territories—for problematic reasons and for reasons rooted in the specific contexts of subnational political cultures—from adopting similar requirements.[218] These new requirements, however, were *usually* more protective of democratic will than their ancestors.[219] Likewise, several New England states originally opted to fill state legislative vacancies by appointment, not special elections.[220] As these systems crashed and burned, they were eliminated in state constitutions—but have seen a re-emergence in the last century, again with more democratic protections.[221] To a lesser extent, a similar trend exists with unicameral legislatures. They originally existed in Georgia, Pennsylvania, and Vermont, but were nonexistent by the mid-nineteenth century.[222] A burst of renewed interest in unicameralism occurred in the early twentieth century, during the height of the Progressive Era,[223] though only Nebraska[224] (and later, Guam and the U.S. Virgin Islands[225]) adopted a unicameral legislature.

It's possible that a similar resurgence could occur with respect to indirectly elected governors. Admittedly, few people are seriously suggesting that gubernatorial elections should be removed from ballots and that we

216 *See* N. Mar. I. Const. art. II, § 2(a), (b) ("The term of office for senator shall be four years except that the candidate receiving the third highest number of votes in the first election in each senatorial district shall serve a term of two years.").

217 *Supra* Section I.B.1.

218 *Supra* Section II.A.

219 *Supra* Sections I.B.2, II.C.

220 Yeargain, *supra* note 43, at 345–55.

221 Yeargain, *supra* note 202, at 588–601.

222 Demitrios M. Moschos & David L. Katsky, Note, *Unicameralism and Bicameralism: History and Tradition*, 45 B.U. L. Rev. 250, 260–62 (1965).

223 *Id.* at 263–69.

224 *Id.* at 265.

225 48 U.S.C. §§ 1423(a), 1571(a).

should return to the Revolutionary War-era system of indirect gubernatorial elections.[226] But there's a way to rethink that idea and to significantly improve on it.

During the Progressive Era, reformers advanced a wide variety of suggested improvements on state and national systems of government.[227] Many of these suggestions were regionally focused or state-specific in nature, and it's difficult to conflate localized suggestions with national progressive support.[228] The movement, after all, was not monolithic. Generally speaking, progressive reformers didn't focus much on radically altering gubernatorial elections.[229] To the extent that governorships needed to be reformed, progressives largely focused on expanding governors' executive authority, including governors' appointment powers.[230]

However, at least two prominent reformers—Governor George Hodges of Kansas and William S. U'Ren of Oregon—proposed a shift in how governors operated in state systems of government.[231] Under their proposals, bicameral state legislatures would be shrunk to just one chamber, with the governor an *ex officio* member and the presiding officer.[232] It was, intentionally or not, evocative of how many early state governorships were organized. And it ultimately went nowhere.[233]

Few reformers ever seriously suggested the adoption of a parliamentary form of government in any state.[234] The early-state governorships, as mentioned before,[235] and the Hodges–U'Ren approach[236] both came *close*, but were different in several material ways. Though some early-state constitutions included the governor as a member of the legislature, as Hodges and U'Ren suggested, most didn't—and none *required* that the legislature choose one of its own members.[237] Moreover, governors were elected for set terms, unlike prime ministers or regional premiers, and a vote of no-confidence was impossible.[238] And in any event, the legislature

226 *See, e.g.*, Ward, *supra* note 139.
227 Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496–98 (2017).
228 *See id.*
229 *See id.*
230 *Id.*
231 Yeargain, *supra* note 202, at 625–26.
232 *Id.*
233 *Compare id.*, *with supra* Section I.A.
234 *See* Jonathan Zasloff, *Why No Parliaments in the United States?*, 35 U. PA. J. INT'L L. 269, 291–92 (2013).
235 *See supra* Section I.A.
236 Yeargain, *supra* note 202, at 625–26.
237 *Id.*
238 Yeargain, *supra* note 39.

was similarly elected to a specified term, which couldn't be cut short if the governor wished to call a snap election.[239] So even the most serious ideas that got the *closest* to a parliamentary system nonetheless fell short of actually doing so.

Today, some suggest the idea of parliamentary state governments semi-seriously. Largely abstract think pieces have been written on how, with some incredibly unlikely changes to the U.S. Constitution, such a move might upend the existing party system.[240] Some commentators have speculated that Oregon—with its strong initiative movement and willingness to try democratic experiments—would be the likeliest place to launch such an effort,[241] but again, no serious effort to do so has emerged.[242]

But though the idea has not *yet* been seriously proposed, there's no reason to suspect that it may not be at some point in the near future. State constitutional development is constantly in flux. In recent decades, the biggest changes to state constitutions have been the restructuring of elected executive offices, the abolition of certain positions—like state treasurers—or broadening the franchise with increased voting rights. While a shift to a parliamentary government is not necessarily the next step, the changes that have taken place—maximizing the efficiency of state government and making it more directly representative—are at least supportive of such a shift. And while the idea of a quasi-parliamentary democracy might sound like a more left-leaning idea, some recent statements on American democracy from prominent Republicans,[243] as well as the cynical suggestion of returning to a gubernatorial electoral college,[244] suggest that returning to

239 *See id.*

240 *E.g.*, Dylan Matthews, *Justin Trudeau Isn't Magic, Liberals. Parliaments Make It Easier to Pass Laws.*, Vox (May 18, 2016), https://www.vox.com/2016/5/18/11692402/parliaments-better-presidents-liberal; Akhilesh Pillalamarri, *America Needs a Parliament*, Nat'l Int. (Aug. 2, 2016), https://nationalinterest.org/feature/america-needs-parliament-17220; Ari Shapiro, *Would the U.S. Be Better Off with a Parliament?*, NPR (Oct. 12, 2013), https://www.npr.org/sections/itsallpolitics/2013/10/12/232270289/would-the-u-s-be-better-off-with-a-parliament; Michael Tomasky, Opinion, *If America Had a Parliament*, N.Y. Times (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/opinion/america-politics-parliament.html.

241 Matthews, *supra* note 240.

242 *See generally* Zasloff, *supra* note 234 (noting the complete absence of an organized movement in favor of a shift to a parliamentary democracy).

243 *See, e.g.*, Zack Beauchamp, *Sen. Mike Lee's Tweets Against "Democracy," Explained*, Vox (Oct. 8, 2020), https://www.vox.com/policy-and-politics/21507713/mike-lee-democracy-republic-trump-2020; Joseph Morton, *Sasse Proposes Ending Direct Election of U.S. Senators*, Omaha World-Herald (Sept. 10, 2020), https://omaha.com/news/state-and-regional/govt-and-politics/sasse-proposes-ending-direct-election-of-u-s-senators/article_ad1f0116-d3ec-5248-932a-b48c5e231525.html.

244 Ward, *supra* note 139.

legislatively elected governors might find some Republican support—if it could be used to their advantage.[245]

CONCLUSION

During the last two centuries, governors, as political institutions, have undergone tremendous change—in terms of how they are selected, how they are succeeded, and what powers they have once in office. These changes are reflective of broader societal movements in American democracy and of fundamental changes in state constitutional law. But governors, like all other political institutions, are not done changing. The cautious movement by state-level reformers to adopt wide-ranging changes in the methods of gubernatorial election—from the abolition of Jim Crow-era restrictions to top-two or top-four primaries to ranked-choice voting—demonstrate that there is no value in complacency. The ultimate challenge of American democracy is to continue seeking the best, most democratically legitimate methods of conducting and deciding elections. While these efforts may not *begin* with gubernatorial elections, and though they certainly shouldn't *end* with gubernatorial elections, they must *include* gubernatorial elections.

245 Following the made-up controversy surrounding the 2020 presidential election and the authoritarian-lite efforts by Republican members of Congress to reject the results of the Electoral College, Republican Congressman Thomas Massie issued a statement opposing those efforts. *See* Press Release, Congressman Thomas Massie, Joint Statement Concerning January 6 Attempt to Overturn the Results of the Election (Jan. 3, 2021), https://massie.house.gov/news/email/show.aspx?ID=Z5MPA3CVK5FYZQ3KBYQIDSAWB4. Massie made it *very clear* that he wanted nothing to do with any effort to delegitimize the Electoral College because "[f]rom a purely partisan perspective, Republican presidential candidates have won the national popular vote only once in the last 32 years. They have therefore depended on the electoral college for nearly all presidential victories in the last generation. If we perpetuate the notion that Congress may disregard certified electoral votes—based solely on its own assessment that one or more states mishandled the presidential election—we will be delegitimizing the very system that led Donald Trump to victory in 2016, and that could provide the only path to victory in 2024." *Id.*

ESSENTIAL BUT IGNORED: COVID-19 LITIGATION AND THE MEATPACKING INDUSTRY

*By Alexia Brunet Marks**

* Associate Professor of Law, University of Colorado Law School. J.D., Northwestern University; Ph.D., Purdue University (Agricultural Economics). I am grateful to Gordon Gamm for the Gamm Justice Award, and Project Protect Food System Workers for the stories I have heard firsthand, and Sidney Tikalsky for excellent research assistance. I thank Michael and our three C's for support throughout this project and during the pandemic. I welcome all comments at: alexia.brunet@colorado.edu.

Abstract

The spread of the novel coronavirus SARS-CoV-2 (COVID-19) among meatpacking employees forced closures and slowdowns at many plants across the United States. As the meatpacking giants JBS, Smithfield, and Tyson became hotbeds for COVID-19, national meat production plummeted. To forestall further supply chain disruptions, former President Trump passed an Executive Order compelling plants to continue operating as "essential businesses." As work continued, employees reported that social distancing and mask-wearing were not being enforced, managers were pressuring sick employees to work and not revealing co-worker's infections, and an overall lack of Personal Protective Equipment (PPE) or training to reduce the risk of infection prevailed. With over 50,000 meatpacking workers contracting and 250 dying from COVID-19, academic scholarship has neglected addressing this failure to keep workers safe.

The problem is that while workers were deemed "essential," they were ignored by employer practices and lax regulations allowing rapid COVID-19 transmission in the workplace. As illnesses and deaths mounted, the former Trump administration did not issue a COVID-19 emergency standard and many states also narrowed their worker protections, passing "liability shield" legislation and restricting worker's compensation coverage for employee claims. Injured on the job, plaintiffs began suing for their rights. However, while litigation brought by workers and their families, labor advocates, and unions has advanced, plaintiffs continue to struggle to overcome motions to dismiss based on preemption by either workers' compensation, primary jurisdiction, or liability shields.

This Article is the first to use COVID-19 litigation to expose gaps in workplace safety, and the first to present a timely, evidence-based solution to address the problem: a new Emergency Temporary Standard (ETS) and workers' compensation reform. The new ETS will provide a necessary baseline for Occupational Safety and Health Administration (OSHA) fines and citations which will, in turn, motivate companies to adopt safety practices. It will also help plaintiffs present evidence of breach of a standard in their workers' compensation hearings and personal injury claims. Finally, this Article will fundamentally impact three simultaneous discussions: (1) an investigation by the new House Select Subcommittee on the Coronavirus Crisis on how the country's meatpacking companies handled the pandemic; (2) the development of a new Emergency Temporary Standard to combat the spread of COVID-19; (3) litigation involving a case accusing the world's largest meat processing company of causing a worker's COVID-19 death.

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Introduction: The Pandemic's Toll

The litigation surrounding COVID-19 and meatpacking plants is filled with stories of lives tragically cut short by gaps and lapses in workplace safety. During the COVID-19 pandemic, workers revealed that social distancing and mask-wearing were not being enforced, managers were pressuring sick employees to work and not revealing co-worker's infections, and an overall lack of Personal Protective Equipment (PPE) or training on reducing the risk of infection prevailed. The case summaries below highlight what it was like to be deemed "essential" during a pandemic and how the big three meatpacking companies—JBS, Smithfield and Tyson[1]—struggling to manage profit maximizing, maintained a business-as-usual climate during a raging pandemic.

Smithfield plant employee, Jane Doe, and nonprofit Rural Community Workers Alliance, brought suit against Smithfield Foods, Inc., in April, 2020, alleging that Smithfield operated its plant in Milan, Mo., in a manner that contributed to the spread of the coronavirus.[2] To the best of my knowledge, this was the first case filed against the meatpacking giant, the first use of public nuisance in a COVID-19 context, and the first lawsuit to demand an injunction to force Smithfield to comply with Centers for Disease Control and public health guidelines.[3] Plaintiffs allege Smithfield did not provide workers with sufficient protective equipment, forced them to work shoulder to shoulder, gave them insufficient opportunities to wash their hands, and discouraged them from taking sick leave, among other violations.[4]

JBS employee, Enock Benjamin, came down with a cough and took time off from work starting March 27, 2020, and died from COVID-19 on April 3, 2020.[5] Benjamin's family brought a wrongful death suit in May against JBS, alleging that JBS ignored Occupational Safety and Health Administration (OSHA) recommendations instructing businesses to have sick workers stay at

1 JBS USA Holdings Inc. based in Greeley, Colorado (hereinafter JBS), Smithfield Foods Inc., based in Smithfield, Virginia (hereinafter Smithfield) and Tyson Foods Inc., based in Springdale, Arkansas (hereinafter Tyson). *The 2019 Top 100 Meat & Poultry Processors*, Nat'l Provisioner, https://www.provisioneronline.com/2019-top-100-meat-and-poultry-processors (last visited Feb. 18, 2021).

2 Rural Cmty. Workers All. v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228, 1232 (W.D. Mo. 2020).

3 *Id.* at 1234.

4 *Id.*

5 Benjamin v. JBS S.A., 516 F. Supp. 3d 463, 467 (E.D. Pa. 2021).

home and to issue PPE to keep workers safe on the job.[6] A court denied JBS's motion to remove the case to federal court under a primary jurisdiction doctrine theory and a state court will hear this lawsuit in 2022.[7]

Tyson employees, Sedika Buljic, Reberiano Garcia, and Jose Ayala Jr., all worked in Tyson's largest meatpacking plant in Waterloo, IA, and died of COVID-19.[8] Families of the deceased filed negligence and fraudulent misrepresentation claims alleging that Tyson transferred employees from another plant which had been shut down due to a COVID-19 outbreak, to the Waterloo, IA, facility, that they knew there was an outbreak in the plant, and that they allowed or encouraged sick workers to come to work.[9] An amended complaint alleges that the Tyson plant management gave incorrect information to translators at the plant,[10] instructing them to tell employees that "everything is fine" and that the plant had been cleared to continue – while state health officials urged them to close down.[11]

These summaries provide a glimpse into the lives of those who fell ill and died from contracting COVID-19 starting in April 2020, in our nation's largest meatpacking plants. The global pandemic had started months earlier, with initial detections in Wuhan, China in December, 2019, moving to confirmed infections in the United States as early as January, 2020.[12] As cases rose globally, on March 11, 2020, the World Health Organization declared a global pandemic.[13] On March 13, former President Trump declared a

6 *Id.*

7 *See id.* at 476.

8 Petition at Law and Demand for Jury Trial at 2, Buljic v. Tyson Foods, Inc., No. 0107 LACV140521 (Iowa Dist. Ct. filed June 25, 2020).

9 Specifically, "At least one worker at the facility vomited on the production line and management allowed him to continue working and return to work the next day." *Id.* at 9.

10 Michael Hirtzer, *Tyson Accused of Misleading Interpreters at Virus-Hit Plant*, Bloomberg (Nov. 30, 2020, 6:03 PM) (updated 7:43 PM), https://www.bloomberg.com/news/articles/2020-11-30/tyson-accused-of-misleading-interpreters-at-virus-hit-iowa-plant.

11 *Id.*

12 *See Archived: WHO Timeline - COVID-19*, World Health Org. (Apr. 27, 2020), https://www.who.int/news/item/27-04-2020-who-timeline---covid-19 (listing dates of confirmed cases in China); *CDC Museum COVID-19 Timeline*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/museum/timeline/covid19.html#:~:text=January%2020%2C%202020%20CDC,18%20in%20Washington%20state (last reviewed Aug. 4, 2021) (listing dates of confirmed cases in U.S.).

13 *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, World Health Org. (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-

national emergency,[14] and soon thereafter the first wave of shelter-in-place and stay-at-home orders at local and state levels asked residents to stay in their homes, leading to extensive closures, cancellations, and disruptions.[15]

Despite the pandemic-related restrictions, those individuals deemed "essential" could continue working and states could determine which sectors and industries they considered "essential." At the federal level, all workers who provide services that are typically essential to continue critical infrastructure operations in sixteen critical infrastructure sectors were deemed "essential" by the U.S. Cybersecurity and Infrastructure Security Agenc.[16] For instance, this meant that those employed in the Food and Agricultural sector—in the 2.1 million farms, 935,000 restaurants, and more than 200,000 registered food manufacturing, processing, and storage facilities in the U.S.—were considered "essential."[17] And yet, even in the Food and Agricultural sector, workers within this broad category faced different challenges. For restaurant and food service workers, the essential worker designation did not mean that these workers continued their jobs as normal; on the other extreme, for those on the production side of the food system who continued working to feed our country, work came at a grave human cost.[18]

One month after the emergency declaration, meatpacking plants had already become epicenters of disease spread. By April 2020, COVID-19 cases among 115 meat or poultry processing facilities in 19 states were reported to the U.S. Centers for Disease Control and Prevention (CDC) and details exposed several vulnerabilities in meatpacking plants, many inherent in the facilities and work itself.[19] Meatpacking is "the business of killing animals for meat and getting the meat ready to be sold,"[20] which includes specific tasks of slaughtering, processing, packaging, and distributing of cattle, hogs, and broilers into beef, pork, and chicken.[21] Meatpacking is a highly consolidated

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Covid-19---11-march-2020.

14 *Id.*

15 *COVID-19: Essential Workers in the States*, NAT'L CONF. STATE LEGISLATURES (Jan. 11, 2021), https://www.ncsl.org/research/labor-and-employment/Covid-19-essential-workers-in-the-states.aspx.

16 *Identifying Critical Infrastructure During COVID-19*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Mar. 19, 2020) (updated Aug. 13, 2020), https://www.cisa.gov/identifying-critical-infrastructure-during-Covid-19.

17 *Id.*

18 *Id.*; *see also Food and Agriculture Sector*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/food-and-agriculture-sector (last visited Feb. 17, 2021).

19 Jonathan W. Dyal et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities — 19 States, April 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 533, 557–59 (2020).

20 *Meatpacking*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/meatpacking (last visited Aug. 6, 2021).

21 *See* U.S. DEP'T OF AGRIC., ECON. RSCH. SERV., AER-785, CONSOLIDATION IN U.S.

industry and the big four meatpackers produce 85% of meat sold in the United States.[22] This Article focuses on the COVID-19 policies, practices, and violations of the three largest meatpackers in the United States: JBS, Smithfield, and Tyson. In the United States, JBS operates 60 plants with 85,000 employees, Smithfield, operates 59 plants in with 54,000 employees, and Tyson, operates 110 plants with 121,000 employees.[23] These companies are diversified with Tyson and JBS processing beef, pork and poultry, and Smithfield focusing on pork. [24]

Meatpacking is also labor-intensive. The economics of meatpacking are such that large plants must operate at low costs to produce as much meat as possible.[25] A packing plant requires a large refrigerated building, the cost of which needs to be spread over as many pounds of production as possible and when U.S. Department of Agriculture (USDA) inspectors are required, with labs and tests to run, and workers to pay, there is a strong incentive to ensure that a plant can accomplish as much production as possible in as little time as possible.[26] All plants, regardless of size, aim to control costs, which means that there is no extra production capacity.

The nearly 500,000 people employed in meat and poultry processing are considered to be at increased risk for infectious disease transmission, including respiratory illness outbreaks.[27] One reason for this

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Meatpacking (2000).

22 In 2001, Tyson purchased IBP, Inc., then the nation's largest beef packer. Tyson Foods, Inc., Annual Report (Form 10-K) 4 (Dec. 21, 2001). In 2002, Cargill purchased Taylor Packing Co. *Taylor Packing*, Careers Food, https://www.careersinfood.com/taylor-packing-listing-3151.htm (last visited Aug. 28, 2021). In 2007 and 2008, JBS acquired Swift & Co. and Smithfield Beef Group, Inc., respectively, the third- and fifth-largest U.S. beef packers. JBS S.A., Financial Statements and Report of Independent Auditors 8, 12 (Feb. 16, 2009), https://sec.report/otc/financial-report/20792/2008-Financial-Statements.pdf. Similarly, Smithfield was bought by the Hong Kong-based WH Group, the largest pork processor in the world a decade ago, and JBS acquired Cargill's U.S.-based pork business in 2015 for $1.45 billion. *JBS USA Pork Agrees to Purchase Cargill Pork Business*, Cargill (July 1, 2015), https://www.cargill.com/news/releases/2015/NA31861255.jsp. *See generally Explainer: How Four Big Companies Control the U.S. Beef Industry*, Reuters (June 17, 2021), https://www.reuters.com/business/how-four-big-companies-control-us-beef-industry-2021-06-17/.

23 *The 2019 Top 100 Meat & Poultry Processors*, *supra* note 1.

24 *Id.* (listing the meat products produced by each company). *See also* Smithfield Foods, Inc., Annual Report (Form 10-K) 3 (Mar. 29, 2016).

25 *See generally* U.S. Dep't of Agric., Econ. Rsch. Serv., *supra* note 21.

26 *See generally id.*

27 Dyal et al., *supra* note 19, at 557; *May 2020 National Industry-Specific Occupational Employment and Wage Estimates*, *NAICS 311600 - Animal Slaughtering and Processing*, U.S. Bureau Lab. Stat., https://www.bls.gov/oes/current/naics4_311600.htm (Mar. 31, 2021).

is that it is difficult to maintain 6-feet of distance while working, since employees work in proximity to other workers especially on production lines, during breaks, and while entering and exiting facilities.[28] Additionally, the physical exertion involved in processing work often makes it difficult for workers to maintain facial coverings.[29] Also, meatpacking workers perform monotonous and physically demanding work, in cold, re-circulated air[30] and are already susceptible to sickness, absence, and reduced work ability[31] due to occupational health hazards like musculoskeletal disorders, skin disorders, hearing disorders, and infectious diseases.[32] The injury rates among foreign-born workers in the United States are significantly higher than non-foreign born workers.[33] With Latino workers in particular, there is a high workplace injury rate and under-reporting of workplace injuries.[34]

The U.S. meatpacking industry has long relied upon a vulnerable population of ethnic minorities, immigrants, refugees, and undocumented laborers to fill its workforce. This helps to explain why a reported 90% of COVID-19 cases are attributed to ethnic minorities in the meatpacking industry.[35] Migration of Hispanic workers to rural parts of the U.S. was largely caused by the move of the meat processing industry.[36] Lack of cohesive language and community keep these employees at a disadvantage making it hard to fight for increased protections.[37] At the Tyson plant in Sioux

28 Dyal et al., *supra* note 19.

29 *May 2020 National Industry-Specific Occupational Employment and Wage Estimates*, *NAICS 311600 - Animal Slaughtering and Processing*, *supra* note 27.

30 SONJA NOSSENT ET AL., WORKING CONDITIONS IN THE EUROPEAN MEAT PROCESSING INDUSTRY 10 (1995); *see* Nils Fallentin et al., *Physical Exposure Assessment in Monotonous Repetitive Work — the PRIM Study*, 27 SCANDINAVIAN J. WORK ENV'T & HEALTH 21 (2001).

31 *See* NOSSENT ET AL., *supra* note 30.

32 *See Meatpacking*, U.S DEP'T LAB., https://www.osha.gov/meatpacking (last visited July 23, 2021).

33 Rachel Nadas & Jayesh Rathod, *Damaged Bodies, Damaged Lives: Immigrant Worker Injuries as Dignity Takings*, 92 CHI.-KENT L. REV. 1155, 1155 (2018).

34 Sara A. Quandt et al., *Illnesses and Injuries Reported by Latino Poultry Workers in Western North Carolina*, 49 AM. J. INDUS. MED. 343 (2006).

35 WILLIAM G. WHITTAKER, CONG. RSCH. SERV., RL33002, LABOR PRACTICES IN THE MEAT PACKING AND POULTRY PROCESSING INDUSTRY: AN OVERVIEW (2006); *see* Alex Gangitano, *Meatpacking Plant Workers Take New Approach in COVID-19 Safety Push*, HILL (July 15, 2020), https://thehill.com/business-a-lobbying/507373-meatpacking-plant-workers-take-new-approach-in-covid-19-safety-push (noting that as of July 14, 2020, over 35,000 employees at meat processing plants have contracted COVID-19).

36 *See* William Kandel & Emilio A. Parrado, *Restructuring of the US Meat Processing Industry and New Hispanic Migrant Destinations*, 31 POPULATION & DEV. REV. 447 (2005).

37 Fatima Hussein & Genevieve Douglas, *Language Barriers Pose Worker Rights Pitfalls During Pandemic*, BLOOMBERG L. (Oct. 9, 2020), https://news.bloomberglaw.com/safety/language-barriers-pose-worker-rights-pitfalls-during-pandemic/.

Falls, SD, there are 40 different primary languages spoken.[38] The working conditions of these plants have subsequently deteriorated as de-unionization and deskilling has increased[39] Today, union membership is not pervasive and only half of the employees are unionized at the JBS, Smithfield, and Tyson plants.

From April to June 2020, more than 80 meatpacking plants had confirmed COVID-19 outbreaks, and in some plants, large outbreaks infected 30% to 70% of the meatpacking workforce.[40] The Smithfield plant in Sioux Falls, SD, which handles 5% of U.S. pork production, recorded the largest national outbreak on April 13, with 783 workers testing positive for the virus and two deaths.[41] The plant closed the next day.[42] At that time, Tyson had already closed facilities in Logansport, IN, and Waterloo, IA, and JBS had closed a facility in Worthington, MN, due to outbreaks. [43] Due to consolidation, a closure in one plant can have a sizable impact on the entire industry. For instance, when the Waterloo, IA, Worthington, MN, and Sioux Falls, SD, facilities closed due to COIVD-19 outbreaks, the closures resulted in a 15% reduction in America's pork production.[44]

Meatpacking plants struggled to retain workers and maintain workplace safety in their operations. Almost half of the plants with outbreaks closed for some time, with most facilities closing for over one week.[45] Plants that did not close or that reopened after a temporary closure typically slowed production due to the need for social distancing and other precautionary

38 *See* Corky Siemaszko, *Language Barriers Helped Turn Smithfield Foods Meat Plant into COVID-19 Hotspot*, NBC News (Apr. 23, 2020, 2:23 PM) (updated 3:42 PM), https://www.nbcnews.com/news/us-news/language-barriers-helped-turn-smithfield-foods-meat-plant-Covid-19-n1190736.

39 *Id.*

40 *See* Cortney Cowley, *COVID-19 Disruptions in the U.S. Meat Supply Chain*, Fed. Rsrv. Bank Kan. City (July 31, 2020), https://www.kansascityfed.org/agriculture/ag-outlooks/COVID-19-US-Meat-Supply-Chain/.

41 *See* Zoe Strozewski, *South Dakota Meat Processing Plant, Which Produces About 5% of US' Pork Supply, to Go on Strike*, Newsweek (June 8, 2021), https://www.newsweek.com/south-dakota-meat-processing-plant-which-produces-about-5-us-pork-supply-go-strike-1598680; *see also* Siemaszko, *supra* note 38.

42 Siemaszko, *supra* note 38.

43 *Tyson Fresh Meats and Cass County, Ind., Health Department Issue Joint Statement*, Tyson (Apr. 22, 2020), https://www.tysonfoods.com/news/news-releases/2020/4/tyson-fresh-meats-and-cass-county-ind-health-department-issue-joint; *see* Dianne Gallagher & Pamela Kirkland, *Meat Processing Plants Across the US Are Closing Due to the Pandemic. Will Consumers Feel the Impact?*, CNN Bus., https://www.cnn.com/2020/04/26/business/meat-processing-plants-coronavirus/index.html (Apr. 27, 2020).

44 *See* Gallagher & Kirkland, *supra* note 43.

45 Cowley, *supra* note 40.

measures.[46] The JBS plant in Greeley, CO, had to close its plant for a two-week cleanse. The United Food and Commercial Workers Union (UFCW) President alleged that JBS Greeley pulled workers from halfway houses in the community to keep the plant running.[47] Some employers offered financial rewards for showing up during a pandemic, offering a "responsibility bonus" of $500 to employees who did not miss time (e.g., were not late or sick) during the month of April.[48] The Nebraska governor directed departments not to release COVID-19 case statistics at meat plants in an effort to de-emphasize COVID-19 cases to protect privacy interests but meatpacking workers argue that they need to know if their workplaces are safe.[49]

As plants closed, Tyson ran a full-page ad on April 26, 2020, that the closure of food-processing plants due to COVID-19 is "breaking" the supply chain, adding that farmers will be left without markets for their livestock and "millions of animals—chickens, pigs and cattle—will be depopulated."[50] Two days later, former President Trump issued an Executive Order designating meat packing plants as critical infrastructure and compelling them to remain open.[51] From April 2020 to August 2021, there were 50,000 COVID-19 cases attributed to meatpacking facilities.[52]

Lawsuits emerged in response to the numbers of meatpacking employees infected during the pandemic. With over 50,000 infections and 250 deaths since the start of the pandemic, meatpacking employees and their families brought negligence, public nuisance, fraudulent representation, and wrongful death claims against the big three meatpacking companies.[53] To

46 *Id.*

47 *See* Polly Mosendz et al., *U.S. Meat Plants Are Deadly As Ever, with No Incentive to Change*, BLOOMBERG L. (June 18, 2020), https://news.bloomberglaw.com/daily-labor-report/u-s-meat-plants-are-deadly-as-ever-with-no-incentive-to-change.

48 *See* Siemaszko, *supra* note 38.

49 *See* Mosendz et al., *supra* note 47.

50 Zack Budryk, *Tyson Foods Takes Out Full-Page Ad: 'The Food Supply Chain Is Breaking,'* HILL (Apr. 27, 2020), https://thehill.com/policy/healthcare/494772-tyson-foods-takes-out-full-page-ad-the-food-supply-chain-is-breaking (noting that the first worker at this plant tested positive for the virus on March 24).

51 Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020); *see also* Press Release, U.S. Dep't of Agric., USDA to Implement President Trump's Executive Order on Meat and Poultry Processors (Apr. 28, 2020), https://www.usda.gov/media/press-releases/2020/04/28/usda-implement-president-trumps-executive-order-meat-and-poultry.

52 Sky Chadde, *Tracking Covid-19's Impact on Meatpacking Workers and Industry*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Apr. 16, 2020) (updated Aug. 10, 2021), https://investigatemidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/.

53 Bernice Yeung & Michael Grabell, *After Hundreds of Meatpacking Workers Died from COVID-19, Congress Wants Answers*, GOV'T EXEC. (Feb. 5, 2021), https://www.govexec.

date, lawsuits in the U.S. are in tort; in Canada, however, there has been one meatpacking suit brought in criminal negligence.[54] The first case—filed in April 23, 2020, against Smithfield—was brought by a nonprofit organization representing a meatpacking worker.[55] Since then, other suits seeking injunctive relief have been filed by unions and non-profits against the Department of Labor's OSHA, in an attempt to force meatpacking plants to implement safety measures to prevent the spread of COVID-19.[56] Other suits, including a shareholder suit, emerged, signaling systemic corporate and regulatory failure. The shareholder suit claims that Tyson failed to protect its meat plant workers from COVID-19, leading to meat plant shutdowns and lower production, and that they withheld this information from investors.[57] The normal pace of litigation has been slowed by the pandemic; there is a backlog of cases with few going to trial, in part because lawyers who would have been motivated to settle cases before a trial have less motivation to do so now. [58]

Lawsuits allege that meatpacking companies failed to take necessary measures to prevent COVID-19 spread; social distancing and mask-wearing were not being enforced, managers were pressuring sick employees to work, and employers were not notifying employees about co-workers' infections.[59]

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com/oversight/2021/02/after-hundreds-meatpacking-workers-died-Covid-19-congress-wants-answers/171874/.

54 Lauren Krugel, *Alberta RCMP Reviewing Whether COVID-19 Death of Cargill Meat Plant Worker Was Criminal*, Glob. News (Jan. 11, 2021, 2:55 PM) (updated 8:32 PM), https://globalnews.ca/news/7568659/alberta-Covid-19-cargill-worker-death-rcmp-review/ (discussing a criminal investigation by the Royal Canadian Mounted Police in response to a meatpacking worker's death).

55 Complaint, Rural Cmty. Workers All. v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. 2020) (No. 5:20-cv-06063).

56 *See, e.g.*, Complaint and Emergency Petition for Emergency Mandamus Relief, Doe I v. Scalia, No. 3:20-cv-01260, 2021 WL 1197669 (M.D. Pa. Mar. 30, 2021), *appeal docketed*, No. 21-2057 (3d Cir. June 1, 2021).

57 Class Action Complaint for Violations of the Federal Securities Laws, Guo v. Tyson Foods, Inc., No. 1:21-cv-00552 (E.D.N.Y. filed Feb. 2, 2021); Hailey Konnath, *Tyson Hit with Investor Suit Over Lackluster Virus Response*, Law360 (Feb. 2, 2021), https://www.law360.com/articles/1351425/tyson-hit-with-investor-suit-over-lackluster-virus-response.

58 *See* Roy Strom, *A Trial Firm Questions Big Law's Pandemic Litigation Tactics*, Bloomberg L. (Jan. 28, 2021), https://news.bloomberglaw.com/business-and-practice/a-trial-firm-questions-big-laws-pandemic-litigation-tactics; *see also* Jennifer Kay, *Florida Faces 'Daunting' Backlog of Pending Cases Due to Virus*, Bloomberg L. (Jan. 26, 2021), https://news.bloomberglaw.com/business-and-practice/florida-faces-daunting-backlog-of-pending-cases-due-to-virus.

59 *See* Sebastian Martinez Valdivia & Dan Margolies, *Workers Sue Smithfield Foods, Allege Conditions Put Them at Risk for COVID-19*, NPR (Apr. 24, 2020), https://www.npr.org/2020/04/24/844644200/workers-sue-smithfield-foods-allege-conditions-put-

Lawsuits also point to regulatory failures. Plaintiffs blame the former Trump administration for not issuing a COVID-19 emergency standard, relying instead on an existing general duty clause of the OSHA Act to enable proper enforcement, and a set of recommendations for companies to voluntarily follow the guidelines of the CDC.[60] OSHA regulators, in turn, were criticized for applying lax oversight and negligible penalties–comparatively lower to those issued to health care facilities–despite widespread virus outbreaks at meatpacking plants.[61] After announcing penalties totaling over $1 million to dozens of health care facilities and nursing homes, OSHA fined two meatpacking plants less than $30,000, even as the virus infected over 1,500 at the two facilities in question.[62] OSHA was also criticized for arriving late to the scene when, according to the National Beef slaughterhouse in Dodge City, three workers had died by the time OSHA arrived in mid-May.[63] While these accounts were taken during the pandemic, they are characteristic of an industry that has, historically, suppressed workers' wages and rights by misclassifying them as independent contractors which deprives employees of essential rights such as overtime pay, medical leave, and the right to unionize.[64]

This Article uses lessons learned from the ongoing litigation, along with state best practices, to present two reforms for immediate adoption: (1) adopt a federal OSHA Emergency Temporary Standard (ETS) to guide inspections and citations, and (2) reform worker compensation programs to provide meatpacking employees with benefits for COVID-19 workplace exposure. Workplace safety mechanisms are failing to protect workers. As meatpacking companies operate for profit, the litigation highlights that companies are not adopting the necessary precautionary measures. COIVD-19 safety precautions are only voluntary and meatpacking firms have no economic incentive to increase workplace safety. Moreover, the slow pace of pandemic litigation, coupled with state-adopted liability shields and reductions in worker compensation benefits, enable corporate deniability. The recommended reforms would alter federal and state rules for workplace safety to make companies internalize the social cost of workplace safety. Only when companies incur additional costs—like penalties for OSHA non-

them-at-risk-for-covid-19.

60 *See Doe I*, 2021 WL 1197669.

61 *See* Noam Scheiber, *OSHA Is Under Fire Over Its Regulation of Meatpacking Plants.*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/world/osha-is-under-fire-over-its-regulation-of-meatpacking-plants.html.

62 *See id.*

63 *See* Mosendz, et al., *supra* note 47.

64 *See* Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 380–82 (2008).

compliance with a new ETS, or worker compensation payouts for employees who contract COVID-19 on the job—will they adopt necessary workplace safety precautions.

This Article contributes to the literature on COVID-19, and literatures in Business Law, Food and Agricultural Law, and Tort Law.[65] The literature has not adequately discussed the toll of meatpacking work and OSHA reform. OSHA reform, workers' compensation, and expanded tort doctrine can help prevent workplace injuries and/or adequately compensate employees fairly for them.[66] The Article is organized as follows. Part I outlines workplace safety governance and describes measures protecting workers during the pandemic, namely the rules regulating workplace safety. Part II describes measures protecting meatpacking plants during a pandemic, from executive orders to state liability shields. Part III presents the litigation, the cases brought by plaintiffs, and the defenses' key arguments. Part IV presents the solution to a broken regulatory system: an ETS modeled after the Virginia state OSHA program, and stronger workers' compensation laws. This final section also describes the impact of a new ETS on litigation going forward.

I. Protecting Workers During a Pandemic

In the United States, workplace safety in the meatpacking sector is a "shared" responsibility. Four major sources of workplace safety guidelines include: (1) state and federal government agencies, (2) industry through workers' compensation rules, (3) other participants such as unions and non-profit organizations who support worker rights, and (4) employees. Each of these sources of responsibility will be described for the protection provided and the role they play in advocating for worker's rights during the pandemic.

During the pandemic, OSHA and the CDC provided voluntary guidance to all businesses in the United States.[67] Providing employees with

65 *See, e.g.*, Lisa Heinzerling, *The Varieties and Limits of Transparency in U.S. Food Law*, 70 Food & Drug L.J. 11, 21 (2015) (remarking that with respect to workers and animal welfare, the regulations often opt for secrecy over transparency); *see also* Emily M. Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 Calif. L. Rev. 1173 (2019) (making the case for a broader understanding of 'food safety' to encompass diet and consumption as well as workplace safety); Jayesh M. Rathod, *Beyond the "Chilling Effect": Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 Emp. Rts. & Emp. Pol'y J. 267 (2010).

66 *See* Jennifer Dillard, Note, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, 15 Geo. J. on Poverty L. & Pol'y 391 (2008).

67 *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*,

a safe workplace may be an impossible objective to satisfy completely in a pandemic, particularly in those workplaces where employees or customers must congregate. Primarily for this reason, governments identified businesses they deemed essential; for example, in the state of Colorado, meatpacking plants, as food processors, were exempted from the stay-at-home order while hair salons had to abide by the stay-at-home order.[68] Industry also plays a role in promoting workplace safety. Most employers act in good faith to protect their employees in accordance with the law and applicable governmental guidance; but some do not. Some employees may be hyper-sensitive to the workplace risks during the pandemic and may never be satisfied with their working conditions. Other employees may have well-grounded fears of their working conditions. In all cases, when frustrated with the precautions taken by their employers, or lack thereof, employees in both categories have a variety of options: filing internal grievances with their employers and/or unions, filing complaints with state and federal agencies, and filing lawsuits in state or federal court. The last resort is quitting their jobs (and, possibly, collecting unemployment). When available, these options all represent pressure points for industry to maintain workplace safety.

A. *Federal and State OSHA Rules*

Federal and State rules are in place to ensure that employers provide safe workplaces. OSHA's mission is to ensure that employees work in a safe and healthful environment "by setting and enforcing standards, and by providing training, outreach, education and assistance."[69] OSHA covers most employers in the private sector across all U.S. jurisdictions.[70] Twenty-two states have developed their own, OSHA-approved, plans to cover private and public sector employees while six states have developed plans to cover only public employees. [71] Where state governments have not created their

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CTRS. FOR DISEASE CONTROL & PREVENTION [hereinafter *Guidance for Businesses*], https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html (Mar. 8, 2021); U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 3990-03, GUIDANCE ON PREPARING WORKPLACES FOR COVID-19 (2020) [hereinafter GUIDANCE ON PREPARING WORKPLACES], https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf.

68 *See* COLO. DEP'T OF PUB. HEALTH & ENV'T, AMENDED PUBLIC HEALTH ORDER 20-24 IMPLEMENTING STAY AT HOME REQUIREMENTS (2020), https://sjbpublichealth.org/wp-content/uploads/2020/03/Public_Health_Order_20-20_3-25-20.pdf.

69 *About OSHA*, U.S. DEP'T LAB., https://www.osha.gov/aboutosha (last visited Feb. 17, 2021).

70 *Id.*

71 *Id.*

own law, OSHA governs.[72]

Employers must comply with all applicable OSHA standards and with the General Duty Clause of the Occupational Safety and Health (OSH) Act of 1970.[73] Four OSHA industry standards exist: general industry, construction, maritime, and agriculture standards.[74] The general standards apply to all employments covered by OSHA, including those with specific standards if those standards do not offer the same protections.[75] Since the meat processing industry is not covered under a specific standard, the general standards apply.[76]

Employers must also comply with the General Duty Clause, stating that each employer must provide their employees with a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[77] The General Duty Clause was the same section OSHA relied upon during the historic Swine Flu, Zika, and Ebola outbreaks.[78]

There is no private right of action under the OSH Act that enables a worker to sue their employer for violating or being cited under a safety statute; however, employees can ask OSHA to inspect and issue a citation.[79] A violation of the General Duty Clause will be issued when four elements are met: (1) the employer failed to keep the workplace free from a hazard that employees were exposed to; (2) the hazard was recognized; (3) the hazard was causing or was likely to cause death or serious physical harm; and (4) there was a feasible and useful method to correct the hazard.[80] To meet the

72 *Id.*

73 *Law and Regulations*, U.S. Dep't Lab., https://www.osha.gov/laws-regs (last visited Feb. 17, 2021).

74 U.S. Dep't of Lab., Occupational Safety & Health Admin., OSHA 3021-06R, Workers' Rights 7 (2017) [hereinafter Workers' Rights], https://www.osha.gov/Publications/osha3021.pdf.

75 U.S. Dep't of Lab., Occupational Safety & Health Admin., Field Operations Manual 4-2 (2020) [hereinafter Field Operations Manual], https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164_1.pdf.

76 *Id.*

77 § 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1).

78 Tim Mullaney, *The Union Battle Versus Trump Administration Over Bringing Workers Back, Safely*, CNBC (July 10, 2020, 8:27 AM) (updated 1:11 PM), https://www.cnbc.com/2020/07/10/as-workplaces-reopen-unions-ask-trump-admin-where-is-osha.html.

79 *Id.*; *see also* David Sparkman, *Will Employees Be Able to Sue Over OSHA Violations?*, EHS Today (Feb. 22, 2021), https://www.ehstoday.com/standards/osha/article/21155868/will-employees-be-able-to-sue-over-osha-violations.

80 *See* Field Operations Manual, *supra* note 75, at 4-12 ("In a Section 5(a)(1) citation, a 'hazard' is defined as a *workplace condition* or *practice* to which employees are exposed, creating the *potential for death or serious physical harm* to employees.").

first element, one cannot cite the failure to implement safety precautions but can instead cite the failure to remove or prevent certain hazards. For example, a citation given for a hazard such as a potential fire due to sparks, could not be given for the lack of ventilation that could abate that hazard.[81]

During the pandemic, the former Trump administration was criticized for not issuing an ETS, instead relying on the general OSHA rules.[82] A loose application of the above rules could find that the big three meatpackers violated the General Duty Clause. In the COVID-19 context, and specifically for meatpacking plants, the first element is established by the existence of a hazard that the employer failed to keep out of the workplace. If the hazard is defined as person-to-person transmission, then, based on the current evidence of extensive spread throughout meatpacking plants, it would seem that this element is fulfilled.[83] Providing masks and spacing employees could be classified as either an "abatement" or as "prevention and removal of the hazard of spread."[84] The second element asks for a recognized hazard. This can be proven by looking at employers' actual knowledge and recognition of the hazard through written or oral statements made by the employer or management.[85] The second element is easily fulfilled as many employers actively acknowledged the risks associated with continuing to work through company memoranda.[86] The third element asks for a showing that the hazard was causing or was likely to cause death or

81 *See id.* A coronavirus specific example would look more like: Employees work shoulder to shoulder (workplace condition) exposing them to person to person spread of coronavirus (potential for serious harm or death). The hazard would be the potential spread of coronavirus, not the lack of abatement practices or precautions.

82 *See* Complaint and Emergency Petition for Emergency Mandamus Relief, *supra* note 56, at 20.

83 *See* Miriam Jordan & Caitlin Dickerson, *Poultry Worker's Death Highlights Spread of Coronavirus in Meat Plants*, N.Y. TIMES (Apr. 9, 2020) (updated Jan. 28, 2021), https://www.nytimes.com/2020/04/09/us/coronavirus-chicken-meat-processing-plants-immigrants.html; Caitlin Dickerson & Miriam Jordan, *South Dakota Meat Plant Is Now Country's Biggest Coronavirus Hot Spot*, N.Y. TIMES (Apr. 15, 2020) (updated May 4, 2020), https://www.nytimes.com/2020/04/15/us/coronavirus-south-dakota-meat-plant-refugees.html.

84 FIELD OPERATIONS MANUAL, *supra* note 75, at 4-18.

85 *Id.* at 4-14.

86 *See, e.g.*, *Smithfield Foods Says that the Company and Its Team Members Want the Same Thing: To Protect Employee Health and Safety While Also Safeguarding America's Food Supply*, GLOBE NEWSWIRE (May 1, 2021), http://www.globenewswire.com/news-release/2020/05/01/2026373/0/en/Smithfield-Foods-Says-That-the- Company-and-Its-Team-Members-Want-the-Same-Thing-To-Protect-Employee-Health-and-Safety-While-Also-Safeguarding-America-s-Food-Supply.html; *JBS USA Announces Temporary Closure of Greeley Beef Facility*, JBS FOODS (Apr. 13, 2020), https://jbsfoodsgroup.com/articles/jbs-usa-announces-temporary-closure-of-greeley-beef-facility.

serious physical harm. If a recognized hazard has caused an actual death or serious injury, then the third element is fulfilled. As there were dozens of deaths allegedly caused by the spread of COVID-19 within these facilities, this element would easily be met.[87] The last element is that the agency must identify existing measures that would correct the hazard. If the proposed abatement method would cause a significant reduction of the hazard compared to what the employer has done, then a citation can be issued under § 5(a)(1) of the General Duty Clause.[88]

This last element is perhaps the most challenging to prove. Retroactively, it would seem clear that the companies failed to put in place many measures that would have corrected the hazard, such as spacing workers on the processing line and requiring them to wear masks. This would have largely eliminated the hazard of person-to-person spread. However, OSHA notes that once the employers have implemented safety measures, there is nothing for an inspector to cite.[89] For example, in the Tyson Waterloo Plant investigation, a finding of no violations shocked some Iowa politicians who later asked the regional OSHA office to conduct a second site visit.[90]

Aside from a call for an OSHA inspection in the case of a failure to uphold the general duty of employers set forth in §5(a)(1),[91] the OSHA Workers' Rights manual[92] provides that employees can file a complaint and ask for an OSHA inspection if they believe there is a *significant hazard* or if the employer is not following a *rule or standard*.[93] Since the Trump administration did not issue an ETS, it may be difficult for employees to point to a rule or standard in the current context of the pandemic, where federal agencies, principally the Departments of Health and Human Services (through the CDC) and Labor (through OSHA), issued evolving voluntary guidance for plants to implement, to help ensure employee safety during the pandemic.[94]

87 *See* Scheiber, *supra* note 61.

88 Field Operations Manual, *supra* note 75, at 4-17.

89 *See* Ryan J. Foley, *Iowa Finds No Violations at Tyson Plant with Deadly Outbreak*, ABC News (June 23, 2020), https://abcnews.go.com/Health/wireStory/iowa-finds-violations-tyson-plant-deadly-outbreak-71419503.

90 Rachelle Chase, *Months After Outbreak, Safety Concerns Remain at Tyson Waterloo*, Iowa Starting Line (Aug. 7, 2020), https://iowastartingline.com/2020/08/07/months-after-outbreak-safety-concerns-remain-at-tyson-waterloo/.

91 29 U.S.C. § 654.

92 Workers' Rights, *supra* note 74, at 11.

93 *Id.* "Standard means a standard which *requires . . . the adoption or use* of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 C.F.R. § 1910.2(f) (2017) (emphasis added). Since guidance is not required, it would not qualify as a standard.

94 *Guidance for Businesses*, *supra* note 67; *COVID-19 Critical Infrastructure Sector Response*

Since these were *voluntary* recommendations, employees may not be able to call for an OSHA inspection based on employer's failure to uphold those recommendations. However, if they can prove they pose a significant hazard, they may be able to claim a failure to uphold the general duty of employers, set forth in the § 5(a)(1) General Duty requirement.[95]

There is evidence that OSHA is not meeting their own standard to protect workers.[96] Meatpacking is one of the most dangerous jobs and OSHA is not adequately investigating complaints or punishing violations.[97] Lack of funding, political will, and inefficient management all likely play a role in this.[98] Currently each inspector is responsible for about 60,000 workers, making it nearly impossible to adequately inspect all working conditions.[99] For example, Daniel Avila Loma, who worked at the JBS plant in Greeley, CO, became ill at work and died of COVID-19 two weeks later, on April 29, 2020. [100] Five months later, in September, after several employees who worked at the plant died of COVID-19, OSHA cited the Greeley plant for failing to provide a safe workplace.[101] After receiving the citation from OSHA, in November 2020, JBS removed 202 workers at the plant whom it considered vulnerable to COVID-19, due to age and other factors, and paid them full wages and benefits during their time away from work.[102] It took OSHA five months to cite the Greeley plant.[103]

Planning, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/critical-infrastructure-sectors.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fcritical-workers%2Fimplementing-safety-practices.html (Dec. 3, 2020); GUIDANCE ON PREPARING WORKPLACES, *supra* note 67.

95 29 U.S.C. § 654; WORKERS' RIGHTS, *supra* note 74, at 7–8.

96 *See* Michael S. Worrall, Note, *Meatpacking Safety: Is OSHA Enforcement Adequate?*, 9 DRAKE J. AGRIC. L. 299, 321 (2004).

97 *See id.* at 315.

98 *See id.* at 302, 321; Sidney Shapiro et al., *Regulatory Dysfunction: How Insufficient Resources, Outdated Law, and Political Interference Cripple the 'Protector Agencies,'* CTR. FOR PROGRESSIVE REFORM (Nov. 5, 2009), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1500577_code254274.pdf?abstractid=1500577&mirid=1 (noting the regulatory dysfunction in "protector agencies" identified as OSHA, FDA, NHTSA, EPA, and CPSC, problems rooted in shortfalls in funding, outdated authorizing statutes, political interference and the aging and demoralized civil service).

99 *See* Thomas McGarity et al., *Workers at Risk: Regulatory Dysfunction at OSHA*, CTR. FOR PROGRESSIVE REFORM 6–7 (Feb. 1, 2010), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1717097_code1491968.pdf?abstractid=1566897&mirid=1.

100 Lauren Weber, *Why So Many Covid-19 Workers' Comp Claims Are Being Rejected*, WALL ST. J. (Feb. 14, 2021), https://www.wsj.com/articles/why-so-many-Covid-19-workers-comp-claims-are-being-rejected-11613316304.

101 *Id.*

102 *Id.*

103 *Id.*

B. *State Workers' Compensation Laws*

During the pandemic, many workers' compensation claims for COVID-19 exposure were denied. In the story above, Mr. Avila Loma's family filed a worker's compensation claim to cover his lost wages and the loss of future earnings. The case was denied and a hearing was scheduled for spring 2021.[104] At JBS, Loma was a 'sharpener'—he sharpened other workers' knives and that is where he was exposed due to the contact with people from different lines, making a convincing case that he contracted COVID-19 on the job.[105] Workers' compensation is a state-mandated insurance program that pays the expenses of employees and provides pay to workers who are injured or die while performing job-related duties.[106] While state laws vary, employees can typically collect lost wages, medical expenses, disability payments, and costs associated with rehabilitation and retraining. Most workers' compensation claims stem from workplace injuries, but some involve illnesses acquired on the job. In most states, all employers are required to carry workers' compensation insurance. For the insurance industry, workers' compensation is one of the biggest product lines by premium volume, with employers paying $48.3 billion to insurers in 2018.[107]

During the pandemic, state workers' compensation systems were criticized for denying claims from workers who suffered COVID-19 symptoms on the job.[108] Workers filed hundreds of thousands of virus-related claims in 2020, but most have been denied.[109] It should be noted that these numbers underestimate those who would have filed. The documentation status of many workers in the meat packing industry is a large contributor to the lack of safety mechanisms, and to lower workers' compensation claims or injury reporting.[110] Insurance carriers denied claims, arguing that

104 *Id.*

105 *Id.*

106 *See, e.g.*, *What is Worker Compensation?*, Colo. Dep't Lab. & Emp., https://cdle.colorado.gov/dwc (last visited Nov. 5, 2021).

107 Russell Gold & Leslie Scism, *States Aim to Expand Workers' Compensation for Covid-19*, Wall St. J. (Apr. 27, 2020), https://www.wsj.com/articles/states-aim-to-expand-workers-compensation-for-covid-19-11588011257?mod=article_inline&tesla=y.

108 Weber, *supra* note 100 (noting that attorney Healther Kaplan filed 20 workers' compensation claims for people who said they contracted Covid-19 while on the job at meatpacking plants and all were denied).

109 *Id.*

110 *See* Sapna Jain, *Can We Keep Meatpacking Companies Accountable for Hiring Undocumented Immigrants?*, 3 Emory Corp. Governance & Accountability Rev. 157, 157–158, 161 (2016).

workers contracted COVID-19 outside work hours; meanwhile, attorneys representing workers argued their client's COVID-19 cases were directly linked with unsafe job environments.[111] Since workers' compensation claims typically involve injuries and accidents that happen on the job, generally, an illness can only be covered if it is specific to a profession—for instance, certain respiratory illnesses for firefighters—and not, say, a case of the flu acquired from a sick co-worker.[112] There is still legal ambiguity over whether COVID-19 qualifies as an "occupational disease" arising directly out of some work environments.[113]

The concern that employees could not be compensated by the workers' compensation system led a half-dozen states to amend their worker's compensation programs starting in March 2020, to have presumed coverage for health care workers, first responders and other essential workers who contract or are exposed to COVID-19.[114] Normally, workers have the burden to prove they were hurt or infected on the job, but these amendments allow access to worker's compensation coverage without requiring workers to prove infections occurred on the job.[115] To deny coverage, the insurance carrier has the burden to prove that the employee was infected outside of work.[116]

While no comprehensive national data exists on the number of COVID-19-related claims, payouts, and denials and acceptances, several states have released data on workers' compensation payouts. The available data suggests that carriers are denying a significant percentage of claims related to COVID-19, even in states with the so-called presumptive-eligibility rules.[117] In Texas, where no presumption of eligibility for COVID-19 exists, the total number of reported worker compensation claims in 2020 was 24% higher than in 2019 and of the more than 32,000 claims related to COVID-19 that were filed through December 2020, insurers denied 45% of those in which workers produced a positive COVID-19 test, according to the state's Department of Insurance.[118] Insurers denied 38% of those

111 *See* Weber, *supra* note 100.

112 Gold & Scism, *supra* note 107.

113 *See id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *See* Bryce Covert, *Covid-19 Workers' Comp Claims Are Being Held Up or Denied*, INTERCEPT (Sept. 7, 2020), https://theintercept.com/2020/09/07/coronavirus-workers-compensation-claims-labor/.

118 *See* Louise Escola, *Insurers Denying Nearly Half of COVID-19 Claims: Texas Report*, BUS. INS. (Mar. 5, 2021), https://www.businessinsurance.com/article/20210305/NEWS08/912340275/Insurers-denying-nearly-half-of-COVID-19-claims-Texas-

in which workers produced a positive COVID-19 test, according to the state's Department of Insurance.[119] Meanwhile in California, which has a broad presumption law for certain lines of work, workers filed 93,470 claims related to COVID-19 through the end of December; 26% were denied.[120] In Florida, which received 29,400 workers' compensation claims related to COVID-19 by the end of December, front-line workers who are state employees were given a presumption of eligibility. Public data shows state and local employees' claims were accepted at far higher rates—with only 22% denied—than claims from another pool of workers in the state that consists primarily of private-sector employees—in which roughly 56% of the cases were denied.[121] Of the claims paid in Florida through December 2020, less than 2% of those claims cost carriers more than $10,000.[122]

Workers' compensation rules are supposed to be the exclusive remedy, so the bar for litigation is high. Typically, employees covered by workers' compensation are precluded from suing their employer, but where there is potential evidence of gross negligence, or wanton and willful misconduct on the part of the employer, a worker or their family could take an employer to court. In court, employee claims may be strengthened by OSHA citations, or a recorded violation of an ETS.

C. *Unions and Non-Profits*

Given OSHA's delay in responding to the employee complaints, and local health departments surge in patients to care for, other organizations—like unions and non-profit organizations—stepped up to fill the regulatory gaps. During the pandemic, private call centers, volunteers, and one union—not always employers themselves—ran contact-tracing programs.[123] There is no federal mandate for employers to do contact tracing: CDC guidelines are advisory and OSHA recordkeeping requirements only mandate employers

comp-report-coronavirus-p; Weber, *supra* note 100.

119 Weber, *supra* note 100.

120 *Id.*

121 *Id.*

122 *Id.*

123 *See* Olga Kharif, *Do-It-Yourself Contact Tracing for 1.3 Million: A Union Jumps in*, Bloomberg (Aug. 10, 2020), https://www.bloomberg.com/news/articles/2020-08-10/with-official-systems-swamped-union-gets-into-contact-tracing (discussing that since the start of the pandemic, the UFCW union has sent agents into grocery stores, meatpacking plants and food-processing facilities, talking to workers and reviewing work schedules to determine who might have been exposed); *see also* Selena Simmons-Duffin, *Why Contact Tracing Couldn't Keep Up with the U.S. COVID Outbreak*, NPR (June 3, 2021), https://www.npr.org/sections/health-shots/2021/06/03/1002878557/why-contact-tracing-couldnt-keep-up-with-the-u-s-covid-outbreak.

record cases of COVID-19 if they are certain a worker was infected on the job.[124] Companies have to follow state and local guidance, which are at least as effective as OSHA's and may have different or more stringent requirements.[125] While contact tracing may not be practical in all areas, local health departments, which usually perform the function, have been overwhelmed by a disease that has sickened more than 4.8 million Americans and killed more than 158,000.[126] In one meatpacking plant, the United Food and Commercial Workers International Union (UFCW) stepped in for the Trump administration, which failed to create a national test-and-trace regimen, with UFCW stewards and representatives running their own COVID-19 contact-tracing program for 1.3 million members.[127] Where employers failed to track outbreaks in their own facilitates, UFCW stepped in to report them to health authorities.[128] After finding someone who has been infected, UFCW contacts the employer's human resources department and refers employees to free, and sometimes union-provided, testing sites.[129]

Unions and non-profits have also represented clients in COVID-19 exposure litigation, providing an argument for a continued and growing unionization while also working for new labor protections.[130]

II. Protecting Meatpacking Companies During a Pandemic

As meat processing plants closed throughout the country, Executive Orders and legislation enabled and promoted the production of meat during the pandemic. This section will discuss how executive actions gave agencies the authority to compel production, how pre-existing export contracts pressured meatpacking companies to maintain high production levels, and how state legislatures protected meatpacking.

A. *Executive Pressure: Defense Production Act and Executive Order*

On the evening of April 28, 2020, former President Trump issued

124 29 C.F.R. § 1904.5 (2019); *see also* Kharif, *supra* note 123.

125 *Regulations*, U.S. Dep't Lab., https://www.osha.gov/coronavirus/standards (last visited Nov. 5, 2021); Kharif, *supra* note 123.

126 Kharif, *supra* note 123.

127 *See id.*

128 *Id.*

129 *Id.*

130 *See* Lance Compa, *Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies*, 4 U.C. Irvine L. Rev. 609, 615, 619 (2014) (highlighting effective unionization pushes from the UFCW union with Smithfield in 2008, leading to an NLRB election).

Executive Order 13917, *Delegating Authority Under the Defense Production Act with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* (Executive Order).[131] The Executive Order expanded authority to the USDA to compel production; it did not create an emergency temporary OSHA standard.[132] Under the Executive Order, the USDA will work with the meat processing industry to confirm that they meet the CDC and OSHA guidance, as well as with state and local officials to ensure that these plants can remain open to produce meat protein.[133] The USDA will continue to work with the CDC, OSHA, FDA, and state and local officials to ensure that facilities implementing this guidance can continue operating.[134]

The Executive Order reads, "[i]t is important that processors of beef, pork, and poultry ('meat and poultry') in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans."[135] The Executive Order goes on to say that, "[s]uch closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency."[136] Importantly, the Executive Order delegates the Secretary of Agriculture to "take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA."[137] Authority is also given "to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense."[138] Furthermore, it delegates the Secretary of Agriculture "to determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry, consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA."[139]

131 Exec. Order No. 13,917, 85 Fed. Reg. at 26,313 (Apr. 28, 2020); *see also* Press Release, U.S. Dep't of Agric., *supra* note 51.

132 Exec. Order No. 13,917, 85 Fed. Reg. at 26,313 (Apr. 28, 2020); s*ee also* Press Release, U.S. Dep't. of Agric., *supra* note 51.

133 Press Release, U.S. Dep't. of Agric., *supra* note 51.

134 Exec. Order No. 13,917, 85 Fed. Reg. at 26,313 (Apr. 28, 2020); *see also* Press Release, U.S. Dep't. of Agric., *supra* note 51.

135 Exec. Order No. 13,917, 85 Fed. Reg. at 26,313 (Apr. 28, 2020); *see also* Press Release, U.S. Dep't. of Agric., *supra* note 51.

136 Exec. Order No. 13,917, 85 Fed. Reg. at 26,313 (Apr. 28, 2020).

137 *Id.*

138 *Id.*; *see also* Press Release, U.S. Dep't. of Agric., *supra* note 51.

139 Exec. Order No. 13,917, 85 Fed. Reg. at 26,314 (Apr. 28, 2020).

B. *Market Pressure: Export Contracts*

Contractual obligations secured by plants before the pandemic and a surge in overseas demand pressured meatpacking companies to maintain pre-pandemic production levels. During certain months of the pandemic, major pork producers, JBS, Smithfield, and Tyson, all increased pork exports, for example.[140] In the early phases of the pandemic, pork producers in the U.S. exported large quantities of pork to China with Smithfield and Tyson together exporting over 10,000 tons of pork to China in the month of April alone.[141]

Before the pandemic was declared on March 11, 2020, JBS, Smithfield, and Tyson had already obligated their production due to signed trade agreements and private contracts. In January 2020, the "phase one" deal was agreed upon between the U.S. and China.[142] This deal, in part, opened up the Chinese beef market and was predicted to lead to China becoming one of the top three importers of American beef.[143] JBS signed two deals which committed meatpacking plants to exporting its products. JBS entered a deal with China-based Alibaba worth $1.5 billion in November 2019[144] and also agreed to supply WH Group, a Hong Kong-based meat processor with extensive connections throughout China, worth around $687 million a year beginning in 2020.[145]

Even before the pandemic, pork producers had been warning of potential shortages facing rising global demand[146] coming from China.[147]

140 Press Release, Sen. Elizabeth Warren, Warren, Booker Release Information from Their Investigation into Giant Meatpackers Exploiting Workers and Consumers During COVID-19 (July 24, 2020), https://www.warren.senate.gov/newsroom/press-releases/warren-booker-release-information-from-their-investigation-into-giant-meatpackers-exploiting-workers-and-consumers-during-covid-19.

141 Michael Corkery & David Yaffe-Bellany, *As Meat Plants Stayed Open to Feed Americans, Exports to China Surged*, N.Y. TIMES (June 16, 2020) (updated July 4, 2021), https://www.nytimes.com/2020/06/16/business/meat-industry-china-pork.html.

142 *See* Bill Tomson, *Hundreds of US Beef and Pork Plants Eligible to Export to China*, AGRI-PULSE (Mar. 21, 2020), https://www.agri-pulse.com/articles/13341-hundreds-of-us-beef-and-pork-plants-eligible-to-export-to-china.

143 *See id.*

144 *JBS Signs a $1.5 Billion Deal with Alibaba to Sell Meat in China*, EUROMEAT (Nov. 9, 2020), https://www.euromeatnews.com/Article-JBS-signs-a-$1.5-billion-deal-with-Alibaba-to-sell-meat-in-China/2168.

145 *Brazilian Meat Giant JBS Expands Its Reach in China*, MONGABAY (Feb. 20, 2020), https://news.mongabay.com/2020/02/brazilian-meat-giant-jbs-expands-its-reach-in-china/.

146 Lillianna Byington, *US Meat Exports to China Rise as Supply Falls, Analysis Shows*, FOOD DIVE (May 12, 2020), https://www.fooddive.com/news/us-meat-exports-to-china-rise-as-supply-falls-analysis-shows-1/577711/.

147 Corkery & Yaffe-Bellany, *supra* note 141.

Starting in 2018, China began to lose its hog herds to African Swine Fever, resulting in lower production.[148] China has responded by increasing imports and loosening restrictions on pork (in 2018), poultry (in 2019), and beef (in 2020).[149] The highest export month on record for U.S. pork products was December 2019 with 102,177 tons, followed by a total of 280,507 tons in the first three months of 2020—a 300% increase compared to the same period last year.[150]

Obligations required that—despite illnesses and deaths and closures and re-openings at meatpacking plants—meatpacking companies continued to produce. According to the USDA, pork exports to China in April 2020, were the highest since the USDA began tracking the statistic over 20 years ago, up 22% compared to last April, 2019.[151] Pork producers typically send between 25-27% of the pork overseas, but this jumped to 32% in the first four months of 2020 as a result of increased demand from China.[152] Among the big three meatpackers, Tyson reported the greatest export growth. [153] While Smithfield's exports to China increased 135% year to year, JBS and Tyson increased exports significantly more, 878% and 1,771% respectively.[154]

These increases were controversial.[155] These businesses simultaneously espoused the need for workers to continue to come into dangerous processing facilities to protect U.S.'s food supply, all while exporting record amounts of food.[156] According to the USDA, since mid-

148 *See* Karen Braun, *U.S. Faces Meat Shortage While Its Pork Exports to China Soar*, Reuters (May 5, 2020), https://www.reuters.com/article/us-usa-pork-braun/u-s-faces-meat-shortage-while-its-pork-exports-to-china-soar-braun-idUSKBN22H2Q6.

149 *Beef Exports to the People's Republic of China*, U.S. Dep't Agric., https://www.ams.usda.gov/services/imports-exports/beef-ev-china (last visited Feb. 17, 2021); *see also* Tomson, *supra* note 142 (discussing China's agreement to lift certain hormone and age restrictions on the beef imports which has opened the door to large exports).

150 Tomson, *supra* note 142.

151 Corkery & Yaffe-Bellany, *supra* note 141.

152 *Id.*

153 Press Release, Sen. Elizabeth Warren, *supra* note 140.

154 *Id.*

155 *See* Tom Polansek, *As U.S. Meat Workers Fall Sick and Supplies Dwindle, Exports to China Soar*, Reuters (May 11, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-meatpacking-an/as-u-s-meat-workers-fall-sick-and-supplies-dwindle-exports-to-china-soar-idUSKBN22N0IN. The meat processing disruptions were predicted to lead to a 30% decrease in available meat products in supermarkets as well as a 20% increase in price. In response to the rising cases in the meat industry and the potential shortages domestically, U.S. Representative Rosa DeLauro (D-Ct) stated, "That tragic outcome is all the worse when the food being processed is not going to our nation's families." *Id.*

156 *See* Daniel Arkin, *Tyson Foods Chairman Warns 'the Food Supply Chain Is Breaking,'* NBC News (Apr. 27, 2020), https://www.nbcnews.com/news/us-news/tyson-foods-chairman-warns-food-supply -chain-breaking-n1193256. John Tyson, the chairman

March 2020, the frozen pork supplies in the U.S. dropped 25% while exports to China more than increased by 135%.[157] The President of the National Pork Producers Council made it very clear that this was indeed largely out of economic concerns, stating that pork producers need to keep their customers abroad, otherwise they may lose them forever.[158]

C. *State Liability Shield Legislation and Workers Compensation Policies*

State level liability shield legislation emerged to help meatpackers sustain production levels. Advanced by Republicans and business interest groups, "liability shields" provide a broad civil liability shield for COVID-19 exposure suits to businesses that have substantially complied with public health guidelines.[159] Federal attempts led by congressional Republicans to pass a federal liability shield under the former Trump administration, "The Safe to Work Act," were defeated[160] against strong opposition from congressional Democrats.[161] The Safe to Work Act included broad immunity for businesses; excluding acts of gross negligence[162] and capping compensatory damages to actual economic loss caused by the injury, unless it was the result of willful misconduct.[163] Under this bill, plaintiffs would be required to prove causation, showing that the company's actions were

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of Tyson Foods warned that "millions of pounds of meat will disappear" and that "[t]he food supply chain is breaking" due to facility closures. *Id.*

157 Tom Polansek, *Frozen U.S. Pork Supplies Fell in June, Exports to China Rose: Data*, REUTERS (July 22, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-meatpacking/frozen- us-pork-supplies-fell-in-june-exports-to-china-rose-data-idUSKCN24N2VE.

158 *See* Ally J. Levine et al., *A Meaty Problem*, REUTERS GRAPHICS (May 11, 2020), https://graphics.reuters.com/HEALTH-CORONAVIRUS/USA-MEATPACKING/qmypmnxxbvr/index.html (citing the harms from the long term trade war with China as a reason for the need to retain that market now).

159 *See* Jaclyn Diaz, *GOP Virus Plan Backstops Businesses, Boosts Child-Care Aid*, BLOOMBERG L. (July 27, 2020), https://news.bloomberglaw.com/business-and-practice/gop-virus-plan-backstops-businesses-boosts-child-care-aid?context=article-related.

160 *See* Y. Peter Kang, *Red State AGs Lobby for COVID-19 Business Immunity*, LAW360 (Aug. 7, 2020), https://www.law360.com/foodbeverage/articles/1299527.

161 *See* Diaz, *supra* note 159.

162 SAFE TO WORK Act, S. 4317, 116th Cong. §§ 121–22 (2020); Billy House, *McConnell Fight for Liability Shield a Key Hitch as Talks Stall*, BLOOMBERG L. (Aug. 11, 2020), https://news.bloomberglaw.com/coronavirus/mcconnell-fight-for-liability-shield-a-key-hitch-as-talks-stall.

163 *See* Diaz, *supra* note 159; *see also* Robert Iafolla, *Employers Get Major Protections in GOP Liability Shield Bill (1)*, BLOOMBERG L. (Aug. 3, 2020, 5:46 AM) (updated 12:20 PM), https://news.bloomberglaw.com/daily-labor-report/employers-get-major-protections-in-gop-liability-shield-bill.

the cause of their exposure and that their exposure caused the injuries.[164] In addition, the proposed bill required detailed recordkeeping of potential exposures in the two weeks leading up to showing symptoms, provided for automatic appeals when a defendant's motion to dismiss is denied, and allowed businesses to sue over meritless demand letters.[165] The proposed federal bill set a high bar for plaintiffs to litigate a claim for COVID-19 exposure, with requirements to prove gross negligence and to show that the business did not make a reasonable effort to comply with federal or state public health guidance—even if those safety standards are only guidance, not mandatory.[166]

Critics of the federal liability shield proposal, and liability shields generally, argue that the wave of litigation may never materialize.[167] They claimed, of the 3,500 COVID-19 related lawsuits being tracked, fewer than 100 claimed personal injury, unsafe working conditions, or wrongful death.[168] Moreover, using a narrower case tracker focusing solely on employment litigation regarding COVID-19, out of a total of 327 cases, only 26 cited an unsafe workplace and 10 cited negligence or wrongful death.[169] Interestingly, criticism of liability shields can also be found in some states with liability shields in place. In Idaho, for example, six months after the first reported COVID-19 case, with over 30,000 confirmed cases in the state, not a single COVID-19 exposure tort suit had been filed.[170]

Beyond efficacy debates, questions remain surrounding the implementation of a federal immunity bill. Since the proposed bill would create an exclusive federal cause of action, less strict state liability shield laws would be preempted.[171] Concern exists over federal law usurping state

164 Iafolla, *supra* note 163 (noting that the proposed bill would require a detailed record of potential exposures in the two weeks leading up to showing symptoms, provide for automatic appeals when a defendant's motion to dismiss is denied, and allow businesses to sue over meritless demand letters).

165 *Id.*

166 *See* Y. Peter Kang, *GOP Sets Sights on COVID-19 Biz Immunity in Relief Bill*, Law360 (July 27, 2020), https://www.law360.com/articles/1295675.

167 *See* Chris Marr, *Like State Efforts, Senate's Virus Liability Limit's No Cure-All*, Bloomberg L. (July 16, 2020), https://news.bloomberglaw.com/daily-labor-report/like-state-efforts-senates-virus-liability-limits-no-cure-all.

168 *See id.*

169 Y. Peter Kang, *Idaho Gives COVID-19 Civil Immunity to Businesses, Schools*, Law360 (Aug. 28, 2020), https://www.law360.com/articles/1305141/idaho-gives-covid-19-civil-immunity-to-businesses-schools.

170 *Id.*

171 Brian E. Finch & Zachary M. Kessler, *Senate Republicans Unveil Proposed COVID-19 Liability Shield*, Pillsbury (July 29, 2020), https://www.pillsburylaw.com/en/news-and-insights/Covid-19-liability-shield.html.

power, specifically with regard to tort claims that have generally resided in the states purview.[172] Further, if the federal liability shield uses the same standard used by states (gross negligence), the argument is that further complications will arise due to the fact that tort law is covered under state law, not federal law, and each state's definition for gross negligence varies by state common law.[173]

As of June 15, 2021, thirty states have passed some form of COVID-19 liability shield laws.[174] These states cover over half of the U.S. population and typically have Republican-controlled legislatures.[175] The laws vary from state to state, but all those discussed below have broad coverage for all businesses.

The vast majority of states have limited liability for all businesses unless they act with gross negligence or recklessness.[176] The standard for both of these terms is functionally the same. The standard is described as an act that demonstrates such reckless disregard for others safety that it appears as a conscious choice to violate the rights of others.[177] Generally, bills require those who were infected or exposed to prove gross negligence or a similar level of disregard for the health and safety standards, making it quite hard to effectively file a lawsuit.[178]

172 *See* Kang, *supra* note 166.

173 *See* Marr, *supra* note 167.

174 PRACTICAL LAW COMMERCIAL TRANSACTIONS, THOMSON REUTERS, STATE LIABILITY SHIELD LAWS FOR BUSINESSES CHARTS: COVID-19 IMMUNITY: OVERVIEW (database updated Aug. 1, 2021), W-027-5361.

175 Chris Marr, *Covid-19 Shield Laws Proliferate Even as Liability Suits Do Not*, BLOOMBERG L. (June 8, 2021), https://news.bloomberglaw.com/daily-labor-report/covid-19-shield-laws-proliferate-even-as-liability-suits-do-not.

176 Twenty of the thirty states that have issued a liability shield have this as the standard of care required. The states are Alabama (ALA. CODE § 6-5-790 to -799 (2021)); Alaska (H.R. 76, 32nd Leg., 1st Sess. (Alaska 2021)); Arizona (S. 1377, 55th Leg., 1st Sess. (Ariz. 2021)); Arkansas (ARK. CODE ANN. §§ 16-120-1101 to -1106 (West 2021)); Florida (FLA. STAT. ANN. § 768.38 (West 2021)); Georgia (GA. CODE ANN. §§ 51-16-1 to -5 (West 2020)); Idaho (IDAHO CODE ANN. §§ 6-3401 to -3403 (West 2020)); Indiana (IND. CODE ANN. §§ 34-30-32-1 to -11 (West 2021)); Iowa (IOWA CODE ANN. §§ 686D.1–.8 (West 2020)); Kentucky (KY. REV. STAT. ANN. § 39A.275 (West. 2021)); Louisiana (LA. STAT. ANN. § 9:2800.25 (2020)); Montana (S. 65, 67th Leg., Reg. Sess. (Mont. 2021)); Nevada (NEV. REV. STAT. ANN. §§ 41.810–.835 (West 2020)); North Carolina (N.C. GEN. STAT. ANN. §§ 99E-70 to -72 (West 2020)); Ohio (H.R. 606, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020)); South Carolina (Act No. 99, 2021-2022 Gen. Assemb., 124th Sess. (S.C. 2021)); Tennessee (TENN. CODE ANN. §§ 29-34-801 to -802 (West 2020)); Utah (UTAH CODE ANN. § 78B-4-517 (West 2020)); Wisconsin (WIS. STAT. ANN. § 895.476 (West 2021)); and, Wyoming (WYO. STAT. ANN. § 35-4-114 (West 2021)).

177 *Gross Negligence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/gross_negligence (last visited Aug. 25, 2021).

178 *Id.*

A small minority of the states that have COVID-19 liability shields have opted to require proof of actual malice or intentional exposure in order for plaintiffs to recover.[179] This is a much higher standard than gross negligence, and therefore more difficult for plaintiffs to meet. In order to hold a business liable under this standard, plaintiffs must show that a business acted deliberately with the conscious objective of engaging in conduct that exposes someone to COVID-19.[180] Finally, some states choose to use public health standards as the basis for liability.[181] In these states, businesses are shielded from liability so long as they are in substantial compliance with the applicable health laws and directives. However, each state has a slightly different definition of which health laws are applicable. Michigan includes all federal, state, and local rules and regulations; while Nebraska only requires following federal health guidance.[182]

Unlike Michigan and Nevada, Texas does not fall neatly into any legal category for liability. In order for a business to be liable the Texas law requires that a business knowingly fail to warn of a condition that makes it more likely than not that a person will be exposed to the COVID-19 or if they fail to comply with applicable government standards and guidance.[183] Either way, the plaintiff must also provide scientific evidence showing that failure to warn or implement standards was the cause in fact of contracting COVID-19.

III. Litigating for Workplace Safety During a Pandemic

The litigation implicating meatpacking companies during the pandemic has been wide-ranging. The following claims have been advanced on behalf of meatpacking workers: (1) negligence and wrongful death, (2) public nuisance, (3) discrimination in the workplace violations, (4) OSHA violations, and (5) shareholder claims of fraudulent misrepresentation. Contrary to public opinion, courts were not immediately flooded by

179 Four of the thirty states have adopted this standard, including Mississippi (Miss. Code Ann. §§ 11-71-1 to -13 (West 2020)); North Dakota (N.D. Cent. Code Ann. §§ 32-48-01 to -08 (West 2021)); South Dakota (S.D. Codified Laws §§ 21-68-1 to -6 (2021)); and, West Virginia (W. Va. Code Ann. §§ 55-19-1 to -19 (West 2021)).

180 *Intentionally Law and Legal Definition*, USLegal, https://definitions.uslegal.com/i/intentionally/ (last visited Aug. 25, 2021).

181 The four states that follow this system are Kansas (Kan. Stat. Ann. §§ 60-5501 to -5508 (West 2020)); Michigan (Mich. Comp. Laws Ann. §§ 691.1451–.1460 (West 2020)); Nebraska (L.B. 139, 107th Leg., 1st Sess. (Neb. 2021)); and, Oklahoma (Okla. Stat. Ann. tit. 76, § 111 (West 2020)).

182 Practical Law Commercial Transactions, Thomson Reuters, *supra* note 174.

183 S. 6, 87th Leg., 2d Sess. (Tex. 2021).

COVID-19 litigation from meatpacking plants. Only a few dozen cases were filed and they, like other cases, have been delayed for nearly a year since COVID-19 forced courts to curtail in-person proceedings.[184] Since there is no comprehensive tracker of state litigation—or litigation on COVID-19 exposure in meatpacking plants, specifically—it is difficult to track these cases and the potential delays associated with them. Invariably, the general backlog of cases in many states impacts the ability for quick adjudication of the meatpacking cases.

To summarize, the litigation is ongoing, and most cases have been removed to federal court and are pending decisions. The plaintiffs in the cases presented below are meatpacking workers themselves and their families and/or nonprofits and unions. Some cases are brought by meatpacking plant shareholders. The focus of this Article is on cases brought against JBS, Smithfield, Tyson, and federal regulators (USDA and OSHA), but other cases (such as one brought against fast food giant, McDonald's) will be discussed as they contribute to the litigation. Table 1, below, tracks the individual lawsuits filed and the overall pace of litigation since the start of the pandemic. It lists the cases by defendant and cause of action. From this presentation of the data, the big outbreaks in the meatpacking plants in April 2020, prompted the lawsuits filed in April and May through the month of August 2020. At the time of writing this article in early 2021, the most recent development is the federal order removing a case from federal court to state court for trial in 2021.[185]

184 Kay, *supra* note 58 (noting that Florida, for example, has over one million pending cases in the trial courts, and Maine and Tennessee also have thousands of backlogged cases over the last ten months). For more information on each state's court operation policy, see *Court Operations During COVID-19: 50-State Resources*, JUSTIA, https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/ (July 2021). *See also* Jack Karp, *Trial Alternatives Getting Fresh Look with COVID-19 Backlog*, LAW360 (Feb. 4, 2021), https://www.law360.com/foodbeverage/articles/1351450.

185 Benjamin v. JBS S.A., 516 F. Supp. 3d 463 (E.D. Pa. 2021).

Table 1: COVID-19 Meatpacking Plant Litigation by Company and Cause of Action[186]

Company/Agency	**Cause(s) of Action**	**Case** **Name, Docket Number, Court, and Filing Date**
JBS (incl. subsidiary: Pilgrim's Pride)	Wrongful Death	<u>*Wrongful Death:*</u> *Benjamin v. JBS S.A. et al.*, No. 2:20-cv-02594 (E.D. Pa., June 2, 2020); *Requena et al. v. Pilgrim's Pride Corp.*, No. 9:20-cv-00147 (E.D. Tex., July 2, 2020).
Smithfield	Public Nuisance	<u>*Public Nuisance:*</u> *Rural Cmty. Worker's All. v. Smithfield Foods, Inc.*, No. 5:20-cv-0606, (W.D. Mo., Apr. 24, 2020).
Tyson (incl. subsidiary: Cargill)	Wrongful Death	<u>*Wrongful Death:*</u> *Chavez et al. v. Tyson Foods, Inc.*, No.9:20-cv-00134 (E.D. Tex., June 15, 2020); *Fernandez v. Tyson Foods Inc. et al.* No. 6:20-cv-02079 (N.D. Iowa, Oct. 2, 2020). *Buljic v. Tyson Foods, Inc.*, No. 6:20-cv-02055 (Ia. Black Hawk Cnty. Dist. Ct., June 25, 2020); *Food Chain Workers All. v. Tyson Foods, Inc.*, (USDA AMS, July 8, 2020).

186 This table represents data up until November 12, 2020, for wrongful death, public nuisance, and agency failures to declare emergency standards.

Company/Agency	**Cause(s) of Action**	**Case** **Name, Docket Number, Court, and Filing Date**
Federal Agencies: OSHA & USDA	Failure to issue an ETS; Compel safety measures	*Failure to issue ETS:* *In re AFL-CIO*, No. 20-01158 (D.C. Cir. May 18, 2020); *Jane Does I, II, III et al. v. Scalia et al.*, 3:20-cv-01260 (M.D. Pa., July 7, 2020); *Smithfield v. OSHA*, No. 4:20-mc-18 (D.S.D., July 1, 2020); *UFCW Local No. 227 et al. v. Dep't of Agric.*, No. 1:20-cv-02045 (D.C. Dist. Ct.,July 28, 2020).
Other Meatpacking Plants and Food Establishment Cases of Interest	Wrongful Death or Public Nuisance	*Wrongful Death:* *Blanca Esther Parra v. Quality Sausage Co.*, No. DC-20-06406 (Tex. Dist. Ct., Apr. 30, 2020); *Hernandez et al. v. VES McDonald's et al.*, (Ca. Alameda Cnty. Sup. Ct., June 16, 2020); *Massey et al. v. McDonald's Corp. et al.*, No. 2020-CH-04247 (Il. Cook Cnty. Cir. Ct., May 19, 2020). *Public Nuisance:* *Familias Unidas Por La Justicia v. Wa. Dep't of Lab, & Indus.*, No. 20-2-01556-34 (Wa. Skagit Cnty. Sup. Ct, June 4, 2020).

A. *Plaintiffs Make Their Case*

In April 2020, only months after the first COVID-19 case was identified in the U.S., the first COVID-19 exposure lawsuits began to emerge. The lawsuits filed in negligence and wrongful death sought monetary relief and were brought by families of meatpacking employees who contracted COVID-19 in the workplace and died from COVID-19.[187] The litigation that implicates meatpacking workers directly is listed in Table 1 and the cases are individually discussed below, broken down by cause of action. Other cases discussed below include suits brought on behalf of those injured in the meatpacking plants by unions and nonprofits suing OSHA to enjoin the agency to enforce workplace safety standards. These lawsuits seek injunctive relief only. Another set of cases arise from shareholder plaintiffs and grocery store plaintiffs. This section outlines the plaintiff arguments. The next section, *Defendants Make their Case*, outlines the challenges plaintiffs need to overcome.

Of note, recent developments in litigation against JBS and Tyson are perceived jurisdictional victories for plaintiffs. First, in February 2021, a Pennsylvania federal judge remanded a case accusing JBS of causing a worker's COVID-19 death, stating that a violation of federal health guidelines is not enough to keep a suit in federal court.[188] The wrongful death case was originally brought in state court by the family of deceased JBS employee, Enock Benjamin, who came down with COVID-19 at work and died from COVID-19 two weeks later, in April 2020.[189] The case alleges that JBS ignored OSHA recommendations for businesses to have sick workers stay at home and to issue personal protective equipment to keep workers safe on the job. A state court will hear the case in 2022. In the fall of 2021, the Eighth Circuit Court of Appeals will hear two cases implicating Tyson, the outcome of which will determine whether wrongful death litigation can advance at the state level.

1. Negligence and Wrongful Death

In March 2020, families of deceased meatpacking workers began filing negligence and wrongful death suits against meatpacking giants (JBS,

187 Todd Neeley, *Meatpacker Worker Deaths Spark Lawsuits*, Progressive Farmer (May 14, 2020), https://www.dtnpf.com/agriculture/web/ag/news/farm-life/article/2020/05/14/families-Covid-19-victims-allege.

188 *Benjamin*, 516 F. Supp. 3d 463.

189 *Id.* at 466–67.

Smithfield, and Tyson) and their subsidiaries.[190] The suits alleged that meatpacking companies failed to follow voluntary guidelines and did not warn about the risk of infection.[191] They also alleged that company culture at the plant level discouraged employees from missing work even when sick leave policies were in place.[192] The cases are listed in Table 1 and include two cases against JBS and Tyson, respectively. Cases against their subsidiaries—Pilgrim's Pride as a subsidiary of JBS, and Cargill as a subsidiary of Tyson—are also included. Filed initially in state court, the suits were quickly removed to federal court. The cases, described below, reveal company practices in these plants.

Of the cases against JBS, *Benjamin v. JBS S.A.*, has received attention for being successful in its attempt to bring claims in state versus federal court. The suit, *Benjamin v. JBS S.A.*, filed in May 2020, claims that JBS failed to follow the CDC and OSHA guidelines and promoted a culture that discouraged workers from taking sick leave.[193] JBS employee Enock Benjamin came down with a cough and took time off from work starting March 27, and died on April 3, 2020.[194] The suit, brought by Benjamin's estate, alleges "negligence, fraudulent misrepresentation regarding the safety of working conditions at the plant, and wrongful death."[195] In an attempt to remove the case to federal court, JBS argues that JBS Souderton Inc., the local plant in which Benjamin worked, could not be named in the suit because such a suit would be preempted by workers compensation law and

190 Neeley, *supra* note 187; *see also supra* Table 1.

191 Neeley, *supra* note 187.

192 *Id.* (noting that "[b]ased upon information and belief, the culture at JBS Souderton resulted in workers coming to work sick for fear of losing their job if missing multiple days of work" and that "[d]uring the course and scope of [Dominguez's] work, decedent was driving the forklift, and as his symptoms became evident, he was told to report to work and to keep at it—otherwise he would have been laid off").

193 *Benjamin*, 516 F. Supp. 3d at 469. Specifically, the complaint alleges that JBS "failed to provide sufficient personal protective equipment," "forced workers to work in close proximity," "forced workers to use cramped and crowded work areas, break areas, restrooms, and hallways," "discouraged workers from taking sick leave in a manner that had sick workers in fear of losing their jobs," and "failed to properly provide testing and monitoring for individuals who may have been exposed to the virus that causes COVID-19." Complaint - Civil Action at 4, Benjamin v. JBS S.A., No. 200500370 (Pa. Ct. Com. Pl. filed May 7, 2020); *See* Shook, Hardy & Bacon L.L.P., *Family of Deceased Meatpacking Plant Worker Sues JBS for Alleged COVID-19 Negligence*, FOOD & BEVERAGE LITIG. & REGUL. UPDATE (May 15, 2020) (quoting Complaint - Civil Action, *supra*), https://foodbeveragelitigationupdate.com/family-of-deceased-meatpacking-plant-worker-sues-jbs-for-alleged-Covid-19-negligence/.

194 *Benjamin*, 516 F. Supp. 3d at 467.

195 Matt Fair, *Meatpacker Sued in 1st Virus-Related Death Case in Pa.*, LAW360 (May 7, 2020), https://www.law360.com/articles/1271295.

therefore only the national JBS could be named.[196] Benjamin's estate argues that since JBS Souderton misrepresented the safety of the workplace, the claim falls under an exception and therefore the case should remain in state court.[197] After months of pleadings and motions in the Eastern District Court of Pennsylvania, the case was remanded to state court.[198] This case is ongoing and perceived as a small victory for the plaintiff's bar in that it will be tried at the state level which is presumably more favorable to plaintiffs.[199]

The second case against JBS was dismissed early; however, it presents novel defenses worth noting—not workers' compensation preemption as seen in *Benjamin*, but rather primary jurisdiction and "the President made us do it"—to be discussed later. JBS employee, Maria Hernandez, 63, was a 30-year employee at Pilgrim's Pride Corporation (a JBS subsidiary) when she died of COVID-19 on May 8, 2020. [200] Her family brought a wrongful death suit in *Requena v. Pilgrim's Pride Corporation,* claiming that Hernandez was "instructed to report to work" and switched to the Shipping and Labeling Department, noted for being a "hot spot" with a higher number of cases relative to other areas of the plant, and short-staffed due to COVID-19 illness, employees being tested, or absenteeism.[201] Her sons claim that the switch was made without informing her, or other employees, that the other workers were out sick with COVID-19 and without taking into account the higher risk posed to Ms. Hernandez as she was over 60 years of age.[202] One week following her switch to the Shipping and Labeling Department, Ms. Hernandez fell sick and died shortly thereafter.[203] Pilgrim's denied wrongdoing, filed a notice of removal to federal court, and invoked a novel legal argument that the former President Trump made them do it.[204] "Any

196 Matthew Santoni, *Worker's Family Pushes to Keep Virus Death Suit in Pa. Court*, Law360 (June 30, 2020), https://www.law360.com/foodbeverage/articles/1287881/worker-s-family-pushes-to-keep-virus-death-suit-in-pa-court.

197 *Id.* (citing Martin v. Lancaster Battery Co., 606 A.2d 444, 446 (Pa. 1992) (holding that a company lost its immunity under workers compensation law when it actively misled employees about workplace safety)).

198 The case will be heard in the Court of Common Pleas of Philadelphia County. *Benjamin*, 516 F. Supp. 3d at 476 (granting motion to remand).

199 Fatima Hussein, *Tyson's Trump-Made-Us-Do-It Claim Set for Eighth Circuit Test*, Bloomberg L. (May 25, 2021), https://news.bloomberglaw.com/safety/tysons-president-made-us-do-it-claim-set-for-eighth-cir-test.

200 Plaintiffs' Original Petition at 2–3, Requena v. Pilgrim's Pride Corp., No. CV-00296-20-06 (Tex. Dist. Ct. June 9, 2020).

201 *Id.* at 4—5.

202 *Id.* at 4.

203 *Id.* at 5.

204 Fatima Hussein, *Sued Over Covid-19, Companies Scramble for Federal Court Shelter*, Bloomberg L. (July 20, 2020), https://news.bloomberglaw.com/daily-labor-report/sued-over-

duty ascribed to Pilgrim's unavoidably implicates President Trump's explicit directive regarding the safe operation of meat processing facilities during the pandemic," the company's attorney claimed.[205] JBS filed a motion to dismiss asserting OSHA has primary jurisdiction.[206] In contrast, a similar suit in Texas brought against a smaller meat processer, is going to trial. In *Blanca Esther Parra v. Quality Sausage Co.*, negligence and wrongful death claims are brought by the family of Quality Sausage Company plant worker, Hugo Dominguez, who died from COVID-19, alleging that: (1) the plaintiff worker was exposed at work and was told to report for work even after displaying symptoms of COVID-19; (2) management failed to provide PPE or training on reducing the risk of infection;[207] and (3) it was clear by April 8, 2020, that employees at the plant were becoming sick, but the defendant did not close the plant for reevaluation of policies and cleaning until after April 24, 2020.[208] This case is scheduled for trial in March 2022.[209] Why was this suit scheduled for trial and the Hernandez suit dismissed? The defendant (a smaller meat processer, Quality Sausage, versus larger, processor Pilgrims Pride/JBS) may have played a role.

Next, Tyson was implicated in two suits alleging workplace safety. The first case involves a poultry processing plant in Texas and is the first COVID-19 exposure lawsuit seeking punitive damages.[210] The outcome shows the difficulty plaintiffs face in overcoming the causation element. Tyson poultry plant employee, Jose Angel Chavez, worked at the Shelby County, TX, poultry plant for more than 20 years, and died on April 17, 2020, from complications caused by COVID-19.[211] In *Chavez v. Tyson Foods, Inc.*, the Chavez family brought negligence and wrongful death claims against Tyson alleging that the company disregarded safety protocols by failing to provide protective gear or inform employees when others were

covid-19-companies-scramble-for-federal-court-shelter.

205 *Id.* (quoting the company's July 2 notice of removal).

206 *Id.*

207 Stella M. Chávez, *Family of Man Who Died of COVID-19 Suing Dallas Meat Plant*, KERA NEWS (May 5, 2020), https://www.keranews.org/post/family-man-who-died-Covid-19-suing-dallas-meat-plant.

208 Kevin Krause, *Wife of Dallas Meat Plant Worker Who Died from Virus Sues Company, Claiming It Ignored Worker Safety*, DALL. MORNING NEWS (May 5, 2020), https://www.dallasnews.com/business/local-companies/2020/05/05/wife-of-dallas-meat-plant-worker-who-died-from-virus-sues-company-claiming-it-ignored-worker-safety/.

209 Agreed Scheduling Order, Parra v. Quality Sausage Co., No. DC-20-06406 (Tex. Dist. Ct. Oct. 29, 2020).

210 Plaintiffs' Original Petition at 4–5, Chavez v. Tyson Foods, Inc., No. 9:20-cv-00134 (E.D. Tex. dismissed Aug. 7, 2020).

211 *Id.* at 2; *see also* Rosie Manins, *Tyson Hit with Another COVID-19 Death Suit in Texas*, LAW360 (June 16, 2020), https://www.law360.com/articles/1283346.

infected and are seeking punitive damages due to the extreme risk posed by a mass outbreak.[212] Knowing the risks, plaintiffs allege, Tyson proceeded with conscious indifference to the rights, welfare and safety of others.[213] In its motion to dismiss filed on July 30, 2020, Tyson Foods Inc. told a U.S. District Court judge that the Chavez family failed to rule out other possible causes of the infection.[214] Before a ruling on this motion, the family dropped their suit stating they plan to file a stronger version of the case in the future.[215]

In the litigation against Tyson, two cases—*Buljic v. Tyson Foods, Inc (Buljic)*, and *Fernandez v. Tyson Foods, Inc. (Fernandez)*—have received notable attention. They both stem from outbreaks at the same Waterloo, IA, Tyson plant, both face similar jurisdiction challenges, and both have received support from nineteen Attorneys General.

In *Buljic*, plaintiffs are the representatives of three employees working in Tyson's largest meatpacking plant in Waterloo, IA, who died from contracting COVID-19 at work: Sedika Buljic, age 58, died on April 18, 2020; Reberiano Garcia, age 60, died on April 23, 2020; and Jose Ayala, Jr., age 44, died on May 25, 2020.[216] The Waterloo plant is Tyson's largest pork facility and can process 20,000 hogs per day.[217] Since the combination of Tyson's Waterloo, IA, plant, and Smithfield's Worthington, IA, and Sioux Falls, SD, plants account for roughly 15% of pork production in the U.S.,[218] COVID-19 outbreaks in these facilities naturally cause a decrease in national pork sales. Alleging violations of workplace safety, plaintiffs claim: (1) Tyson transferred employees from the Columbus Junction plant, which had been shut down due to a COVID-19 outbreak, to the Waterloo Facility; and (2) Tyson knew there was an outbreak in the Waterloo plant and allowed or encouraged sick workers to come to work.[219] Tyson officials denied the outbreak even after over 20 employees were admitted to the emergency

212 *Id.*

213 Plaintiffs' Original Petition, *supra* note 210, at 5.

214 Michelle Casady, *Tyson Says Suit Doesn't Tie Worker's COVID-19 Death to Plant*, Law360 (July 31, 2020), https://www.law360.com/articles/1297505.

215 Jon Steingart, *Tyson Worker's Family Vows to Press 'Stronger' COVID Suit*, Law360 (Aug. 10, 2020), https://www.law360.com/articles/1299875/tyson-worker-s-family-vows-to-press-stronger-covid-suit?copied=1.

216 Ryan J. Foley, *Families of 3 Deceased Workers Sue Tyson over Iowa Outbreak*, US News (June 25, 2020), https://www.usnews.com/news/politics/articles/2020-06-25/families-of-3-deceased-workers-sue-tyson-over-iowa-outbreak.

217 *Id.*

218 *See* Gallagher & Kirkland, *supra* note 43.

219 Specifically, "At least one worker at the facility vomited on the production line and management allowed him to continue working and return to work the next day." Petition at Law and Demand for Jury Trial, *supra* note 8, at 9.

room and local officials called for the plant's closure.[220] The plaintiffs state that Tyson lied in order to keep employees on the job, risking their lives.[221] An amended complaint alleges that the Tyson plant management incorrectly informed translators to tell the employees that "everything is fine" and that the plant had been cleared to continue—while state health officials urged them to close down. [222] Finally, an amended complaint alleges that managers created a betting pool based on the percentage of employees who would contract the virus.[223]

The case of *Fernandez* is factually similar to *Buljic*. Oscar Fernandez was another Tyson employee exposed to the COVID-19 at the Waterloo, IA, meatpacking facility where he worked, and died a few weeks later in April 2020 from complications of COVID-19. [224] Fernandez's survivors filed a suit in Iowa state court against Tyson, claiming that it violated Iowa tort law.

Tyson removed both *Buljic* and *Fernandez* from state court to the federal court using two theories: (1) that Tyson was acting "at the direction of a federal officer and (2) that the Federal Meat Inspection Act preempted the workers' claims based on state workplace safety rules."[225] In December 2020, the district court granted the plaintiff's Motions to Remand and sent the cases back to state court. Importantly, the court held that Tyson was not acting as a "federal officer" in operating its meatpacking plants. It also held that neither the Federal Meat Inspection Act nor the Defense Production Act preempted plaintiffs' state law claims. [226] The defendants have appealed the decision to the Court of Appeals for the Eighth Circuit.[227] The *Buljic* and *Fernandez* cases have been consolidated for consideration as they allege similar facts and are pending a jurisdictional ruling in the Eighth Circuit.[228] Due to this, the defendants moved for a Joint Motion to Stay Proceedings with the

220 Fatima Hussein, *Tyson Faces Virus Fraud Lawsuit from Families of Dead Workers*, BLOOMBERG L. (June 26, 2020), https://news.bloomberglaw.com/safety/tyson-faces-virus-fraud-lawsuit-from-families-of-dead-workers?context=article-related.

221 Foley, *supra* note 216.

222 Hirtzer, *supra* note 10.

223 Ryan J. Foley, *Tyson Fires 7 at Iowa Pork Plant After COVID Betting Inquiry*, ABC NEWS (Dec. 16, 2020), https://abcnews.go.com/Health/wireStory/tyson-facing-lawsuit-employee-Covid-19-death-74762451.

224 First Amended Complaint, Fernandez v. Tyson Foods, Inc., No. 6:20-cv-02079 (N.D. Iowa filed Nov. 11, 2020).

225 Fernandez v. Tyson Foods, Inc., PUB. CITIZEN, https://www.citizen.org/litigation/fernandez-v-tyson-foods-inc/ (last visited July 26, 2021).

226 First Amended Complaint, *supra* note 224.

227 Buljic v. Tyson Foods, Inc., No. 6:20-cv-02055 (N.D. Iowa July 27, 2020), *appeal docketed*, No. 21-1010 (8th Cir. Jan. 5, 2021); Fernandez v. Tyson Foods, Inc., 509 F. Supp. 3d 1064 (N.D. Iowa 2020), *appeal docketed*, No. 21-1012 (8th Cir. Jan. 5, 2021).

228 Order, Buljic v. Tyson Foods, Inc., No. 21-1010 (8th Cir. Feb. 8, 2021).

Northern District of Iowa and it was granted on February 9, 2021.[229]

Where does the consolidated case rightfully belong? The Iowa District Court, nineteen Attorneys General, and federal officers agree that the case implicates state, not federal, issues. Tyson claims this case should be heard in federal court based on the Federal Officer Removal Statute.[230] It claims that under this law a company acting at the direction of a federal officer will be granted a federal court forum to hear any claims arising from that direction. The District Court will have to determine, (1) whether former President Trump had the authority to make these private actors, Tyson in this case, into government actors who therefore acquired government actor immunity,[231] and (2) whether the Trump administration exercised that authority properly.[232]

The district court deemed that Tyson could not rely on former President Trump's order because its actions occurred before he issued the April Executive Order.[233] However, a formal order is not necessary and a defendant can act under informal orders, and often times does until the formal order is issued.[234] While the Federal Office Removal Statute issue has not been decided in this context, there is some relevant precedent in a Supreme Court case from 2008, *Watson v. Philip Morris*, in which the Supreme Court determined that a company must assert more than mere compliance with an order, but instead prove it acted under direction of a federal officer.[235]

In response, nineteen Attorneys General have stepped in and filed a brief urging the Eighth Circuit to reject federal jurisdiction and remand to state court.[236] They claim this is a vast overstep of the Federal Officer Removal Statute and this case should rightfully be heard in state court, where the violations occurred and that the Removal Statute is meant to protect federal agents from hostile state courts, not private entities that operate in those states. The nineteen Attorneys General stated in their amicus brief

229 *Id.*

230 Melissa Angell, *Tyson Asks 8th Circ. to Keep COVID-19 Suits in Fed. Court*, Law360 (Feb. 23, 2021), https://www.law360.com/employment-authority/articles/1356961/tyson-asks-8th-circ-to-keep-covid-19-suits-in-fed-court.

231 Hussein, *supra* note 199.

232 *Id.* Interestingly, some legal scholars believe that Tyson will be opening themselves up to a host of civil rights claims if they are deemed to be federal actors. *Id.*

233 Order, Buljic v. Tyson Foods, Inc., No. 6:20-cv-02055 (N.D. Iowa Dec. 28, 2020).

234 Angell, *supra* note 230.

235 Hussein, *supra* note 199.

236 Colorado is one of the 18 states, plus the District of Columbia, to have signed on to the brief. Mike Curley, *19 AGs Urge 8th Circ. to Keep Tyson Virus Suit in State Court*, Law360 (Apr. 13, 2021), https://www.law360.com/employment-authority/articles/1374561/19-ags-urge-8th-circ-to-keep-tyson-virus-suit-in-state-court.

that "allowing the case to proceed in federal court would undermine states' ability to enforce their own laws and allow nearly any company to pull state law claims against it into federal court by arguing that it was working under federal guidance."[237]

The federal government has also stepped in, filing an amicus brief in favor of remanding the case back to state court, stating that Tyson had not been acting under its direction and was instead, simply conducting business as usual.[238] This move further damages Tyson's claim that they were working under federal order. However, Tyson has made clear in their brief that while the Biden administration may disagree now, they are an inaccurate proxy for the views of the federal officials who issued the order that Tyson relied upon.[239] There is fear that if Tyson is denied federal immunity, it may have consequences for future emergencies when the meatpacking industry may be asked again to continue production.[240]

This case has been approved for oral arguments in front of the Eighth Circuit to determine whether it should be in the federal or state court system in the fall of 2021.[241]

2. Public Nuisance

In April 2020, as the meatpacking plants became hotbeds for COVID-19 spread, Smithfield was implicated in a suit alleging that the company's Milan, MO, plant is a "public nuisance" because the spread of COVID-19 at the plant increases the risk of infection in the broader community.[242] In the following case plaintiffs argued that, "[p]ut simply, workers, their family members, and many others who live in Milan and in the broader community may die—all because Smithfield refused to change its practices in the face of this pandemic."[243] The public nuisance case against Smithfield is significant in four ways: (1) it was the first case

237 Y. Peter Kang, *8th Circ. Tyson Case Could Streamline COVID-19 Suits*, LAW360 (Apr. 23, 2021), https://www.law360.com/articles/1378370/8th-circ-tyson-case-could-streamline-covid-19-suits.

238 *Id.*

239 Hussein, *supra* note 199.

240 *Id.*

241 Order, Everhard v. Tyson Foods, Inc., No. 5:21-cv-04002 (N.D. Iowa Feb. 9, 2021) (clarifying that the *Everhard* case is awaiting an answer from the 8th Circuit regarding jurisdiction before proceeding).

242 Noam Scheiber & Michael Corkery, *Missouri Pork Plant Workers Say They Can't Cover Mouths to Cough*, N.Y. TIMES (Apr. 24, 2020), https://www.nytimes.com/2020/04/24/business/economy/coronavirus-smithfield-meat.html.

243 Complaint, *supra* note 55, at 3.

filed in the pandemic, (2) the first to advance the claim of public nuisance, (3) the first seeking injunctive rather than monetary relief in the context of COVID-19, and (4) the first meatpacking case where the defense used "primary jurisdiction" preemption. Primary jurisdiction preemption will be discussed in the next section and this section describes the case and introduces the public nuisance doctrine.

Public nuisance cases solely ask for stricter safety measures in the workplace. In *Rural Cmty. Worker's All. v. Smithfield Foods, Inc.* (*Rural Cmty. Workers)*, "[p]laintiffs are not seeking monetary damages, only declaratory judgments stating that: (1) Smithfield's practices at the plant constitute a public nuisance; and (2) Smithfield has breached its duty to provide a safe workplace."[244] Specifically, the lawsuit claimed that the lack of PPE and appropriate distancing of workers, the company's culture toward sick leave, and the lack of a plan for contact tracing are problematic and need to be changed.[245] The lawsuit claims that Smithfield failed to satisfy even minimum public health guidelines. For example, it was not until April 16, 2020, that any worker at the plant reported receiving a mask. [246] As of April 20, 2020, most workers were getting just one simple surgical mask from Smithfield every week and could get a new one only if the first one broke, according to the suit. It also alleges that, in an effort to process as much meat as possible "as cheaply as possible," workers were forced to stand so closely together "that they are literally touching." [247] The suit was dismissed after a federal judge determined that, given that OSHA issued guidance after the lawsuit was filed and the executive order mandated meatpacking plants continue operating, OSHA and the USDA have more authority over the case under the primary jurisdiction doctrine.[248] However, as noted, this case set several precedents and is often cited.

Interestingly, outside the meatpacking context, two suits filed against different McDonald's franchises—one against four fast food restaurants in Chicago, IL,[249] and the other in Alameda County, CA,[250]—were not dismissed

244 *Id.*

245 Valdivia & Margolies, *supra* note 59.

246 Complaint, *supra* note 55, at 13.

247 *Id.*

248 Rural Cmty. Workers All. v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228, 1240–41 (W.D. Mo. 2020); *see also Meat and Poultry Processing Workers and Employers*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html (June 11, 2021).

249 Complaint for Injunctive Relief, Massey v. McDonald's Corp., No. 2020CH04247, 2020 WL 5700874 (Ill. Cir. Ct. June 24, 2020).

250 Complaint, Hernandez v. VES McDonald's, No. RG20064825 (Cal. Super. Ct. filed

under the primary jurisdiction doctrine. These public nuisance cases are one example of how workers can get safety measures instituted. One of the first to test public nuisance claims under the novel coronavirus context, the first suit was filed in Illinois Circuit Court by 'Fight for $15'[251] on behalf of 5 employees, and their family members, at multiple McDonald's locations.[252] Instead of barring the suits outright based on the exclusive remedy rule of workers compensation law or primary jurisdiction,[253] the judge initially ruled that public nuisance fell under the state court's purview.[254] She has since partially granted the employees preliminary injunction stating that McDonald's has done some things right but they need to fix certain "serious failures."[255] The other public nuisance suit filed against McDonald's sought a temporary restraining order to force an Oakland McDonald's to close and comply with the minimum safety measures including the paid sick leave laws in place in Oakland.[256] The suit claims that the owner and managers did not notify employees of virus exposure and failed to implement social distancing or cleaning practices.[257] In June 2020, a state judge issued a temporary restraining order forcing the Oakland franchise to remain closed for a month unless the local health department approved an earlier reopening.[258] If they failed to implement the necessary safety measures, the judge was to rule on a preliminary injunction.[259]

June 16, 2020).

251 Fight for $15 is a group advocating for a $15 minimum wage and unionization for McDonald's employees. *See About Us*, FIGHT FOR $15, https://fightfor15.org/about-us/ (last visited Feb. 17, 2021).

252 Vin Gurrieri, *COVID Suits Test 'Public Nuisance' Claim in Workplace Cases*, LAW360 (June 9, 2020), https://www.law360.com/articles/1281347/covid-suits-test-public-nuisance-claim-in-workplace-cases.

253 *Id.*

254 Gabi Jackson, *Public Nuisance Lawsuits Against Employers Over COVID-19: What You Need to Know*, NAT'L SEA GRANT L. CTR.: BLOG (June 29, 2020), https://nsglc.olemiss.edu/blog/2020/jun/29/index.html.

255 Specifically, Judge Reilly says McDonald's needs to strictly enforce their mask policy and retrain employees on proper social distancing procedures. She found that there would only be a slight hardship to the franchise and that workers have a right to a workplace free from exposure to the coronavirus. *See* Lauraann Wood, *McDonald's Told to Give Ill. Workers More Virus Protections*, LAW360 (June 24, 2020), https://www.law360.com/articles/1286329/mcdonald-s-told-to-give-ill-workers-more-virus-protections.

256 Y. Peter Kang, *McDonald's Franchise Hit with Suit Over COVID-19 Outbreak*, LAW360 (June 16, 2020), https://www.law360.com/articles/1283543.

257 *Id.*

258 Karen F. Tynan & Jennifer Yanni, *California Judge Grants TRO Related to COVID-19 Risks at Fast-Food Restaurant*, OGLETREE DEAKINS (July 2, 2020), https://ogletree.com/insights/california-judge-grants-tro-related-to-covid-19-risks-at-fast-food-restaurant/.

259 *Id.*

Drawing comparisons, why did the injunction succeed for the plaintiffs in *McDonald's* and not for the plaintiffs in *Rural Cmty. Workers*? Differences between the *Rural Cmty. Workers* and *McDonald's* decisions can be justified by industry differences, differences in the number of employees affected (the Smithfield's plant employs thousands while the McDonald's employed only a few dozen) and differences among the plaintiffs themselves. Since both *McDonald's* lawsuits included plaintiff non-employees who had been infected by McDonald's employees, the nonemployee plaintiffs may have been influential in keeping the case outside of the OSHA jurisdiction.

In dismissing this suit in May 2020, Judge Kays stated that OSHA had primary jurisdiction and that there was no imminent harm in June 2020. Public Justice, one of the plaintiffs in *Rural Cmty. Workers,* sought to reopen the case, arguing that there was ample and recent proof of spread within the facility and imminent harm.[260] In July 2020, this motion was denied.[261]

3. Discrimination in the Workplace—Civil Rights Act Violation

A group of nonprofits and worker advocacy groups filed an administrative civil rights complaint with the USDA against JBS USA, Tyson Foods, and their subsidiaries for putting minority employees in more danger than white managers.[262] In *Food Chain Workers Alliance v. Tyson Inc.,* (*Food Chain Workers*) the plaintiffs raise a Title VI of the Civil Rights Act of 1954 claim[263]—prohibiting race, color and national origin discrimination by organizations that receive federal funding—to allege that meatpacking companies ignored recommenations from the CDC and subjected minority

260 Plaintiff's Motion to Reconsider and Suggestions in Support at 2–3, Rural Cmty. Workers All. v. Smithfield Foods, Inc., No. 5:20-cv-06063 (W.D. Mo. filed June 2, 2020), https://food.publicjustice.net/wp-content/uploads/sites/3/2020/06/2020.06.03-Dkt-53-Pltfs-Mot-to-Reconsider.pdf (noting that 20-30 employees were quarantined in the week following the court's decision showing clear imminence of harm.); *see also* Order Denying Motion for Reconsideration, Rural Cmty. Workers All. v. Smithfield Foods, Inc., No. 5:20-cv-06063 (W.D. Mo. July 14, 2020), https://food.publicjustice.net/wp-content/uploads/sites/3/2020/11/2020.07.14-Dkt-58-Order-Denying-Motion-for-Reconsideration.pdf.

261 Order Denying Motion for Reconsideration, *supra* note 260.

262 *See* Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7; 7 C.F.R. §§ 15.1-15.12, Food Chain Workers All. v. Tyson Foods, Inc. (U.S.D.A. filed July 8, 2020); Jon Steingart, *Tyson, JBS Accused of Putting Minority Workers at Virus Risk*, Law360 (July 9, 2020), https://www.law360.com/articles/1290542/tyson-jbs-accused-of-putting-minority-workers-at-virus-risk. One of the groups bringing this lawsuit is the Rural Community Workers Alliance noted earlier for bringing suit against Smithfield in Missouri.

263 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

workers to dangers that their white counterparts avoided.[264] Since companies receive federal contracts—roughly $150 million from USDA programs that support child nutrition and food assistance, and aid for farmers injured by foreign tariffs—the disparate impact of minority workers is illegal, and the funding should be stopped.[265] As of the time of writing, the case is ongoing.[266]

A CDC study of 21 states reported on July 7, 2020, that 87% of all infections in the meatpacking industry involved minority workers.[267] Hispanic workers make up about 56% of those infections despite being only about one third of the workforce.[268] To win a racial discrimination claim under Title VI of the Civil Rights Act of 1964,[269] a party has a high burden of proving that rules are being applied unevenly or that non-minority workers are given better protections.[270] It is not a violation of Title VI for different job functions to have varying levels of protections; thus, if minority managers were being treated differently than white managers, or if an employer actively sends minority applicants to different jobs than white applicants, there may be a disparate treatment claim.[271] Often, the party advancing the claim has a difficult time proving disparate impact due to small numbers of affected employees, and because they must prove that white employees with the same job function as the minority employees were treated more favorably.[272]

264 Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7; 7 C.F.R. §§ 15.1-15.12, *supra* note 262.

265 Fatima Hussein & Michael Hirtzer, *Tyson, JBS Hit with Minority Worker Exposure Complaint (1)*, BLOOMBERG L. (July 9, 2020, 1:11 PM) (updated 6:41 PM), https://news.bloomberglaw.com/safety/tyson-jbs-hit-with-complaint-for-minority-worker-virus-exposure.

266 *See* Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7; 7 C.F.R. §§ 15.1-15.12, *supra* note 262; Steingart, *supra* note 262.

267 According to the Department of Labor, Black or African American, Latino or Hispanic, and Asian butchers and other meat processing employees make up only 60% of the workforce. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT., http://www.bls.gov/cps/cpsaat11.htm (Jan. 22, 2021).

268 Megan Durisin, *Virus Can Travel 26 Feet at Cold Meat Plants with Stale Air*, BLOOMBERG (July 23, 2020, 1:23 PM) (updated 3:13 PM), https://www.bloomberg.com/news/articles/2020-07-23/virus-can-jump-26-feet-at-cold-meat-plants-filled-with-stale-air.

269 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

270 Erin Mulvaney, *Minorities on Pandemic Frontlines Take Race Bias Claims to Court*, BLOOMBERG L. (Nov. 24, 2020), https://news.bloomberglaw.com/class-action/minorities-on-pandemic-frontlines-take-race-bias-claims-to-court.

271 *Id.*

272 *Id.*

4. OSHA Actions

Several actions emerged blaming OSHA for not promulgating new safety measures or enforcing safety measures already in place, despite a rising rate of infection and series of formal complaints. Two actions—one lawsuit against OSHA and the other a rulemaking petition with OSHA—compel OSHA to set an ETS, implement mandatory standards for meatpacking workers, or implement basic COVID-19 safety precautions.[273] One lawsuit names a meatpacking plant, while the petition implicates meatpacking plants generally. Finally, it is worth noting that the Departments of Labor (DOL) in state-OSHA plan states have seen petitions filed for rulemaking asking the state DOL to issue an ETS to protect workers from coronavirus. These cases are ongoing unless otherwise noted.

a. Federal OSHA

The first COVID-19 lawsuit against OSHA, *In re AFL-CIO*, was filed in federal court in May 2020, by AFL-CIO, petitioning the court to compel OSHA to issue "an Emergency Temporary Standard for Infectious Diseases aimed at protecting the life and health of millions of workers throughout the United States in grave danger from the deadly COVID-19 pandemic."[274] The Labor Secretary's response to calls for a specific standard during the pandemic has been that employees can bring a claim under the General Duty Clause of the OSH Act.[275] AFL-CIO President has called OSHA's handling of the pandemic "totally deficient, abandoning workers in meatpacking, poultry, grocery, transportation and other critical industries."[276] The lawsuit asserts that an emergency standard is warranted and that OSHA's failure to issue such a standard amounts to "a clear

273 Emergency Petition for a Writ of Mandamus, and Request for Expedited Briefing and Disposition, *In re* Am. Fed'n of Lab. & Cong. of Indus. Orgs., No. 20-01158 (D.C. Cir. filed May 18, 2020); Smithfield Packaged Meats Corp. v. U.S. Dep't of Lab., Occupational Safety & Health Admin., No. 4:20-mc-00018 (D.S.D. dismissed July 29, 2020); Complaint for Declaratory and Injunctive Relief, United Food & Com. Workers Union Local No. 227 v. U.S. Dep't of Agric., No. 1:20-cv-02045 (D.D.C. filed July 28, 2020).

274 Emergency Petition for a Writ of Mandamus, and Request for Expedited Briefing and Disposition, *supra* note 273, at 1—2.

275 Fatima Hussein, *AFL-CIO Sues OSHA to Force Temporary Worker-Safety Standard (2)*, Bloomberg L. (May 18, 2020, 10:26 AM) (updated 7:11 PM), https://news.bloomberglaw.com/safety/afl-cio-sues-osha-to-force-temporary-worker-safety-standard.

276 *Id.* (quoting Richard Trumka, AFL-CIO President).

abdication of statutory responsibility."[277] The lawsuit was dismissed by a three-judge panel on the D.C. Circuit Court of Appeals, stating that OSHA has the authority to decide when, and when not, to issue an ETS.[278] AFL-CIO sought a rehearing but was denied.[279]

Also in May 2020, the Center for Food Safety and the Food Chain Workers Alliance filed a rulemaking petition with OSHA, requesting that OSHA promulgate specific rules with respect to meatpacking facilities.[280] While AFL-CIO's actions broadly sought a COVID-19-related ETS, this action by nonprofits was solely focused on OSHA implementing mandatory standards for meatpacking workers.[281] The petition asked for mandatory protective gear, physical distancing, and paid sick leave.[282]

Litigation is ongoing in *Jane Does I, II, III v. Scalia,* a lawsuit filed in July 2020, against the DOL Secretary Scalia in his official capacity overseeing OSHA.[283] The suit, brought by three unidentified individuals, sought to compel OSHA to take action against the Pennsylvania meatpacker, Maid-Rite, to implement basic COVID-19 safety precautions.[284] The suit claimed that due to lax standards set by OSHA, many workers at the Maid-Rite plant became sick.[285] Workers from the plant had previously filed two complaints to OSHA. [286] The first filed in April was dismissed after Maid-

277 Emergency Petition for a Writ of Mandamus, and Request for Expedited Briefing and Disposition, *supra* note 273, at 5 (citations omitted).

278 Harper Neidig, *Appeals Court Rejects AFL-CIO Lawsuit Over Lack of COVID-19 Labor Protections*, HILL (June 11, 2020), https://thehill.com/regulation/court-battles/502249-appeals-court-rejects-afl-cio-lawsuit-over-lack-of-Covid-19-labor.

279 *In re* Am. Fed'n of Lab. & Cong. of Indus. Orgs., No. 20-01158, 2020 U.S. App. LEXIS 23837 (D.C. Cir. July 28, 2020) (denying petition for rehearing en banc).

280 *Food Safety and Worker Advocacy Organizations File Legal Action to Implement Mandatory Worker Safety Standards at Meatpacking Facilities*, CTR. FOR FOOD SAFETY (May 5, 2020), https://www.centerforfoodsafety.org/press-releases/6009/food-safety-and-worker-advocacy-organizations-file-legal-action-to-implement-mandatory-worker-safety-standards-at-meatpacking-facilities.

281 *Id.*

282 *See* Rulemaking Petition to the United States Department of Labor Occupational Safety and Health Administration at 3, CTR. FOR FOOD SAFETY (May 4, 2020), https://www.centerforfoodsafety.org/files/2020-05-04-osha-ets-petition_58890.pdf.

283 The workers are seeking anonymity out of fear of retaliation. It will be up to the court whether to allow this. Doe I v. Scalia, No. 3:20-cv-01260, 2021 WL 1197669 (M.D. Pa. Mar. 30, 2021), *appeal docketed*, No. 21-2057 (3d Cir. June 1, 2021). Fatima Hussein, *OSHA Asked to Inspect Meat Processing Plant for Virus Violations*, BLOOMBERG L. (July 23, 2020), https://news.bloomberglaw.com/safety/osha-asked-to-inspect-meat-processing-plant-for-virus-violations.

284 Craig Clough, *Pa. Meatpackers Sue OSHA to Compel COVID-19 Safety*, LAW360 (July 23, 2020), https://www.law360.com/foodbeverage/articles/1294682.

285 *Id.* (reporting that workers claim over 50% of the employees became sick).

286 *Id.*

Rite representatives told OSHA things were okay inside the plant.[287] The other filed in May cited an 'imminent danger' which requires OSHA to respond either with an investigation, or in writing explaining why they believe there is no imminent danger.[288] According to workers, OSHA did not fulfill either requirement; instead, it stated that not a single COVID-19 complaint is considered an 'imminent danger.'[289]

There is evidence that OSHA was aware of conditions that placed workers in imminent danger. For example, contradicting OSHA's own protocols, the OSHA inspector informed Maid-Rite of the inspection the day before, stating that her supervisor told her to give notice for her safety.[290] According to David Michaels, former Assistant Secretary of Labor for OSHA from 2009-2017, this act contradicts OSHA's own position—if the factory was too dangerous for the OSHA inspector to visit without prior notice, then how could it be so safe that no citations were warranted or that there was no imminent danger?[291] The DOL filed a motion to dismiss, warning that if the court sides with the plaintiffs it will lead to an "avalanche" of worker suits.[292]

In December 2020, OSHA informed Maid-Rite that it would not fine the company, despite COVID-19 infections among half the workforce.[293] Instead, OSHA recommended reconfiguring the workspace and installing physical barriers to better protect workers.[294] Relying on this letter, the DOL encouraged the court to dismiss the lawsuit.[295] The plaintiffs, meanwhile, pointed to OSHA's lack of enforcement as further proof that the court

287 *Id.*; Complaint and Emergency Petition for Emergency Mandamus Relief, *supra* note 56, at 4.

288 Employees say that the dangers could be abated if Maid-Rite "will simply assume the costs" such as slowing the production line to allow for more spacing. Complaint and Emergency Petition for Emergency Mandamus Relief, *supra* note 56, at 3.

289 *Id.* at 6–7.

290 Clare Roth, *U.S. Inspector Called Ahead of Meat Plant Visit, to Be Safe*, Bloomberg (Aug. 14, 2020) (updated Aug. 15, 2020), https://www.bloomberg.com/news/articles/2020-08-15/u-s-inspector-called-ahead-of-meat-plant-visit-just-to-be-safe.

291 Bryce Covert, *OSHA Blamed for Going AWOL During COVID-19*, FairWarning (Oct. 6, 2020), https://www.fairwarning.org/2020/10/oshas-business-friendly-approach-fails-to-protect-workers-threatened-by-Covid-19-critics-say/.

292 Fatima Hussein, *DOL Warns of Worker Safety Case 'Avalanche' in Maid-Rite Lawsuit*, Bloomberg L. (July 29, 2020), https://news.bloomberglaw.com/daily-labor-report/dol-warns-of-worker-safety-case-avalanche-in-maid-rite-lawsuit.

293 Robert Burnson, *Meat Plant Cleared by Agency Under Fire for Lax Virus Policing*, Bloomberg L. (Dec. 2, 2020), https://news.bloomberglaw.com/safety/meat-plant-cleared-by-agency-under-fire-for-lax-virus-policing?context=article-related.

294 *Id.*

295 Suggestion of Mootness, Doe I v. Scalia, No. 3:20-cv-01260, 2021 WL 1197669 (M.D. Pa. Mar. 30, 2021), *appeal docketed*, No. 21-2057 (3d Cir. June 1, 2021).

needed to intervene.[296] In a court filing in January 2021, the DOL argued that the decision not to issue a citation meant the court had "no meaningful or effective relief" to provide, and effectively "no jurisdiction to second guess or override OSHA's decision."[297] The plaintiff's attorney decried the motion for mootness as "fundamentally wrong" and is still determining how best to respond.[298]

b. State OSHA

Other states which run state-OSHA programs—Virginia[299], Oregon,[300] and Michigan[301]—have issued their own ETS or their equivalent.[302] Virginia was the first to issue an ETS which went into effect on July 27, 2020.[303] Fourteen states have now issued some form of extended workers protections due to COVID-19, either through executive order, ETS, or guidance that they intend to enforce.[304] Many of these orders and standards include, among other things: physical distancing of six feet, providing facemasks to all employees if distancing is impossible, requiring customers to wear masks, improving ventilation, and notifying workers when cases are found.[305]

Labor groups including NAACP, AFL-CIO, and NC Raise Up, filed a petition for rulemaking with the North Carolina Department of

296 Response to Letter from Occupational Health and Safety Administration at 1, *Doe I*, 2021 WL 1197669.

297 Fatima Hussein, *No Covid Citations Against Maid-Rite Moots Safety Suit, DOL Says*, BLOOMBERG L. (Jan. 13, 2021), https://news.bloomberglaw.com/safety/no-covid-citations-against-maid-rite-moots-safety-suit-dol-says (quoting OSHA's suggestion of mootness letter).

298 *Id.*

299 Emergency Temporary Standard - Infectious Disease Prevention: Sars-Cov-2 Virus that Causes Covid-19, 16 VA. ADMIN. CODE §§ 25-220-10 to -90 (2020) (amended 2021).

300 OR. ADMIN. R. 437-001-0744 (2020) (amended 2021) (addressing workplace risks caused by COVID-19).

301 MICH. ADMIN CODE r. 408E-2.2020 (2020) (amended 2021).

302 All three states are under State OSHA plans. *State Plans*, U.S. DEP'T LAB., https://www.osha.gov/stateplans/ (last visited Nov. 15, 2021.

303 Deborah Berkowitz, *Which States and Cities Have Adopted Comprehensive COVID-19 Worker Protections?*, NAT'L EMP. L. PROJECT: BLOG (June 9, 2021), https://www.nelp.org/blog/which-states-cities-have-adopted-comprehensive-covid-19-worker-protections/; *see also* 16 VA. ADMIN. CODE §§ 25-220-10 to -90.

304 These states include California, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington. Berkowitz, *supra* note 303.

305 *Id.*

Labor, asking for them to issue an emergency temporary standard to protect workers from coronavirus.[306] The complaint is largely looking for similar protections as the other states who have issued an ETS: employers would be required to provide PPE for employees, customers would be required to wear masks, facilities would be required to improve ventilation, individuals would be required to submit to temperature checks, and companies would be required to report COVID-19 cases.[307] These groups are saying the voluntary guidance currently in place does not do enough to protect workers.[308] Executive Director Illana Dubester of The Hispanic Liaison, one labor group joining the petition, stated that thousands of workers were getting sick in meat and poultry factories and spreading it throughout the community, noting, "[t]hese workers, deemed essential, are being treated as expendable by their employers and by our state officials."[309] According to Dubester, voluntary guidance is not enough to protect workers, they need enforceable rules and enforcement from the NCDOL.[310]

Another claim, outside of the meatpacking context, illustrates a clear instance of agricultural workers and unions litigating for better conditions.[311] In Washington state, "[t]wo unions have filed a lawsuit seeking to force Washington's state labor and health departments to issue rules to protect immigrant [and non-immigrant] farmworkers during the coronavirus pandemic, saying non-binding guidance released by the agencies is inadequate."[312] In *Familias Unidas Por La Justicia v. Washington Department of Labor & Industries*, plaintiffs argue that departments failed their "statutory duties to issue health and safety standards" by issuing non-mandatory and confusing guidelines.[313] Plaintiffs are seeking injunctive relief in the form of

306 Jonathan Crotty, *Labor Groups Petition North Carolina for COVID-19 Workplace Safety Standard*, JD Supra (Nov. 6, 2020), https://www.jdsupra.com/legalnews/labor-groups-petition-north-carolina-81859/.

307 *Id.*

308 Julia Hawes, *Workers' Rights Advocates Petition NC Department of Labor to Adopt a Rule that Would Protect Workers During COVID-19 Pandemic*, N.C. Just. Ctr. (Oct. 12, 2020), https://www.ncjustice.org/workers-rights-advocates-petition-nc-department-of-labor-to-adopt-a-rule-that-would-protect-workers-during-Covid-19-pandemic/.

309 *Id.*

310 *Id.*

311 Petition for Judicial Review, Declaratory Judgment and Injunctive Relief, Familias Unidas Por La Justicia v. Wash. State Dep't. of Lab. & Indus., No. 20-2-01556-34 (Wash. Super. Ct. June 4, 2020).

312 Daniel Wiessner, *Unions Demand Wash. Labor and Health Agencies Protect Farmworkers from COVID-19*, Reuters (Apr. 17, 2020), https://www.reuters.com/article/labor-farms/unions-demand-wash-labor-and-health-agencies-protect-farmworkers-from-covid-19-idUSL1N2C51D3.

313 *Id.*

an emergency rule to protect workers.[314] These lawsuits serve as examples of workers and unions suing their own state for failure to quickly and adequately promulgate mandatory labor standards to protect workers.[315]

5. Shareholder and Antitrust Suits

Three class action lawsuits allege Securities Exchange Act and Sherman Act violations and are worth noting to illustrate the wide-ranging scope of COVID-19 litigation. While these cases are not about workplace safety, per se, they provide insight into a company culture that did not prioritize workers, shareholders, or consumers.

The first two cases are shareholder cases. The first, *Guo v. Tyson Foods, Inc.,* was filed on February 2, 2021, in a New York federal court. The complaint alleges that defendants throughout the class period (beginning on March 13, 2020, when the U.S. State of Emergency was declared) knew or should have known that the coronavirus was highly contagious and that the company did not have adequate safety protocols to protect its workers, that Tyson made public statements that were materially false and/or misleading to investors about its response; ultimately leading to complete shutdowns of some facilities and significantly lowered production.[316] The proposed class action against the company alleges it made materially false and misleading misrepresentations about worker safety and other issues in violation of the Securities Exchange Act.[317]

The second suit, *Hugues v. Tyson,* also filed by a Tyson shareholder, similarly alleges that Tyson failed to maintain safety measures necessary to keep meatpacking plants open and failed to alert employees when their co-workers got sick.[318] With three times as many COVID-19 cases and double the related deaths as compared to other meatpacking companies, these statistics from the Tyson plant and the potential Securities and Exchange

314 *Id.*; *see also* Jocelyn Sherman, *Farm Worker Unions File Emergency Petition for Judicial Review, Citing Urgent Need for 'Clear and Decisive Action' to Protect WA Farm Workers*, UNITED FARM WORKERS (Apr. 16, 2020), https://ufw.org/lnicividwa/.

315 *See* Gabe Guarente, *Farmworkers Unions Sue Washington State Over Lack of Adequate COVID-19 Protections*, SEATTLE EATER (Apr. 17, 2020), https://seattle.eater.com/2020/4/17/21224996/farmworkers-unions-sue-washington-state-Covid-19-protections.

316 Hailey Konnath, *Tyson Hit with Investor Suit Over Lackluster Virus Response*, LAW360 (Feb. 2, 2021), https://www.law360.com/articles/1351425/tyson-hit-with-investor-suit-over-lackluster-virus-response.

317 Class Action Complaint for Violations of the Federal Securities Laws at 5–9, Guo v. Tyson Foods, Inc., No. 1:21-cv-00552 (E.D.N.Y. Feb. 2, 2021).

318 Verified Shareholder Derivative Complaint at 2–3, Gervat v. Tyson Foods, Inc., No. 1:21-cv-00730 (E.D.N.Y. Feb. 10, 2021).

Commission investigation into Tyson practices, led Tyson's stock price to drop 2.5% and market capitalization to drop $560 million from December 14 to 15, 2020.[319]

In the third class action suit, *Samuels. v. Cargill Inc.*, plaintiff grocers allege antitrust violations, naming JBS USA, Tyson Foods, Cargill, and National Beef Packing Company as defendants.[320] Plaintiffs allege that these beef packers intentionally agreed to buy and slaughter fewer cattle than they had capacity to process, which effectively reduced the supply of beef and made grocers pay more for beef.[321]

B. *Defendants Make Their Case*

Lawsuits against the meatpacking plants have alleged that OSHA standards and recommendations have not been followed by employers. These lawsuits generally plead that the employer failed to implement certain safeguards and protocols, which led to the transmission of COVID-19 in the workplace and resulted in the decedents' passing. The litigation suggests that meatpacking plants adopted a litigation strategy to move cases to early dismissal using different approaches and force removal to federal jurisdiction. Defendants relied upon: (1) workers' compensation preemption, (2) primary jurisdiction preemption, and (3) state liability shield preemption.

1. Workers' Compensation Preemption

Workers' compensation preemption arises when lawsuits are preempted by workers' compensation laws. For instance, Tyson Foods Inc. asked a federal court in Iowa to dismiss two cases brought by families of meatpacking workers, employees Isidro Fernandez and Michael Everhard, who died after contracting COVID-19 using workers' compensation preemption; arguing that claims must proceed through the workers' compensation system instead of court.[322] For employees who were denied workers' compensation claims for COVID-19 exposure, a negligence or

319 *Id.* at 4, 34; *see also Tyson Foods Market Cap*, YCharts, https://ycharts.com/companies/TSN/market_cap (last visited July 25, 2021) (showing market cap dropped from $25.46 Billion on Dec. 14, 2020, to $24.90 Billion on Dec. 15, 2020).

320 Samuels v. Cargill, Inc. (*In re* DPP Beef Litig.), Ch. 7 Case No. 0:20-cv-01319 (D. Minn. filed June 6, 2020).

321 Class Action Complaint at 3–4, *In re* DPP Beef Litig., No. 0:20-cv-01319.

322 Chris Marr & Fatima Hussein, *Amid Virus Shield Laws and Workers' Comp, Lawyers Seek Gaps (1)*, Bloomberg L. (Feb. 18, 2021. 5:31 AM) (updated 10:20 AM), https://news.bloomberglaw.com/daily-labor-report/virus-liability-shields-can-be-redundant-making-exceptions-key.

wrongful death lawsuit is the only form of relief available. In these suits, plaintiffs may be able to raise an exemption to workers' compensation law. In some states, if the employer acted recklessly or intentionally, the employee could have a legal remedy. In Texas where state law does not require employers to carry workers' compensation insurance, employers who have opted out could be subject to legal liability if employees allege they contracted COVID-19 at work.[323]

2. OSHA Primary Jurisdiction

The doctrine of primary jurisdiction stands as another obstacle to plaintiff litigation. Primary jurisdiction is a common-law doctrine utilized to coordinate judicial and administrative decision making.[324] This doctrine is applied for two main reasons: (1) to take advantage of the expertise and experience of agencies, and (2) to promote uniformity in an industry or field of regulation (since multiple court rulings on issues may lead to a patchwork of enforcement, it may be unwise for the courts to handle it rather than the agency that regulates the whole field). [325] This primary jurisdiction doctrine has rarely been applied to unsafe work conditions and OSHA in the past; typically being confined to actions with the FDA and EPA. Since OSHA has indicated reluctance to engage in these disputes, courts may have more reason to adjudicate the claims.[326]

Two cases highlight two competing interpretations of the primary jurisdiction doctrine as used in the Eighth and Third Circuit Courts. The *Rural Community Workers Alliance v. Smithfield Foods* case is one such case in which the court has ruled on a primary jurisdiction issue in regard to COVID-19.[327] In this case, worker advocacy organization, Rural Community Workers Alliance sued Smithfield on behalf of an employee, alleging that Smithfield failed to adequately protect workers at the plant from COVID-19.[328] The court found that (1) OSHA was better positioned than District Court to

323 *A Quick Guide to Workers' Compensation in Texas*, EMPLOYERS, https://www.employers.com/blog/2019/a-quick-guide-to-workers-compensation-in-texas/ (last visited Sept. 1, 2021).

324 Aliza Karetnick et al., *Insight: Doctrine of Primary Jurisdiction–an Ace for Dismissing Covid-19 Suits?*, BLOOMBERG L. (June 11, 2020), https://news.bloomberglaw.com/daily-labor-report/insight-doctrine-of-primary-jurisdiction-an-ace-for-dismissing-covid-19-suits.

325 *Id.*

326 *Id.*

327 *See* Rural Cmty. Workers All. v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228, 1241 (2020) (dismissing without prejudice so plaintiffs can seek relief for the issue falling "squarely within OSHA/USDA's jurisdiction").

328 *Id.*

determine whether the meatpacking plant owner and operator were complying with joint guidance issued by OSHA and the CDC; (2) OSHA had expertise and experience with workplace regulation; (3) determination of whether owner and operator was complying with joint guidance went to the heart of OSHA's special competence; and (4) OSHA had already shown interest in determining whether the plant was abiding by joint guidance by sending owner and operator a request for information regarding COVID-19 work practices and infection the plant the day before lawsuit was filed.[329]

In *Rural Community Workers Alliance v. Smithfield Foods*, the court was guided by several factors. Since the claims fully rely on whether the plants are complying with the joint guidance on workplace safety put forth by the CDC, OSHA, and the USDA, the court found that the agencies are in a better position to make a determination.[330] The court also found that deference to OSHA and the USDA is the only way in which they could ensure a uniform national enforcement of the joint guidance; especially when guidance is changing rapidly, there must be a uniform source for guidance.[331] The court also highlights that if OSHA does not act quickly to enforce safety measures, relief could come with the Secretary of Labor petitioning the court to cease the dangerous conditions.[332] This, however, is unlikely to occur, as the Secretary of Labor has stated that the guidance is sufficient. These factors are surely to guide the Eighth Circuit in future decisions.

Benjamin v. JBS was the first decision where defendants' motion to use primary jurisdiction failed.[333] Since this decision differs from the earlier case outcome, it is important to note that the court relied upon the following four factors to determine that primary jurisdiction did not apply:

> (1) [w]hether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) [w]hether the question at issue is particularly within the agency's discretion; (3) [w]hether there exists a substantial danger of inconsistent rulings; and (4) [w]hether a prior application to the

329 Rural Cmty. Workers All., 459 F. Supp. 3d at 1240–41.

330 *Id.*

331 *Id.* at 1241.

332 *Id.*

333 *Compare* Motion to Dismiss of Defendants JBS USA Food Company, JBS USA Holdings, Inc., JBS Souderton, Inc., and Pilgrim's Pride Corporation Pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6) at 21–27, Benjamin v. JBS S.A., 516 F. Supp. 3d 463 (E.D. Pa. 2021) (No. 2:20-cv-02594) (arguing for stay or dismissal under primary jurisdiction doctrine), *with Benjamin*, 516 F. Supp. 3d 463 (remanding to state court and making no mention of primary jurisdiction doctrine).

agency has been made. [334]

Defendants, meanwhile, argued that these same factors show that the primary jurisdiction doctrine should prevail. In their view, dealing with the COVID-19 pandemic takes the case out of the conventional experience of judges and into the expertise of the agencies promulgating the guidance.[335]

3. State Liability Shields

State liability shields which are spreading across Republican-majority state legislatures have the potential to be the next strategic device used by defendants. We do not know whether courts will uphold these shields, however, as they have not yet been tested in courts.[336] Most liability shields require plaintiffs to prove gross negligence setting a high bar for recovery. Despite the urging of Republican Governor Greg Abbott, the Texas state legislature has not yet passed a liability shield law.[337] All but one of the personal injury lawsuits examined were filed before state liability shields were passed—even then, all liability shields are retroactive to the start of the pandemic. It will be interesting to see how the Iowa liability shield will affect the litigation against Tyson, for outbreaks in the Waterloo, IA, plant.[338] The other personal injury cases filed against the big three meatpacking plants were filed in states that, to date, do not have liability shields (PA, TX, and MO).

4. The Executive Order "Made Me Do It"

Meatpacking companies have used the April 28, 2020, Executive Order as a defense. In the July 2, 2020, notice of removal of the *Hernandez* wrongful death claim, defendants stated that the President "made them do it."[339] The defendants in the *Benjamin* case also argued that the suit should remain in federal court because it involved the former President Trump's

334 Baykeeper v. NL Indus., Inc., 660 F.3d 686, 691 (3d Cir. 2011).

335 Motion to Dismiss of Defendants JBS USA Food Company, JBS USA Holdings, Inc., JBS Souderton, Inc., and Pilgrim's Pride Corporation Pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), *supra* note 333, at 21–27.

336 Marr & Hussein, *supra* note 322.

337 *Id.*

338 Petition at Law and Demand for Jury Trial, *supra* note 8, at 9; S. File 2338, 88th Gen. Assemb., 2d Sess. (Iowa. 2020) (creating a broad liability shield that has an exemption for reckless disregard or actual malice and that was passed on June 18, 2020, retroactive to January 1, 2020).

339 Hussein, *supra* note 204.

April 28, 2020, Executive Order, however the court rejected the argument.[340]

IV. Solutions

Meatpacking workers, and their detailed stories found in the litigation, tell a consistent story: as they were deemed "essential" they were also ignored. Since the start of the pandemic, the big three meatpacking companies (among others), did not maintain safe workplaces for their employees and federal and state regulators did not perform their duty to protect those they are sworn to protect. The regulatory system which supported the meatpacking industry for decades failed workers when they needed it the most.

The litigation highlights that legal pressure has not provided an incentive to make companies adopt precautionary measures or for regulators to inspect and cite plants and to enact an ETS. To be sure, plaintiffs have seen some victories (*see Benjamin*), but COVID-19 has slowed the pace of litigation, most cases are ongoing, and more cases will surely follow. Plaintiffs will continue to bring claims in negligence and wrongful death, claims against OSHA and shareholder claims will surely persist. Defendants, meanwhile, will continue to use their principal defenses: the Executive Order "made me do it", workers' compensation preemption, primary jurisdiction preemption and in the future, a liability shield defense may be raised. Litigation may have difficulty surviving arguments that OSHA should handle the claims. Especially as OSHA continues to issue guidance (albeit non-mandatory guidance) addressing more specific workplace concerns, courts might be more likely to defer to the agency. As the litigation endures, OSHA and state governments can take affirmative steps to create safer workplaces, to help meatpacking workers expand their avenues for relief.

President Joe Biden's Executive Order[341] calling for OSHA to launch an enforcement program focused on COVID-19 violations and to promulgate an ETS is likely to lead to more business inspections,[342] potentially impacting litigation.[343] The question remains what form the new

340 Y. Peter Kang, *Meatpacking Co. Can't Keep Virus Death Suit in Federal Court*, Law360 (Feb. 1, 2021), https://www.law360.com/employment-authority/articles/1350258/meatpacking-co-can-t-keep-virus-death-suit-in-federal-court.

341 Exec. Order No. 13,999, 86 Fed. Reg. 7,211 (Jan. 21, 2021).

342 Bruce Rolfsen, *Biden's OSHA Virus Plan Promises Frontline Enforcement Boost*, Bloomberg L. (Feb. 2, 2021), https://news.bloomberglaw.com/safety/bidens-osha-virus-plan-promises-frontline-enforcement-boost.

343 Fatima Hussein, *OSHA Virus Emergency Rule Looms As Potent Weapon for Litigation*, Bloomberg L. (Feb. 12, 2021), https://news.bloomberglaw.com/daily-labor-report/osha-virus-emergency-rule-looms-as-potent-weapon-for-litigation.

ETS will take. [344]

In the meantime, OSHA has made progress implementing a National Emphasis Program (NEP)[345] that (1) targets employers at the heart of large COVID-19 outbreaks and complaints by increasing inspections and whistleblower protections[346] and (2) updates an OSHA Interim Enforcement Response Plan.[347] An NEP is a directive from OSHA that focuses its resources on a specific risk or hazard—previously they had been issued for amputations in manufacturing industries and respirable Crystalline Silica for example.[348] The NEP targets employers who have been the source of large outbreaks or multiple complaints for unsafe working conditions, including meat and poultry processing plants.[349] These workplaces will be the target of heightened enforcement efforts as well as a heightened focus on preventing retaliation for whistleblowers.[350] Enforcement for the NEP provisions began on March 25, 2021, and will stay in place for one year with the potential for extension or shortening depending on the pandemic.[351] Any OSHA State Plan state will have sixty days to notify OSHA that they are either adopting the NEP, relying on their own standards, or not adopting the NEP.[352] While the federal OSHA highly recommends adoption of the NEP, it is not required.[353] Under a typical NEP, OSHA must conduct outreach at least ninety days prior to initiating an inspection; however, OSHA argued that

344 John F. Martin & Arthur G. Sapper, *President Biden Issues Executive Order Promising Fast Movement by OSHA on COVID-19—Can It Deliver?*, OGLETREE DEAKINS (Jan. 22, 2021), https://ogletree.com/insights/president-biden-issues-executive-order-promising-fast-movement-by-osha-on-covid-19-can-it-deliver/.

345 U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., DIR 2021-01 (CPL-03), NATIONAL EMPHASIS PROGRAM – CORONAVIRUS DISEASE 2019 (COVID-19) (2021), https://www.osha.gov/sites/default/files/enforcement/directives/DIR_2021-01_CPL-03.pdf.

346 Nicholas Hulse & Travis Vance, *OSHA Signals More COVID-19 Inspections Are Coming: 5 Steps for Employers to Prepare for the National Emphasis Program*, JD SUPRA (Mar. 15, 2021), https://www.jdsupra.com/legalnews/osha-signals-more-covid-19-inspections-9086971/.

347 Memorandum from Patrick J. Kapust, Acting Dir., Directorate of Enf't Programs, Occupational Safety & Health Admin., to Reg'l Adm'rs, State Plan Designees, Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) (2021), https://www.osha.gov/memos/2021-03-12/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19.

348 E. Phileda Tennant, *OSHA's National Emphasis Program for COVID-19 Inspections: Things to Look For*, JD SUPRA (Apr. 9, 2021), https://www.jdsupra.com/legalnews/osha-s-national-emphasis-program-for-1651430/.

349 *Id.*

350 *Id.*

351 Memorandum from Patrick J. Kapust, Acting Dir., Directorate of Enf't Programs, Occupational Safety & Health Admin., *supra* note 347.

352 Hulse & Vance, *supra* note 346.

353 *Id.*

the national outreach regarding the pandemic over the last year has satisfied this requirement, allowing immediate inspections to begin.[354] OSHA also has instructed inspections to be conducted on-site wherever practical unless the only available inspector has a medical concern. [355]

Other steps beyond the NEP may follow. The following paragraphs focus on how the meatpacking litigation and state best practices can inform the development of: (1) a new federal OSHA ETS, based on the Virginia model, to guide COVID-19 inspections and citations, and (2) state level reform of workers' compensation program to provide meatpacking employees with benefits for COVID-19 workplace exposure. These two reforms will exert pressure on firms by adding costs—fines associated with OSHA non-compliance with a new ETS, and worker compensation payouts for employees who contract COVID-19 on the job—to adopt necessary workplace safety precautions.

A. *A New Federal OSHA Standard*

Given claims that meatpacking plants have not met OSHA and the CDC voluntary guidelines, a new federal ETS for the meatpacking industry will provide companies with concrete, required measures to adopt to prevent the spread of COVID-19 and will provide OSHA with a benchmark for inspections and citations. This is in addition to preventative measures that employees can take, such as vaccination.[356]

An ETS for the meatpacking industry would not require notice-and-comment rulemaking, thus being a far more rapid way to implement safety regulations.[357] This ETS would act as a notice of proposed rulemaking, starting the six-month timeline for OSHA to promulgate a final standard.[358] In order to pass an ETS, OSHA must show that employees are in "grave danger," which could prove challenging as more employees are receiving

354 Robert Foster & Ashley Hirano, *OSHA Adopts New COVID-19 National Emphasis Program to Increase Its Enforcement Efforts*, Sheppard Mullin: Lab. & Emp. L. Blog (Mar. 22, 2021), https://www.laboremploymentlawblog.com/2021/03/articles/coronavirus/osha-nep-enforcement-efforts/.

355 *Id.*

356 Josh Funk, *Thousands of Meatpacking Workers to Be Vaccinated this Week*, AP News (Mar. 1, 2021), https://apnews.com/article/iowa-coronavirus-pandemic-waterloo-0c47b2fbe8f9919753c0d4b181ca15be (noting that the United Food and Commercial Workers International Union and the North American Meat Institute pressured the governors of all 50 states to put meat and poultry workers at a high priority for vaccinations; Iowa has stated that plant workers will be eligible for the vaccine as soon as February 1, 2021).

357 Martin & Sapper, *supra* note 344.

358 *Id.*

COVID-19 vaccines.[359] However, given ongoing outbreaks and continued lack of oversight, there is a strong case to be made that employees continue to be in "grave danger." In addition, OSHA does have a proposed airborne infectious disease rule that was originally drafted in 2009 in response to the H1N1 flu outbreak, which may make it easier to draft the current rule.[360] The Heroes Act, approved by the U.S. House of Representatives in 2020, also included an outline for a rule which may assist OSHA.[361]

A new ETS can be modeled after one of more successful ETS state-level plans. As noted earlier, as COVID-19 cases started to rise, states began to pass liability shields and narrow avenues for workers' compensation relief. A few states went in the opposite direction and instead opted to increase protections for workers. These COVID-19 standards are in large part due to the lack of action on the federal level from OSHA. Fourteen states have adopted comprehensive COVID-19 worker safety protections as of June 9, 2021.[362] Some states issued executive orders with worker protections, Virginia issued a first-ever Emergency Standard to protect workers, and Oregon and Michigan issued temporary standards. Other states have issued guidelines.[363]

The Virginia ETS should be used to draft the new federal OSHA ETS. Virginia was the first, and so far only, state to pass temporary legislation requiring employers to protect employees from COVID-19 while at work.[364] The permanent rule follows what was, at the time, the first ETS, which went into effect July 27, 2020.[365] The ETS required employers who were covered by the Virginia Occupational Safety and Health program to comply with all guidance issued by the CDC and contained potential for fines in excess of $130,000 for repeat or willful violations.[366] The new permanent rule, passed by the Virginia Safety and Health Codes Board, replaced the ETS that was set to expire on January 26, 2021.[367] The new rule maintains most of

359 *See id.*

360 Bruce Rolfsen, *Biden Calls for Tougher OSHA Covid-19 Enforcement, Signs Order (1)*, BLOOMBERG L. (Jan. 21, 2021, 4:06 PM) (updated 6:12 PM), https://news.bloomberglaw.com/daily-labor-report/biden-calls-for-tougher-osha-covid-19-enforcement-signs-order.

361 *Id.*

362 Berkowitz, *supra* note 303.

363 *Id.*

364 *Id.*

365 *Id.*

366 *Id.*

367 Bruce Rolfsen, *Virginia Adopts First Permanent Workplace Virus Rule in U.S. (1)*, BLOOMBERG L. (Jan. 13, 2021, 5:43 PM) (updated 6:52 PM), https://news.bloomberglaw.com/safety/virginia-adopts-first-permanent-workplace-virus-rule-in-u-s; *see also* Bruce Rolfsen, *Virginia's First-in-U.S. Worker Virus Safety Rule Takes Effect*, BLOOMBERG L. (July 27, 2020), https://news.bloomberglaw.com/safety/virginias-first-in-u-s-worker-virus-safety-rule-takes-effect.

the previous ETS by continuing to group jobs in very high, high, medium, and low risk categories and applying different safety standards based on that classification.[368] Some of the included rules or precautions include: no enforcement actions against healthcare providers or other employers attempting in good faith to provide PPE, but failing due to short supply; requiring employers to provide telework or staggered shifts when feasible; provide COVID-19 training to all employees, except those deemed "low-hazard"; prepare infectious disease preparedness plans; and it adopts time-based return to work requirements consistent with the CDC guidelines.[369] The Virginia ETS does not expire until Governor Northam lifts the state of emergency, and the state's Safety and Health Codes Board agrees there is no longer a need. Unlike California's rule, Virginia does not have any requirements regarding paid leave for those exposed to COVID-19 at work nor does it require employee testing after a workplace outbreak.

And yet, some details of a new ETS still need to be determined. For example, the state will need to determine the way that a new ETS will impact litigation and how a new ETS will operate in states that have passed their own COVID-19 liability protections. A new OSHA temporary standard may have an impact on litigation.[370] Citations may be used to evidence employer wrongdoing in certain types of cases—such as personal injury or wrongful death—and they may also be used to meet the "on the job" bar in workers compensation claims.[371]

It is uncertain how a federal OSHA standard would interact with these state COVID-19 liability shields. State law, it seems, would still apply and there would not be any preemptive force to a new federal standard. An ETS through OSHA would, perhaps, create for some litigants a duty of care in a negligence claim against a business.

There is good reason for OSHA to take the time necessary to ensure the new ETS is supported by data and science before promulgation. Emergency standards are rare, and are meant to bypass the normal notice-and-comment rule-making process required of agencies.[372] OSHA has issued nine emergency standards over the agency's history but of the six

368 Courtney Malveaux, *Virginia Passes Permanent Standard on COVID-19*, EHS Today (Jan. 19, 2021), https://www.ehstoday.com/covid19/article/21152614/virginia-passes-permanent-standard-on-covid19.

369 *Id.*

370 Hussein, *supra* note 343.

371 *Id.*

372 Dori Goldstein, *Analysis: OSHA Emergency Covid Rule Imminent, but Vulnerable*, Bloomberg L. (Apr. 29, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-osha-emergency-covid-rule-imminent-but-vulnerable.

that were challenged, only one was successfully implemented.[373] The courts have been hesitant to allow such standards to go into place as they have likened them to agency-made legislation.[374] The last ETS to go into effect was in June 2021, for COVID-19 in the healthcare industry. [375] It is likely that courts would be skeptical of a COVID-19 standard for meatpacking. One potential challenge will be showing that workers in meatpacking plants continue to be in "grave danger" from COVID-19 and that an ETS is necessary in order to protect them.[376] This is especially challenging with increasing vaccination rates leading to lower risk of spread, a point business groups are quick to point out.[377] However, Rebecca Reindel, the AFL-CIO's Director of Occupational Safety and Health, said that enforceable standards are still necessary even with rising vaccination rates.[378]

B. *Reforming State Worker's Compensation Systems*

Reforming workers' compensation would enable employees to claim benefits for COVID-19 exposure in the workplace.[379] Many states are experimenting with different approaches to expanding workers' compensation eligibility. A common approach is to amend state policy to allow for a presumption that COVID-19 infections in certain workers are presumed to be work-related and covered under worker's compensation. By placing the burden on the employer and insurer to prove that the infection was not work-related, this simplifies the process for workers to file successful claims. To summarize statewide policies, as of December 9, 2020, seventeen states and Puerto Rico have added a presumption, extending workers' compensation coverage to include COVID-19 as a work-related illness, and nine states have enacted legislation creating a presumption of coverage for various types of workers.[380] For instance, Minnesota, Utah, and Wisconsin limit coverage to first responders and healthcare workers.

373 *Id.*

374 *Id.*

375 *See* 29 C.F.R. §§ 1910.502, .504, .505, .509 (2021).

376 *See* Goldstein, *supra* note 372.

377 *See, e.g.*, Bruce Rolfsen, *Emergency OSHA Covid Rule Drawn Out by More White House Meetings*, BLOOMBERG L. (May 7, 2021), https://news.bloomberglaw.com/daily-labor-report/emergency-osha-covid-rule-drawn-out-by-more-white-house-meetings.

378 *Id.*

379 *See* Brooke C. Bahlinger & Carrie Hoffman, *A Shield for Employers: State COVID-19 Indemnity Laws*, FOLEY (June 22, 2020), https://www.foley.com/en/insights/publications/2020/06/shield-employers-state-covid-19-indemnity-laws.

380 *See* Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. STATE LEGISLATURES (Dec. 9, 2020), https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx.

Illinois, New Jersey, and Vermont cover all essential workers. California and Wyoming cover all workers.[381] States have used different powers to bring about these changes. While four states have used executive branch authority to implement presumption policies for first responders and health care workers, four states including California and Kentucky have taken executive action to provide coverage to other essential workers like grocery store employees.[382] All other states with liability shields have not chosen to expand workers' compensation coverage, or proposed amendments, as of yet, leaving many employees with few or no options for recourse.[383]

California's Executive Order N-62-20 (Senate Bill 1159) stands as an example of a workers' compensation system that was re-worked and expanded for COVID-19.[384] The California bill has conditions that need to be met prior to receiving the presumption[385] and an avenue for employers to dispute the presumption and controvert it with other evidence.[386] The California Executive Order is broad, covering *all workers* so long as they meet the criteria set out in § 1(a-d):

> (a) the employee tested positive for COVID-19, or was diagnosed, within 14 days of performing labor or services at their place of employment; (b) the day referenced in (a) was on or after March 19, 2020[387]; (c) the employee's place of employment was outside their residence; and (d) the diagnosis of COVID-19 was done by a licensed physician and that diagnosis is confirmed by testing

381 *See id.*

382 *See id.*

383 *State Action on Coronavirus*, Nat'l Conf. State Legislatures, https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx (Sept. 17, 2021) (compiling user-manipulated database of state COVID-19 legislation). This consists of: Idaho, Iowa, Georgia, Kansas, Mississippi, Nevada and Oklahoma. Kansas had proposed legislation but it died in House Committees. *See Orders and Other Authority or Guidance to Provide Workers' Compensation (WC) Coverage for COVID-19*, Ogletree Deakins, https://ogletree.com/app/uploads/covid-19/COVID-19-Workers-Compensation-Coverage.pdf?Version=12 (June 14, 2021) (compiling states' COVID-19-related amendments to workers' compensation and other laws). *See generally* Covert, *supra* note 117; Melissa Bailey & Christina Jewett, *Families of Health Workers Killed by COVID Fight for Denied Workers' Comp Benefits*, KHN (July 13, 2020), https://khn.org/news/adding-to-covid-stress-families-of-health-workers-fight-for-denied-workers-comp-benefits/.

384 Cal. Exec. Order No. 62-20 (May 6, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20.pdf.

385 S. 1159, 2019-2020 Reg. Sess. § 2 (Cal. 2020).

386 *Id*.

387 This was the day Governor Newsom issued Executive Order N-33-20 directing all residents to stay at home. *See* Cal. Exec. Order No. 33-20 (Mar. 19, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf.

within 30 days of diagnosis.[388]

California later passed SB 1159[389] which practically codifies EO 62-20, creating a presumption of coverage for COVID-19 and making injuries due to related illness compensable.[390] This statute includes a provision that requires employees to use all sick leave benefits available in response to COVID-19 before they are eligible for disability benefits.[391]

Coupled with a new federal ETS, OSHA inspections and citations can, in turn, be used by meatpacking employees and their families as evidence of injury in their worker's compensation proceedings, and as evidence of wrongdoing in any wrongful death and negligence lawsuits that may arise. Both of these recommendations will force meatpacking plants to take necessary measures to increase workplace safety to prevent COVID-19 spread.

CONCLUSION

The COVID-19 meatpacking exposure litigation tells many stories with one consistent theme: at a time when meatpacking work and workers were deemed "essential," their injuries were ignored. Litigation advanced by meatpacking employees during the pandemic paints a picture of how traditional workplace safety governance mechanisms—such as industry self-regulation and state and government regulation—failed those who needed it most, the workers themselves. As COVID-19 illnesses surged, instead of increasing workplace safety, evidence suggests that employers, states, and federal agencies limited protections.

Litigation reveals regulatory gaps and breaches in workplace safety such as lax enforcement of OSHA with no ETS, state attempts to narrow coverage for workers' compensation during COVID-19, and state efforts to draft liability shields. OSHA was criticized for not preventing virus spread in the meatpacking plants by offering recommendations instead of an emergency rule and by applying scant oversight and negligible penalties despite widespread virus outbreaks at the plants.

This Article recommends a new OSHA ETS modeled after the Virginia State ETS, and a reform of worker's compensation programs modeled after California's workers' compensation system. These solutions can inform three discussions: (1) the new House Select Subcommittee on

388 Cal. Exec. Order No. 62-20 (May 6, 2020).

389 CAL. LAB. CODE §§ 3212.86–.88 (West 2020).

390 *Orders and Other Authority or Guidance to Provide Workers' Compensation (WC) Coverage for COVID-19*, *supra* note 383.

391 *Id.*

the Coronavirus Crisis which recently launched an investigation into how the country's meatpacking companies handled the pandemic, (2) discussion concerning a new ETS for the meatpacking industry following President Joe Biden's January 2021 Executive Order, and (3) litigation before the Eighth Circuit and state courts on cases accusing the world's largest meat processors of wrongful death and negligence in placing employees at risk of contracting COVID-19.

In the meantime, litigation will continue at a slow pace given COVID-19 restrictions on trials. Gains have been made by some plaintiffs, but meatpacking defendants benefit from the absence of a federal ETS and from very strong defenses: primary jurisdiction preemption, workers' compensation preemption and now, state liability shields. A federal ETS, coupled with stronger workers' compensation coverage at the state level, would provide the necessary incentive to motivate firms to adopt safety measures and for meatpacking companies to adhere to workplace standards to keep those we deem "essential," truly safe.

RELEASED, BUT NOT FREE: THE UNEXONERATED

*By Heidi R. Gilchrist**

* Associate Professor of Legal Writing at Brooklyn Law School. She would like to thank Susan Bandes, Ximena Benavides, Lynette Chua, Maryellen Fullerton, Eve Hanan, Susan Hazeldean, Susan Herman, Jamie Macleod, Scott Sundby, the participants in the Law & Emotion panel at the 2021 Law and Society Annual meeting, and the participants in the works-in-progress series at the SEALS conference for their invaluable feedback. She would also like to thank Spencer Goodson and Dzenela Becic for excellent research assistance.

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That evening, I sat on our balcony, staring at the rooftops of Sarajevo and the mountains in the background, and felt at home and at peace. This time, I thought, maybe it will last.[1]

—Lakhdar Boumediene, in the weeks before mistakenly being taken to Guantanamo Bay where he spent seven years without ever being charged with a crime.

I have come to America seeking three things… [a]n acknowledgement that the United States government is responsible for kidnapping, abusing and detaining me; an explanation as to why I was singled out for this treatment; and an apology because I am an innocent man who has never been charged with any crime.[2]

—Khaled El-Masri, abducted, tortured, and rendered to a CIA "black site" because he had a similar name to an al-Qaeda operative.

INTRODUCTION

I am sorry. Three simple words, but often so hard for individuals to say. And perhaps even harder for a nation. Sometimes, it can even be easier to defend the unjust act for which an apology is needed. But just as one would tell a child, the United States as a country needs to learn from its mistakes, especially when it has inflicted grievous harm—torture, incarceration, rendition, solitary confinement, and surveillance. An apology by the United States government should be the beginning. The apology gives the victim some sense of closure and vindication and it shows the United States' commitment to ensuring that it does not let the grievous harm happen again.

In the aftermath of 9/11, individuals, mostly young Muslim men, were abducted and held without charges in Guantanamo Bay Detention Camp (Guantanamo), and black sites around the globe, and tortured. Some, who have never been charged, are still being held in Guantanamo today. Others were incarcerated for up to twenty years, often held in solitary confinement, using material support laws based on little or no evidence of an actual terror connection. These men deserve an apology from the United States government—for instance, Khaled el-Masri, who was abducted and rendered to a black site simply because he had a name similar to an al-

1 LAKHDAR BOUMEDIENE & MUSTAFA AIT IDIR, WITNESSES OF THE UNSEEN: SEVEN YEARS IN GUANTANAMO 26 (2017).

2 Press Release, ACLU, El-Masri in U.S. to Hear ACLU Lawsuit Argued Before Federal Appeals Court (Nov. 28, 2006), https://www.aclu.org/press-releases/khaled-el-masri-victim-cia-kidnapping-and-abuse-seeks-acknowledgement-explanation-and.

Qaeda operative. Instead of apologizing, the United States government has blocked any avenue these individuals have for vindication using the 'national security' shield; for example, invoking the state secrets privilege[3] to block any litigation.

Unlike the United States, Canada apologized for their behavior, and it mattered.[4] The apology showed to the injured individual, the Muslim community, the Canadian population generally, and the world, that the Canadian government acknowledged what they did was wrong, and that they were committed to not repeating the wrong in the future. In some instances, they also provided compensation to those wronged.

International law is helping. Khaled El-Masri at least got some vindication when he won his case in the European Court of Human Rights and received compensation from Macedonia,[5] but it is not enough. Domestic courts are also playing a role. Italy's highest court upheld guilty verdicts for twenty-three Americans who abducted and rendered an Egyptian Muslim cleric to a black site.[6] However, it was a mostly symbolic victory, as none of those convicted will actually be extradited and imprisoned.[7]

While an apology matters, and has its own important value, it needs to be followed by concrete action. The United States needs to close Guantanamo and never again hold individuals without charges. The material support laws need to be amended for fairness, and as a way of beginning to make amends. People should not continue to be incarcerated for decades, often in solitary confinement, for little or no actions–especially as is the case in some attempted material support cases. The United States needs to delete its "reservations, declarations, and understandings"[8] and reaffirm its commitment to the Convention Against Torture[9] to tell the world and the impacted individuals: NEVER. AGAIN. This paper focuses on the necessity of national apologies to terror detainees, but apologies are also needed by other individuals who have been wrongly convicted for the color of their skin.

Additionally, these stories must be shared through every medium

3 *See* discussion *infra* Section II.A.

4 See Farida Deif, The Power of Canada's Apology to Omar Khadr, Hum. Rts. Watch (July 7, 2017), https://www.hrw.org/news/2017/07/07/power-canadas-apology-omar-khadr.

5 *See El-Masri v. Macedonia,* App. No. 39630/09 Eur. Ct. H.R. (2012).

6 Naomi O'Leary, *Italy Court Upholds "Rendition" Convictions on Ex-CIA Agents*, Reuters (Sept. 19, 2012), https://www.reuters.com/article/us-italy-usa-rendition-verdict-idUSBRE88I13320120919.

7 *See id.*

8 *See* 136 Cong. Rec. 36,192 (1990).

9 G.A. Res. 39/46, (Dec. 10, 1984).

possible. These are real people who were incarcerated, often in solitary confinement, incorrectly. Some have lost more than a decade of their lives. Some were left there even after their innocence was revealed. They may be out of prison, but they have not been exonerated; they are not "free." The media needs to keep telling their stories. Movies can retell on the big screen and reach a broader audience, but as academics, our responsibility extends further than sharing stories. We need to teach national security law to not only explain the doctrine, but to include and focus on human rights abuses such as these. The real people behind the cases deserve to be a focus of our teaching.

In sum, by not apologizing to these individuals and exonerating them, the injustice continues. This article will be the first to specifically examine the need for an apology and exoneration by those wronged after 9/11. Section I examines the powerful need for an apology and exoneration for wronged individuals. This section also looks at how governments often avoid apologies, even though they can help the healing process. Section II presents the real people behind well-known national security law cases and their quest for an apology and vindication under United States law. Some individuals whose stories are shared were held without charges, and tortured, yet have never received an apology. Looking at the material support laws and their overreach, I posit that there may be some small ray of hope as some material support cases have recently been overturned or dismissed. However, the individuals have not received any vindication or apology from the government. In fact, the opposite has occurred. The government indicates they are not pursuing new trials due to inconvenience or lack of resources. Then, Section III shows how international law can be used as an alternative means to acquire some vindication for those wrongfully imprisoned, tortured, or both. Finally, the article discusses how the best apology is to take concrete action to ensure these abuses *never happen again*.

I. THE POWER OF AN APOLOGY AND THE NEED FOR EXONERATION

A. *The Power of Apologies*

Apologies are powerful. One needs to look no further than the daily news cycle to see the importance of apologies where "some person, group, corporation, or official is offering, demanding, or rejecting an apology."[10] In the words of Dr. Aaron Lazare, a psychiatrist and apology expert, an

10 Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1265 (2006).

"[a]pology is one of the most profound modes of healing and restoration we have. For the offending party, it can release them from guilt and shame. For the harmed person, it can restore their dignity."[11] However, apologies need to be done correctly to work. Merriam-Webster defines apology as "an admission of error or discourtesy accompanied by an expression of regret."[12] And, as Lazare has cautioned, bad apologies may only make things worse.[13]

Apologies can mitigate the need for litigation.[14] In fact, in order to encourage apologies, and therefore reduce litigation, many states have enacted legislation making apologies inadmissible in court–in civil litigation or in medical malpractice litigation.[15] Michael Woods, a physician and advocate for apologies, asserts that "the likelihood of a lawsuit falls by 50 percent when an apology is offered and the details of a medical error are disclosed immediately."[16] Justice Kennedy has pointed out that remorse can play a role in whether "the offender lives or dies" in a capital sentencing proceeding.[17] Additionally, an empirical study of apologies conducted by

11 Aaron Lazare, *What Makes an Apology Work*, Restore Justice, https://restorecal.org/wp-content/uploads/2020/08/What-makes-and-apology-work-.pdf (last visited Aug. 30, 2021).

12 *Apology*, Merriam-Webster, https://www.merriam-webster.com/dictionary/apology (last visited Aug. 30, 2021).

13 Lazare, *supra* note 11, at 1.

14 Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 Pepp. Disp. Resol. L.J. 35, 38–39 (2013) ("[L]egal scholarship and legislation now reinforce the belief that strategically timed and worded apologies can prevent litigation altogether, reduce damage payments and jury awards by considerable amounts, or shave years from prison sentences.").

15 Thirty-eight states have adopted legislation which limit the admissibility of apologies in court. *See* Alaska Stat. §09.55.544; Ariz. Rev. Stat. Ann. § 12-2605; Cal. Evid. Code § 1160; Colo. Rev. Stat. § 13-25-135; Conn. Gen. Stat. § 52-184d; Del. Code. Ann. tit. 10, §4318; Fla. Stat. § 90.4026; Ga. Code § 24-4-416; Haw. Rev. Stat. § 626-1, Rule 409.5; Idaho Code §9-2-9-207; Ind. Code §34-43.5-1-1 et seq; Iowa Code §622.31; La. Rev. Stat. Ann. § 13:3715.5; Me. Rev. Stat. Ann. tit. 24, § 2907; Md. Cts. & Jud. Proc. Code Ann. § 10-920; Mass. Gen. Laws. Ann. Ch. 233, §79L; Mich. Comp. Laws § 600.2155; Mo. Rev. Stat. §538.299; Mont. Code. Ann. §26-1-814; Neb. Rev. Stat. §27-1201; N.H. Rev. Stat. Ann. § 507-E:4; N.C. Gen. Stat. § 8C-1, Rule 413; N.D. Cent. Code § 31-04-12; Ohio Rev. Code Ann. § 2317.43; Okla. Stat. tit. 63, §1-1708.1H; Or. Rev. Stat. §677.082; Pa. Stat. tit. 35, § 10228.1 et seq.; S.C. Code Ann. § 19-1-190; S.D. Codified Laws Ann. § 19-12-14; Tenn. Evid. §409.1; Tex. Civ. Prac. & Rem. § 18.061; Utah Code Ann. §78B-3-422; Vt. Stat. Ann. tit. 12, §1912; Va. Code § 8.01-52.1; RCW § 5.64.010; W. Va. Code § 55-7-11A; Wis. Stat. § 904.14; Wyo. Stat. § 1-1-130.

16 Smith, *supra* note 14, at 44 (quoting Michael S. Woods, Healing Words: The Power of Apology in Medicine 11 (Catherine Chopp Hinckley ed., 2d. ed. 2007)).

17 Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring)*; see also* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten*

Jennifer Robbennolt, a scholar in the area of psychology and law, shows the favorable role apologies can play in leading to a settlement, while recognizing "that attention must be paid to the nature of the apologetic expression and the circumstances of the individual case."[18]

There is a critical difference between "expressions of sympathy and categorical apologies admitting wrongdoing" as apology expert Nick Smith has argued.[19] He utilized the example, "[w]hether spoken by a convict or a practicing physician, a sympathetic expression that 'I am sorry your daughter died' conveys a distinct moral substance from an admission that 'I deserve blame for killing your daughter.'"[20] Although "this distinction may seem rather obvious upon reflection, legislators, attorneys, and academics routinely describe such expressions of sympathy as 'apologies.' Even 'safe apology' legislation sends mixed messages, with some states protecting only expressions of sympathy . . . ."[21]

Australia has made its apology a national holiday. Australia marks a National Sorry Day each year on the 26th of May which "remembers and acknowledges the mistreatment of Aboriginal and Torres Strait Islander people who were forcibly removed from their families and communities, now known as 'The Stolen Generations.'"[22] Community groups declared the holiday in 1998, but it took the government another decade to actually apologize for the atrocities committed.[23] In 2008, then Prime Minister Kevin Rudd stated, "[w]e apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians. We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country."[24] The date chosen signifies when, on May 26, 1997, the landmark "Bringing Them Home" report was formally presented in the Australian federal parliament, which made public the fact that tens of thousands of Aboriginal children were removed from

Florida Death Penalty Cases, 15 AM. J. CRIM. L. 1, 51–53 (1987).

18 Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 462 (2003).

19 Smith, *supra* note 14, at 49.

20 *Id.*

21 *Id.*

22 *National Sorry Day 2020*, RECONCILIATION AUSTRALIA (May 25, 2020), https://www.reconciliation.org.au/national-sorry-day-2020/.

23 Jennifer Latson, *This Is Why Australia Has 'National Sorry Day,'* TIME (May 25, 2015), https://time.com/3890518/national-sorry-day/.

24 *National Apology*, NAT'L MUSEUM AUSTL., https://www.nma.gov.au/defining-moments/resources/national-apology (last updated July 21, 2021).

their parents during Australia's assimilation era.[25] On May 26, 1998, "the first National Sorry Day was held to commemorate the anniversary of the report and remember the grief, suffering and injustice experienced by the stolen generations."[26]

Restorative justice recognizes the importance of reconciliation. Restorative justice scholars, such as Marth Minnow, focus on three things: one, "the here and now and the future, rather than just the past;" two, "the concentric circles of causation that have led to this breach or violation of human trust;" and three, "coming up with a plan of action for the future, where conduct will change and people will take steps to repair, restore, and remedy the situation to make the world different."[27] In the United States, the criminal justice system centers on punishment. As Bryan Stevenson, the founder of the Equal Justice Initiative, the nonprofit organization behind The National Memorial for Peace and Justice, stated, "[p]eople do not want to admit wrongdoing in America . . . because they expect only punishment."[28]

In his book, *When Sorry Isn't Enough*, Roy L. Brooks details the harm victims endure when they do not receive an apology. Victims endure incredible fear that the harm may be committed again. Brooks emphasizes how an apology can assuage this fear, because "[h]eartfelt contrition . . . might signify a nation's capacity to suppress its next impulse to harm others."[29] Before working on his book, Brooks "was not conscious of the undercurrent of fear that exists among survivors of human injustices that the very same atrocity might be revisited upon them."[30] However, through his research, he found that Jewish people often fear another Holocaust could occur, while Japanese Americans reported that they "worry that relocation and internment could happen again even on American soil under the right

25 *Australia Marks Sixth Anniversary of National Sorry Day*, Cultural Survival, https://www.culturalsurvival.org/news/australia-marks-sixth-anniversary-national-sorry-day (last visited Aug. 30, 2021); *see also National Sorry Day*, Austl. Hum. Rts. Comm'n, https://humanrights.gov.au/about/get-involved/events/national-sorry-day (last visited Aug. 30, 2021).

26 Austl. Hum. Rts. Comm'n, *supra* note 25.

27 Karen Sloan, *Harvard Law's Martha Minow on How Law Can Encourage Forgiveness over Vengeance*, Law.com (Sept. 1, 2020), https://www.law.com/nationallawjournal/2020/09/01/harvard-laws-martha-minow-on-how-law-can-encourage-forgiveness-over-vengeance.

28 Campbell Robertson, *A Lynching Memorial Is Opening. The Country Has Never Seen Anything Like It.*, N.Y. Times (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/us/lynching-memorial-alabama.html.

29 Roy L. Brooks, *The Age of Apology*, When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice 3, 4 (Roy L. Brooks ed., 1999).

30 *Id.*

set of circumstances."[31] Apologies from German and American leaders have eased the survivors' concerns, and "without such apologies, there would be greater concern, perhaps not just among the survivors, that those shameful acts might be repeated."[32]

In addition to reconciliation or apologies, concrete action is needed. Pumla Gobodo-Madikizela, a former psychologist on the Truth and Reconciliation Commission in South Africa, and a leading authority on remorse and forgiveness, in an interview with the New York Times stated:

> The Truth and Reconciliation Commission did bring the country together. The point that I'm making is that we made it too easy. You tell your story, the other person is moved and we express a sense of forgiveness. Which is great. I'm not undermining that. There is suffering, but at the same time we needed to do something to mitigate the impacts of this pain. This is where addressing economic injustices comes in. That didn't happen at the right time, and now it's not happening. The language of reconciliation is limited when used in isolation from other critical issues of social justice. Some things *have* changed. I mean, I am a professor at a university. But the structural problems still do exist.[33]

While an apology is an important first step, it needs to be followed by structural changes. Such changes should work to rectify past injustices and ensure the injustice never happens again.

B. *Apologies by United States Government Figures*

Nations do not apologize often. Regarding the United States, Jennifer Lind, a professor of government, stated, "[w]e don't apologize, ever."[34] This is not unusual, as "[c]ountries in general do not apologize for violence against other countries."[35] However, there are a few outliers like Germany and Japan who have rendered apologies.[36] In 1985, Richard von Weizsacker, then the President of Germany, won global respect for a speech in which he called the day World War II ended a day of liberation for the

31 *Id.*

32 *Id.*

33 David Marchese, *What Can America Learn from South Africa About National Healing?*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/interactive/2020/12/14/magazine/pumla-gobodo-madikizela-interview.html.

34 Adam Taylor, *It's Not Just Hiroshima: The Many Other Things America Hasn't Apologized for*, WASH. POST (May 26, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/05/26/the-things-america-hasnt-apologized-for/.

35 *Id.*

36 *Id.*

German people and stated, "[a]ll of us, whether guilty or not, whether young or old, must accept the past. We are all affected by it and liable for it. Anyone who closes his eyes to the past is blind to the present."[37] Additionally, after World War II, Germany ratified its Basic Law or Constitution, including Article 79(3), providing that Article I provisions protecting human dignity are unamendable.[38] When a nation apologizes, it "serves the same function as a personal apology, but on a different scale."[39] Like a personal apology, it "asserts changed values, condemns past behaviour, and commits to different, better actions in the future."[40] It can also lead to broad reconciliation between harmed parties and the nation responsible for the harm.[41]

The United States has not offered many official apologies.[42] Of the few times they have, only once—the formal apology to every Japanese-American interned during World War II documented in the Civil Liberties Act—involved any form of direct compensation or reparations.[43] Incredibly, it was not until 2008 that the House of Representatives formally apologized for slavery.[44] A year later, the United States Senate also issued a

37 *German Former President Richard von Weizsaecker Given State Funeral*, BBC (Feb. 11, 2015), https://www.bbc.com/news/world-europe-31407000.

38 *See* Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html%20(Ger.) (Germany Article 79(3) reads, "Amendments to this Basic Law affecting . . . the principles laid down in Articles 1 and 20 shall be inadmissible." Article 1 is as follows:
"(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.").

39 Edwin Battistella, *When Nations Apologise*, Aeon (Mar. 27, 2017), https://aeon.co/essays/a-national-apology-has-the-power-to-change-the-future.

40 *Id.*

41 *Id.*

42 Danny Lewis, *Five Times the United States Officially Apologized*, Smithsonian Mag. (May 27, 2016), https://www.smithsonianmag.com/smart-news/five-times-united-states-officially-apologized-180959254/. Lewis describes the five instances as (1) protecting a Nazi officer accused of war crimes; (2) interning Japanese citizens during World War II – "Reagan signed the Civil Liberties Act which offered every Japanese-American interned in the camps during the war a formal apology and $20,000 in compensation;" (3) backing a coup against the Kingdom of Hawaii; (4) conducting the Tuskegee Experiment; and (5) perpetuating slavery and the Jim Crow laws (by House of Representatives). *Id. See also* Daniella Stoltz & Beth Van Schaack, *It's Never Too Late to Say "I'm Sorry": Sovereign Apologies over the Years*, Just Sec. (Mar. 16, 2021), https://www.justsecurity.org/75340/its-never-too-late-to-say-im-sorry-sovereign-apologies-over-the-years/.

43 *See* Lewis, *supra* note 42.

44 H.R. Res. 194, 100th Cong. (2008).

formal apology.[45] However, unlike the House apology, the Senate apology contained additional language specifically stating that the apology does not "authorize[] or support[] any claim against the United States" and does not "serve[] as a settlement of any claim against the United States."[46] Critically, however, the legislation did:

> (A) acknowledge[] the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws; (B) apologize[] to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws; and (C) express[] its recommitment to the principle that all people are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness, and calls on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society.[47]

Although criticized for not including the possibility of reparations,[48] the NAACP applauded the legislation, calling it a "historic resolution apologizing for the enslavement and racial segregation of African-Americans."[49]

United States officials have not apologized effectively during the "War on Terror," even on the rare occasion when they did try to apologize after the atrocities committed at Abu Ghraib prison (Abu Ghraib). In April 2004, photographs from Abu Ghraib showed American soldiers partaking in, and even enjoying, the abuse and torture of Iraqi prisoners who were being held in United States military custody.[50] Soon after, President Bush advised the American public that he had made an apology to King Abdullah II of Jordan:[51]

> "I was sorry for the humiliation suffered by the Iraqi prisoners and the humiliation suffered by their families," he said. "I told him I was as equally sorry that people seeing those pictures

45 S. Con. Res. 26, 111th Cong. (2009).

46 *Id.*

47 *Id.*

48 Deborah Miller, *Senate Apologizes for Slavery, but Disclaimer Draws Criticism*, CLEVELAND.COM (June 19, 2009) (updated Mar. 27, 2019), https://www.cleveland.com/nation/2009/06/senate_apologizes_for_slavery.html.

49 Press Release, NAACP, NAACP Applauds U.S. Senate for Passing Bipartisan Resolution Apologizing for the Enslavement and Racial Segregation of African-Americans; Urges U.S. House to Pass Concurrent Resolution Swiftly (June 19, 2009), https://www.commondreams.org/newswire/2009/06/19/naacp-applauds-us-senate-passing-bipartisan-resolution-apologizing-enslavement.

50 Aaron Lazare, *Making Peace Through Apology*, GREATER GOOD MAG. (Sept. 1, 2004), https://greatergood.berkeley.edu/article/item/making_peace_through_apology.

51 *Id.*

> didn't understand the true nature and heart of America . . . I am sickened that people got the wrong impression."[52]

Donald Rumsfeld went further in his apology, saying that the alleged abuse of Iraqi prisoners "occurred on my watch, and as secretary of defense I am accountable for them, and I take full responsibility."[53] He offered his "deepest apology" to "those Iraqis that were mistreated by members of our armed forces."[54] He further dubbed the abuse "inconsistent with the values of our nation, inconsistent with the teachings of the military, and . . . fundamentally un-American."[55]

Theses apologies failed to elicit forgiveness from the Iraqi people or more generally from the Arab world because they were deficient.[56] Dr. Lazare believes there are typically four parts to an effective apology: "acknowledgment of the offense; explanation; expressions of remorse, shame, and humility; and reparation."[57] He notes that "[n]ot every apology requires all four parts," but nevertheless, the United States' apologies were deficient in several crucial aspects.[58] An apology of this magnitude needs to come from the President.[59] President Bush never directly apologized to the Iraqi people, but rather to the King of Jordan who then reported secondhand to the Iraqi people.[60] He never took responsibility for the offense, only repeating that he felt sorry.[61] However, "[f]eeling sorry does not communicate acceptance of responsibility."[62] He used the passive voice and said that "[m]istakes will be investigated."[63] He also sidestepped the enormity of the abuses, which was likely a "pervasive and systematic pattern of prisoner abuse occurring over an extended period of time, as reported by the International Red Cross."[64] He offered "no restoration of dignity, no assurance of future safety for the prisoners, no reparative justice, no reparations, and no suggestion for dialogue with the Iraqis."[65] Therefore,

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52 *Id.*
53 *Rumsfeld Accepts Responsibility for Abu Ghraib*, American Forces Information Service News Articles, May 7, 2004, at 1, WLNR 24573013.
54 *Id.*
55 *Id.*
56 Lazare, *supra* note 50.
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*

it was not surprising that the Iraqi people and the rest of the world did not forgive the United States.[66]

In January 2009, just before taking office, President Barack Obama spoke of the alleged wrongdoing of the Bush administration, including torture: "we need to look forward as opposed to looking backwards."[67] Yet, for many victims that can be an impossible task. And the United States, as a country, needs to understand the wrongs committed and ensure they do not happen again.

President Obama's apology in a formal letter to the then Afghan President Karzai for U.S. military involvement in the burning of copies of the Quran highlights the delicate balance of official apologies. President Obama called the burning of the Quran by NATO troops an "error," but said "[w]e will take the appropriate steps to avoid any recurrence, including holding accountable those responsible."[68] He was both praised and vilified. Newt Gingrich called the apology an "outrage . . . on the same day two American troops were murdered."[69] Ultimately, the Taliban refused the apology, claiming "the invading infidel authorities" only offered "so-called show(s) of apologies" while "in reality they let their inhuman soldiers insult our holy book."[70]

Some see apologies as a sort of weakness. During his campaign, presidential hopeful Mitt Romney touted that President Obama "went around the world and apologized for America."[71] He even entitled his book *No Apology: The Case for American Greatness*.[72] However, scholars have argued that apologies are a critical tool in the toolbox of international dispute resolution techniques.[73] Although Richard Bilder, legal scholar and

66 *Id.*

67 David Johnston & Charlie Savage, *Obama Reluctant to Look into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), http://www.nytimes.com/2009/01/12/us/politics/12inquire.html?pagewanted=all&_r=0.

68 Masoud Popalzai & Nick Paton Walsh, *Obama Apologizes to Afghanistan for Quran Burning*, CNN (Feb. 23, 2012), https://www.cnn.com/2012/02/23/world/asia/afghanistan-burned-qurans/index.html.

69 Matt Spetalnick & Laura MacInnis, *Obama Apologizes for Koran Burning in Afghanistan*, REUTERS (Feb. 23, 2012), https://www.reuters.com/article/us-afghanistan-korans-obama/obama-apologizes-for-koran-burning-in-afghanistan-idUSTRE81M13W20120223.

70 Popalzai & Walsh, *supra* note 68.

71 Scott Wilson, *Obama Apology Resonates in Kabul, on Campaign Trail*, WASH. POST (Feb. 24, 2012), https://www.washingtonpost.com/the-art-of-the-presidential-apology/2010/07/28/gIQARVtnYR_story.html.

72 MITT ROMNEY, NO APOLOGY: THE CASE FOR AMERICAN GREATNESS (2010).

73 Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 472–73 (2006).

researcher on the role of apologies in international law and diplomacy, recognizes that countries may be reluctant to apologize out of concern for potential liability,[74] liability can deter bad behavior. That is why liability exists in other contexts.

C. *The Incredible Need for an Apology to Those Wrongfully Convicted*

Because the injury to those wrongfully and unjustly convicted of a crime is so incredibly great—the deprivation of one's liberty and damage to reputation and sense of self—the need for an apology seems obvious as a first step. As the Witness to Innocence organization has stated, "[t]he government's public recognition of the harm inflicted upon a wrongfully convicted person helps to foster the healing process, while assuring the public that the government – regardless of fault – is willing to take ownership of its wrongs or errors."[75] Two recent studies "suggest that issuing an apology may be more effective than compensation at improving peoples' perceptions of exonerees. Exonerees themselves have expressed a desire to receive an apology from the system that wronged them, viewing apologies as symbolic of the mistakes made by the responsible party: the government."[76]

Nothing may completely repair the injustice done, but an apology and compensation at least give the individual the exoneration they deserve. In the words of John Wilson, a psychology professor:

> I believe that the injuries from a wrongful conviction and incarceration are permanent. I think they're permanent scars. And even though counseling and psychotherapy and treatments are helpful, I don't think you can undo the permanent damage to the soul of the person, to their sense of self, to their sense of dignity. There is no way that money or even being exonerated gives a person back what they lost. . . . And one of the real existential dilemmas every day for a person is, they know that when they go to their grave, this experience is going to be right here, in the forefront of their mind, even though they try to push it away and get on with their normal life afterwards.[77]

74 *Id.*

75 *Justice After Exoneration*, Witness to Innocence, https://www.witnesstoinnocence.org/justice-after-exoneration (last visited July 28, 2021).

76 Alyx A. Ivany, Examining the Effects of Apology and Compensation on Participants' Perceptions of Exonerees, 37 (Aug. 2014) (M.A. thesis, University of Ontario Institute of Technology) (https://ir.library.dc-uoit.ca/xmlui/bitstream/handle/10155/489/Ivany_Alyx.pdf?sequence=1).

77 *Burden of Innocence Interview: John Wilson*, PBS: Frontline (May 1, 2003), https://www.pbs.org/wgbh/pages/frontline/shows/burden/interviews/wilson.html; *see also* Leslie

Research has generally shown that compensating and apologizing to wrongly convicted individuals is supported by the public.[78] A small study showed that publicly apologizing to the wrongly convicted may also restore the public's faith in the criminal justice system.[79]

The exonerees own words most effectively demonstrate the need for an apology. One exoneree, Alan Newton, commented on the Bronx County District Attorney's Office's apology stating that, "[i]t means somebody actually cares on the other side."[80] He reflected that after spending twenty years wrongfully incarcerated, "anger will eat you up inside, but apology restores my faith in individuals."[81] One exoneree, Jeffrey Deskovic, received $5.4 million in compensation, but no apology.[82] His words are striking regarding the refusal of the city of Peekskill, New York or its police officers to apologize, as he explained, "[t]here is much more at stake than a personal apology; Peekskill's silence suggests that they have not learned any lessons from my case and I remain concerned about wrongful convictions and criminal justice in Peekskill going forward."[83] Money is important, but people wrongfully convicted yearn for an apology, and the message that comes with it that society is learning from these wrongs and actual change to the criminal justice system is occurring.

Unfortunately, some prisoners never receive the exoneration or compensation they deserve. Under federal law, a person who was unjustly sentenced to death may be awarded up to $100,000 for each 12-month period of incarceration; a person not sentenced to death may receive up to $50,000 for each 12-month period of incarceration.[84] However, the law requires that the person suing allege and prove that: "[h]is conviction has

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Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, 5 AM. U. CRIM. L. BRIEF, no. 2, 2010 (discussing the extremely damaging psychological impact of wrongful conviction on the exonerated).

78 Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1421–22, 1425–26 (2012).

79 *Id.* at 1438. ("If this is the case, perhaps greater efforts can be made to convince governments to offer apologies and financial compensation more frequently—perhaps as legislative requirements immediately following exoneration—as public apologies appear to have benefits for all and compensation is necessary to assist with reintegration and healing for exonerees.").

80 Abigail Penzell, Note, *Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry*, 9 CARDOZO J. OF CONFLICT RESOL. 145, 158 (2007).

81 *Id.*

82 *No Apology, but $5.4 Million from City of Peekskill to Exoneree*, THE INNOCENCE PROJECT (Sept. 5, 2013), https://innocenceproject.org/no-apology-but-5-4-million-from-city-of-peekskill-to-exoneree/.

83 *Id.*

84 28 U.S.C. § 2513.

been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense" and "[h]e did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution."[85] Thirty-six states and the District of Columbia also have some form of compensation statutes.[86] Although outside the scope of this paper, the fact that some states do not have compensation statutes for those wrongfully convicted is appalling. Additionally, although there is valid criticism that exonerated prisoners need more than simply monetary aid,[87] such as help finding employment and housing or social and emotional support services, at least these compensation statutes give those wrongfully convicted prisoners the exoneration they desperately need and some compensation to move forward with their lives.

Exoneration itself is important, but so too is telling the stories of those wrongfully convicted. We can then learn from them and hopefully inspire actual change so that those wrongfully convicted can feel that they at least helped ensure meaningful change. The young men who had been known as the "Central Park Five," after being falsely accused and convicted of committing the brutal attack on a woman in Central Park in 1989, now call themselves the "Exonerated Five."[88] They credit Ava DuVernay's television series, "When They See Us," for publicizing their story and the abuses they endured.[89] However, they write powerfully about the fact that false confessions still happen today and advocate for a bill proposed by New York State Senator Zellnor Myrie that would "ban the use of deception in interrogations and ensure that confessions are assessed for reliability" before being used in the courtroom.[90] They want their wrongful convictions to help prevent future wrongful convictions and to ensure that "no one else is ever

85 28 U.S.C. § 2513(a). *See* Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. Mich. J.L. Reform 123, 123 (2010) (arguing state compensation statutes should shift the burden of proof to the state on the issue of innocence as "too many meritorious claims are dismissed, settled for far too little, or never brought in the first place.").

86 *Compensating the Wrongly Convicted*, The Innocence Project, https://www.innocenceproject.org/compensating-wrongly-convicted/ (last visited July 28, 2021).

87 *See* Fernanda Santos & Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. Times (Dec. 2, 2007), https://www.nytimes.com/2007/12/02/weekinreview/02santos.html.

88 Yusef Salaam, Kevin Richardson & Raymond Santana, *We Are the 'Exonerated 5.' What Happened to Us Isn't Past, It's Present*, N.Y. Times (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/opinion/exonerated-five-false-confessions.html.

89 *Id.*

90 *Id.*

robbed of their youth or freedom."[91]

For terror detainees, the stigma and harm are so great, and yet they have no exoneration and would be unable to use the wrongful conviction statutes described above. In the case of many of those who had been detained in Guantanamo or in black sites, they were never actually ever charged with a crime; therefore, there is no "unjust conviction." Many were also tortured, and still they were never exonerated or given an apology. In fact, the government uses the state secrets privilege and other avenues to block any possible vindication or exoneration.[92] In the case of the material support cases detailed in the next section, the government went out of their way to not exonerate those who have had their convictions overturned so most likely the unjust conviction statutes would be unavailable to them as well.

II. THE LACK OF AN APOLOGY OR EVEN EXONERATION

A. *Khaled El-Masri: Wrongfully Detained*

The El-Masri case highlights both the powerful need for an apology and how devastating not receiving one can be. El-Masri is a case of mistaken identity that led to an extraordinary rendition that reads like a movie script. Khaled El-Masri was abducted in Macedonia because he had a similar name to an Al Qaeda operative, and was transferred to a U.S. detention center in Afghanistan.[93] He was held there and tortured for five months, even after the United States government realized they had the wrong individual.[94] He was then released, finally, in Albania and put on a plane to Germany.[95] When he tried to sue the United States for his illegal detention and torture, his case was dismissed because the government asserted the State Secrets Privilege.[96] With the State Secrets Privilege, a judicially created evidentiary privilege, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not

91 *Id.*

92 *See* discussion *infra* Section II.A.

93 Allison Frankel, *European Court: U.S. Extraordinary Rendition "Amounted to Torture,"* ACLU (Dec. 13, 2012), https://www.aclu.org/blog/national-security/torture/european-court-us-extraordinary-rendition-amounted-torture.

94 *Khaled El-Masri v. United States*, ACLU, https://www.aclu.org/cases/khaled-el-masri-v-united-states (Nov. 6, 2018).

95 *Id.*

96 El-Masri v. Tenet, 437 F. Supp. 2d 530, 540–41 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007).

be divulged."[97] After 9/11, the government has used the privilege widely[98] to dismiss litigation alleging a myriad constitutional and human rights abuses, by either refusing to disclose information during discovery or requesting complete dismissal on national security grounds.[99] Judges all too often defer to the Executive when "national security" or "state secrets" defenses have been asserted.[100]

The district court in the El-Masri case indicated that El-Masri did deserve a remedy, but that the courts were not the appropriate venue for him to receive one.[101] The court stated, "the state secrets privilege is absolute and therefore once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake."[102] The court did not find it convincing that almost all of the details of El-Masri's case had already been in the public domain in various news stories and government reports about the rendition program.[103] However, the judge did understand the grievous harm El-Masri suffered and the need for a remedy, stating:

> [I]f El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.[104]

The Fourth Circuit affirmed, and although it did not go as far, it did acknowledge "the gravity of our conclusion that El-Masri must be denied a judicial forum for his Complaint."[105] However, they reiterated "that dismissal on state secrets grounds is appropriate only in a narrow category of disputes" and that "the matter before us falls squarely within that narrow class, and we

97 United States v. Reynolds, 345 U.S. 1, 10 (1953).

98 *See* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 87 (2010) (using docket searches to estimate that the government invoked the privilege in more than 100 cases from January 2001 to January 2009).

99 *Id.* at 78.

100 *See* Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 Calif. L. Rev. 991, 1001–03 (2018); *see also* Heidi Gilchrist, *Security Clearance Conundrum: The Need for Reform and Judicial Review*, 51 U. Rich. L. Rev. 953, 957, 967 (2017).

101 *El-Masri*, 437 F. Supp. 2d at 541.

102 *Id.* at 537.

103 *Id.* at 538.

104 *Id.* at 541.

105 El-Masri v. United States, 479 F.3d 296, 313 (4th Cir. 2007).

are unable to find merit in El-Masri's assertion to the contrary."[106]

Instead of having access to legal recourse for the wrongs that were committed, El-Masri was left with nothing, not even an apology, from the United States. Indeed, even worse than the fact that he received no apology from the United States, is the fact that the United States litigated extensively to ensure he received no remedy. In his own words, El-Masri stated that he sued the United States government because he wanted "an explanation, an apology, and reassurance" that what he had endured would never happen to anyone else.[107] When a party, like the United States government, does not admit the terrible wrongs that were committed, the injustice continues for the injured party.

Therefore, as United States law did not get him any recourse, El-Masri turned to international law. He had a victory against Macedonia in the European Court of Human Rights (ECHR), and eventually received an apology from Macedonia, but not from the United States. Increasingly, international courts are used as a vehicle for those who suffer human rights abuses to get some degree of vindication. In 2012, the ECHR held that "respondent State [Macedonia] is to be held responsible for the inhuman and degrading treatment to which the applicant [El-Masri] was subjected while in the hotel, for his torture at Skopje Airport and for having transferred the applicant into the custody of the US authorities, thus exposing him to the risk of further treatment contrary to Article 3 of the Convention."[108] He was awarded 60,000 Euros in compensation.[109] Although not an apology from the United States or a reassurance that what happened to him would not happen to anyone else ever again, the ECHR judgment is at least a step in the right direction.

Then, in 2014, the Senate Intelligence Committee study of the CIA's Detention and Interrogation Program affirmatively found that El-Masri had been wrongfully detained.[110] They detailed that the Inspector General of the CIA found that his "prolonged detention" was "unjustified."[111] But, El-

106 *Id.*

107 *Statement: Khaled El-Masri*, ACLU, https://www.aclu.org/other/statement-khaled-el-masri (last visited Aug. 30, 2021).

108 El-Masri v. Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263, para. 223 (2012).

109 *Id.* at para. 270.

110 S. REP. NO. 113–288, at 128–129 (2014).

111 *Id.* at 15, 128 ("The rendition was based on the determination by officers in the CIA's ALEC Station that 'al-Masri knows key information that could assist in the capture of other al-Qa'ida operatives that pose a serious threat of violence or death to U.S. persons and interests and who may be planning terrorist activities.' The cable did not state that Khalid al-Masri himself posed a serious threat of violence or death,

Masri was still left without an apology, explanation, or exoneration. In an interview he talked about the anguish he feels about the fact that there have been no consequences for those responsible, saying "[p]eople in the West are the last ones in the world that should talk about human rights. Look what they have done to me and others. There have been no consequences for those responsible."[112] He continued, "[o]n one hand they are great in pointing at others and criticize them, but then they don't want to look inside and have accountability for human rights crimes."[113] And the terror label looms large. As El-Masri explained, "I never received any help, nor did my family. The only thing we received from the Germans [while we lived in Germany] was pressure and humiliation, no help or support. It was as if people had no empathy for us."[114]

Macedonia formally apologized to El-Masri in 2018.[115] In a letter to El-Masri that year, Macedonia's minister of foreign affairs offered his "sincere apologies and unreserved regrets" for the "improper conduct of [Macedonia's] authorities" in 2004.[116] He also acknowledged "the immeasurable and painful experiences and grave physical and psychological wounds [El-Masri] suffered."[117] Although not nearly enough, it is at least a start.

B. *Wrongful Detention at Guantanamo Bay*

In two important national security law cases studied by students around the world, *Hamdi v. Rumsfeld* and *Boumidiene v. Bush*, the United States government went all the way to the Supreme Court arguing that the two men should be held indefinitely in Guantanamo as "enemy combatants"

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the standard required for detention under the September 17, 2001, Memorandum of Notification (MON) . . . Despite doubts from CIA officers in Country [redacted] about Khalid al-Masri's links to terrorists, and RDG's concurrence with those doubts, different components within the CIA disagreed on the process for his release.").

112 Souad Mekhennet, *A German Man Held Captive in CIA's Secret Prisons Gives First Interview in 8 Years*, Wash. Post (Sept. 16, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/09/16/a-german-man-held-captive-in-the-cias-secret-prisons-gives-first-interview-in-8-years/.

113 *Id.*

114 *Id.*

115 Konstantin Testorides, *Macedonia Apologizes to German Snatched for CIA*, AP News (Apr. 4, 2018), https://apnews.com/2e1582889d49443a97a4c5578ae7630f.

116 Press Release, ACLU, Macedonia Issues Apology for Involvement in Torture by CIA (Apr. 3, 2018), https://www.aclu.org/press-releases/macedonia-issues-apology-involvement-torture-cia.

117 *Id.*

without charges, as a danger to national security.[118] When the government lost in the Supreme Court, however, rather than actually prosecute the two men, they were both released. They were suddenly no longer dangerous terrorists. Yaser Hamdi now lives in Saudi Arabia and was released after an agreement with the government to give up his U.S. citizenship, report possible terrorist activity, and abide by certain travel restrictions, including a ten-year ban on returning to the United States.[119] Lakhdar Boumediene now lives in France with his family under an undisclosed agreement between the French and American governments.[120]

Once again, the government in no way apologized or made any acknowledgement of the suffering the men endured. The Department of Justice's press release stated perfunctorily, "Lakhdar Boumediene, an Algerian national who had been held at the Guantanamo Bay detention facility since 2002, has been transferred to France."[121] He lives in public housing in Nice with his family, but is not a French citizen and has not been granted asylum or permanent residence.[122] As the United States never returned his Algerian and Bosnian passports, he is effectively stateless.[123] The need for exoneration and an apology is real. Boumediene told the Washington Post that he would like to sue the United States government, stating, "I don't know whether it will be possible… but even if it takes 100 years, I am determined to bring suit."[124] It is impossible to move forward completely when a wrong such as torture has been committed without consequences.

Those still languishing in Guantanamo with no charges have no voice to get their stories out. Hundreds held in Guantanamo for years were never

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118 Hamdi v. Rumsfeld, 542 U.S. 507, 512–513 (2004); Boumediene v. Bush, 553 U.S. 723, 797 (2008).

119 Press Release, Mark Corallo, Dir. of Pub. Affs., U.S. Dep't of Just., Regarding Yaser Hamdi (Sept. 22, 2004), https://www.justice.gov/archive/opa/pr/2004/September/04_opa_640.htm [hereinafter Corallo Press Release]; Eric Lichtblau, *U.S., Bowing to Court, to Free 'Enemy Combatant*,' N.Y. TIMES (Sept. 23, 2004), https://www.nytimes.com/2004/09/23/politics/us-bowing-to-court-to-free-enemy-combatant.html.

120 Press Release, U.S. Dep't of Just., United States Transfers Lakhdar Boumediene to France (May 15, 2009), https://www.justice.gov/opa/pr/united-states-transfers-lakhdar-boumediene-france; Scott Sayare, *After Guantánamo, Starting Anew, in Quiet Anger*, N.Y. TIMES (May 25, 2012), https://www.nytimes.com/2012/05/26/world/europe/lakhdar-boumediene-starts-anew-in-france-after-years-at-guantanamo.html.

121 U.S. Dep't of Just., *supra* note 120.

122 Sayare, *supra* note 120.

123 *Id.*

124 Edward Cody, *Ex-Detainee Describes Struggle for Exoneration*, WASH. POST (May 26, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/05/25/AR2009052502263_pf.html.

charged and have now been repatriated,[125] but the United States has never apologized or admitted wrong-doing. One scholar has proposed legislation entitled the "Civil Redress and Historical Memory Act of 2029," based on the Civil Liberties Act of 1988, to "establish a commission of inquiry to investigate cases of arbitrary detention and mistreatment perpetrated by the U.S. during the 'War on Terror'" and "offer an apology and provide restitution to individuals who were wrongfully detained and mistreated by the United States."[126]

Those wrongfully convicted, or wrongfully held and tortured in the case of Guantanamo, deserve an apology, compensation, and true exoneration. About three quarters of the forty prisoners still at Guantanamo, even twenty years after the events of 9/11, have never been charged with a crime.[127] An apology is needed in order for the healing process to begin, but also in the real sense of rebuilding one's life. Looking for employment is difficult enough without having Guantanamo on your record, as is the case with Boumediene, or any conviction, especially a terror-related charge. In a small sign of hope, the Guantanamo Military Commission ruled that, "as a matter of law, th[is] Military Judge has legal authority to grant administrative credit as a remedy for illegal pretrial punishment."[128] One detainee, Majid Khan, is "seek[ing] 'administrative credit equivalent to no less than half of his approved sentence as a comprehensive, prophylactic remedy' for the torture and other cruel, inhuman, and degrading treatment he suffered in Government custody for the offenses for which he was subsequently charged and pleaded guilty."[129] Additionally, the judge allowed use of the word "torture" to describe what the inmates endured stating, "[t]aken as true, this mistreatment rises to the level of torture."[130] However, Boumediene urges that concrete action is also needed, writing in a recent letter, written along with other former prisons, for President Biden to "[j]ust close Guantanamo – this is my message."[131]

125 *See The Guantánamo Docket*, N.Y. Times, https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html (last updated Sept. 1, 2021); *see also Guantanamo by the Numbers*, Human Rights First (Oct. 10, 2018), https://www.humanrightsfirst.org/resource/guantanamo-numbers.

126 William J. Aceves, *The Civil Redress and Historical Memory Act of 2029: A Legislative Proposal*, 51 U. Mich. J.L. Reform 163, 163 (2017) (examining the mistreatment of Khaled El-Masri, and others, and the lack of recourse they were given).

127 *The Guantánamo Docket*, *supra* note 125.

128 United States v. Khan, No. 033K, Ruling on Defense Motion for Pretrial Punishment Credit and Other Related Relief, 42 (Mil. Comm'ns Trial Judiciary June 4, 2020), https://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE033K).pdf.

129 *Id.* at 1.

130 *Id.* at 34.

131 *Ex-Gitmo Detainee Subjected to Years of Torture Urges Washington to Shut Down Notorious Facility*,

C. *Material Support Cases for Supposed Terrorist Activity*

Many defendants in material support to terrorism cases, especially attempted material support cases, are prosecuted without having done anything that actually constitutes terrorism, or even a crime.[132] Recently, there have been a few reversals of sentences in these cases, and a hung jury in one other case,[133] but the defendant is still left without truly being exonerated. The problems with and overreach of the material support law has been long studied by academics and others advocating for change.[134] The material support laws are so broad[135] that intent to engage in terrorism is not a required element so someone can be prosecuted for minor actions, or even simply speech, often prodded on by a government informant.[136] The material support laws are preventative, trying to catch a "terrorist" before they act—a noble aim but, as seen, extraordinarily difficult, if not impossible, in practice.

i. Hamid Hayat: Fourteen Years Later, Released in the Interest of Justice

One example of finally being freed, but not completely exonerated, is Hamid Hayat who was prosecuted under the material support laws. Hamid Hayat's conviction and sentence were vacated on July 30, 2019, after he had spent fourteen years behind bars, when a judge found he had constitutionally defective representation by his attorney in violation of his Sixth Amendment

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GLOBAL TIMES (Apr. 27, 2021), https://www.globaltimes.cn/page/202104/1222237.shtml.

132 *See* Heidi R. Gilchrist, *The Vast Gulf Between Attempted Mass Shooting and Attempted Material Support*, 81 U. PITT. L. REV. 63, 100–01 (2019).

133 *See* discussion i*nfra* Section II.C.iii.

134 *See* THE CONSTITUTION PROJECT, REFORMING THE MATERIAL SUPPORT LAWS: CONSTITUTIONAL CONCERNS PRESENTED BY PROHIBITIONS ON MATERIAL SUPPORT TO "TERRORIST ORGANIZATIONS" 1–2 (2009); Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 1–2 (2005); Tom Stacy, *The "Material Support" Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL'Y 461, 477 (2005).

135 18 U.S.C. § 2339B. Under this statute, the only intent requirement is that the person "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so." The statute defines "knowingly" as "[having] knowledge that the organization is a designated terrorist organization" or "that the organization has engaged or engages in terrorist activity" or "that the organization has engaged or engages in terrorism." *Id.*

136 *See* Gilchrist, *supra* note 132, at 64, 66.

right to effective assistance of counsel.[137] In February 2020, the government submitted an unopposed motion to dismiss arguing that, although the Ninth Circuit had affirmed Hayat's conviction, his trial representation had been deemed deficient by the district court.[138] The prosecution explained that, "[d]ue to the passage of time . . . the government now moves this Court to dismiss, in the interest of justice, the indictments in this case."[139] The court subsequently granted the motion.[140] This dismissal "in the interest of justice" is the closest to an apology that Hayat was able to get.

It is an incredibly high standard to find constitutionally deficient counsel, as a defendant must prove that the outcome of the trial would have been different; however, the judge in Hayat's case was able to reach this conclusion. A defendant must show (1) that their trial attorney's performance "fell below an objective standard of reasonableness;" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[141] The court found the representation of Hayat deficient and adopted the magistrate judge's findings on two issues: failure to investigate six potential alibi witnesses and to present an alibi defense, and failure to procure and present an Arabic language defense expert on the meaning of the supplication found in Hayat's wallet.[142] The court found that these errors were prejudicial and that there was a "'reasonable probability' that Hayat's jury, or a juror would have reached a different decision" if the jurors had been presented the evidence that was not presented due to the attorney's errors.[143]

The judge found that an attorney should have presented alibi witnesses to show that Hayat's confession that he attended a terror training camp was coerced.[144] And without his confession, there would have been no act in material support of terrorism. The magistrate judge held that all six alibi witnesses were "sufficiently credible, explaining that notwithstanding Hayat's confession that he attended a terror training camp for three to six months, the witnesses' testimony 'directly contradicted' the confession…."[145]

137 United States v. Hayat, No. 2:05-cr-240-GEB, 2019 WL 3423538, at *1, *2, *18 (E.D. Cal. July 30, 2019).

138 *Id.*

139 *Id.*

140 Ken Otterbourg, *Hamid Hayat*, The Nat'l Registry of Exonerations (Mar. 3, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5683 (last updated Feb. 9, 2021).

141 Strickland v. Washington, 466 U.S. 668, 687–688, 694 (1984).

142 *Hayat*, 2019 WL 3423538 at *15, *16.

143 *Id.* at *17.

144 *See id.* at *10, *11, *16.

145 *Id.* at *15.

The alibi testimony was consistent and showed that Hayat, at most, was absent from his family's village for a week.[146]

Another key piece of evidence against Hayat was a prayer card found in his wallet. In Hayat's hearing for ineffective assistance of counsel, his attorney presented Dr. Bernard Haykel, a renowned professor of Near Eastern Studies at Princeton University, to testify that the prayer found in Hayat's wallet was a "supplication… used by many Muslims, not just jihadis."[147] The court therefore found that Hayat's attorney's "failure to present an Arabic language expert on the meaning of the supplication during trial contributed to the prejudice Hayat suffered."[148] At trial, the prosecution's expert, Khaleel Mohammed, had testified that "a person carrying this supplication would be '[a] person engaged in jihad'" and that "there is no other way that it could be used."[149] He further explained that a person carrying this supplication, "'*has* to be involved in jihad'; *must* 'perceive[] himself to be carrying out one of the obligations of jihad, that he was involved in what he deemed to be jihad'; and was completely ready. The person was in the act of being a warrior."[150] Hayat's attorney did not object. Although the Ninth Circuit did not find this to be a "plain error," as the dissent pointed out: "the district court plainly erred in allowing [the expert] to testify broadly about Hayat's supposed 'jihadi intent' which usurped the jury's role as the ultimate trier of fact."[151]

Hayat's case also highlights the importance of telling the stories of unfair prosecutions and raises issues of coerced confessions, the use of government informants, and how after the events of 9/11 anything in Arabic or relating to Islam could be misinterpreted as terror-related. The family of Hamid Hayat heralded the Netflix documentary series *The Confession Tapes*, and the work of other journalists, for highlighting his case to the public.[152] The government paid the informant in Hayat's case, who had previously earned $7 per hour as a fast food worker, $230,000 over a three-year period.[153] Hayat's admissions came after he had been awake and interrogated until 3

146 *Id.*

147 *Id.* at *16.

148 *Id.*

149 United States v. Hayat, 710 F.3d 875, 910–11 (9th Cir. 2013) (emphasis omitted).

150 *Id.* at 911.

151 *Id.*

152 ABC10, *Hamid Hayat's family says Netflix documentary helped overturn terrorism conviction*, YOUTUBE (July 31, 2019), https://www.youtube.com/watch?v=WcB-gv_zQUA.

153 Trevor Aaronson, *For Years, Reporters Questioned the Terror Prosecution of Hamid Hayat. Now He's Been Freed*, THE INTERCEPT (Aug. 16, 2019), https://theintercept.com/2019/08/16/terrorism-september-11-prosecution/.

a.m.[154] Journalist Lowell Bergman worked with PBS Frontline and the New York Times and detailed his case in a 2006 film "The Enemy Within" that documented the problems with Hayat's case and the FBI's counterterrorism program.[155] After seeing Bergman's work, Syeda Amna Hassan, a Pakistani graduate student in journalism at Berkeley, researched the case for her master's thesis.[156] She located people in Pakistan who spent time with Hayat when he was supposedly in the training camp, who instead "described how Hayat had spent his entire time in Pakistan playing soccer and video games, supporting the claim that Hayat's confession had been coerced by FBI agents."[157] She then gave the evidence to Hayat's lawyers to use in order to show his confession was false. Additionally, journalist Abbie Van Sickle, who previously worked with Bergmann, used Hassan's reporting and thesis to further scrutinize Hayat's case and its myriad problems and published the story in the Intercept.[158]

Hamid Hayat's own words show he had doubted that justice would ever be served. "I can't believe this day came," said Hayat, now 36-years-old, at a news conference after his release.[159] "I still think this is a dream. I wake up and I still think I'm in prison."[160] He continued, "I'll never be able to pay back none of my brothers and sisters, none of my supporters…. I'm your guys' servant until the day of judgment."[161]

For some, the problems with this case were obvious from the beginning. After being convicted of providing material support to terrorists, Hayat's motion for a new trial was denied, as well as his motion to vacate, set aside, or correct his sentence.[162] When he appealed, the dissenting judge in the Ninth Circuit, Judge Tashima, pointed out the vagueness of Hayat's prosecution, as well as the material support laws more generally:

> To paraphrase a famous line, in this case, the government has concluded that it is not for it to say *what* offense Hamid Hayat has

154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 Abbie VanSickle, *Judge in Infamous "Sleeper Cell" Case Agrees to Hear New Evidence that Could Help Convicted Terrorist*, The Intercept (June 12, 2017), https://theintercept.com/2017/06/12/judge-in-infamous-sleeper-cell-case-agrees-to-hear-new-evidence-that-could-help-convicted-terrorist/.
159 Demian Bulwa, Bob Egelko & Tatiana Sanchez, *Hamid Hayat, Freed After 14 Years in Terror Case: 'I Can't Believe This Day Came'* S.F. Chron. (Aug. 11, 2019), https://www.sfchronicle.com/bayarea/article/Lodi-s-Hamid-Hayat-speaks-after-release-in-14295994.php.
160 *Id.*
161 *Id.*
162 United States v. Hayat, 710 F.3d 875, 885 (9th Cir. 2013).

> committed, but it is satisfied that he committed *some* offense, for which he should be punished. This case is a stark demonstration of the unsettling and untoward consequences of the government's use of anticipatory prosecution as a weapon in the "war on terrorism."… [T]he government asks a jury to deprive a man of his liberty largely based on dire, but vague, predictions that he *might* commit unspecified crimes in the future.[163]

Hayat is free, but not exonerated. Although the reporter who investigated the Hayat case for years said he was glad to see the courts "share some of the concerns he had long had about Hayat's prosecution," he thought they could have gone further, stating that "[n]obody in the judiciary has challenged the government's behavior in these terrorism cases."[164] And to some it was not enough because, as Basim Elkarra, the executive director of the Sacramento Valley office of the Council on American-Islamic Relations, said, "[a]n entire community was left traumatized due to prosecution taking advantage of anti-Muslim, post-9/11 hysteria."[165]

ii. Uzair Paracha: Sixteen Years Later, Nolle Prosequi as Justice

In another recent reversal, Uzair Paracha did not get an apology or true exoneration. In March 2020, two years after the court's decision ordering a new trial, federal prosecutors filed a motion for nolle prosequi.[166] The government wrote:

> Because Uzair Paracha, the defendant, has served approximately sixteen years of his sentence; because the schedule in this matter precludes the Government from taking necessary steps to protect national-security equities without diverting substantial resources from other important national-security and law-enforcement functions; and because Paracha has agreed to renounce his status as a lawful permanent resident in the United States and has consented to voluntary and immediate repatriation from the United States to Pakistan, the Government believes that dismissing the Indictment under the circumstances presented is the best available option to protect the public and preserve national-security equities.[167]

163 *Id.* at 904 (Tashima, J., dissenting) (citations omitted).

164 Aaronson, *supra* note 153.

165 Don Thompson, *US Prosecutors End Old Terror Case Against California Man*, AP NEWS (Feb. 14, 2020), https://apnews.com/article/0cfc91b078cb4e0ea2217aeb7d95fa4e.

166 Motion for Nolle Prosequi at 3, United States v. Paracha, No. 1:03-CR-01197(SHS), 2006 WL 12768, (S.D.N.Y. Mar. 16, 2020).

167 *Id.* at 5.

Instead of an apology, or any hint of vindication, Paracha was released, according to the government, because of a lack of resources to retry him. This made his release the "best available option."[168]

The very filing of a nolle prosequi showed how unwilling prosecutors were to exonerate Paracha and drove home the notion that he was not exonerated because the filing of nolle prosequi leaves open the possibility of a new prosecution. The order granting a new trial vacated Paracha's conviction and placed him in the same position "as if no trial had ever taken place."[169] Nolle prosequi is a Latin phrase that translates to "we shall no longer prosecute."[170] Nolle prosequi does not vacate a judgment; it means that the government dropped all charges against a petitioner.[171] Although nolle prosequi terminates prosecution, "the prosecuting authority is permitted to initiate a new action against the defendant within the statute of limitations."[172] Therefore, unlike an exoneration, the nolle prosequi does nothing to clear an individual's name and leaves them open to future prosecution if the government is so inclined.

Unlike the prosecutors, the judge in Paracha's case indicated that "allowing [the] defendant's conviction to stand would be a manifest injustice."[173] He granted Paracha's motion for a new trial, ten years after the initial filing.[174] He waited, inexplicably, nearly ten years for justice. In deciding the motion, the court had to consider, among other factors, whether the new evidence "would likely result in an acquittal."[175] The court decided that the evidence would likely create the required reasonable doubt in favor of Paracha's theory of the case–"that he knew Majid Khan but remained ignorant of Khan's al Qaeda affiliations, and that his contrary pretrial statements to the government were lies told out of fear and a misguided hope of cooperation"–over the government's theory of the case.[176] Meanwhile, Paracha, as well as other successful material support cases based on flimsy evidence, were heralded as successes in the "War on Terror."[177]

168 *Id.*

169 United States v. Recio, 371 F.3d 1093, 1105 n.11 (9th Cir. 2004).

170 Blue v. Medeiros, 913 F.3d 1, 5 n.6 (1st Cir. 2019).

171 *See id.*

172 *See, e.g.*, Roberts v. Babkiewicz, 582 F.3d 418, 420 (2d Cir. 2009).

173 United States v. Paracha, No. 03-CR-1197(SHS), 2018 WL 3238824, at *1 (S.D.N.Y. July 3, 2018).

174 *Id.* at *1, *9.

175 *Id.* at *10.

176 *Id.* at *17.

177 *See, e.g.*, Press Release, Dep't of Just., Att'y Gen. Alberto R. Gonzales Highlights Success in the War on Terror at the Council on Foreign Rels. (Dec. 1, 2005), https://www.justice.gov/archive/opa/pr/2005/December/05_opa_641.html; *List of Foiled Terror Attack Plots in NYC Since 9/11*, ABC7NY (Oct. 18, 2012), https://abc7ny.com/

Paracha was in prison for well over a decade while technically innocent before his trial and then during an incredibly lengthy, inexplicable appeals process. Initially, after Paracha declined to take a plea deal, he was placed under Special Administrative Measures (SAMs), leading commentators to question whether SAMs were imposed as punishment.[178] SAMs are measures that "let the government restrict the contact that dangerous prisoners may have with the outside world in order to prevent further harm to society. SAMs can result in extremely harsh conditions on top of lengthy solitary confinement–practices that many groups, including the United Nations, believe may constitute torture."[179] Paracha was held in isolation for two and a half years before his trial and described it by saying, "I faced the harshest part of the SAMs while I was innocent in the eyes of American law."[180]

Both Paracha[181] and Hayat[182] are listed as exonerated on the National Registry of Exonerations even though neither were truly exonerated by the Government. The Registry offers a comprehensive description of "every known exoneration in the United States since 1989 – cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence."[183] Their mission is to "prevent future false

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archive/8850846/.

178 *See* Katherine Erickson, *This Is Still a Profession: Special Administrative Measures, the Sixth Amendment, and the Practice of Law*, 50 COLUM. HUM. RTS. L. REV. 283, 289 (2018).

179 *Id.* at 283.

180 *Id.* at 307–08. Pursuant to federal regulations effective since May 17, 1996, the Attorney General may authorize prison officials:

> [T]o implement special administrative measures… [when the Attorney General notifies them that] there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism.

28 C.F.R. § 501.3(a) (2021).

181 Ken Otterbourg, *Uzair Paracha*, NAT'L REGISTRY OF EXONERATIONS (Apr. 2, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5706.

182 Otterbourg, *supra* note 140.

183 The registry is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. *See id.* It was formed in collaboration with the Center on Wrongful Convictions at Northwestern University School of Law in 2012. *Id.*

convictions by learning from past errors."[184]

iii. Adam Shafi: Forty Months of Imprisonment and a Hung Jury

I have detailed in another article how charges of attempted material support ensnared a young man, Adam Shafi,[185] another individual who has not received true exoneration, but at least is now out of prison.[186] A jury did not find him guilty of attempted material support—a rare occurrence when there are terror charges, and his case ended with a hung jury.[187] But, he was only released after he had already spent forty months in prison—some of that time in solitary confinement.[188] Forty months in prison for not actually doing anything but perhaps the equivalent of the Spanish crime of "glorifying terrorism."[189]

Adam Shafi's long ordeal began when his father lost track of him during a family trip to Cairo, Egypt.[190] Having lost contact with his son, Mr. Shafi's father filed a report with the American Embassy in Cairo in an attempt to track him down.[191] Ultimately, Mr. Shafi returned to his family in Cairo and returned to the United States with them.[192] However, his father's report had piqued the FBI's interest and they obtained a warrant to surveil Mr. Shafi.[193]

Back in America, Mr. Shafi researched routes to get to Syria by way of Turkey and exchanged emails about potentially traveling to Turkey.[194] Mr.

184 *Our Mission*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/mission.aspx.

185 *See* Gilchrist, *supra* note 132, at 75–77 (2019).

186 Darwin BondGraham, *Accused of Terrorism and Jailed for Three Years, Adam Shafi Is Released Following a Mistrial*, E. Bay Express (Oct. 8, 2018), https://eastbayexpress.com/accused-of-terrorism-and-jailed-for-three-years-adam-shafi-is-released-following-a-mistrial-2-1/.

187 *Id.*

188 *Id.*

189 *See Spain: Counter-Terror Law Used to Crush Satire and Creative Expression Online*, Amnesty Int'l (Mar. 13, 2018), https://www.amnesty.ie/spain-counter-terror-law-used-crush-satire-creative-expression-online/. ("Under Article 578 of the Spanish Criminal Code those deemed to have 'glorified terrorism' or 'humiliated the victims of terrorism or their relatives'… face fines, bans from jobs in the public sector and even prison sentences. The number of people charged under this Article increased from three in 2011 to 39 in 2017 and nearly 70 people were convicted in the last two years alone."). *Id*.

190 United States v. Shafi, 252 F. Supp. 3d 787, 790 (2017).

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

Shafi also led "his two younger brothers in . . . training exercises, including calisthenics, running through the neighborhood, and 'crawling through the mud at a park near the family's home in Fremont, California.'"[195] The government's complaint characterizes these activities as "paramilitary training."[196]

In addition to researching travel and exercising with his younger brothers, Mr. Shafi also made comments in telephone conversations that he would be "completely fine with dying with [an unspecified terrorist organization]."[197] Mr. Shafi also expressed contempt for America and discussed plans of living in part of Syria which was controlled by a foreign terrorist organization.[198]

On June 30, 2015, Mr. Shafi was intercepted by federal agents at an airport on his way to board a one-way flight to Turkey.[199] When questioned, Mr. Shafi denied that he was traveling to Turkey with the intention of joining a terrorist organization.[200] Instead, Mr. Shafi noted that there are many refugees in Turkey who he would help if he could.[201] Mr. Shafi explained that some people "helped by building a house, while others picked up a gun."[202] When agents asked Mr. Shafi if he planned on helping by arming himself, he said that he had no such plans.[203]

Agents then performed a consensual search of the backpack Mr. Shafi was traveling with.[204] This search turned up "personal items along with a copy of the Quran and a 'small paper-back book of Islamic prayers,' among other things."[205] After this search, agents released Mr. Shafi to return to his family's home in Freemont.[206] While on his way home, Mr. Shafi placed calls which were intercepted by the government. On these calls, Mr. Shafi detailed his experience at the airport and remarked that only an "idiot" would have told agents they had intentions to take up arms.[207] Sometime later, Mr. Shafi was arrested and charged with attempted material support, charges that could result in up to twenty years in prison.[208] Mr. Shafi was

195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.*
208 *Id.*

held in solitary confinement while awaiting his trial.[209]

The jury declared that after deliberation, they were "hopelessly deadlocked."[210] The note from the jury read, "[w]e've reached a deadlock. We've reviewed all the evidence, discussed everything multiple times and in great detail, and don't think we'll be able to reach a unanimous decision."[211] There was an 8-4 split in favor of acquittal.[212] After the deadlocked jury, the judge rejected the prosecutor's request to keep Shafi imprisoned and instead released him to his parents.[213] Following Shafi's plea to bank fraud in January, the judge found prosecutors "had failed to prove Shafi had acted out of terrorist motives and limited his sentence to the 40 months he had already served, plus six months of house arrest that ended that month."[214]

Interestingly, it was Adam Shafi and his parents who kept apologizing, not the government that had locked him up. In court, when it became obvious that the judge was going to order his son's release, his father Sal began crying and said "I'm sorry" as he wiped away his tears.[215] "There is nothing to be sorry about," the judge replied.[216] Adam Shafi had previously sent his own letter to the judge apologizing for "my disturbing comments and actions leading up to my arrest."[217] He continued, "[b]eing away from my family allowed me to see the irresponsible, immature, and reckless manner with which I dealt with problems at home and in the world. I now see the flaws of my past hopelessness and will now strive to use the life and opportunities given to me to make the world a better place."[218]

iv. The Need for True Exoneration

Although they have been freed, these individuals have not received true exoneration. Under federal law,[219] a person who was unjustly convicted

209 BondGraham, *supra* note 186.

210 Criminal Minutes at 1, United States v. Shafi, 252 F. Supp. 3d 787 (N.D. Cal. 2017) (No. 15-cr-00582-1), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Shafi%20Criminal%20Minutes.pdf.

211 *Id.*

212 Bob Egelko, *Prosecution of Fremont Man Shows Why Terrorism Cases Can Come Up Short*, S.F. Chron. (Apr. 19, 2019), https://www.sfchronicle.com/bayarea/article/Prosecution-of-Fremont-man-shows-why-terrorism-13781811.php.

213 *Id.*

214 *Id.*

215 BondGraham, *supra* note 186.

216 *Id.*

217 Egelko, *supra* note 212.

218 *Id.*

219 Thirty-six states and the District of Columbia also have compensation statutes of some form. *Compensating the Wrongly Convicted*, *supra* note 86.

of a non-death penalty offense may be awarded up to $50,000 for each 12-month period of incarceration.[220] However, the law requires that the person suing must allege and prove that: "[h]is conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense" and "[h]e did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution."[221] Therefore, this would not apply to any of the terror cases detailed because they did not receive true exoneration. Hayat's conviction was vacated after fourteen years in prison, but not on the grounds that he was not guilty of the offense, and he never had a new trial. Paracha was released after seventeen years in prison due to an agreement with the government; but they specifically filed a motion nolle prosequi which means only that the government is no longer pursuing charges, not that the person is innocent. And Shafi was in prison for three years pending and during trial, but only released after a mistrial so he was never actually convicted or found innocent.

By examining these cases, we can learn what went wrong and what we can do to make sure people are not unjustly prosecuted under the material support laws in the future. As Innocence Project Co-Director Barry Scheck commented, "[t]he exonerees [are] the greatest human resource our criminal justice system has had, ever. Because what we can learn from them and their cases can help us create a more just society and fix this system and move it forward in a way that it hasn't been within memory."[222] Professor Brent T. White has proposed that "civil rights plaintiffs pursuing cases against governmental defendants should be entitled to receive court-ordered apologies as an equitable remedy."[223] He argues that "traditional forms of compensation fail to provide adequate relief to civil rights victims because they neglect psychological, emotional, and symbolic injuries."[224] He proposes court-ordered apologies as an effective means of "healing psychological wounds, reinforcing norms, restoring social equilibriums, confirming the justice of plaintiffs' causes, and compelling governmental reform."[225]

220 A person sentenced to death may receive up to $100,000 for each 12-month period of incarceration. 28 U.S.C. § 2513(e).

221 28 U.S.C. § 2513.

222 AFTER INNOCENCE (Showtime Networks Inc. 2005).

223 White, *supra* note 10, at 1261.

224 *Id.*

225 *Id.* at 1265.

The list of "unexonerated" people deserving an apology in the aftermath of the events of 9/11 is truly astounding. They deserve apologies for: Guantanamo, black sites, material support laws, being rounded up and deported. The use of the no-fly list as a means of black-mail by the FBI is yet another example.[226] Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari are Muslim men who claimed that "Federal Bureau of Investigation agents placed them on the no-fly list because they refused to act as informants against their religious communities."[227] Under the Religious Freedom Restoration Act of 1993 (RFRA), they "sued various agents in their official capacities, seeking removal from the No Fly List" and "[t]hey also sued the agents in their individual capacities for money damages."[228] The respondents claim that the retaliation caused them significant financial harm: "airline tickets wasted and income from job opportunities lost."[229] Once the respondents sued, the Department of Homeland Security then informed them that they would be able to fly, therefore mooting the claims for injunctive relief.[230] However, the RFRA prohibits the federal government from imposing substantial burdens on religious exercise, absent a compelling interest pursued through the least restrictive means.[231] It also gives a person whose religious exercise has been unlawfully burdened the right to seek "appropriate relief."[232] Tanvir, Algibah, and Shinwari achieved victory at last when the Supreme Court ruled unanimously that "appropriate relief" includes "money damages against Government officials in their individual capacities."[233] The Supreme Court decision is a rare victory in receiving some amount of vindication for those individuals wronged by the United States government or its officers after 9/11.

III. International and Human Rights Law as the Only Path for Exoneration

Even when United States law does not allow for the victims of the "War on Terror" to recover and have their rights vindicated, international

226 *See* Adam Liptak, *Supreme Court Hears Case of Muslims on No-Fly List*, N.Y. Times (Oct. 6, 2020) (updated Dec. 10, 2020), https://www.nytimes.com/2020/10/06/us/politics/supreme-court-muslims-no-fly-list.html.
227 Tanzin v. Tanvir, 141 S.Ct. 486, 489 (2020).
228 *Id.* at 489.
229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.*
233 *Id.*

law and human rights law offer some ability to redress these violations.[234] Khaled El-Masri, whose story is detailed in Section II.A, received vindication and compensation in the European Court of Human Rights. In 2018, the ACLU presented the American Commission on Human Rights with its Final Observations on the Merits of Khaled El-Masri's case.[235] Therefore, he may have another court vindicate him. Additionally, rendition victims gained a symbolic victory in 2009 when a judge in Italy convicted, in absentia, a Central Intelligence Agency base chief and 22 others, mostly CIA operatives, for the kidnapping of a Muslim cleric in 2003.[236] Egyptian Imam Abu Omar was seized from the streets of Milan and taken to Egypt, where he claims he was interrogated and tortured for seven months.[237] It is doubtful that the CIA agents will serve the criminal sentences imposed, as Italy has not requested their extradition; however, the agents can no longer travel in Europe without the risk of arrest.[238] Italy's Court of Cassation, the highest appeals court, also held "five senior Italian secret service agents could be tried for the abduction," overturning the ruling of a lower court that had "barr[ed] a trial on the grounds that it would reveal state secrets."[239]

Just four countries have compensated extraordinary rendition victims—Canada, Sweden, Australia, and the United Kingdom.[240] However, Australia and the United Kingdom conducted confidential settlements in order to elude any litigation related to human rights violations.[241] Italy is the sole country to have criminally convicted officials for participating in extraordinary rendition operations.[242]

234 *See* Kent Roach, *Substitute Justice? Challenges to American Counterterrorism Activities in Non-American Courts*, 82 MISS. L.J. 907, 974 (2012) ("The unwillingness of American courts to review much counterterrorism activities on the merits means that, in many cases, substitute justice will be the only chance of justice for those adversely affected by American military detention, renditions, and targeted killings. Substitute justice is not ideal. It is, however, better than no justice at all."); *see also* Juan E. Méndez, *How International Law Can Eradicate Torture: A Response to Cynics*, 22 SW. J. INT'L L. 247 (2016) (arguing the international legal framework is key to eliminating and preventing torture in our time).

235 *Khaled El-Masri v. United States*, *supra* note 94.

236 Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES (Nov. 4, 2009), https://www.nytimes.com/2009/11/05/world/europe/05italy.html.

237 O'Leary, *supra* note 6.

238 *Id.*

239 *Id.*

240 AMRIT SINGH, OPEN SOC'Y. JUST. INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 62 (2013), https://www.justiceinitiative.org/uploads/655bbd41-082b-4df3-940c-18a3bd9ed956/globalizing-torture-20120205.pdf.

241 *Id.*

242 *Id.*

Apologies are not required under international law, but they matter. In 2017, the Canadian government issued a formal apology and paid compensation to Omar Khadr, the only Canadian national held at Guantanamo.[243] Farida Deif, the Canada Director of Human Rights Watch, applauded the government for its apology stating:

> While international law requires compensation but not apologies for serious human rights violations, an apology yields tremendous significance for victims nonetheless. They represent a formal attempt by the government to acknowledge the serious harm inflicted on an individual, their family, or an entire community. They send a strong message that the government acted unlawfully.[244]

She added, "[w]hile an apology doesn't guarantee that these abuses will never happen to anyone again, today many Canadian Muslims are breathing a small sigh of relief knowing that the country is moving to redress the wrongs committed."[245] In 2007, Canada also issued a formal apology and compensation to Maher Arar for its role in his deportation and detention in Syria.[246]

International law does mandate, in addition to the substantive rights of victims not to be tortured for example, the right to truth or the right to anti-impunity or accountability.[247] The right to truth may not give the individual the apology they deserve, but it at least provides some exoneration and the knowledge that those responsible are being held accountable. The ECHR in the El-Masri case addressed the need for truth:

> [T]he Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant

243 Ian Austen, *Canada Apologizes and Pays Millions to Citizen Held at Guantánamo Bay*, N.Y. Times (July 7, 2017), https://www.nytimes.com/2017/07/07/world/canada/omar-khadr-apology-guantanamo-bay.html.

244 Farida Deif, *The Power of Canada's Apology to Omar Khadr*, Hum. Rts. Watch (July 7, 2017), https://www.hrw.org/news/2017/07/07/power-canadas-apology-omar-khadr.

245 *Id.*

246 Ian Austen, *Canada Reaches Settlement with Torture Victim*, N.Y. Times (Jan. 26, 2007), https://www.nytimes.com/2007/01/26/world/americas/26cnd-canada.html.

247 *See* Ruti Teitel, *Transitional Justice and Judicial Activism—A Right to Accountability*? 48 Cornell Int'l L.J. 385, 385, 409 (2015) ("Victims of systemic rights abuses, their families, and non-governmental organizations are turning to international and regional human rights tribunals to address the failure of states to investigate, prosecute, and remedy past human rights violations.").

> and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.[248]

In their concurring opinion, Judges Tulkens, Spielmann, Sicilianos and Keller addressed the fact that they would have liked the Court to "acknowledge[] that in the absence of any effective remedies – as conceded by the Government – the applicant was denied the 'right to the truth', that is, the right to an accurate account of the suffering endured and the role of those responsible for that ordeal."[249] They emphasized the importance of truth for society in general, noting, "the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law."[250] Additionally, for the victims' friends and family, "establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so."[251] They concluded that the lack of right to truth prevents victims from being able to move on because "the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery."[252]

The right to a remedy, as articulated under the United Nations Basic Principles, is not aspirational but already exists under preexisting treaty and customary law.[253] Governments have a duty to give individuals an adequate and effective remedy, including reparations.[254] The right to truth is a "key component of the legal architecture built around victims' rights."[255] At least some progress has been made surrounding the CIA's rendition program in discovering the truth, but those abused deserve, as a beginning, an apology. Although criticized for being a bit boring,[256] movies like *The Report* at least try to get the message about what the American government did to a larger audience. *The Report* chronicled the investigation by a Senate staffer into the CIA's detention and torture of suspected terrorists during the George

248 El-Masri v. Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263, para. 191 (2012).

249 *Id.* at para. 1 (Tulkens, Spielmann, Sicilianos, & Keller, JJ., concurring).

250 *Id.* at para 6.

251 *Id.*

252 *Id.*

253 G.A. Res. 60/147, (Dec. 16, 2005) [hereinafter Basic Principles]. *See also* Lisa J. LaPlante, *Just Repair*, 48 CORNELL INT'L L.J. 513, 524–25 (2015).

254 Basic Principles, *supra* note 253.

255 Kathleen Cavanaugh, *Unspoken Truths: Accessing Rights for Victims of Extraordinary Rendition,* 47 COLUM. HUM. RTS. L. REV., Winter 2015, at 1, 1.

256 Jeannette Catsoulis, *'The Report' Review: Inconvenient Truths*, N.Y. TIMES (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/movies/the-report-review.html.

W. Bush administration, and the "subsequent struggle with the Obama administration to release [the information] uncovered."[257] Journalists, movies, courts, and academics all play a role in sharing the stories of terrible wrongs committed to ensure they never happen again.

Professor Kathleen Cavanaugh argues that the Senate report on the CIA's rendition program, the 2014 Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program (SSCI), at least "partially satisfies the right to truth."[258] She argues this even though the full report "is 6,700 pages, has not been released and the executive summary is heavily redacted," since at least "the release of this information in the public domain partially satisfies the right to truth."[259] The report has a value as a historical record of events, and can be used by victims pursuing legal claims:

> The report serves as a type of "truth dump." It names those who were subject to extraordinary rendition and acknowledges their victimization. Numerous victims have used the information from the report to support their legal claims of forced disappearance and torture by the United States and other states that are similarly situated. The report also serves as a historical record of events, providing civil society a public disclosure of events and offering detailed accounts of flawed information and decision-making. In providing this truth, this report exposed the use of flawed intelligence and illegal procedures that resulted in severe human rights violations and is a "vital safeguard against the recurrence of violations."[260]

The United States government should apologize as what is just for the violations of basic human rights. However, these apologies are additionally important because the unfair treatment of Muslims, for example at Guantanamo, is used as recruiting tactic by terror groups. The group that abducted, and then beheaded Daniel Pearl, demanded better treatment for detainees held by American forces at Guantanamo and the return of all Pakistani men being held there in return for his release.[261]

There is a consistent theme in the statements of the men highlighted and their attorneys that they do not want what happened to them to happen to anyone else ever again. Perhaps the best apology is ensuring that it does

257 Madeleine Carlisle, *The True Story Behind the Movie The Report*, TIME (Nov. 15, 2019), https://time.com/5725001/the-report-movie-true-story/.

258 Cavanaugh, *supra* note 255, at 46–47.

259 *Id.*

260 *Id.*

261 Secunder Kermani, *Daniel Pearl: Pakistan Court Acquits Men Accused of Murder*, BBC NEWS (Jan. 28, 2021), https://www.bbc.com/news/world-asia-55735869.

not. Those wrongfully detained or tortured are using international law as the only way to exoneration and to hopefully ensure the same wrongs are not committed in the future.

CONCLUSION

"Perhaps the best advice to ordinary people and government leaders is: [a]pologize and do it as effusively as conditions permit."[262] However, the best apology additionally ensures the wrong conduct never happens again. The voices of those who were wrongfully detained or tortured are emphatically clear on this.

> "While we are grateful for the dismissal, the 14 years Hamid spent behind bars on charges of which he was innocent remain a grave miscarriage of justice," Hayat's family and attorney said in a joint statement. "Hamid's exoneration is a cause for celebration, but the story of his case is tragedy that must not be repeated."[263]

All Khaled El-Masri really wanted was an explanation and an apology, even after all the abuse he endured based on a mistake.[264] By failing to apologize to or exonerate these men, the United States is still implying, or outright saying, they are "terrorists," but for some reason, the government is going to let them be freed. This is not an apology, and does not remedy the incredible wrongs. Those wrongfully detained are still living with the "terror" stigma and the horror of the abuses they endured. Their stories need to be shared.

262 Craig W. Blatz, et al. *Government Apologies for Historical Injustices*, 30 POL. PSYCH. 219, 237 (2009) (finding that apologies for historical injustice can be effective, even without financial compensation, unless the victims were demanding financial compensation).

263 Thompson, *supra* note 165.

264 Armen Keteyian & Phil Hirschkorn, *Muslim Says He Was Abducted by U.S.*, CBS NEWS (Nov. 28, 2006), https://www.cbsnews.com/news/muslim-says-he-was-abducted-by-us/.

SECURING TRIBAL CONSULTATION TO SUPPORT TRIBAL HEALTH SOVEREIGNTY

*By Aila Hoss**

* Aila Hoss, JD is an Assistant Professor at the Native American Law Center at the University of Tulsa College of Law. She teaches and researches at the intersection of federal Indian law and health law. Before joining the legal academy, she practiced Tribal public health law at the Centers for Disease Control and Prevention where she observed the implementation of federal consultation mandates and their limitations. The author thanks Dr. Mary Owen, MD, Director of the Center of American Indian and Minority Health at the University of Minnesota Medical School, for her review and thoughtful comments on this article. She also thanks Center for Health Policy and Law for including this paper as part of a workshop at the Northeastern University Health Law Symposium: Health and the Body Politic: Undermining Democracy, Undermining Health. The author also thanks the board and staff of the *Northeastern University Law Review* for their excellent editorial assistance.

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"If we are not seen as equals, consultation is never going to produce the results we want them to produce."[1]
Sarah Adams-Cornell & Walela Knight

INTRODUCTION

Effective intergovernmental coordination is essential to promoting health and safety. Yet, the current political climate has seen discord between Tribes, states, and the federal government on issues ranging from public health to environmental protection, among countless others. The COVID-19 pandemic has magnified this discord. Many states have challenged Tribal authority to access data, implement quarantine and isolation measures, and establish checkpoints and mask mandates.[2] The federal government has delayed access to COVID-19 data, established burdensome and inconsistent policies for the use of federal response funds, and failed to meet its obligations to provide health care in many American Indian and Alaska Native communities.[3]

As sovereign nations, Tribes have authority and responsibility over their land and people. Modern relationships between Tribes, states,

1 Sarah Adams-Cornell & Walela Knight, Matriarch, Speech at the Philbrook Museum Harvest Weekend: Why Representation Matters (Nov. 13, 2020); *see also* Betty Ridge, *Matriarch Helps Women Share, Solve Issues*, TAHLEQUAH DAILY PRESS (Apr. 11, 2019), https://www.tahlequahdailypress.com/news/tribal_news/matriarch-helps-women-share-solve-issues/article_81eec02b-306f-5319-8b9e-f0c89e6f47b8.html (discussing the origins of Matriarch and how native women gather to support, heal, and empower each other through the organization).

2 *See* Aila Hoss, *Tribes Are Public Health Authorities: Protecting Tribal Sovereignty in Times of Public Health Crisis*, SSRN 2–3 (Jan. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3759311&download=yes; Darius Tahir & Adam Cancryn, *American Indian Tribes Thwarted in Efforts to Get Coronavirus Data*, POLITICO (June 11, 2020), https://www.politico.com/news/2020/06/11/native-american-coronavirus-data-314527; Dalton Walker, *South Dakota Checkpoints: Timeline of Events*, INDIAN COUNTRY TODAY (July 22, 2020), https://indiancountrytoday.com/news/south-dakota-checkpoints-a-look-at-key-events.

3 *See* Aila Hoss & Heather Tanana, *Upholding Tribal Sovereignty and Promoting Tribal Public Health Capacity During the COVID-19 Pandemic*, *in* ASSESSING LEGAL RESPONSES TO COVID-19 77, 79–80 (Scott Buris et al. eds., 2020), https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0/1598908033901/COVID19PolicyPlaybook_Aug2020+Full.pdf; *Oversight of the Trump Administration's Response to the COVID-19 Pandemic: Hearing Before the H. Comm. on Energy & Com.*, 116th Cong. 19–21 (2020) (statement of Robert R. Redfield, Director, Centers for Disease Control and Prevention); Lizzie Wade, *COVID-19 Data on Native Americans Is 'A National Disgrace.' This Scientist Is Fighting to Be Counted*, SCIENCE (Sept. 24, 2020), https://www.science.org/news/2020/09/covid-19-data-native-americans-national-disgrace-scientist-fighting-be-counted.

and the federal government are based on the colonization and genocide legalized by the United States under federal Indian law.[4] Federal Indian law both recognizes Tribal sovereignty but also carves out instances in which a Tribe's criminal or civil jurisdiction can be infringed.[5] It has allowed federal agencies, Congress, and federal courts to exercise overwhelming authority to determine the scope of Tribal and Indigenous rights. And yet, Native representation in these same branches have been abysmal.

One method for ensuring Tribal and Native perspectives in these decision-making processes has been through Tribal consultation. Consultation is a formal, government-to-government process that requires governments to consult with Tribes before taking actions that would impact them.[6]

Tribal consultation is essential for effective Indian health policy. This article argues for a more robust mechanism for Tribal consultation for health policy issues. Section I briefly describes Tribal governments and their relationship to the federal government. Section II summarizes existing requirements for Tribal consultation under federal and state law. Section III describes the limitations of existing Tribal consultation practices. Finally, section IV describes the impact of inadequate consultation on American Indian and Alaska Native health and offers recommendations for a Tribal consultation framework[7] that fully supports American Indian and Alaska Native health.

This article refers to the Indigenous people of what is now referred to as the United States using various terms including American Indian and Alaska Native, Native, Indian, and Indigenous. Each of these terms is used regularly in practice and, depending on the context, can be appropriate.[8]

4 Stephen L. Pevar, The Rights of Indians and Tribes 56 (4th ed. 2012); *see also* Sahir Doshi et al., *The COVID-19 Response in Indian Country*, Ctr. for Am. Progress (June 18, 2020), https://www.americanprogress.org/issues/green/reports/2020/06/18/486480/covid-19-response-indian-country/.

5 *See* Matthew L. M. Fletcher, Federal Indian Law 3–7 (2016).

6 *See* Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 Weekly Comp. Pres. Doc. 936 (Apr. 29, 1994).

7 Urban Indian organizations are provided opportunities to confer with the federal agencies on various issues. *See, e.g.*, 25 U.S.C. § 1660d(b); 38 U.S.C. § 547(f)(5); 25 U.S.C.A. § 5703(b)(2). Conferring is defined differently than formal government-to-government consultation, 25 U.S.C. § 1660d(a), and is outside the scope of this article.

8 *See Native American vs. Indian*, Indian Country Today (Sept. 13, 2018), https://indiancountrytoday.com/archive/native-american-vs-indian; *Tribal Nations and the United States: An Introduction*, Nat'l Cong. Am. Indians 24 (Feb. 2020), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf.

Some primary sources will use other terms such as "Native American." If quoting or describing these primary sources, this article will also utilize the language used by the source. This article capitalizes these terms, as well as Tribe and Tribal.

I. TRIBAL GOVERNMENTS AND FEDERAL INDIAN LAW

Tribes have existed as distinct sovereign nations on the land that is now considered the United States since time immemorial.[9] Tribal governments exercise the authorities and responsibilities of a nation-state,[10] including protecting the health and welfare of their citizens.[11] European colonization, genocide, and the founding of the United States all have diminished Indigenous populations and undermined Tribal governments.[12] Despite this history, the resiliency of Tribes and Native people has resulted in thriving Tribal governments and vibrant communities. Today, there are 574 Tribes recognized by the United States[13] and dozens of state-recognized Tribes.[14]

Tribal, state, and federal government relationships are governed by a body of law called federal Indian law.[15] At the core of this body of law is the principle of Tribal sovereignty, which is not based on federal law but instead recognized by it.[16] Sovereignty refers to the authority of Tribes to exercise jurisdiction over their land and govern their people.[17] As distinct nations, each Tribal government and its law are unique and reflective of their histories and cultures.[18] Tribal sovereignty is also a means to protect each Tribe's cultures, practices, and teachings.[19]

9 PEVAR, *supra* note 4, at 3.

10 *Id.* at 81.

11 Aila Hoss, *A Framework for Tribal Public Health Law*, 20 NEV. L.J. 113, 119–20 (2019).

12 *See* ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 39–42, 46 (2014).

13 Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021).

14 *See Federal and State Recognized Tribes*, NAT'L CONF. STATE LEGISLATURES, http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx (Mar. 2020).

15 FLETCHER, *supra* note 5, at 3.

16 PEVAR, *supra* note 4, at 81.

17 *See* Williams v. Lee, 358 U.S. 217, 218–19 (1959).

18 *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 4.01, 4.07 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK].

19 Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001).

The Supreme Court has found that the United States Congress holds a plenary power to legislate on all issues regarding Tribes or American Indian and Alaska Natives.[20] While plenary power allows for a federal preemption of Tribal authority or abrogation of Tribal treaty rights, the use of this power to undermine Tribal sovereignty or to absolve federal responsibilities outlined in treaties is strongly disfavored. Nevertheless, the federal government has a long history of using law to erode Tribal jurisdiction,[21] remove Indian children from their communities,[22] and limit cultural and religious practices.[23]

Based on history, treaties, agreements, case law, and legislation, the federal government maintains a trust responsibility towards Tribes.[24] The trust responsibility is both a fiduciary duty and a moral duty to protect Tribal treaties, lands, resources, and rights as outlined under federal law.[25] One of such rights under federal law is the provision of health care from the federal government. Tribal-United States treaties require the federal government to provide health services to Tribes in exchange for their ceded territories.[26] These requirements have also been incorporated in federal legislation.[27] In many ways, the federal government has reneged on these treaty responsibilities as Indian health care is chronically underfunded

20 *Ex parte* Kan-gi-Shun-ca, 109 U.S. 556, 561–62 (1883); United States v. Kagama, 118 U.S. 375, 375, 383–84 (1886).

21 *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); Montana v. United States, 450 U.S. 544, 556 (1981); Curtis Act, Pub. L. No. 55-517, 30 Stat. 495 (1898).

22 *See* Civilization Fund Act, Pub. L. No. 15-85, 3 Stat. 516b (1819); Dunbar-Ortiz, *supra* note 12, at 151, 153.

23 *See, e.g.*, Courts of Indian Offense and Law and Order Code, 25 C.F.R. § 11; Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–43 (1988); Felix S. Cohen et al., Cohen's Handbook of Federal Indian Law § 1.04 (Nell Jessup Newton et al. eds., 4th rev. ed. 2005).

24 *See* United States v. Mitchell, 463 U.S. 206, 224, 228 (1980); Menominee v. United States, 391 U.S. 404, 406 (1968); Passamaquoddy v. Morton, 528 F.2d 370, 379 (1st Cir. 1975); Seminole Nation v. United States, 316 U.S. 286, 315–16 (1942).

25 *Frequently Asked Questions*, Bureau Indian Affs., U.S. Dep't Interior, https://www.bia.gov/frequently-asked-questions (last visited Sept. 10, 2021); *Seminole Nation*, 316 U.S. at 296–97 ("In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.").

26 Cohen's Handbook, *supra* note 18, at § 22.04[1].

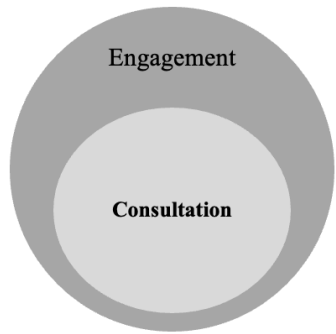
27 *See, e.g.*, Snyder Act, 25 U.S.C. § 13; Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 C.F.R. § 900); Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified at 25 U.S.C. § 1601).

and many health inequities persist in Indian country.[28] Thanks to Tribal programming, some of these failings have been mitigated.[29]

II. TRIBAL CONSULTATION AND THE LAW

Consultation is a formal process that allows Tribes to evaluate governmental action prior to being enacted.[30] Consultation can be distinguished from other, essential, methods of engagement with Tribes and American Indian and Alaska Native communities, like task forces, "Dear Tribal Leader" letters, advisory committees, and informal communications.[31] Unlike these activities, formal consultation requires communication to occur at a government-to-government level.[32] This necessitates participation of leadership from the Tribal and agency level, although in practice leadership can delegate authorized representatives. It also requires a formal process for which the consultation occurs. In short, Tribal consultation is an example of Tribal engagement but not all methods of Tribal engagement constitute Tribal consultation (figure 1).

Figure 1: Tribal Consultation v. Tribal Engagement



28 U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 65–66, 209 (2018). "Funding for the [Indian Health Service] and Native American health care is inequitable and unequal." *Id.* at 7.

29 *See* Hoss & Tanana, *supra* note 3, at 77–80.

30 *See* Memorandum on Government-to-Government Relations with Native American Tribal Governments, *supra* note 6.

31 *See Tribal Engagement & Consultation*, BUREAU SAFETY & ENV'T ENF'T, https://www.bsee.gov/about-bsee/tribal-engagement-consultation (last visited Nov. 25, 2021); U.S. DEP'T OF AGRIC., FOREST SERVICE, FS-1043, FOREST SERVICE RESEARCH AND DEVELOPMENT TRIBAL ENGAGEMENT ROADMAP 17 (2015).

32 PEVAR, *supra* note 4, at 40.

As discussed above, the United States has weaponized law and legal systems against Indigenous people and Tribal governments. Additionally, federal Indian law assigns incredible authority in Congress, the President, agencies, and courts to determine the scope of Indigenous rights[33] and in turn the welfare of Indigenous communities.[34] Thus, effective Tribal consultation is essential to prevent the continued unilateral adoption of federal policies that negatively impact Indian country[35] and is obligated under the federal trust responsibility.[36]

In the United States, Tribal consultation requirements have been incorporated into law. This section summarizes these legal requirements. Chronologically, the consultation "requirements" proffered by the United Nations (UN) are both younger than federal consultation mandates and not legally binding. Yet, they offer some of the most rigorous language. Therefore, this section first discusses consultation requirements proffered by the United Nations followed by a summary of federal executive and statutory requirements in the United States. This section ends by providing examples of state-level consultation requirements.

A. *United Nations Declaration on the Rights of Indigenous Peoples*

In 2007, the UN passed the Declaration on the Rights of Indigenous Peoples (UNDRIP).[37] UNDRIP was the product of decades of advocacy by Indigenous activists around the world, who documented human and civil rights violations against Indigenous communities and brought them to the international stage.[38] It outlines the rights of Indigenous individuals and communities across a multitude of areas including culture, language, governance, and land.[39]

Consultation is referenced several times throughout UNDRIP,[40] but Article 19 provides its overarching consultation mandate: "States shall consult and cooperate in good faith with the indigenous peoples concerned

33 *See generally id.* at 55–79.

34 *See* U.S. Comm'n on C.R., *supra* note 28, at 1.

35 Pevar, *supra* note 4, at 40–41.

36 *Id.* at 40.

37 *See United Nations Declaration on the Rights of Indigenous Peoples*, United Nations, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited Sept. 10, 2021).

38 *See Indigenous Peoples at the United Nations*, United Nations, https://www.un.org/development/desa/indigenouspeoples/about-us.html (last visited Sept. 10, 2021).

39 *See* United Nations, *supra* note 37.

40 *See* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at 10, 15, 17, 19, 28, 29, 30, 32, 36, 38 (Sept. 13, 2007) [hereinafter UNDRIP].

through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[41] In the context of international law, "states" refers to countries. Here, UNDRIP is (1) requiring countries to consult with Indigenous people, and (2) establishing a standard for this consultation in that it is based on "free, prior and informed consent."[42] Professor Carla Fredericks (Mandan, Hidatsa, and Arikara Nation) has described this standard as containing individual elements, each with legal significance.[43] Although the threshold for meeting each element continues to develop and may depend on the factual circumstance,[44] it generally refers to consent that is secured without coercion, external pressure, and external timelines and based on adequate and transparent information.[45] The standard also requires that consent be secured prior to action being taken.[46]

As a Declaration, UNDRIP is not legally enforceable against the countries that voted in favor of it.[47] Instead, its impact has "moral and political force."[48] The United States voted against the declaration in 2007 but subsequently signed on under the Obama Administration in 2011.[49] In its statement announcing the adoption of UNDRIP, the Administration tempered its support by including a statement regarding its understanding of Tribal consultation, stating, "the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken."[50] In this statement, the Obama Administration emphasized its understanding of the term

41 *Id.* at 19.

42 *Id.*

43 Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALB. L. REV. 429, 440 (2017).

44 *Id.*

45 UN-REDD PROGRAMME, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 18–19 (2013), https://www.uncclearn.org/wp-content/uploads/library/un-redd05.pdf.

46 *Id.* at 19, 24–25.

47 S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 98–104 (2009).

48 U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1 (Jan. 12, 2011), https://2009-2017.state.gov/documents/organization/184099.pdf.

49 Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007); *see* U.S. DEP'T OF STATE, *supra* note 48.

50 U.S. DEP'T OF STATE, *supra* note 48, at 5.

"consent" in UNDRIP not to be synonymous with the term "agreement." Under this interpretation, the United States can consult with Tribes without agreeing with the course of action. It highlights an important distinction, made by Professor Robert Miller (Eastern Shawnee)[51] and others,[52] in the language provided in UNDRIP as compared to the requirements under federal law. Consultation is not the same as consent.

B. *Federal Executive Branch Requirements*

Presidents have used memoranda and executive orders to require Tribal consultation.[53] Presidential memoranda and executive orders are executive actions that are legally binding upon federal executive agencies. Executive orders are more formal and take precedence over memoranda. President Clinton was the first President to take executive action regarding Tribal consultation.[54] His 1994 presidential memorandum required agencies to operate with Tribes on a government-to-government basis and to consult with Tribes on regulatory issues "to the greatest extent practicable."[55] Thanks to the advocacy of Professor Gerald Torres and others, President Clinton followed up on this memorandum by issuing Executive Orders 13084 and 13175 in 1998 and 2000, respectively.[56] Executive Order 13084 outlined similar principles as the 1994 memorandum but with a broader scope, allowing agencies to waive certain administrative requirements for Tribes upon application to improve Tribal access to federal programs.[57] Executive Order 13175, which replaced Executive Order 13084, adopted the same provisions and expanded them to require agencies to develop consultation

51 Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. Rev. 37, 37 (2015).

52 *See, e.g.*, Alana K. Bevan, *The Fundamental Inadequacy of Tribe-Agency Consultation on Major Federal Infrastructure Projects*, 6 U. Pa. J.L. & Pub. Affs. 561 (2021); Elizabeth Kronk Warner et al., *Changing Consultation*, 54 U.C. Davis L. Rev. 1127 (2020); Fredericks, *supra* note 43, at 429; David E. Wilkins & Hank Adams, *Nothing Less Than Consent: Consultation and the Diminishment of Indigenous Rights*, Indian Country Today (Apr. 3, 2018) (updated Apr. 8, 2019), https://indiancountrytoday.com/opinion/nothing-less-than-consent-consultation-and-the-diminishment-of-indigenous-rights.

53 *Infra* Table 1.

54 *See* Exec. Order No. 12,875, 3 C.F.R. § 100 (1994); Memorandum on Government-to-Government Relations with Native American Tribal Governments, *supra* note 6.

55 Memorandum on Government-to-Government Relations with Native American Tribal Governments, *supra* note 6.

56 *See* Exec. Order No. 13,084, 3 C.F.R § 100 (1998); Exec. Order No. 13,175, 3 C.F.R. § 100 (2001); Rebecca Hersher, *Hope and Skepticism as Biden Promises to Address Environmental Racism*, NPR (Jan. 29, 2021), https://www.npr.org/2021/01/29/956012329/hope-and-skepticism-as-biden-promises-to-address-environmental-racism.

57 Exec. Order No. 13,084, 3 C.F.R § 100 (1998).

policies.[58]

Under Executive Order 13175, agencies are required to consult with Tribes on "policies that have tribal implications," defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power . . . ."[59] Independent agencies are not bound by the requirement but encouraged to follow them.[60] Section 10 of the Executive Order prohibits enforceable rights or judicial review for breach of consultation requirements.[61]

The Bush, Obama, and Biden Administrations have reaffirmed existing requirements for Tribal consultation under Executive Order 13175 in their own presidential memoranda.[62] The Trump Administration did not.[63]

Consultation practices and policies vary across agencies. Agencies with missions that are exclusive to Indians, like the Indian Health Service (IHS) and the Bureau of Indian Affairs, will have unique experiences of consultation as compared to those that do not. The same might be said when comparing agencies with substantial regulatory and enforcement authority, like the Environmental Protection Agency and the Occupational Safety and Health Administration, and those that do not. Unsurprisingly, the consultation policies of each agency can vary as well but generally will provide background on Tribal consultation, identify consultation participants and roles, and list requirements on the minimum number of consultation sessions hosted each year.[64]

58 Exec. Order No. 13,175, 3 C.F.R. § 100 (2001).

59 *Id.*

60 *Id.*

61 *Id.*

62 Memorandum on Government-to-Government Relationship with Tribal Governments, 40 WEEKLY COMP. PRES. DOC. 2106 (Sept. 24, 2004); Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. 91 (Jan. 26, 2021); Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

63 *See Compilation of Presidential Documents*, U.S. GOV'T PUBL'G OFF., https://www.govinfo.gov/app/collection/cpd/2016/01 (last visited Nov. 26, 2021). *See generally* Andrew Westney, *Biden Returns to Obama Standards for Tribal Consultation*, LAW360 (Jan. 27, 2021), https://www-law360-com.ezproxy.neu.edu/articles/1349125/biden-returns-to-obama-standards-for-tribal-consultation.

64 *See* U.S. DEP'T OF HEALTH & HUM. SERVS., TRIBAL CONSULTATION POLICY 1–2, 6–7, 13, 15 (2010), https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf; CTRS. FOR DISEASE CONTROL & PREVENTION, CDC/ATSDR TRIBAL CONSULTATION POLICY 2–6 (2013), https://www.cdc.gov/tribal/documents/

In practice, many agencies host consultation sessions during set times throughout the year, open to all Tribes.[65] Often these sessions are held in conjunction with Tribal Advisory Committee meetings, whose members are Tribal leaders providing recommendations on issues but are not meeting on a government-to-government basis.[66] Consultation does not need to be relegated to set meetings scheduled by an agency. Any Tribe or agency can request consultation at any time on any issue.

Table 1: Presidential Actions on Tribal Government Relations

Date	**Administration**	**Action**	**Title**
Apr. 29, 1994	Clinton	Presidential Memorandum	Memorandum on Government-to-Government Relations With Native American Tribal Governments[67]
May 14, 1998	Clinton	Executive Order 13084	Consultation and Coordination With Indian Tribal Governments[68]
Nov. 6, 2000	Clinton	Executive Order 13175	Consultation and Coordination With Indian Tribal Governments[69]
Sept. 23, 2004	Bush	Presidential Memorandum	Government-to-Government Relationship with Tribal Governments[70]
Nov. 5, 2009	Obama	Presidential Memorandum	Memorandum on Tribal Consultation[71]
Jan. 26, 2021	Biden	Presidential Memorandum	Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships[72]

tac/2014/CDCATSDR_Tribal_Consultation_Policy.pdf [hereinafter CDC/ATSDR Tribal Consultation Policy]; *Tribal Consultation Policy*, Indian Health Serv. (Jan. 18, 2006), https://www.ihs.gov/IHM/circulars/2006/tribal-consultation-policy/.

65 *See, e.g.*, *Tribal Consultations Sessions and Tribal Advisory Committee Meetings*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/tribal/consultation-support/tribal-consultation/sessions.html (Apr. 5, 2021).

66 *See, e.g.*, *id.*

67 Memorandum on Government-to-Government Relations with Native American Tribal Governments, *supra* note 6.

68 Exec. Order No. 13,084, 3 C.F.R § 100 (1998).

69 Exec. Order No. 13,175, 3 C.F.R. § 100 (2001).

70 Memorandum on Government-to-Government Relationship with Tribal Governments, *supra* note 62.

71 Memorandum on Tribal Consultation, *supra* note 62.

72 Tribal Consultation and Strengthening Nation-to-Nation Relationships, *supra* note 62.

C. *Federal Statutory Requirements*

Federal statutory schemes also require Tribal consultation or do so in the implementation of these statutes. Unlike Executive Order 13175, failure to consult or inadequate consultation under statutory schemes is not without remedy. Agency actions can be delayed or invalidated.

For example, the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) mandates the return of culturally significant items, like human remains and sacred objects, to Tribes and Native Hawaiian organizations.[73] NAGPRA applies to items that are in the possession of any institution or government receiving federal funds or discovered on federal or Tribal lands.[74] The inventory and return of culturally significant items must be conducted in consultation with Tribes.[75] NAGPRA authorizes lawsuits when its provisions are violated or to enforce provisions under the law.[76]

Although the National Environmental Policy Act does not expressly mention Tribal consultation, corresponding regulations require it.[77] Additional laws including the National Historic Preservation Act, the Archaeological Resources Protection Act, and the American Indian Religious Freedom Act also require Tribal consultation.[78] Federal legislators have also introduced legislation to provide more comprehensive consultation requirements, but have thus far been unsuccessful.[79]

In the context of health, the Indian Health Care Improvement Act (IHCIA)[80] does state that "all actions under this chapter shall be carried out with active and meaningful consultation with Indian tribes."[81] However, this is done in the purpose section of the Act, the "Declaration of national

73 *See* Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001–02 (1990).

74 43 C.F.R. § 10.1(b) (1995).

75 *See* 25 U.S.C. §§ 3002, 3003(b)(1)(A) (1990), 3005.

76 25 U.S.C. § 3013 (1990).

77 40 C.F.R. § 1501.2 (2021).

78 *Tribal Consultation*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/resources-for/native-american-tribes/tribal-consultation (Mar. 29, 2018).

79 *See, e.g.*, RESPECT Act, H.R. 2689, 115th Cong. (2017); *Indigenous Peoples Legislative Hearing: Hearing on H.R. 375, H.R. 312 and RESPECT Act Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 116th Cong. (2019); *Hearing on Tribal-Related Legislation Including RESPECT Act and Stop Act: Hearing on H.R. 2930, H.R. 438 and RESPECT ACT Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 117th Cong. (2021); RESPECT Act, H.R. 3587, 117th Cong. (2021).

80 25 U.S.C. §§ 1601–85.

81 25 U.S.C. § 1602(5).

Indian health policy,"[82] rather than the operative provisions. Operative provisions are those that provide actual rights and obligations.[83] Only a handful of operative provisions of the IHCIA reference consultation requirements.[84] For example, consultation is required prior to the closure of an IHS facility.[85] The *United States District Court* for the *District of South Dakota* has found the enforceability of this particular consultation provision.[86] But the Court subsequently acknowledged that the provision does not require a certain type or method for consultation.[87] Although important, IHCIA's constulation requirements are limited and would not apply to broader health policy decisions coming out of the work of other health agencies beyond IHS, such as the Centers for Disease Control and Prevention (CDC) or the Food and Drug Administration (FDA).[88]

D. *State Requirements*

Some states have used intergovernmental agreements, gubernatorial executive orders, and state statutes to require consultation with Tribal governments.[89] These laws vary substantially in the scope and rigor of their consultation mandates.[90] A handful of states have established broad consultation requirements. In Oregon, state agencies are required to "make a reasonable effort to cooperate with tribes" when developing and implementing programs that impact Tribes.[91] This law, however, does not create a right of action against an agency nor a right to review an agency

82 *Id.*

83 Linda Jellum, Mastering Legislation, Regulation and Statutory Interpretation 218 (3d ed. 2020).

84 *See, e.g.*, 25 U.S.C. §§ 1631(b)(1), 1621y(b), 1621c(a); *see also* 25 C.F.R. § 900.3(6) (2021) (regarding constulation for IHS budgets).

85 25 U.S.C. § 1631(b)(1).

86 Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs., 869 F. Supp. 760, 765 (D.S.D. 1994).

87 Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs., 533 F.3d 634, 638 (8th Cir. 2008).

88 For example, 25 U.S.C. § 1631(a) states that constulation is required by the Secretary of Health and Human Services, acting through Indian Health Service. 25 U.S.C. § 1603(17)–(18).

89 Gabriel S. Galanda, *Advancing the State-Tribal Consultation Mandate*, Indian Country Today (Oct. 7, 2012), https://indiancountrytoday.com/archive/advancing-the-state-tribal-consultation-mandate.

90 *See, e.g.*, Or. Rev. Stat. §§ 182.164(3), 182.168 (2019); N.M. Stat. Ann. §§ 11-18-3, 11-18-5 (2021); Wash. Rev. Code Ann. § 43.376.020(1) (West 2021); *Centennial Accord*, Governor's Off. Indian Affs., https://goia.wa.gov/relations/centennial-accord (last visited Sept. 14, 2021).

91 Or. Rev. Stat. § 182.164(3) (2019).

action.[92] In fact, it explicitly excludes both, leaving Tribes without legal remedies when state agencies fail to consult.[93] New Mexico's State-Tribal Collaboration Act uses nearly identical language stating "[a] state agency shall make a reasonable effort to collaborate with Indian nations, tribes or pueblos in the development and implementation of policies, agreements and programs of the state agency that directly affect American Indians or Alaska Natives."[94] Here too, the New Mexico law explicitly denies Tribes a right of action.[95] Pursuant to this Act, state agencies, including the New Mexico Department of Health, have developed and adopted Tribal consultation policies.[96]

The foundations of Washington State's consultation requirements are based on an intergovernmental agreement, the Centennial Accord, adopted in 1989 and signed by the state and each of the federally recognized Tribes within the boundaries of the state.[97] It acknowledges the individual, government-to-government relationship between the state and each Tribe, and sets forth requirements to cultivate these relationships through communication.[98] Consultation is not expressly mentioned in this accord but the parties considered it as part of the scope.[99] However, Tribes found that in practice, consultation was inadequate, ineffective, or omitted.[100] The subsequent Millennium Agreement, adopted in 1999, included an explicit commitment from all parties to develop a consultation process.[101] Some of the requirements in this agreement were codified in the statute requiring state agencies to "[m]ake reasonable efforts to collaborate with Indian tribes in the development of policies, agreements, and program implementation

92 *Id.* at § 182.168.

93 *Id.*

94 N.M. STAT. ANN. § 11-18-3 (2021).

95 *Id.* at § 11-18-5.

96 *Collaboration and Communication Policy*, N.M. DEP'T HEALTH, STATE-TRIBAL CONSULTATION (2009), https://www.nmhealth.org/publication/view/policy/847/.

97 *Centennial Accord*, *supra* note 90.

98 *Id.*

99 *See* Martha Prothro, *Preliminary Report: Challenges to Relations Between the State of Washington and the Washington Tribes*, ROSS & ASSOCS. ENV'T CONSULTING (1999), https://goia.wa.gov/sites/default/files/public/gov-to-gov/millennim/rpt0928d.pdf; *Institutionalizing the Government-to-Government Relationship in Preparation for the New Millennium,* GOVERNOR'S OFF. INDIAN AFFS., https://goia.wa.gov/relations/millennium-agreement/agreement (last visited Sept. 14, 2021) ("Developing a consultation process, protocols and action plans that will move us forward on the Centennial Accord's promise that, 'The parties will continue to strive for complete institutionalization of the government-to-government relationship by seeking an accord among all the tribes and all elements of state government.'").

100 Prothro, *supra* note 99, at 4–5.

101 *Centennial Accord*, *supra* note 90.

that directly affect Indian tribes and develop a consultation process that is used by the agency for issues involving specific Indian tribes."[102] Under statutory code, a state agency is any "agency, department, office, or the office of a statewide elected official, of the state of Washington."[103] Some have suggested that these statutory requirements thus do not apply to the Washington State Health Authority (WSHA), which is tasked with assessing and developing state health care benefits plans.[104] On its website, the WSHA appears to engage in at least some consultation activities.[105] Recently, the Washington legislature received attention for the Climate Commitment Act, a late draft of which included a requirement for Tribal consent.[106] One commentator noted that Tribes located within the boundaries of the state were not consulted regarding this provision.[107]

In addition to consultation requirements applicable broadly across certain entities, some states have codified certain requirements to communicate with Tribes regarding health-specific issues. Notably, the term "consultation" is not always used. Louisiana law requires its Medicaid program to establish "a process to seek advice on a regular, ongoing basis from designees of the state's federally-recognized Indian tribal organizations and Indian health programs about Medicaid and Children's Health Insurance Program matters that may have a direct impact on Indian health programs and tribal organizations."[108]

In 1995, the California legislature tasked the Rural Health Division of the State Department of Health Services with conducting a study to develop methods to improve the collection of American Indian death statistics,[109] which continues to be an issue across the United States today.[110]

102 Wash. Rev. Code Ann. § 43.376.020(1) (West 2021).

103 *Id.* at § 43.376.010(2).

104 *Id.* at § 41.05.006(2).

105 *Consultation and Meetings*, Wash. State Health Care Auth., https://www.hca.wa.gov/about-hca/tribal-affairs/consultations-and-meetings (last visited Aug. 31, 2021).

106 *See* Fawn Sharp & Matthew Randazzo V, *Washington State Tribal Coalition Passes Unprecedented Climate Change Bill, Puts Consent Instead of Consultation into Law*, Indianz.com (May 21, 2021), https://www.indianz.com/News/2021/05/21/fawn-sharp-tribal-consent-becomes-the-law-in-washington-state/; Rebecca Nagle (@rebeccanagle), Twitter (May 21, 2021), https://twitter.com/rebeccanagle/status/1395864416235687943.

107 Gabe Galanda (@NDNlawyer), Twitter (May 27, 2021), https://twitter.com/NDNlawyer/status/1397976559143641089.

108 La. Admin. Code tit. 50, § 105(A) (West 2021).

109 Cal. Health & Safety Code § 102905(a) (West 2019).

110 Scott Erickson et al., *Data Genocide of American Indians and Alaska Natives in COVID-19 Data*, Urb. Indian Health Inst. (Feb. 15, 2021), https://www.uihi.org/download/data-genocide-of-american-indians-and-alaska-natives-a-report-card-grading-u-s-

The legislature required that the study be conducted with "input from, and consultation with, concerned tribes and tribal organizations and American Indian-controlled health care corporations."[111]

One Idaho law uses the term "consult" but does so in its general meaning to seek information,[112] rather than to refer to a formal government-to-government process. The state's Hazardous Substance Emergency Response Act allows the Military Division of the Idaho Office of Emergency Management to "[a]dvise, consult and cooperate with . . . tribal governments . . . concerned with emergency response and matters relating to and arising out of hazardous substance incidents."[113] This law also authorizes communication and coordination with Tribal governments but does not expressly require it.

A North Dakota law requires facilities seeking a license to operate an opioid treatment program to submit a community relations plan as part of its licensure application that was "developed in consultation with the . . . tribal authority."[114] Interestingly, this requirement is not included to give access to the Tribal community for treatment of opioid use disorder but instead "to minimize the impact of the opioid treatment program on the business and residential neighborhoods in which the program will be located."[115] This law also assigns the task of consultation to the third-party facility rather than requiring consultation from the state before it approves the facility's license.[116] In this way, it likely is not formal government-to-government consultation but it may speak to some of the limitations of existing consultation mandates discussed in the subsequent section.

In some instances, the federal government requires states to consult with Tribes under federal law and policy. When making changes to Medicaid, Children's Health Insurance Program, or health insurance exchange,[117]

states-quality-of-covid-19-data-and-their-effectiveness-in-tracking-it-for-american-indian-and-alaska-native-p/?wpdmdl=17709&refresh=61a131dd5d9c41637954013 (providing an analysis of state collection and analysis of state COVID-19 racial data); TRIBAL EPIDEMIOLOGY CTRS., BEST PRACTICES IN AMERICAN INDIAN & ALASKA NATIVE PUBLIC HEALTH 124–37 (2013), https://itcaonline.com/wp-content/uploads/2014/03/TEC_Best_Practices_Book_2013.pdf (describing challenges to securing public health data on American Indians and Alaska Natives).

111 CAL. HEALTH & SAFETY CODE § 102905(b) (West 2019).

112 *See Consult*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consult (Sept. 9, 2021).

113 IDAHO CODE ANN. § 39-7104(1)(d) (West 2021).

114 N.D. ADMIN. CODE 75-09.1-10-02(5)(c) (2021).

115 *Id.*

116 *Id.*

117 *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 5006, 123 Stat. 115, 496–512; National Health Care Workforce Commission, 42 U.S.C. §

or when applying for Medicaid Section 1115 waivers, states are required to consult with Tribes.[118] However, states do not have to honor Tribal recommendations.[119] Tribal consultation and advocacy proved essential in the approval of Arizona's Section 1115 waiver in 2019.[120]

Medicaid is a public insurance program jointly funded between states and the federal government and administered by states.[121] Although state Medicaid programs are required to follow federal law and policy, states have substantial flexibility in program structure and participant eligibility.[122] Section 1115 waivers give the Secretary of Health and Human Services the ability to waive certain federal program requirements following a state application.[123] The application must demonstrate that the waiver of a requirement will grant states the flexibility to improve their programs without compromising the goals of Medicaid.[124] These applications are reviewed and approved on a case-by-case basis.[125] Recently, under the encouragement of the Trump Administration, some states have been using section 1115 waivers to establish additional conditions to determine Medicaid eligibility, including employment.[126] Such work requirement waivers are disfavored by health policy experts and advocates[127] for reducing health coverage without

294q(e)(1); *State Tribal Relations on HealthCare*, Ctrs. for Medicare & Medicaid Servs., https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/redirect-StateTribal-RelationsonHealthcare (last visited Sept. 12, 2021).

118 American Recovery and Reinvestment Act § 5006(e)(2); 42 U.S.C. § 1396(a)(72) (2012); 42 C.F.R. § 431.408(b) (2021).

119 Robert Onders, *Medicaid: Can Federal Responsibilities, State Authorities, and Tribal Sovereignty Be Reconciled?*, 15 Wyo. L. Rev. 165, 181 (2015).

120 Felicia Fonseca, *Arizona Is Only State Where Tribes Avoid Medicaid Work Rules*, AP News (Jan. 18, 2009), https://apnews.com/article/north-america-ut-state-wire-ar-state-wire-az-state-wire-native-americans-fc5cfaea775542a7ad761b1b98183ec2.

121 *Program History*, Medicaid.gov, https://www.medicaid.gov/about-us/program-history/index.html (last visited Sept. 12, 2021).

122 *See id.*; *Policy Basics — Introduction to Medicaid*, Ctr. on Budget & Pol'y Priorities 1 (Apr. 14, 2020), https://www.cbpp.org/sites/default/files/atoms/files/policybasics-medicaid_0.pdf.

123 *See* Social Security Act, 42 U.S.C. § 1315(a)(1).

124 *About Section 1115 Demonstrations*, Medicaid.gov, https://www.medicaid.gov/medicaid/section-1115-demonstrations/about-section-1115-demonstrations/index.html (last visited Sept. 12, 2021).

125 *Id.*

126 *See Work Requirement Waivers: Approved and Pending as of April 16, 2021*, Kaiser Fam. Found., https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/#Table2 (last visited Apr. 16, 2021).

127 *See, e.g.*, Leighton Ku & Erin Brantley, *Medicaid Work Requirements: Who's At Risk?*, Health Affs. Blog (Apr. 12, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170412.059575/full/; MaryBeth Musumeci & Julia Zur, *Medicaid Enrollees*

impact on employment.[128] Reimbursements through Medicaid are also important funding streams for health facilities serving American Indians and Alaska Natives eligible for services through IHS and Tribal health facilities.[129] Arizona's initial Section 1115 waiver application did not exclude American Indians and Alaska Natives from the work requirements.[130] Following consultation at the state and federal level, the approved waiver provided an exemption for Tribal members.[131]

III. LIMITATIONS OF EXISTING CONSULTATION MANDATES

There are myriad limitations under the existing consultation frameworks referenced in the previous sections, long documented by Tribes, advocates, and scholars.[132] This section will highlight some of the most urgent limitations. Each of the issues outlined below relate to the federal consultation experience and can likely also be applied to the state level, especially since so few states have robust consultation requirements.

First, Executive Order 13175 has limited applicability. The executive order defines agency action to include regulations, legislative comments, proposed legislation, policy statements, and policy actions.[133] It also only applies to those actions with "substantial direct effects on Tribes."[134] In some ways, this definition is narrower than what administrative law prescribes since it does not include "failure to act."[135] The definition under the executive

and Work Requirements: Lessons from the TANF Experience, KAISER FAM. FOUND. (Aug. 18, 2017), https://www.kff.org/medicaid/issue-brief/medicaid-enrollees-and-work-requirements-lessons-from-the-tanf-experience/.

128 Benjamin D. Sommers et al., *Medicaid Work Requirements — Results from the First Year in Arkansas*, NEW ENG. J. MED. (SPECIAL REPORT) (2019).

129 *Medicaid Work Requirements Will Not Work in Indian Country*, NAT'L INDIAN HEALTH BD. (2017), https://www.nihb.org/docs/09182017/Medicaid%20Work%20Requirements%20One%20pager.pdf.

130 Fonseca, *supra* note 120.

131 *CMS Approves Arizona's Medicaid Community Engagement Demonstration Amendment*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 18, 2019), https://www.cms.gov/newsroom/press-releases/cms-approves-arizonas-medicaid-community-engagement-demonstration-amendment.

132 *See, e.g.*, PEVAR, *supra* note 4, at 40–41; Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 73–74 (1999); Fredericks, *supra* note 43, at 469–70; Warner et al., *supra* note 52, at 1133; Miller, *supra* note 51, at 64–67.

133 Exec. Order No. 13,175, 3 C.F.R. § 100 (2001).

134 *Id.*

135 *See* 5 U.S.C. § 551(13) (defining agency action as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); Exec. Order No. 13,175, 3 C.F.R. § 100 (2001).

order also leaves unclear which policy actions or statements would trigger consultation.[136] The CDC's Tribal Consultation Policy lists potential actions triggering consultation as including "policy, funding/budget development, and program services, functions, and activities."[137] The FDA's Tribal Consultation Policy requires consultation for "critical events," defined as "a planned or unplanned policy action that has or may have tribal implications and substantial direct effects on Indian tribe(s)."[138]

Executive Order 13175, and both the CDC's and FDA's Tribal consultation policies, are only implicated by actions that have "substantial direct effects" on Tribes.[139] Agencies, not Tribes, determine what is a substantial direct effect. Yet, Tribes would be better situated to assess which actions implicate them and to what degree. Executive Order 13175 also does not apply to independent regulatory agencies.[140] Actions by agencies like the Federal Emergency Regulatory Commission and the National Transportation Safety Board are thus outside the scope of Executive Order 13175.

Second, there is a well-documented lack of commitment from agencies to ensure meaningful consultation. As Stephen Pevar summarizes, "[c]onsultation has been an exceedingly important development, but it has not always worked well. Some tribes report that government officials often contact them only after a decision has been made, do not participate in discussions in good faith, and only pretend to care what the tribe wants."[141] This lack of commitment manifests in various ways.

Tribal consultation necessitates a government-to-government conversation. However, agency leaders regularly send delegates rather than attend consultation sessions,[142] indicating a lack of priority for these sessions.

136 *See, e.g.*, *Department of Justice Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175*, U.S. Dep't Just. 2 (Jan. 27, 2010), https://www.justice.gov/sites/default/files/opa/legacy/2010/02/12/exec13175-consultation-policy.pdf. The Department of Justice plan to develop a consultation policy acknowledges a need to determine which actions or events would trigger consultation. *Id.*

137 CDC/ATSDR Tribal Consultation Policy, *supra* note 64, at 4.

138 *FDA Tribal Consultation Policy*, U.S. Dep't Health & Hum. Servs. 8 (2016), https://www.fda.gov/media/102299/download.

139 *See* Exec. Order No. 13,175, 65 Fed. Reg. at 67,249; CDC/ATSDR Tribal Consultation Policy, *supra* note 64, at 8; *FDA Tribal Consultation Policy*, *supra* note 138, at 2–3.

140 Exec. Order No. 13,175, 3 C.F.R. § 100 (2001).

141 Pevar, *supra* note 4, at 41.

142 *See, e.g.*, *CDC/ATSDR Tribal Advisory Committee Meeting and 18th Biannual Tribal Consultation Session*, Ctrs. for Disease Control & Prevention 2–5 (Feb. 5-6, 2019), https://www.cdc.gov/tribal/documents/tac/2019/TAC-Winter-2019-Meeting-Minutes-508.pdf (CDC Director Robert Redfield not in attendance); *CDC/ATSDR*

In this way, Tribes are unable to engage in a dialogue with fellow decision makers. Consultation sessions are regularly held with multiple Tribes represented.[143] On its face, this is not necessarily inappropriate. But the voice of a single Tribe can be diluted, and Tribes may feel there is inequitable allocation of scarce resources across Tribes.[144]

Agencies also regularly fail to consult with Tribes prior to taking action,[145] or find that sending a letter or email is sufficient to serve as consultation, even if Tribes do not respond.[146] Agencies conflate and over rely on Tribal engagement activities, like Tribal Advisory Committees and letters to Tribal leaders, in lieu of government-to-government consultation.

Third, consultation sessions are often not structured as discussions or conversations. Instead, Tribes take turns sharing their concerns without any real response or action from agencies. In this way, consultation is not always meaningful. Recordings from recent consultation sessions during the COVID-19 pandemic, offer clear examples of consultation that did not include meaningful dialogue.[147] In these recordings, Tribal representatives explain their perspectives both by unmuting their microphones and utilizing the chat function. There are numerous Tribes represented and each shared their perspective, and while there may be short comments from the agency, there is no meaningful discussion.

Fourth, existing consultation frameworks provide inadequate enforcement mechanisms. Even when consultation has occurred, agencies regularly ignore Tribal recommendations since consent is not required. Executive Order 13175 is the broadest federal consultation requirement in

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Tribal Advisory Committee Meeting and 17th Biannual Tribal Consultation Session, CTRS. FOR DISEASE CONTROL & PREVENTION 48–49 (Aug. 8, 2017), https://www.cdc.gov/tribal/documents/consultation/Summer-2017-Full-Meeting-Summary.pdf (CDC Director Brenda Fitzgerald not in attendance).

143 *See, e.g.*, *CDC/ATSDR Tribal Advisory Committee Meeting and 18th Biannual Tribal Consultation Session*, *supra* note 142, at 2.

144 *See Tribal Consultation Policy*, *supra* note 64.

145 *See, e.g.*, *Biden Fails in Promise to Consult with Indigenous Tribes*, INDIAN COUNTRY TODAY (Mar. 2, 2021), https://indiancountrytoday.com/the-press-pool/biden-fails-in-promise-to-consult-with-indigenous-tribes; Acee Agoyo, *Tribal Consultation Policies Still Lacking Amid Challenges of Trump Era*, INDIANZ.COM (Apr. 23, 2019), https://www.indianz.com/News/2019/04/23/tribal-consultation-policies-still-lacki.asp.

146 Slockish v. U.S. Fed. Highway Admin., No. 3:08-CV-1169-ST, 2012 WL 3637465, at *9 (D. Or. June 19, 2012); *see, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs., 205 F. Supp. 3d 4, 15 (D.D.C. 2016).

147 Admin. for Child. & Fams., *ACF Tribal Consultation June 11, 2020*, YOUTUBE (July 22, 2020), https://www.youtube.com/watch?v=HKD2Jo6aIz8; *see Tribal Consultation and Urban Confer*, INDIAN HEALTH SERV., https://www.ihs.gov/dbh/consultationandconfer/ (last visited Sept. 12, 2021).

scope but offers no enforcement mechanisms. Thus, enforcement is limited only to consultation requirements if also authorized under federal legislation.

Finally, constulation places substantial burdens on Tribes to assess agency policies. This burden is not compensated. There is no racial-ethnic group whose rights are more heavily regulated than American Indians and Alaska Natives.[148] Under federal statutory schemes alone, there are dozens of definitions for when a person is considered an "Indian."[149] The impacts of this on consultation cannot be understated. Native representation across our executive, agency, legislative, and judiciary has been limited. In many ways, Tribal engagement and consultation are the only ways in which Native people can have access to governing processes.

Even without a rigorous consultation mandate, the volume of federal actions that implicate Tribes and American Indian and Alaska Native communities is enormous. Additionally, the burden on Tribes to assess and consult on each of these activities is also immeasurable. Substantial time and resources go into assessing the impact of an agency action.

IV. Consultation and Health Outcomes

Failure to consult or inadequate consultation with Tribes is harmful. It may be impossible to adequately quantify the health impacts of lack of consultation or inadequate consultation. However, there is a wealth of knowledge on how dangerous and deadly many federal Indian policies have been.[150] This section first begins by outlining the health impacts of inadequate consultation. It next describes existing literature for improving consultation and then proposes federal legislation to mitigate failings in existing consultation frameworks to promote Tribal health sovereignty.

148 David H. Getches et al., Cases and Materials on Federal Indian Law 1 (6th ed. 2011).

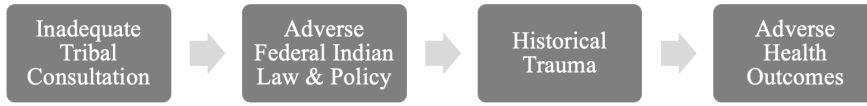
149 Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship*, 66 Notre Dame L. Rev. 1461, 1481 (1991).

150 *See* Walter R. Echo-Hawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided 4 (2010) ("Only rarely in US history has the law served as a shield to *protect* Native Americans from abuse and to further their aspirations as indigenous peoples. The law has more often been employed as a sword to *harm* Native peoples by stripping away their human rights, appropriating their property, stamping out their cultures, and, finally, to provide legal justification for federal policies that have, at times, resorted to genocide and ethnocide.").

A. *Health Impacts of Inadequate Consultation*

Many federal laws and policies were established with the intent to harm and disrupt Tribes and their communities.[151] "Historical trauma refers to the collective emotional and psychological injury both over the life span and across generations resulting from the history of difficulties that Indians as a group have experienced in America."[152] Federal policies, including removal, assimilation, and boarding schools have contributed to historical trauma.[153] The health impacts of historical trauma are also well-documented. Health inequities experienced by American Indians and Alaska Natives, including depression, suicide, anxiety, disordered eating, commercial tobacco use, and substance use disorder, are all linked to historical trauma.[154] Collectively, adverse federal Indian laws and policies can be linked to health inequities.[155] As shown in Figure 2, Tribal consultation is a mechanism that can prevent the passing of adverse federal Indian law and policy and is thus a tool to advance health outcomes.

Figure 2: Logic Model Linking Tribal Consultation to Adverse Health Outcomes



Actions triggering Tribal consultation can also have direct impacts on health. Consider, for example, that consultation is required for the permitting of pipeline and other industry development. These activities can impact water and air pollution, which in turn impacts the health of nearby Tribal communities. Inadequate consultation during the 2009 H1N1 pandemic resulted in the exclusion of Tribes from the federal government's distribution of antiviral medications. Instead, Tribes had to secure antivirals

151 *Id.*

152 PEGGY HALPERN, U.S. DEP'T OF HEALTH & HUM. SERVS., OBESITY AND AMERICAN INDIANS/ALASKA NATIVES xi (2007), https://aspe.hhs.gov/sites/default/files/private/pdf/75036/report.pdf.

153 *See* Joseph P. Gone et al., *The Impact of Historical Trauma on Health Outcomes for Indigenous Populations in the USA and Canada: A Systematic Review*, 74 AM. PSYCH. 20, 26–29 (2019).

154 *Id.*; Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration*, 35 J. PSYCHOACTIVE DRUGS 7, 7–11 (2003). *See generally* Monica C. Skewes & Arthur W. Blume, *Understanding the Link Between Racial Trauma and Substance Use Among American Indians*, 74 AM. PSYCH. 88 (2019).

155 *See generally* Aila Hoss, *Federal Indian Law Is a Structural Determinant of Health*, 47 J. L., MED., & ETHICS 34 (2019).

from states,[156] who sometimes refused to provide Tribal shares if the Tribe's distribution policy did not match the state's policy.[157] More recently, Tribes have not been consistently receiving access to COVID-19 related data from state partners,[158] an outcome that could have been avoided with proper consultation.

Conversely, Tribes who were given the option of direct access to COVID-19 vaccines had some of "the most successful vaccination campaigns in the [United States]."[159] Consultation has also resulted in direct funding to Tribes and Tribal-serving organizations at agencies like the CDC.[160] Previously, Tribal access to grants and cooperative agreements had been limited.

Professor Jonathan Purtle has explored how disenfranchisement can create prolonged and pervasive stress on individuals.[161] Tribal consultation is a means to prevent disenfranchisement in government and the continued omission of consultation on important decisions may have similar health impacts on American Indian and Alaska Native communities. The federal government determines which Tribal cultural practices are entitled to constitutional protections; who is considered an Indian under various federal laws; and the outcome of lands, water, and wildlife that Tribal communities have honored and protected since time immemorial. Not having a voice in such decisions could certainly result in chronic stress and other adverse health outcomes.

B. *Mechanisms for Improving Consultation*

Numerous scholars, researchers, and advocates have considered methods to ensure that free, prior, and informed consent can be achieved in consultation processes. Some of such works are described here. In *The Rights of Indians and Tribes*, Stephen Pevar suggests a six-prong framework for

156 *2009 H1N1 Flu: Resource Guide for American Indian/Alaska Native Tribal Governments*, Ctrs. for Disease Control & Prevention (Nov. 2, 2019), https://www.cdc.gov/h1n1flu/statelocal.

157 Lou Schmitz & Heather Erb, Am. Indian Health Council, Keynote Address at the 3d Annual Tribal Public Health Emergency Preparedness Conference: Partnering in a Climate of Change (May 23, 2009).

158 *See* Tahir & Cancryn, *supra* note 2; Hoss, *supra* note 2.

159 Shawna Chen & Russell Contreras, *Native American Tribes Lead the Way on Coronavirus Vaccinations*, Axios (Mar. 11, 2021), https://www.axios.com/covid-vaccine-native-americans-internet-access-6f1ebc15-987f-4c2a-bf1f-7dcffce7ce8f.html.

160 *Budget, Grants, and Funding*, Ctrs. for Disease Control & Prevention (Sept. 17, 2019), https://www.cdc.gov/tribal/consultation-support/funding/index.html.

161 *See, e.g.*, Jonathan Purtle, *Felon Disenfranchisement in the United States: A Health Equity Perspective*, 103 Am. J. Pub. Health 632, 632–35 (2013).

improving consultations:

> 1. Inform the Tribe of the relevant facts, and do so as early in the decision-making process as possible;
> 2. Give the Tribe sufficient time to consider the situation, and provide the tribe with technical assistance and additional data if requested;
> 3. Maintain dialogue with the Tribe, address the [T]ribe's concerns in a timely manner, keep the [T]ribe informed on developments, and be open;
> 4. Document the consultation process by notifying the Tribe in writing of developments and plans and request written comments from the tribe;
> 5. Accept the Tribe's recommendations unless compelling reason not to;
> 6. When the Tribe's recommendation is not accepted, send a written and detailed explanation of why.[162]

Some version of prongs 1-4 are likely utilized by agencies when choosing to consult with Tribes. Prongs 5 and 6, however, are likely rarely completed and offer a mechanism for agencies to justify their decisions in writing. Pevar's framework does not, however, explicitly require consent. Professor Robert Miller argues that the United States should seek to secure Tribal consent in advance of decision making.[163] He argues that it would be both less expensive and more efficient to secure Tribal consent in advance of executive decisions,[164] which could otherwise be delayed or invalidated in litigation after the fact.[165]

Dean Kronk Warner (Sault Ste. Marie Tribe of Chippewa Indians) and her colleagues suggest that effective consultation requires adequate resources at the federal and Tribal level.[166] Muscogee Nation Ambassador

162 PEVAR, *supra* note 4, at 40–41.
163 Miller, *supra* note 51, at 97.
164 *Id.*
165 For a survey of consultation-related litigation, see *Hearing on H.R. 2930, H.R. 438, and RESPECT Act Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 117th Cong. 16–25 (2021) (statement of Matthew L.M. Fletcher, Director and Professor of Law, Indigenous Law & Policy Center, Michigan State University College of Law).
166 Warner et al., *supra* note 52, at 1181–82.

Jonodev Chaudhuri has argued that individual, Tribally-based consultations are the most effective.[167]

C. *Proposing a National Tribal Health Policy Consultation Act*

As outlined above, existing consultation frameworks are inadequate to provide Tribes meaningful opportunities to evaluate federal actions. Indian health policies need the same threshold of protection as land and human remains. A National Indian Health Policy Consultation Act (NIHPCA) can require a more robust assessment of the impact of agency actions on Indian health and provide sufficient enforcement mechanisms.

First, NIHPCA could outline specific types of actions that would trigger consultation and make the requirements apply to both executive and independent agencies. In supporting consultation in Indian health matters, this legislation could also minimize the burden on Tribal governments through funding and more robust technical assistance. NIHPCA could give mechanisms in which Tribes can request funds to hire or consult with experts of their choosing to support a thoughtful assessment of the federal agency action. For decisions impacting Tribes generally, if agencies choose not to adopt Tribal recommendations, NIHPCA would require agencies to document the reasoning for that decision. In the event that an agency action will specifically impact one or more Tribes, as in the approval of an industry permit near Tribal lands or the closing of an IHS facility, the federal agency should act only with advanced consent.

Additionally, as more funds are going into Indian country through federal grants and cooperative agreements, there needs to be consultation in advance to determine the best mechanisms in which to structure and distribute funds. Ongoing litigation challenging the distribution of Tribal funds from the Coronavirus Aid, Relief, and Economic Security Act could have been avoided had adequate consultation taken place.[168] NIHPCA could also require states that receive federal funding to meaningfully consult with Tribes and outline the same mechanisms to ensure robust consultation.

Perhaps most importantly, Tribes must be able to request judicial review or other enforcement actions when consultation is lacking. This is not possible under Executive Order 13175. Statutory schemes that require consultation, however, can and often do provide mechanisms for redress

167 American Bar Assoc., On-Demand Webinar on Defending Tribal Sovereignty: The Ongoing Battle Over "Meaningful Consultation" and Self-Governance Over Natural and Cultural Resources (Dec. 31, 2020).

168 *See* Shawnee Tribe v. Mnuchin, 984 F.3d 94, 96–97 (D.C. Cir. 2021); Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2442 (2021).

when consultation is bypassed or inadequate. Executive order enforcement also necessitates that the government pursue the remedy, rather than another party like a Tribe.[169] Legislation, however, can carve out the ability for Tribes to pursue litigation. Like NAGPRA and other federal laws, NIHPCA would authorize lawsuits for when its provisions are violated or to enforce provisions under the law.

CONCLUSION

Agency actions that impact public health and health care can directly impact the health outcomes in Tribal communities. The COVID-19 pandemic reinforces the essential need for more robust consultation with Tribes by federal agencies. As we have learned, supporting health in one community can support health in all communities. Such legislation might be more politically feasible in light of ongoing policy efforts to better respond and prevent public health crises like COVID-19.

As the epigraph to this article suggests, a single piece of legislation, alone, will not fix Tribal-federal relations. Bettering Tribal-federal relations requires a respect for Tribal sovereignty and jurisdiction. But federal agencies are already going to go through the theatrics of consultation, so much of which is inadequate. Let's make constulation more meaningful by adding more prescriptive measures though legislation targeted toward health policy.

169 *See* Robert B. Cash, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME L. REV. 44, 51 (1963).

ACTIVISMITIS

*By Courtney Lauren Anderson**

* Courtney Lauren Anderson is an associate professor of law at Georgia State University College of Law.

Table of Contents

ABSTRACT

Protests are usually organized, mobilized, and amplified by the parties for whom the change is sought. Women marching for reproductive rights, against misogyny and for the right to vote. Black people organizing to lead demonstrations against police brutality and to bring attention to racism. Throughout the process of fighting for comprehensive change, the activists rarely have the time and space to contemplate how to properly care for their own health and well-being. Although being entrenched in a cause that aligns with one's passion can provide a positive mood change, often times activists suffer from mental and physical health complications as a direct result of being exposed to stress. Violent and racist incidents reproduce horrifying images and cause communities of color to relive trauma while championing their cause. Due to the urgent nature of most protests, it is rare that advocates have the luxury of considering the long-term health effects of their actions or incorporating health-related protections in their demands. However, if legislators, politicians, and other leaders recognize the validity of the cause and take advantage of the opportunity to support the movement, they should likewise support those who sacrifice their health and put themselves in harm's way to initiate and advance these causes.

INTRODUCTION

This article describes landmark activism in the United States and illustrates how, despite the positive consequences that can arise from such advocacy, activists themselves may face physical and mental health deterioration. Racism, discrimination, and prejudice are generally accepted to be negative social constructs that like-minded people might rally against in the name of equality. These social constructs create unpleasant experiences for classes of people in this country who identify as something other than a white, cisgender, Christian male. Racism not only contributes to unhappiness, but also causes depression, hypertension, and several other mental and physical health problems.[1] Violent and non-violent experiences, caused by discrimination, often force Black people to live in a state of constant distress characterized by troublesome thoughts and feelings of emotional numbness.[2] When activists who are representatives of oppressed individuals advocate for change to this perpetual state of being, they are also provided a set of challenges that negatively impact their physical and mental health. Section I details the Women's Rights protests, from the suffrage movement to more recent advocacy arising from the 2016 presidential election. Civil rights history is outlined in Section II, and the current media environment and coverage of protests is described in Section III. Section IV provides information on the impacts of activism on mental health. This includes the general significance of racism on people of color with a greater focus on the impact of racism on Black people specifically and concludes with an overview of racial disparities to underscore the significance of providing access to equitable healthcare to marginalized populations.

I. WOMEN'S RIGHTS PROTESTS

This section addresses two main topics: (1) the suffrage movement and the modern Women's March and (2) the efficacy of protests and the groups who benefit from them. To explore these topics, this section first analyzes the key players of the Women's Suffrage movement, organizations formed during this time, events held, the results of such events, and the 19th Amendment: Right to Vote. Second, it describes the discrimination within the Women's Suffrage movement. Finally, it analyzes recent events.

Hegel's dialectic theory suggests that there exists, at all times, a

1 Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905, 919–20, 922 (2005).

2 *Id.* at 922–23.

thesis and antithesis at odds with each other.[3] This perpetual opposition progressively yields "a positive result namely, . . . the synthesis—which unifies the two, earlier, opposed concepts."[4] Protest culture in 20th and 21st century America epitomizes this duality. Further, the relationship between protests and counter-protests within this philosophical framework illuminates the law's role as the synthetic catalyst between the two. The law operates to maintain the status quo and minimize the degree of change driven by a thesis or antithesis at any given time. This article analyzes this framework in the context of American protest culture at the turn of the 21st century, and the emergence of prominent contemporary protest movements which build on the successes of the Women's Rights movement and Civil Rights movement of the 20th century.

A. *The Beginning*

The Women's Rights movement was born in a time riddled with prejudice and suppression. Many women wanted change and to have their thoughts and opinions weighed evenly against the thoughts and opinions of men. Women wanted the right to vote for the people creating the policies directly affecting their lives, the same as men. Women such as Elizabeth Cady Stanton, Susan B. Anthony, Lucy Stone, Sojourner Truth, Carrie Chapman Catt, Anna Howard Shaw, Alice Paul, and more blazed the trail for women to be heard.[5] These women were the defining voices and figures of the suffrage movement.[6]

On July 9, 1848, Elizabeth Cady Stanton met with fellow women for tea, at which time they began discussing the plight of women in America.[7] Stanton was frustrated that women did not receive the same freedoms as men, despite their equal contributions in making America.[8] Stanton and her friends planned a Convention, placed the announcement in the Seneca County Courier, and booked the Wesleyan Chapel in Seneca Falls for July

3 *See* Julie E. Maybee, *Hegel's Dialectics*, Stan. Encyc. Phil. (Oct. 2, 2020), https://plato.stanford.edu/archives/win2020/entries/hegel-dialectics/.

4 *See id.*

5 *The U.S. Woman Suffrage Movement, In Brief*, #MonumentalWomen, (2021), https://monumentalwomen.org/suffrage-movement/.

6 *Id.*

7 Erin Blakemore, *The Women's Suffrage Movement Started with a Tea Party*, Hist. (July 10, 2018) (updated Apr. 1, 2019), https://www.history.com/news/early-womens-rights-suffrage-seneca-falls-elizabeth-cady-stanton.

8 *Seneca Falls Convention*, Hist. (Nov. 10, 2017), https://www.history.com/topics/womens-rights/seneca-falls-convention.

19 and 20, 1848.[9] This meeting was the first of its kind.[10]

Racism and exclusivity are detailed later in this section, but it is important to note upfront the divisiveness within the suffrage movement from the outset. In 1866, women's suffragists Stanton and Anthony joined Frederick Douglass and other voting right advocates in forming the American Equal Rights Association (AERA) for the purpose of achieving voting rights for women and Black people.[11] However, Black women were excluded from the goals of this organization as the focus was on white women and Black men.[12] Frances Ellen Watkins Harper, a Black woman suffragist, tried to work with Anthony and Stanton, but had to push back against racism within their platform.[13] After the introduction of the 15th Amendment, Stanton and other female suffragists disagreed with giving Black men the right to vote and AERA disbanded as white, female activists in the group gave public statements riddled with racist stereotypes.[14] Many Black women suffragists continued to fight for equal voting rights.[15] Mary Ann Shadd Cary advocated for the abolition of slavery in what was the first newspaper in North America published by a Black woman.[16] In 1896, Mary Church Terrell and Josephine St. Pierre Ruffin created the National Association of Colored Women which had an inclusive agenda of uniting Black suffrage organizations, creating employment training, fighting for equal pay, and increasing educational and childcare opportunities for Black people.[17] Ida B. Wells was one of the founders of the National Association for the Advancement of Colored People, and she also co-founded the Alpha Suffrage Club which sought to educate Black women about politics and voting rights.[18] Despite the notable achievements of Black women for women's rights, white women suffragists, such as Alice Paul, attempted to segregate and diminish their involvement.[19] Black women suffragists were excluded from women's voting conventions,

9 *Seneca Falls Convention Begins*, HIST. (July 21, 2010), https://www.history.com/this-day-in-history/seneca-falls-convention-begins.

10 *Id.*

11 Becky Little, *How Early Suffragists Left Black Women Out of Their Fight*, HIST. (Nov. 8, 2017), https://www.history.com/news/suffragists-vote-black-women.

12 *Id.*

13 Lakshmi Gandhi, *5 Black Suffragists Who Fought for the 19th Amendment – And Much More*, HIST. (Aug. 4, 2021), https://www.history.com/news/black-suffragists-19th-amendment.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*; Allison Lange, *National Association of Colored Women*, NAT'L WOMEN'S HIST. MUSEUM (2015), https://www.crusadeforthevote.org/nacw.

18 Gandhi, *supra* note 13.

19 *Id.*

instructed to march at the back of women's rights parades, and were mostly excluded from the *History of Woman Suffrage*, a book about the movement authored by Stanton and Anthony.[20]

B. *Seneca Falls Convention of 1848*

Stanton drafted a "Declaration of Sentiments" based on the Declaration of Independence in order to show the magnitude of women's liberty.[21] The declaration began, "[w]e hold these truths to be self-evident; that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."[22] Some of the grievances Stanton included were that "women were not allowed to vote, women were not allowed to enter professions such as medicine or law, husbands had legal power over and responsibility for their wives to the extent that they could imprison or beat them with impunity," and more.[23] At the Seneca Falls Convention of 1848, the Declaration of Sentiments and eleven grievances/resolutions were almost all unanimously passed.[24] However, the resolution for a woman's right to vote was not unanimous, and many people thought it was inconceivable for women to have the right to vote.[25] If not for Frederick Douglass' speech at the convention, the resolution may never have passed by a majority vote.[26]

Fredrick Douglas argued that women had a right to liberty, comparing their fight for freedom to the slavery abolition movement. He stated that "[s]uffrage is the power to choose rulers and make laws, and the right by which all others are secured."[27] One hundred men and women

20 Megan Bailey, *Between Two Worlds: Black Women and the Fight for Voting Rights*, Nat'l Park Serv. (Oct. 9, 2020), https://www.nps.gov/articles/black-women-and-the-fight-for-voting-rights.htm; Gandhi, *supra* note 13; Elizabeth Cady Stanton, History of Woman Suffrage (1881).

21 Mimi Yang, *An Intimate Dialog Between Race and Gender at Women's Suffrage Centennial*, Humans. & Soc. Scis. Commc'ns at 1, 7 (Aug. 13, 2020), https://www.nature.com/articles/s41599-020-00554-3.pdf.

22 *Declarations of Sentiments from the First Women's Rights Convention*, Nat'l Park Serv. (Feb. 26, 2015), https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm.

23 Bonnie Eisenberg & Mary Ruthsdotter, *History of the Women's Rights Movement*, Nat'l Women's Hist. All. (1998), https://nationalwomenshistoryalliance.org/history-of-the-womens-rights-movement/; *see also Declarations of Sentiments from the First Women's Rights Convention, supra* note 22.

24 *Seneca Falls Convention*, *supra* note 8.

25 Eisenberg & Ruthsdotter, *supra* note 23.

26 *Id.*

27 *Id.*

signed the following pledge after the convention:

> In entering upon the great work before us, we anticipate no small amount of misconception, misrepresentation, and ridicule; but we shall use every instrumentality within our power to effect our object. We shall employ agents, circulate tracts, petition the State and national Legislatures, and endeavor to enlist the pulpit and press in our behalf. We hope this Convention will be followed by a series of Conventions, embracing every part of the country.[28]

After the passing of the Declaration of Sentiments, the convention and declaration kindled a fire inside women; campaigns subsequently developed across the country, and soon the Women's Rights movement was steaming full force ahead.[29]

C. *Conventions to Follow*

More conventions began to pop up around the country. On August 2, 1848, a Woman's Rights Convention was held in Rochester, New York, thereafter, along with New York, more sprung up in Ohio and Pennsylvania.[30] In 1850, the first National Woman's Rights Convention was held in Worcester, Massachusetts.[31]

i. Women's Rights Convention Rochester, NY (1848)

Over 150 years ago, sparked by the Seneca Convention, women from Rochester, NY, organized a meeting in the Unitarian Church on August 2, 1848.[32] Amy Post called the meeting to order and announced the following women as officers: Abigail Bush, president; Laura Murray, vice president; Catharine A.F. Stebbins, Sarah L. Hallowell, and Mary H. Hallowell, secretaries.[33] Those in attendance, to name a few, included: Lucretia Mott, Frederick Douglass, and Elizabeth Cady Stanton.[34] The Declaration of Sentiments was read aloud to the convention and garnered

28 *Declarations of Sentiments from the First Women's Rights Convention*, *supra* note 22.

29 *Seneca Falls Convention*, *supra* note 8; *The Declaration of Sentiments by the Seneca Falls Conference (1848)*, NAT'L ENDOWMENT FOR HUMANS. (Aug. 19, 2014), https://edsitement.neh.gov/closer-readings/declaration-sentiments-seneca-falls-conference-1848.

30 *Women's Rights Movement*, NAT'L PARK SERV. (Feb. 26, 2015), https://www.nps.gov/wori/learn/historyculture/womens-rights-movement.htm.

31 *Id.*

32 *University of Rochester Library Bulletin: Report of the Woman's Rights Convention, 1848*, RIVER CAMPUS LIBRS. (1948), https://rbscp.lib.rochester.edu/2448.

33 *Id.*

34 *Id.* at 1–3.

107 signatures.[35] Issues pertaining to the difference in education attained by boys versus girls, and the low wages for sempstresses [sic] were discussed.[36]

Some men of this time were concerned that their wives would be given too much power, too much of an opinion, and that the husbands would not always get their way.[37] During the discussions, a man named Mr. Sully questioned the effect of equality on the happiness of a family, where an argument arises between husband and wife.[38] He challenged, should not the husband decide since he is the "head of woman" and St. Paul states women shall be obedient to their husbands?[39] Lucretia Mott responded to Mr. Sully's question, "which is preferable, ignorant or intelligent differences?"[40] Some men were beginning to fear that women may have opinions contrary to their own, and that such equality was cause for concern. Elizabeth Cady Stanton believed that "the strongest will or the superior intellect now governs the household as they will in the new order."[41]

D. *Organizations*

The National American Woman Suffrage Association (NAWSA) formed in 1912 and was spearheaded by Lucy Burns and Alice Paul.[42] NAWSA was formed to perfect the passage of a federal amendment for a woman's right to vote.[43] NAWSA, with about 2 million members, was the parent organization of the National Woman's Party (NWP).[44]

The National Woman's Party (NWP) was originally founded in 1913 as the Congressional Union for Woman Suffrage (CU).[45] In 1914 and 1916, the CU lobbied legislatures in states where women were already enfranchised to put pressure on the country to enact enfranchisement for all women.[46] The

35 *Id.* at 3.

36 *Id.*

37 Elizabeth Smiltneek, *Suffrage Movement*, Learning to Give, https://www.learningtogive.org/resources/suffrage-movement (last visited Aug. 2, 2021).

38 *Id.*

39 *Id.*

40 *Id.*

41 *University of Rochester Library Bulletin: Report of the Woman's Rights Convention,* 1848, *supra* note 32.

42 *Tactics and Techniques of the National Woman's Party Suffrage Campaign*, Libr. Cong., https://www.loc.gov/static/collections/women-of-protest/images/tactics.pdf (last visited July 26, 2021).

43 *Id.* at 2.

44 *Id.* at 1.

45 *Id.*

46 *Id.*

CU targeted voters to vote for those who supported the suffrage movement, traveled across the country and conducted speaking tours, and organized motorcade parades.[47] They also advertised through banners and billboards in order to inform the public about what the suffrage movement was.[48] The NWP advocated for legislative and executive change; with legislative officers monitoring legislative action and testifying at congressional hearings, and CU and NWP leaders lobbying President Woodrow Wilson more directly.[49] However, President Wilson took the stance that "voting rights were best determined locally at the state level."[50]

The NWP also infiltrated the public eye using conventional and unconventional politicking. For instance, the NWP hosted parades, pageants, street speaking, demonstrations, and mass meetings while also employing tactics such as "aggressive agitation, relentless lobbying, creative publicity stunts, repeated acts of nonviolent confrontation, and examples of civil disobedience."[51]

The NWP parades grew exponentially in their early years, bringing awareness to the suffrage movement.[52] In May 1910, more than 400 women marched in New York City for women's rights.[53] A year later, the number grew to about 3,000 marchers and by May 1912, 10,000 women marched.[54] In November 1912, a staggering 20,000 women overtook New York City by parading and riding in automobiles.[55] These parades were eye opening for the public, because during this time, it was understood "that only women of . . . poor character, [like prostitutes,] walked the streets."[56] The participants in the Women's Rights movement were bold and unafraid to tip social mores.[57] The use of parades as a protest tactic was controversial among moderate suffragists; Carrie Chapman Catt, a key figure of the movement, did not participate in a parade in 1909 and was quoted saying, "[w]e do not have to win sympathy by parading ourselves like the street cleaning department."[58] The controversial nature of the parades created more buzz around them; their newsworthiness caused the suffragists to continue using parades as a

47 *See id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 *See id.* at 4.
53 *Id.*
54 *Id.*
55 *Id.*
56 *See id.*
57 *Id.*
58 *Id.*

tactic.[59]

Alice Paul and Lucy Burns, members of NAWSA's Congressional Committee, planned to march on the eve of President Woodrow Wilson's inauguration in Washington, D.C., on March 3, 1913, with between 5,000 and 8,000 marchers.[60] This parade came to be known as the first "official" national suffrage parade, although it was inspired by earlier parades.[61] The protesters divided themselves amongst their careers (i.e., teachers, lawyers, mothers, and college students) in order to show that the suffrage movement affected women of all backgrounds.[62] Onlookers took to violence; they spit on the suffragists, threw objects, and physically assaulted the marchers.[63] At least 100 suffragists were hospitalized for their injuries from marching in this parade.[64]

In October 1916, the suffragists of the NWP demonstrated in Chicago during Wilson's presidential campaign with anti-Wilson banners.[65] Like the 1913 demonstration in Washington, D.C., this demonstration also turned violent when a mob broke out.[66] After this, activists realized they needed to increase efforts and began a more aggressive attack on women's lack of rights and started picketing at the White House.[67] Beginning on January 10, 1917, and each day thereafter for several months, about 2,000 suffragists brought banners and picketed the White House in protests organized by the NWP.[68] Many NWP activists were arrested and imprisoned.[69] It was during this summer that mob violence against the picketers began to grow in response to their banners, which disparaged the President by comparing

59 *Id.*

60 *Id.* at 3; Megan Gibson, *I Am Woman, Hear Me Roar: The Suffrage Movement*, Time (Aug. 12, 2011), http://content.time.com/time/specials/packages/article/0,28804,2088114_2087975_2087964,00.html.

61 *Tactics and Techniques of the National Woman's Party Suffrage Campaign*, *supra* note 42, at 3–4. In 1908, 23 women from the "American Suffragettes," marched in New York City; 300 people "marched into a state political convention" in Oakland California; 100 suffragists marched through Boone, Iowa "welcoming national leader Anna Howard Shaw to their state suffrage convention." *Id.*

62 *Id.* at 5.

63 Gibson, *supra* note 60.

64 Nicole Puglise, *How These Six Women's Protests Changed History*, Guardian (Jan. 21, 2017), https://www.theguardian.com/world/2017/jan/21/womens-march-protests-history-suffragettes-iceland-poland.

65 *Id.* at 6-7.

66 Gibson, *supra* note 60.

67 *Id.*

68 *Tactics and Techniques of the National Woman's Party Suffrage Campaign*, *supra* note 42, at 7.

69 *Id.* at 1.

him to the Russian Czar, who denied citizenship rights to his people too.[70] The NWP sought to highlight the irony and garnered international attention by showing that while the United States promoted democracy abroad, its women were unable to exercise certain political rights back in the United States.[71] When hostility from bystanders lead to fighting in the crowds, the police responded by arresting the suffragists for "obstructing traffic."[72]

NWP picketers that were arrested began non-violently resisting in jail.[73] The women stopped their sweatshop sewing, manual labor, and refused to eat by going on hunger strikes, all in an effort for the system to recognize that they were not jailed because of obstruction of traffic, or the like, but based on political actions.[74] On November 15, 1917, the "Night of Terror" ensued, where the superintendent at one of the jails allowed the guards to beat and aggressively handle the women picketers.[75] After this, a coordinated hunger strike with sixteen of the women ensued.[76] Of the sixteen, Dora Lewis and Lucy Burns, were force-fed within the jail, and Burns was injured when a feeding tube was forcibly shoved up her nose.[77] These arrests did not stop the NWP or the picketing.[78]

In August and September 1918, the NWP picketed in Lafayette Park in Washington, D.C., and "burned copies of Wilson's speeches and his picture in effigy."[79] Activists expanded their picketing campaigns to include protests in front of the U.S. Capitol and, in October 1918, Senate office buildings.[80] Later, in January 1919, the NWP once again picketed the White House and Lafayette Park, where the suffragists burned Wilson's speeches in cauldrons set up outside in an attempt to get Wilson to influence the last two votes for the 19th Amendment in the Senate.[81] The next month, in February 1919, the NWP members went to Boston where President Wilson was returning from his trip to Europe, in order to picket again for women's rights; however, the picketers were only met with violence.[82] The police aggressively and roughly arrested the suffragists, who then sat

70 *Id.* at 8.
71 *Id.* at 3.
72 *Id.* at 8.
73 *Id.* at 3.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.* at 9.
80 *Id.*
81 *Id.*
82 *Id.*

for eight days in the Charles Street Jail.[83] The next picket occurred at the New York Metropolitan Opera House where President Wilson was giving a speech, but yet again the suffragists were "attacked by police, soldiers, and onlookers . . ." for presenting their banners.[84] The NWP members' actions were in nonviolent protest against the rights not afforded to women, but at many points along the road the women were met with brutality and imprisonment.[85] More women were arrested through 1918 and 1919, and by 1920 after the 19th Amendment passed, 168 NWP members had served jail or prison sentences.[86]

The 19th Amendment was approved in June 1919 and ratified on August 26, 1920.[87] With its passage, the suffrage movement achieved its long-awaited goal to ensure a woman's right to vote.[88] If the Women's Rights movement was a pot of boiling water, the NWP's members were the tea; the members gave meaning to the movement, the members threw themselves into the political pot of boiling water to effect change—and change they did.

E. *Key Women for and Against the Inclusion of Women of Color*

Key players of the Women's Suffrage movement, such as Susan B. Anthony and Elizabeth Cady Stanton, were first and foremost focused on white women's rights.[89] For example, when they began a women's rights newspaper named *Revolution*, they had funding from a Democrat, George Francis Train, who supported slavery.[90] Some suffragists' first concern was how to get white women's right to vote, believing it was of more importance than Black women's right to vote.[91] It was not a movement for all women, but a racially charged movement that was for all women as long as white women had the right to vote, and Black men did not have this supposed power over white women first.[92] Alice Paul, who planned the 1913 Parade in Washington, D.C., was concerned that white women would not come to the parade if they knew they had to march next to Black women; she suggested

83 *Id.*
84 *Id.*
85 *Id.* at 9–10.
86 *Id.* at 10.
87 *Id.* at 1.
88 *Id.*
89 Evette Dionne, *Women's Suffrage Leaders Left Out Black Women*, Teen Vogue (Aug. 18, 2017), https://www.teenvogue.com/story/womens-suffrage-leaders-left-out-black-women.
90 *Id.*
91 *See id.*
92 *Id.*

having either an all-white parade, an all-Black parade, or no parade.[93] Thereafter, the parade was segregated and Ida Wells-Barnett, a renowned journalist, was told to walk in the all-Black group; however, she ignored the instructions and walked with the all-white group.[94]

Some suffragists felt much different about the 15th Amendment and wanted to show their support.[95] Lucy Stone, Julia Ward Howe, and other suffragists created an organization to support the 15th Amendment, the American Women Suffrage Association (AWSA).[96] AWSA accepted members of all races and did not prohibit men from joining.[97] The 15th Amendment was a point of contention amongst the suffragists. Instead of seeing a Black man's right to vote as a steppingstone, some women found it to be an insult.[98] Due to this splitting of the Women's Suffrage movement, some Black women decided to go out and make their own organizations to promote a Black woman's right to vote, as it was just as important as the white woman's right to vote.[99]

In 1867, Sojourner Truth spoke at the American Equal Rights Association and argued that giving Black men the right to vote over Black women only made them "masters over women," the same as it had already been.[100] Sojourner Truth wanted Black women to get the same rights Black men were given by the law.[101] Ida B. Wells-Barnett founded the Alpha Suffrage Club of Chicago.[102] The National Association of Colored Women's Clubs (NACW), which was formed in 1896, also promoted women's suffrage.[103]

Susan B. Anthony and Elizabeth Cady Stanton signed the 1864 congressional petition in order to support the passage of the 13th Amendment; however, on February 3, 1870, when the 15th Amendment was ratified, the leaders of the Women's Suffrage movement changed course.[104] Susan B. Anthony is quoted as saying, "I will cut off this right arm of mine before I will ever work or demand the ballot for the Ne[***] and not the

93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* The 13th Amendment abolished slavery. The 15th Amendment prohibited the denial of the right to vote for men based on race or color. U.S. CONST. amends. XV, XIX.

woman."[105] Indeed, Anna Howard Shaw who was president of the National Women Suffrage Association said, "[y]ou have put the ballot in the hands of your [B]lack men, thus making them political superiors of white women. Never before in the history of the world have men made former slaves the political masters of their former mistresses!"[106] Once the 15th Amendment passed, the suffrage movement focused on the rights of white women at the expense of women of other ethnicities.[107]

After the 15th Amendment passed, lynching was still taking place.[108] The first woman to serve in the Senate, Rebecca Ann Latimer Felton stated in regard to lynching:

> I do not want to see a ne[***] man walk to the polls and vote on who should handle my tax money, while I myself cannot vote at all. . . . When there is not enough religion in the pulpit to organize a crusade against sin; nor justice in the court house to promptly punish crime; nor manhood enough in the nation to put a sheltering arm about innocence and virtue – if it needs lynching to protect woman's dearest possession from the ravening human beasts – then I say lynch, a thousand times a week if necessary.[109]

This quote demonstrates that even after women achieved positions of power, they pushed dangerous, racially charged messages. The Women's Suffrage movement, which is thought to be a great triumph for women banding together, had a dark side.[110] Black women were segregated, some white women in power did not even consider the plight of the Black man, and key suffragists advocated against the right to vote for Black men because the white woman had not been given the right yet.[111]

On August 18, 1920, women were guaranteed the right to vote; however, not until forty-five years later would the Voting Rights Act of 1965 finally secure Black women's right to vote.[112] The Voting Rights Act of 1965 eliminated voting taxes and literacy tests, but Black men and women still experienced violence from white supremacists when they attempted to

105 Evette Dionne, *Women's Suffrage Leaders Left Out Black Women, Teen Vogue* (Aug. 18, 2017), https://www.teenvogue.com/story/womens-suffrage-leaders-left-out-black-women.

106 *Id.*

107 *Id.*

108 *Id.* The 15th Amendment was passed in 1870. *15th Amendment*, Hist., https://www.history.com/topics/black-history/fifteenth-amendment (May 11, 2021); *Lynching in America*, Equal Just. Initiative, https://lynchinginamerica.eji.org/ (last visited July 25, 2021).

109 Dionne, supra note 89.

110 *See id.*

111 *Id.*

112 *Id.*

exercise their right to vote.[113] Despite the mission of the Women's Suffrage movement, racism did not evade the membership, and race was considered a larger precursor than sex.[114] The movement was named the *Women's* Suffrage movement; one would think the only qualification would be to support women—of all races—to get the right to vote.

F. *Recent Women's Marches*

In 2017, once again women decided to march on Washington, D.C., due to Donald Trump's presidential win against what would have been the first woman president, Hillary Clinton.[115] In response to his misogynistic comments about women, and the perceived threats that his policies would have on women's rights, a pro-woman march started to brew.[116] Unlike the Women's Rights movement, which started with a cup of tea, this march began with one Facebook post from Teresa Shook who lived in Hawaii.[117] Teresa Shook voiced that a pro-woman march was imperative after the election and thousands of women signed up to march.[118] Shortly after Donald Trump won the 2016 presidential election, Teresa Shook and other woman began advocating for and planning a march centered on women's rights.[119] As popularity for the idea grew, so did criticism, particularly with the suggested name of the march as the "Million Woman March."[120] Many Women of Color objected to this name, given that a Million Woman March took place in 1997 and was led by Black women.[121] The name was changed to the Women's March on Washington.

On the first day of Donald Trump's presidency, January 21, 2017, thousands of people went to Washington, D.C., for the Women's March

113 *Id.*

114 *See generally id.*

115 *Women's March*, HIST., https://www.history.com/this-day-in-history/womens-march (Jan. 19, 2021); Jeanette Patrick, *Hillary Clinton*, NAT'L WOMEN'S HIST. MUSEUM (Dec. 2016), https://www.womenshistory.org/education-resources/biographies/hillary-clinton.

116 *Women's March, supra* note 115.

117 *Id.*; Blakemore, *supra* note 7.

118 *Women's March, supra* note 115.

119 *Id.*; Jia Tolentino, *The Somehow Controversial Women's March on Washington*, NEW YORKER (Jan. 18, 2017), https://www.newyorker.com/culture/jia-tolentino/the-somehow-controversial-womens-march-on-washington.

120 Tolentino, *supra* note 119.

121 Christina Santi, *On This Day: The Million Woman March Took Place in Philadelphia*, EBONY (Oct. 25, 2018), https://www.ebony.com/exclusive/on-this-day-the-million-woman-march-took-place-in-philadelphia/; Tolentino, *supra* note 119.

on Washington.[122] Moreover, in cities around the globe, millions of people participated in their own respective marches in solidarity with the Women's March in Washington.[123] In Washington, D.C., more than 500,000 people marched.[124] In total, there were about 4.1 million people around the U.S. who marched in their respective cities and another 300,000 people around the globe.[125] This march garnered less resistance than those of the early 1900s, as there were no reported arrests in Washington, D.C., and only a few in other cities.[126] However different the times were in 2017 from that of 1920, one thing remained—women were angry and once again fighting for their rights.[127] One sign at the Women's March in Boston read, "[o]ur arms are tired from holding these signs since the 1920s."[128]

The Women's March of 2018 took place amongst the fury of the #MeToo movement, where women spoke out about men that abused them, revealing how prevalent it truly was in society.[129] Also, the march reflected the continued disapproval of the Trump Administration.[130] One of the march's goals was to encourage women to run for office and to vote in the midterm elections.[131] The Saturday of the march, the government shutdown due to disagreement on immigration, but the march went on.[132] There was less of a turnout in 2018 than in 2017, perhaps because the Women's March organizers were focused on an event they were hosting the next day in Las Vegas, coined "Power to the Polls."[133] The Women's March in 2019 was the smallest of the three, with about 665,324 to 735,978 people in attendance around the United States, not including the international marches.[134]

122 Santi, *supra* note 121.

123 *Id.*

124 *Id.*

125 *Women's March*, *supra* note 115.

126 *Id.*

127 *See Id.*; *see, e.g.*, *Tactics and Techniques of the National Woman's Party Suffrage Campaign*, *supra* note 42, at 1.

128 Anemona Hartocollis & Yamiche Alcindor, *Women's March Highlights as Huge Crowds Protest Trump: 'We're Not Going Away,'* N.Y. Times (Jan. 21, 2017), https://www.nytimes.com/2017/01/21/us/womens-march.html. The girl holding the sign was named Aili Shaw, aged 14. *Id.*

129 *Women's March 2018: Protesters Take to the Streets for the Second Straight Year*, N.Y. Times (Jan. 20, 2018), https://www.nytimes.com/2018/01/20/us/womens-march.html.

130 *Id.*

131 *See id.*

132 *Id.*

133 *Id.*

134 Erica Chenoweth & Jeremy Pressman, *The 2019 Women's March Was Bigger than You Think*, Wash. Post (Feb. 1, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/02/01/the-2019-womens-march-was-bigger-than-you-think/?utm_

G. *The Effects of the Women's Rights Movement on Health*

The Women's Suffrage movement accomplished its goal of obtaining women's right to vote.[135] The Women's Suffrage movement raised awareness for women, brought women into solidarity with each other for the same purpose, and showed the world that they were willing and ready to fight for what they wanted.[136] However, after the Women's Suffrage movement purportedly accomplished its goal, Black women still struggled to exercise the right to vote.[137] All women were given the right to vote with the 19th Amendment, but it took until the 1960s and 1970s for Black women to exercise their right.[138]

Women in the suffrage movement were bold.[139] They pushed the social norms and constructs of society as it was known.[140] They marched down streets during parades which they organized, held pageants, picketed the White House, and pressured not only the country's citizens, but the government.[141] Some women were beaten, imprisoned, and ostracized by society.[142] Yet these rights did not erase gender discrimination, and this discrimination adversely affects mental health.[143] Depression and anxiety have negative impacts on the mental health of women and can be attributed to, in part, prejudice and gender violence.[144] Furthermore, women are often expected to take on the role of primary caretaker in the face of professional obligations, which can cause these women to experience more severe stress disorders.[145] Women who are victims of domestic violence are more likely

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term=.6be7af646786.

135 *Women's Suffrage*, HIST. (Feb. 23, 2021), https://www.history.com/topics/womens-history/the-fight-for-womens-suffrage.

136 *Id.*

137 Olivia B. Waxman, *'It's a Struggle They Will Wage Alone.' How Black Women Won the Right to Vote*, TIME (Aug. 17, 2020), https://time.com/5876456/black-women-right-to-vote/.

138 *Id.*

139 Victoria Sanchez, *'Bold and Unladylike': Women Remembered on Centennial of Women's Suffrage Movement*, ABC7 (Aug. 18, 2020), https://wjla.com/news/local/women-remembered-on-centennial-of-womens-suffrage; *19th Amendment*, HIST. (Feb. 25, 2021), https://www.history.com/topics/womens-history/19th-amendment-1.

140 *19th Amendment*, *supra* note 139.

141 *Id.*; *Tactics and Techniques of the National Woman's Party Suffrage Campaign*, *supra* note 42, at 1.

142 Sarah Pruitt, *The Night of Terror: When Suffragists Were Imprisoned and Tortured in 1917*, HIST. (Apr. 17, 2019), https://www.history.com/news/night-terror-brutality-suffragists-19th-amendment.

143 Leyla Gülcür, *Evaluating the Role of Gender Inequalities and Rights Violations in Women's Mental Health*, 5 HEALTH & HUM. RTS., no. 1, 2000, 46, 51.

144 *Id.* at 52.

145 *Id.*

to suffer from "anxiety, major depression, suicidal tendencies, nightmares, hypervigilance, dissociation . . . low[] self-esteem, alcoholism, and . . . post-traumatic stress" disorders.[146] The increased obstacles faced by women of color during the suffrage movement only exacerbates the health disparities that impact this community.

II. Civil Rights Protests History

A. *Montgomery Bus Boycott*

The Montgomery Bus Boycott is widely viewed as one of the earliest moments in the Civil Rights movement.[147] In the case of *Browder v. Gayle*, the Supreme Court of the United States held:

> [T]hat the statutes and ordinances requiring segregation of . . . [white people] and [Black people] on the motor buses of a common carrier of passengers in the City of Montgomery and its police jurisdiction violate the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States.[148]

While *Gayle* seemed to have resolved the issue of segregation, that was not the case. In fact, the court prohibited segregation only in regard to seating on motorbuses—the battle for equal protection under the law was far from over.

Reaching the conclusion of the Montgomery Bus Boycott did not come without issue.[149] Over 80 leaders of the boycott were indicted "under a 1921 law prohibiting conspiracies that interfered with lawful business," and Montgomery officials were successful in obtaining "injunctions against the boycott in February 1956."[150] Noted in *State of Alabama v. M. L. King, Jr.*, leader of the boycott, Martin Luther King, Jr., was ultimately convicted of conspiracy to interfere with lawful business and was "ordered to pay $500 or serve 386 days in jail."[151]

The Montgomery Bus Boycott persisted, despite local resistance.[152]

146 *Id.*
147 *Montgomery Bus Boycott*, Martin Luther King, Jr. Rsch. & Educ. Inst., https://kinginstitute.stanford.edu/encyclopedia/montgomery-bus-boycott (last visited Aug. 3, 2021).
148 Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala. 1956).
149 *Montgomery Bus Boycott*, *supra* note 147.
150 *Id.*
151 *Id.*
152 *Id.*

While the protest itself was peaceful, the resulting responses were quite the opposite.[153] The situation became so tense that members of the White Citizens' Council, a white supremacist group that used violent tactics to promote racism and oppose integration, firebombed Dr. King's house.[154] Further, in January 1957, four Black churches and the homes of prominent Black leaders were bombed.[155] The boycott's end was a big victory for the Civil Rights movement and Montgomery's buses were integrated on December 21, 1956.[156]

B. *The Albany Movement*

During the Civil Rights movement, protests were coming from all different directions, trying to achieve two simple goals—justice and equality.[157] In 1961, just six years after the Montgomery Bus Boycott, the Albany Movement began.[158] In October 1961, Charles Sherrod and Cordell Reagon, members of the Student Nonviolent Coordinating Committee (SNCC), visited Albany, GA, to urge the Black community to fight against institutionalized segregation by participating in direct action protests.[159]

The Albany Movement protested discrimination and racial segregation in Albany.[160] Dr. Martin Luther King Jr. and the Southern Christian Leadership Conference (SCLC) allied with the movement in December 1961.[161] To no surprise, a day after Dr. King arrived in the city to begin the peaceful movement, Police Chief Pritchett arrested Dr. King and other parade participants for parading without a permit.[162]

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153 *Id.*

154 *See White Citizens' Council (WCC)*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/white-citizens-councils-wcc (last visited Aug. 3, 2021); *see also Martin Luther King, Jr.'s Home is Bombed*, HIST. (Jan. 27, 2021), https://www.history.com/this-day-in-history/martin-luther-king-jr-home-bombed-montgomery.

155 *See Montgomery Bus Boycott*, *supra* note 147; *see also Four Negro Churches Bombed in Alabama*, UNITED PRESS INT'L (Jan. 10, 1957), https://www.upi.com/Archives/1957/01/10/Four-Negro-churches-bombed-in-Alabama/8346918225410/.

156 Four Negro Churches Bombed in Alabama, *supra* note 155.

157 *Montgomery Bus Boycott*, HIST. (Jan. 27, 2021), https://www.history.com/topics/black-history/montgomery-bus-boycott.

158 *Albany Movement*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/albany-movement (last visited July 22, 2021).

159 *Id.*

160 *Id.*

161 *Id.*

162 Leonard S. Rubinowitz et al., *A "Notorious Litigant" and "Frequenter of Jails": Martin Luther King, Jr., His Lawyers, and the Legal System*, 10 NW. J.L. & SOC. POL'Y 494, 555–56 (2016).

Interestingly enough, the judge imposed a fine of $178 or a jail sentence of forty-five days for Dr. King and Ralph David Abernathy, a minister and King's trusted friend and advisor, who joined him in the parade.[163] The two opted for imprisonment, because they believed that they were unjustly convicted and wanted to change segregation policies.[164] City officials arranged to have Dr. King's and Abernathy's fines paid secretly, positing that a Black donor paid them anonymously, because the "officials were concerned about the attention incarceration might receive, including possible federal intervention."[165]

By December 1961, over 500 protesters affiliated with the Albany Movement were thrown in jail, and discussions of compromises were commenced with city officials.[166] Though the Albany Movement was unsuccessful in achieving its initial aims, the movement established a blueprint for later movements.[167] In a 1965 interview, Dr. King attributed the failure of the campaign to its broad scope, stating "[t]he mistake I made there was to protest against segregation generally rather than against a single and distinct facet of it. Our protest was so vague that we got nothing, and the people were left very depressed and in despair."[168]

C. *March on Washington*

In reaction to the issues with the Albany movement of 1961, it seemed as if the mandate of the Civil Rights Movement had taken another step further in the right direction.[169] In 1963, the March on Washington for Jobs and Freedom was one of the largest political rallies ever seen in the U.S.; it drew between 200,000 and 300,000 participants, to whom Dr. King delivered his famous "I Have A Dream" speech on the steps of the Lincoln Memorial.[170]

163 *Id.* at 556.
164 *Id.*
165 *Id.*
166 *Albany Movement*, *supra* note 158.
167 Rubinowitz, *supra* note 162.
168 *Albany Movement*, *supra* note 158.
169 *Id.*
170 *March on Washington*, Hist. (May 16, 2021), https://www.history.com/topics/black-history/march-on-washington; Monroe H. Little, Jr., *More than a Dreamer: Remembering Dr. Martin Luther King, Jr.*, 41 Ind. L. Rev. 507, 524 (2008); *March on Washington for Jobs and Freedom*, Nat'l Park Serv., https://www.nps.gov/articles/march-on-washington.htm. A. Philip Randolph and Dr. King, in coalition with his SCLC, decided to join forces and "merge[d] their efforts into one mass protest." *March on Washington*, *supra*. Despite that the duration of Dr. King's speech "was scheduled to be four minutes long, he . . . [spoke] for 16 minutes," in what became a legendary oration of not only the

President Kennedy originally discouraged the march for fear that it might make the legislature vote against civil rights laws.[171] However, once it became clear that the march would go on, Kennedy reluctantly endorsed it.[172] This protest in particular was significant for not only Dr. King, but for the entire Civil Rights movement.[173]

D. *Selma to Montgomery*

In hopes of obtaining the Voting Rights Act of 1965, movements preceding this Act consisted of the all-famous, Selma to Montgomery March. In 1965, protesters marched fifty-four miles from Selma, Alabama all the way to the state capital of Montgomery and faced deadly violence at the hands of "local authorities and white vigilante groups" all in the hopes of "[registering] Black voters in the south."[174] The march took three days to complete.[175]

While the Black community tried to gain their right to vote, obstacles were forthcoming.[176] In specific, demonstrators suffered deaths, and other injuries.[177] Despite remaining peaceful, "law enforcement officers attacked the . . . marchers with tear gas and billy clubs" on the first day of their march at the Edmund Pettis Bridge, beating them back to Selma.[178] The cruel scene was televised, and provoked religious leaders and civil rights activists, who traveled to Selma in protest.[179] President Lyndon B. Johnson announced his support of the Selma marchers on national television, and issued an executive order, "which federalized the Alabama National Guard and authorized the Defense Secretary to deploy such federal forces as were necessary to ensure

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Civil Rights movement, but also of mankind. *Id.*

171 *March on Washington*, *supra* note 170.

172 *Id.*

173 *See JHU History Professor Discusses the Significance of the March on Washington*, JOHNS HOPKINS UNIV.: HUB (Aug. 26, 2013), https://hub.jhu.edu/2013/08/26/march-on-washington-economic-justice/.

174 *Selma to Montgomery March*, HIST. (Jan. 25, 2021), https://www.history.com/topics/black-history/selma-montgomery-march.

175 *See id.* Obstacles the African-American group faced included "Bloody Sunday;" opposition from Governor of Alabama, George Wallace; and troopers blocking marchers on Highway 80. *Id.*

176 *Id.*

177 *1965 Selma to Montgomery March Fast Facts*, CNN (Feb. 25, 2021), https://www.cnn.com/2013/09/15/us/1965-selma-to-montgomery-march-fast-facts/index.html.

178 Winston P. Nagan, *The Struggle for Justice in the Civil Rights March from Selma to Montgomery: The Legacy of the Magna Carta and the Common Law Tradition*, FAULKNER L. REV. 1, 12 (2014); *Selma to Montgomery March*, *supra* note 174.

179 *Selma to Montgomery March*, *supra* note 174.

the security of the marchers."[180]On March 21, 1965, approximately 3,200 people marched from Selma to Montgomery, "in a march that symbolized more than the repression of voting rights, but rather the effort to validate the legitimacy of the human right to democracy for all."[181]

E. *Civil Rights Legislation and Continued Protests*

The biggest win of it all occurred the following July when Congress passed the Voting Rights Act.[182] Along with the Civil Rights Act, the Voting Rights Act was one of the most expansive pieces of civil rights legislation in American history.[183] The Voting Rights Act increased the political power of Black people by permitting them the right to vote in elections at the local, state, and federal level.[184]

i. Olympic Salute of 1968

While the Civil Rights Act and Voting Rights Act did work to reduce disparity between Black and white voters in America, the country was still far afield from achieving equality. Equality was not achieved after Congress passed the Civil Rights Act and the Voting Rights Act.[185] A protest advocating for equality came right after the Voting Rights Act was passed.[186] At the Olympic Salute of 1968, Tommie Smith and John Carlos had just gained Olympic Medals for their performance in the 200-meter track and field race in the Mexico City Olympics.[187] In doing so, Tommie Smith and John Carlos joined together during the national anthem by raising black-gloved fists during the medal ceremony, to raise awareness of racial inequality.[188]

The protest drew an immense amount of media criticism, specifically from Avery Brundage, who was the head of the International Olympic

180 *Id.*; Nagan, *supra* note 178, at 13.
181 Nagan, *supra* note 178, at 13.
182 *Voting Rights Act of 1965*, Hist. (Jan. 26, 2021), https://www.history.com/topics/black-history/voting-rights-act.
183 *Id.*
184 *Selma to Montgomery March, supra* note 174.
185 Abigail Thernstrom & Stephan Thernstrom, *Black Progress: How Far We've Come, and How Far We Have to Go*, Brookings (Mar. 1, 1998), https://www.brookings.edu/articles/black-progress-how-far-weve-come-and-how-far-we-have-to-go/.
186 Rjrock, *Sport, Politics, and the Media: A Defining Moment at the 1968 Olympics*, Journey24Pointoh (Sept. 5, 2012), https://journey24pointoh.com/2012/09/05/sport-politics-and-the-media-a-defining-moment-at-the-1968-olympics/.
187 *Id.*
188 *Id.*

Committee (IOC).[189] Brundage suspended both men from the United States National Olympic team.[190] Smith and Carlos were further "banned . . . from staying in the Olympic village for making a political statement in violation of the spirit of the Olympic Games."[191] Peter Norman, a white, Australian sprinter, showed immense support for Smith and Carlos.[192] For supporting Smith and Carlos, Norman faced serious backlash from his home country of Australia.[193] He qualified for the Olympic team over and over again, but the Australian team refused to send him to compete in the Olympics.[194]

ii. The Detroit Rebellion

The 1967 Detroit Rebellion is one of the better-known Civil Rights protests.[195] Beginning on July 23, 1967, and lasting five days, the Detroit Rebellion was a sequence of brutal conflicts between residents of predominantly Black neighborhoods and the Detroit City's Police Department.[196] "The deeper, [more specific] causes of the protests were high levels of frustration, resentment, and anger that had been created among [Black] Americans by unemployment and underemployment, persistent and extreme poverty, racism and racial segregation, police brutality, and lack of economic and educational opportunities."[197] The protests were in direct response to "a police raid at an illegal after-hours drinking club," where a welcome home party for two returning Black Vietnam veterans was taking place.[198] The police arrested everyone present at the club; eighty-two of the individuals were Black.[199] The underlying reasons of the protest led to an increase in violence and protests in other parts of Detroit, as police lost control of the situation. In response, the Governor of Michigan, George

189 *See* Todd J. Clark, *An Inherent Contradiction: Corporate Discretion in Morals Clause Enforcement*, 78 LA. L. REV. 1, 6 (2018).

190 *Id.*

191 *Id.*

192 Erin Blakemore, *How the Black Power Protests at the 1968 Olympics Killed Careers*, HIST. (Jan. 26, 2021), https://www.history.com/news/1968-mexico-city-olympics-black-power-protest-backlash.

193 *Id.*

194 *Id.*

195 Lorraine Boissoneault, *Understanding Detroit's 1967 Upheaval 50 Years Later*, SMITHSONIAN MAG. (July 26, 2017), https://www.smithsonianmag.com/history/understanding-detroits-1967-upheaval-50-years-later-180964212/.

196 Traqina Quarks Emeka, *Detroit Riot of 1967*, BRITANNICA (Dec. 13, 2013), https://www.britannica.com/event/Detroit-Riot-of-1967.

197 *Id.*

198 *Id.*; Boissoneault, *supra* note 195.

199 Emeka, *supra* note 196.

Romney, deployed over 9,000 National Guard members and approximately 800 Michigan state police officers, and President Johnson deployed U.S. Army troops to Detroit.[200] In total, forty-three people died as a result of the protest, thirty-three of which were Black, and ten of which were white.[201] Over 7,000 people were arrested, 1,189 were injured, and in excess of 1,000 buildings were burned in total.[202]

iii. The Black Panthers

In the 1960s, the Black Panthers, founded by Huey Newton and Bobby Seale, began their pursuit in challenging police brutality.[203] The Black Panthers grew in size and influence, opening branches in a number of major cities, building a presence on college campuses, and ultimately surging to as many as 2,000 members across 13 local chapters in 1969.[204] Many groups and individuals proclaimed that the party was only seeking violence, yet the party attracted a number of radical-leaning white supporters—many of whom were moved by the Black Panthers' lesser-remembered efforts, like free breakfasts for children in African-American neighborhoods, drug and alcohol abuse awareness courses, community health and consumer classes, and a variety of other programs focused on the health and wellness of their communities.[205]

200 *Id.*

201 *Id.*

202 *Id.*; Tabitha Wang, *Detroit Race Riot (1967),* BlackPast (July 3, 2008), https://www.blackpast.org/african-american-history/detroit-race-riot-1967/.

203 *Black Panthers*, Hist., (Jan. 26, 2021), https://www.history.com/topics/civil-rights-movement/black-panthers.

204 Chuck McFadden, *Armed Black Panthers in the Capitol, 50 Years on,* Capitol Wkly. (Apr. 26, 2017), https://capitolweekly.net/black-panthers-armed-capitol/; *Black Panthers, supra* note 203; *Black Panther Party History and Geography*, Univ. Wash.: Mapping Am. Soc. Movements Proj., https://depts.washington.edu/moves/BPP_intro.shtml (last visited Aug. 3, 2021).

205 *Black Panthers, supra* note 203; *The Black Panther Party Stands for Health*, Colum. Mailman Sch. Pub. Health: Pub. Health Now (Feb. 23, 2016), https://www.publichealth.columbia.edu/public-health-now/news/black-panther-party-stands-health; McFadden, *supra* note 204.

iv. The Democratic Convention of 1968

Black communities not only wanted fair treatment within the streets but wanted fair treatment to those serving overseas.[206] The Democratic Convention of 1968 was held in Chicago, Illinois, from August 26th through the 29th.[207] Protestors assembled outside of the convention in opposition to the Vietnam War and other political decision.[208] There was an eleven o'clock curfew in the city, so around curfew on Sunday, August 25, thousands of police officers suited in gas masks, riot gear, and helmets lined Lincoln Park.[209] Several officers threw tear gas into the crowd.[210] Protestors dispersed and hurried out of the park, "blindly falling over each other as the tear gas assaulted their eyes"—the police assaulted the protesters with clubs, continuing to attack even when someone was already on the ground.[211] With their voices yet to be heard, and the day after the nomination, "the remaining protesters and hundreds of anti-war delegates attempted to reach the Amphitheatre again but were deterred with tear gas," and the controversial and gory 1968 Democratic Convention officially ended August 29th at midnight.[212]

v. The Rally for the Oakland Seven & Huey Newton

The voices flowed from government elections to college campuses. On January 26, 1968, the Rally for the Oakland Seven and Huey Newton took place at the University of California-Berkeley.[213] This event consisted of speeches on Sproul Hall Steps, "calling for the release of the Oakland Seven and Huey Newton, the co-founder of the Black Panthers."[214] There were various legal issues that prefaced the rally, specifically; Newton was arrested the year prior "for allegedly killing an Oakland police officer during

206 *See* Olivia B. Waxman, *'Violence Was Inevitable': How 7 Key Players Remember the Chaos of 1968's Democratic National Convention Protests*, TIME (Aug. 26, 2018), https://time.com/5377386/1968-democratic-national-convention-protesters/.

207 *1968 Democratic Convention*, HIST. (Mar. 16, 2018), https://www.history.com/topics/1960s/1968-democractic-convention.

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.*

213 *Rally for the Oakland Seven and Huey Newton in Berkeley, California*, AM. ARCHIVE PUB. BROAD. (Mar. 26, 1968), http://americanarchive.org/catalog/cpb-aacip_28-ft8df6kf9j.

214 *Id.*

a traffic stop."[215] He was ultimately convicted of voluntary manslaughter and received a sentence of two to fifteen years in prison.[216] Newton appealed his case, arguing that the trial judge did not instruct the jury on Newton's self-defense and unconsciousness to criminal homicide defenses, thus the Appeals court overturned the conviction.[217]

Negative reactions that stemmed from the protests were not because of the protests themselves, but strictly due to the violence that was attached to the protests.[218] According to the October 1964 Gallup Poll, many believed the marches, speeches, and rallies should halt.[219] Some believed the acts of protesting groups were not to gain equality, but to gain superiority.[220] However, in reality, the purpose of protests outlined during the 1960s had the same mantra, and was for one very simply gain—equal protection.[221] Equal protection under the law, equal protection under humanity.[222]

F. *Black Lives Matter*

This same mission continues today. In 2013, Alicia Garza, Patrisse Cullors, and Opal Tometi created a Black-centered movement called #BlackLivesMatter.[223] The nationalization of the movement was driven in large part by the Ferguson protests following the murders of Michael Brown and Trayvon Martin, and has grown to over 40 chapters globally.[224] Alicia Garza began publishing a series of social media posts named "A Love Letter to Black People."[225] In one of her posts, Garza said: "I continue to be surprised at how little Black lives matter."[226] Patrisse Cullors posted

215 *Huey P. Newton,* Biography (Apr. 1, 2014), https://www.biography.com/people/huey-p-newton-37369.

216 *Id.*

217 *See* People v. Newton, 8 Cal. App. 3d 359 (1970).

218 RJ Reinhart, *Protests Seen as Harming Civil Rights Movement in the '60s*, Gallup (Jan. 21, 2019), https://news.gallup.com/vault/246167/protests-seen-harming-civil-rights-movement-60s.aspx.

219 *Public Opinion Polls on Civil Rights Movement, 1961-1969*, Gallup (Mar. 17, 2016), https://www.crmvet.org/docs/60s_crm_public-opinion.pdf.

220 Mildred A. Schwartz, Trends in White Attitudes Toward Ne[*****] 92–93 (1967).

221 *See generally Civil Rights and Equal Protection*, Encyclopedia.com (Nov. 25, 2021), https://www.encyclopedia.com/law/legal-and-political-magazines/civil-rights-and-equal-protection.

222 *See generally id*.

223 *Herstory*, Black Lives Matter, https://blacklivesmatter.com/herstory/ (last visited Feb. 18, 2022).

224 *Id.*

225 Jennifer M. Kinsley, *Black Speech Matters*, 59 U. Louisville L. Rev. 1, 7 (2020).

226 *Id.* at 3.

her own message mourning the death of Trayvon Martin which included "#blacklivesmatter."[227] The Black Lives Matter movement is characterized by "peaceful protests . . . challenging racist police and governmental practices."[228]

III. MEDIA AND PROTESTS

In the wake of the Ferguson protest demonstrations, the media used "racial or ethnic identities to crime narratives, and … negative stereotypes and identities, … to perpetuat[e] both racialized and racist constructions of Black[] [people]—even those engaged in legitimate dissent."[229] This example of racialized news coverage is not unique.[230] Professor Bryan Adamson[231] explains that "newsworthy" protests tend to be those that "result[ed] in arrests, violence, and counterdemonstrations."[232] Various media outlets frame these demonstrations as "'riots,' 'carnivals,' or 'clashes,'" often highlighting "the protesters' outsider or socially-marginal status and question the participants' sociopolitical legitimacy."[233] Adamson points out that when the "underlying reasons and rationales" behind various protest demonstrations are not adequately explained, or fairly represented through television news coverage, "audiences may indeed see them as futile and even irrational."[234]

Minneapolis police officers murdered George Floyd on Memorial Day 2020.[235] Floyd was an unarmed Black man, and police were on site because Floyd was suspected of using a counterfeit $20 bill to buy his

227 *Id.* at 7–8.

228 *Id.* at 8.

229 Bryan Adamson, *"Thugs," "Crooks," and "Rebellious Ne[*****]": Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189, 191 (2016).

230 *Id.*

231 Professor Adamson is the David L. & Ann Brennan Professor of Law, and Associate Dean of Diversity and Inclusion at Case Western Reserve University School of Law and has researched and published extensively in the areas of civil rights and media portrayal of Black people and protestors. *Bryan Adamson, MA, JD,* CASE WESTERN RESERVE UNIV. SCH. LAW, https://case.edu/law/our-school/faculty-directory/bryan-adamson.

232 Adamson, *supra* note 229, at 206. Adamson cites a research study which revealed that protest demonstrations with these characteristics tended to generate the most news coverage. *See* Francis L. F. Lee, *Triggering the Protest Paradigm: Examining Factors Affecting News Coverage of Protests*, 8 INT'L J. COMM. 2725, 2727 (2014).

233 Adamson, *supra* note 229, at 206–07.

234 *Id.* at 207.

235 Kinsley, *supra* note 225, at 1.

groceries.[236] Three officers used excessive force to restrain Floyd until he ultimately could not breathe and died.[237] Several months earlier, in March, Louisville police shot and killed an unarmed Black woman, Breonna Taylor, in her home while executing a no-knock search warrant.[238] Less than a month earlier, Ahmaud Arbery, an unarmed Black man, was murdered by three white men, and police and prosecutors ensured that no charges were initially brought against his killers, though the killers were found guilty on November 24, 2021.[239] These murders, and several others, culminated in mass protests nationwide in the summer of 2020.[240] At this time, protests against police brutality victimizing Black people were active in every major city.[241] Government officials responded by installing curfews, during which people of color were disproportionately arrested, and the protestors were victims of violence as they assembled, illustrated by the use of tear gas and rubber bullets against protestors.[242]

Lawmakers are also looking to hold protestors accountable and have responded to the activism with increased liability for these individuals.[243] "[L]egislators in forty states have proposed at least 133 bills that restrict the right to peaceful assembly" and the justification for this legislation offered by some states is "explicitly tied" to the Black Lives Matter movement.[244]

Especially problematic, in the context of 21st Century protest culture, is the immense variety of information sources, a result of mass media and the advent of the internet.[245] Adamson emphasizes that selective news sourcing is particular harmful in racial contexts where self-identity is likely to be affected.[246] Adamson notes that news selectivity is not novel and

236 *Id.*
237 *Id.*
238 *Id.*
239 *Id.*; Jury Verdict Form, Georgia v. McMichael, No. CR 2000433 (Ga. Super. Ct. Nov. 24, 2021), *https://www.glynncounty.org/DocumentCenter/View/73758/Verdict-Form---Travis-McMichael*
240 Kinsley, *supra* note 225, at 3.
241 *Id.*
242 Tasnim Motala, *'Foreseeable Violence' & Black Lives Matter: How* Mckesson *Can Stifle a Movement*, 73 Stan. L. Rev. Online 61, 69–70 (2020), https://www.stanfordlawreview.org/online/forseeable-violence-black-lives-matter/.
243 *Id.* at 68.
244 *Id.* at 68–69.
245 Adamson, *supra* note 229, at 215. "Audiences do not always receive news stories directly, but will get news through personalized news feeds, peers, significant or proximate (co-workers) others, and those otherwise members of our social media networks. Exposure to news and civic information is mediated through online social networks and electronically-enabled personalization now more than ever." *Id.* at 214–215.
246 *Id.* at 215.

remains problematic because we tend to gravitate towards information that confirms what we know and tend to reject information that fails to fit into our preconceived framework of information.[247] The problem now is how readily available congenial news sources are to any given demographic.[248] The novel opportunity for audience members to engage in the promulgation of news through social media allows increasingly narrower perspectives to create homogeneous groups of perpetual confirmation bias.[249] Worse than that, is the advent of 'Fake News' through tools like memes.[250] "Memes are cultural units . . . seek[ing] replication" that become baseline cultural components of information.[251] Bryan Anderson references a perfect example of the threat to news integrity posed by the prevalence of meme culture:

> One such meme shows a Black man holding a sign reading, "NO MOTHER SHOULD HAVE TO FEAR FOR HER SON'S LIFE EVERY TIME HE LEAVES HOME." . . . Someone in the cascade through the networks added the racist phrase onto the placard. The image was edited to excise the other protestors, leaving the Black male holding the placard anchoring the racist theme of the meme creator. At some point, as the image moved through social networks, a tag "You can't make this up!!!!!" was also added, accumulating thousands of "likes" and racist comments. The meme was shared over 28,000 times on Facebook.[252]

247 *Id.* "While we have always been able to choose which news sources to attend, the degree of political/ideological segregation in social media networks is in fact higher than that associated with mass media such as television and newspapers. In sum, our media selection evinces our general tendency toward confirmation bias–i.e., attentiveness to news sources whose stories tend to reinforce our predispositions and the discounting or exclusion of noncongenial sources and information." *Id.*

248 John Gramlich, *What Makes a News Story Trustworthy? Americans Point to the Outlet that Publishes It, Sources Cited*, PEW RSCH. CTR. (June 9, 2021), https://www.pewresearch.org/fact-tank/2021/06/09/what-makes-a-news-story-trustworthy-americans-point-to-the-outlet-that-publishes-it-sources-cited/.

249 Adamson, *supra* note 229, at 215–16. "Interpersonal and rumor theory principles of leveling, sharpening, and adding explain how news stories, transmitted through electronic social media, undergo consequential distortions. Leveling occurs when the story grows shorter and more concise as it is passed along. Sharpening involves the 'selective perception, retention, and reporting of a limited number of details from a larger context.' Adding occurs as news is passed along, and the communicator adds new material or details in the storytelling. In the adding phase, the transmitter may posit his own opinion, idea, or spin upon which the transmitter incorporates his own cognitive habits, biases, and prejudices. Because in-group network members most likely evince ideological homophily, news items shared through social media have reinforcing effects." *Id.*

250 *Id.* at 216

251 *Id.*

252 *Id.* at 216–17.

Not only are these avenues of "social media" being used by individuals to communicate perverted iterations of news stories, they are also being used by domestic law enforcement agencies "to monitor individual targets and build profiles of networks of connected individuals."[253]

Since January 2017, twenty states have implemented thirty-six initiatives that restrict the right to peaceful assembly at the state and federal level.[254] There are an additional fifty-two bills that are pending in a total of twenty-one states.[255] States have passed bills reducing or eliminating culpability for drivers who strike protestors, and that generally increase fines, penalties, and incarceration time for engaging in protests.[256] Indiana lawmakers passed Senate Bill 199, which protects store owners from prosecution if they use loaded firearms to protect their businesses.[257] One of the reasons given was to ensure that "there is less looting and 'destruction' caused by rioters."[258] Republican lawmakers in the state also set forth laws that would prohibit unlawful protestors from receiving social services such as student loans, unemployment benefits and housing vouchers.[259] Alabama has a bill pending that aims to withhold state funding from cities that reduce the amount of funding for police.[260]

The American Civil Liberties Union has noted that oftentimes, anti-protest bills are proposed in areas where large scale protests are staged[261] and a number of these bills were drafted within the year after the murder of George Floyd by a police officer.[262] The Denver International Airport imposed a requirement that protestors apply at least a week prior to any demonstration after there were protests at the airport for days following the

253 Rachel Levinson-Waldman, *Government Access to and Manipulation of Social Media: Legal and Policy Challenges*, 61 How. L.J. 523, 523 (2018).

254 *US Protest Law Tracker*, Int'l Ctr. For Not-For-Profit L. (Sept. 7, 2021), https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative.

255 *Id.*

256 Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. Times, (Apr. 22, 2021), https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html.

257 S.B. 199, 122nd Gen. Assemb., Reg. Sess. (Ind. 2021).

258 Casey Smith, *Indiana Lawmakers Propose Tougher Penalties for Rioting*, U.S. News (Feb. 2, 2021), https://www.usnews.com/news/best-states/indiana/articles/2021-02-02/indiana-lawmakers-propose-tougher-penalties-for-rioting.

259 Epstein & Mazzei, *supra* note 256.

260 H.B. 2, 2021 Leg., Reg. Sess. (Ala. 2021).

261 *See* Lee Rowland & Vera Eidelman, *Where Protests Flourish, Anti-Protest Bills Follow*, ACLU, (Feb. 17, 2017), https://www.aclu.org/blog/free-speech/rights-protesters/where-protests-flourish-anti-protest-bills-follow.

262 Epstein & Mazzei, *supra* note 256.

implementation of President Trump's Muslim ban.[263] In North Dakota, shortly after the pipeline protests, lawmakers introduced measures that give immunity to drivers who unintentionally hit protestors, and bills that would sentence people who protested on private property to jail for up to thirty days, and those who cause at least $1,000 in financial damage could be liable for up to $10,000 in penalties and be sentenced to as many as five years in prison.[264] Extreme financial penalties for protestors were also pushed in Minnesota following the police shooting of Philando Castile that resulted in his death.[265] Protestors against this and other incidents of police brutality blocked parts of a highway, resulting in state legislators attempting to make an individual protestor liable for the entire cost of policing a protest if they are convicted of public nuisance or unlawful assembly.[266]

It is significant to note that these extreme anti-protest bills introduced in approximately the last five years are in addition to laws that exist in every city and county that criminalize trespassing, or intentionally interfering with traffic.[267] It appears that the purpose of these bills is to intimidate and dissuade protestors from exercising their Constitutional rights in public places, which the Supreme Court has emphatically stated is integral to voicing one's opinion.[268]

Furthermore, about ninety-seven percent of the protests in the states where the recent spate of anti-protest bills were enacted have been peaceful, with low incidents of violent activity.[269] This is particularly true for Florida. Florida's rate of violent protest activity is lower than most states,[270] yet Florida's General Bill CS/HB 1, which was signed into law on April 19, 2021, provides for a more expansive definition of "riot," and categorizes such a situation that consists of more than twenty-five people and "endangers the safe movement of a vehicle" as a second degree felony.[271] This law provides an affirmative defensive to those who physically harm or even kill protestors acting "in furtherance of a riot."[272]

263 Rowland & Eidelman, *supra* note 261.

264 *Id.*

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.*

269 *See Fact Sheet: Anti-Protest Legislation and Demonstration Activity in the US*, ARMED CONFLICT LOCATION & EVENT DATA PROJECT, https://acleddata.com/acleddatanew/wp-content/uploads/2021/04/ACLED_Fact-Sheet_US-Protest-Laws_Apr2021.pdf (last visited Sept. 29, 2021).

270 *Id.*

271 H.B. 1 § 870.01, 2021 Leg., Reg. Sess. (Fla. 2021).

272 *Id.*

The Black Lives Matter movement (BLM) is more prevalent in states that have recently introduced anti-protest legislation compared to those that have not. Forty-three percent of protests in these states have been related to BLM compared to thirty-seven percent of protests that are related to BLM in states that have not had such anti-protest proposals.[273] Police engagement, both with and without force, is also marginally higher in the states that have proposed anti-protest legislation.[274]

The history of protesting shows the necessity of unlawful tactics in bringing about change, and these proposed and enacted laws designed to suppress resistance to prejudice and discrimination will likely silence and deter opposition. Advocacy against anti-protest bills should highlight the compounding negative health effects this type of legislation has on communities of color, specifically Black communities.

IV. Race, Activism, and Mental Health

People who experience racism are subjected to many forms of subtle racism, which can lead to negative health effects.[275] Racism comes in many different forms, such as mass incarceration, racial profiling, and feelings of inferiority.[276] In addition, racism can stem from various different sources, such as institutional racism, systemic racism, and interpersonal racism.[277] Racial trauma doesn't have to be the product of one event but can be a result of the accumulation of long term "subtle" experiences.[278] The most common mental health condition reported amongst Black, Indigenous, and other communities of color is depression.[279] Experiencing racial trauma is an immensely stressful situation, and as noted above, chronic stress can have a major impact on an individual's mental and physical health.[280] Experiencing racism can cause many of the effects experienced from chronic stress such as anxiety, depression, high blood pressure, and Post Traumatic Stress Disorder (PTSD).[281] The effects of racism can be both physical and mental.[282]

273 Fact Sheet: *Anti-Protest Legislation and Demonstration Activity in the US*, *supra* note 269.
274 *Id.*
275 *Racism and Mental Health*, Mental Health Am., www.mhanational.org/racism-and-mental-health (last visited Feb. 18, 2022).
276 *Id.*
277 *Id.*
278 *Id.*
279 *Id.*
280 *See id.*
281 *See id.*
282 Joanne Lewsley, *What Are the Effects of Racism on Health and Mental Health?*, Med. News Today (July 28, 2020), https://www.medicalnewstoday.com/articles/effects-of-racism.

Stress that is attributed to racial abuse or discrimination can erode one's sense of self-worth and lead to disordered eating, substance abuse, and physical changes in the body, from increased heart rate to muscle tension.[283] Over time, stress may also change the brain's structure, which adversely impacts learning and memory.[284] Compromised immune systems and heart health also result from stress[285] as does an acceleration of the aging process, which can result in early death.[286] Stress stemming from race-based discrimination is especially detrimental,[287] "'and physical ailments such as hypertension and diabetes result from racial discrimination."[288]

Not only does racism cause health problems—it is also an obstacle to receiving optimal health care for Black, Indigenous, and other communities of color .[289] Discrimination within the health care system often happens when there is a lack of cultural competency or racism (explicit or implicit) on the part of a medical professional.[290] People who are victims of such prejudice can be misdiagnosed, receive inappropriate treatment, or be deterred from seeking health care services.[291]

Engaging in social activism can exacerbate these poor health outcomes.[292] Police use physical force more often when encountering Black protestors when compared to white protestors.[293] Also, police officers associate Black people with criminal contact and violence which affects their response to this population.[294] A study shows that individuals who experience varying types of physical assault and violence are typically more prone to PTSD, depression, and even physical symptoms as a result of the trauma they experience.[295] A study gauging the mental and physical symptoms of women

283 *Id.*; *Coping with Race-Related Stress*, UNIV. ILL. COUNSELING CTR., https://counselingcenter.illinois.edu/brochures/coping-race-related-stress (last visited Feb. 18, 2022).

284 Bryony Doughty, *Stress and Our Mental Health–What Is the Impact & How Can We Tackle It?*, MENTAL HEALTH RSCH. (May 16, 2018), https://www.mqmentalhealth.org/stress-and-mental-health?lang=en_us.

285 *See id.*

286 Teri Dobbins Baxter, *Dying for Equal Protection*, 71 HASTINGS L.J. 535, 543–44 (2020).

287 *Id.* at 544.

288 *Id.*

289 *Racism and Mental Health*, *supra* note 275.

290 *See id.*

291 *See id.*; Austin Frakt, *Bad Medicine: The Harm That Comes from Racism*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html.

292 *See* Helen Cox, *Impacts of Activism on Health and Wellbeing*, COMMONS SOC. CHANGE LIBR., https://commonslibrary.org/impacts-of-activism-on-health-and-wellbeing/ (last visited July 28, 2021).

293 Motala, *supra* note 242, at 72–73.

294 *See id.* at 73–74.

295 Christina Nicolaidis et al., *Violence, Mental Health, and Physical Symptoms in an Academic*

who have been the subject of physical assault, community violence, and/or intimate partner violence were found to be prone to PTSD and depression.[296] The study speculated that women who experience intimate partner violence can be constantly berated, socially isolated, and dehumanized.[297] Even when Black people are not the subject of direct violence, their health suffers.[298] Black people suffer compassionate fatigue, a health consequence which causes stress and trauma when exposed to the suffering of others.[299] This underscores the risk of activism. One study found that political activism within a Latina student population actually served to counter stress and anxiety caused by racial and ethnic discrimination.[300] Conversely, the study also found that Black students involved in political activism actually suffered more stress and anxiety as a result.[301] Emotional exhaustion is a consequence of being an activist[302] and even learning of racist events for which people who share the same racial background are victims, can cause adverse physical effect.[303] Also, exposure to the details of stories of police killings of unarmed Black people causes the mental health of Black people to suffer.[304] As social media activism increases and these images and stories are shared and amplified, the trauma that Black people experience intensifies.[305] Being victimized by online racial discrimination can cause depression, anger, and anxiety.[306] The mental health effects of Black people being subject to media depicting police killings of unarmed Black people are under-researched, but Sara Jaffee, a Professor of Psychology at the University of Pennsylvania's School of Arts and Sciences, believes it can be linked to the same type of traumatization that occurs when one continuously has to recount or

Internal Medicine Practice, J. Gen. Intern. Med., 819, 823 (2004).

296 *Id.* at 819–27.

297 *Id.*

298 Nylah Burton, *Activism's Impact on Mental Health Can Be Devastating. Here's How Experts Want to Close the Gap*, Bustle (Apr. 19, 2019), https://www.bustle.com/p/the-impact-of-activism-on-mental-health-can-be-devastating-but-heres-how-expertssay-we-can-close-the-gap-17045319.

299 *Id.*

300 Elan C. Hope et al., *Political Activism and Mental Health Among Black and Latinx College Students,* 24 Cultural Diversity & Ethnic Minority Psych. 26, 32 (2018).

301 *Id.* at 26–39.

302 Patrick C. Dwyer et al., *When Does Activism Benefit Well-Being? Evidence from a Longitudinal Study of Clinton Voters in the 2016 U.S. Presidential Election*, PLOS One at 2 (Sept. 5, 2019), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0221754.

303 Baxter, *supra* note 286, at 535 n.62.

304 *Id.* at 583–84.

305 *Id.* at 586.

306 Greg Johnson, *Police Killings and Black Mental Health*, Penn Today (June 23, 2020), https://penntoday.upenn.edu/news/police-killings-and-black-mental-health.

relive a harmful experience.[307] Surveys have shown that about thirty-three percent of Black youth encounter racist content on the internet—its harmful health impacts are widespread, and the long-term effects are yet to be determined.[308] One 2018 study determined that, "a police killing of an unarmed Back person triggered days of poor mental health for Black people living in that state over the following three months—a significant problem given there are about 1,000 police killings annually on average, with Black people comprising a disproportionate twenty-five percent to thirty percent of those deaths."[309]

Studies have shown that the mental health of Black people is negatively impacted due to police killings of unarmed Black people—this is true even among Black people who are not directly involved with or affected by the killing.[310] The adverse effects of police violence can also result in lower academic achievement with respect to grade point average, high school graduation and college matriculation among African American and Hispanic high school students.[311] These individuals also display increased signs of emotional disturbances due to the exposure to this type of violence.[312]

A study published in April 2021 found that reported incidents of poor mental health among Black people increased in weeks where at least two deadly racial events were in the news, with the most triggering incidents being police killings of Black people or legal decisions not to indict or convict the police officer who killed the individual.[313] This may be attributed to the news stories bringing past experiences with racism to the surface.[314] It is important to note that no such increase in poor mental health conditions were noted among white Americans when the killings were in the news.[315] Despite the negative impacts of these stories on Black people, victims of police brutality are often compelled to make public the details of the event in order to seek justice.[316] Another stressor that stems from the dissemination

307 *Id.*

308 *Id.*

309 Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302 (2018), https://www.thelancet.com/action/showPdf?pii=S0140-6736%2818%2931130-9.

310 *Id.*

311 Desmond Ang, *The Effects of Police Violence on Inner-City Students*, 136 Q.J. ECON. 115, 117–18 (2021).

312 *Id.* at 117.

313 David S. Curtis et al., *Highly Public Anti-Black Violence Is Associated with Poor Mental Health Days for Black Americans*, 118 PROC. NAT'L ACAD. SCIS. U.S. AM., no. 17, 2021, at 3.

314 *See id.* at 1.

315 *Id.*

316 Sirry Alang et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 AM. J. PUB. HEALTH 662, 663 (2017).

of information about police killings of Black people is the fact that they often have to describe to white people the link between these killings and general incidents of racism that are embedded in society.[317] Black individuals often have no choice as to when the exposure to racism, police killings, or other events of racial trauma will be publicized or will directly affect them. Therefore, it is important that the tools to stabilize one's mental health are available and accessible.

Howard C. Stevenson, a Professor of Africana Studies and Director of the Racial Empowerment Collective at the University of Pennsylvania's Graduate School of Education[318] says that "[t]hese are very dehumanizing oppressions. . . . Even if the protests bring about change in policing, and even if it changes how schools and workspaces are discriminatory towards Black and Brown people, you will still need the self-care. Even if the systems get better at treating people in a less dehumanizing way, you would still need to say every day I'm going to have to manage."[319] To that end, more information is needed to ascertain the best way to provide holistic healthcare. Additional research should be supported to more comprehensively understand the connection between police brutality and negative mental and physical health outcomes among Black people.[320] The definition of "brutality" should be expanded to include emotional anguish, sexual abuse, sexual harassment and intimidation as well as physical violence.[321] Although data about arrest-related deaths are collected, information regarding all interactions with police are pertinent to fully understanding the stress of these situations on Black and other individuals.[322] This information would be helpful in supporting proactive interventions and guidelines with respect to reporting and projecting images of Black trauma.

It has been shown that when a person's identity is impacted by the issues or causes they are engaged in advocating for, the individual has a heightened risk of suffering from post-traumatic stress syndrome and suicidal ideation.[323] This is especially true for women, Black people, and other historically marginalized groups, and can have negative effects for generations given that certain trauma is passed through genes, negatively affecting the health of descendants.[324] Racial health disparities are preventable instances

317 *Id.*
318 *Howard C. Stevenson*, Univ. Pa. Graduate Sch. Educ., https://www.gse.upenn.edu/academics/faculty-directory/stevenson (last visited Sept. 30, 2021).
319 Johnson, *supra* note 306.
320 Alang et al., *supra* note 316, at 662, 664.
321 *Id.* at 662.
322 *See id.* at 664.
323 Burton, *supra* note 298.
324 *Id.*

in the burden and instances of negative health outcomes for people of color due to their racial and ethnic status.[325] Stress and bias in the health care industry are significant causes of these disparities.[326] In addition to the aforementioned instances of racial bias, social structure contributes to the deterioration of health among Black Americans.[327] The level of stress that is intrinsic to the Black experience leads to chronic disease and infection.[328] Exposure to this discrimination results in Black people being more likely to contract heart disease and cancer, given that such prejudice is a precursor to stress which is attributed to these illnesses.[329]

CONCLUSION: HEALTHCARE FOR ACTIVISTS

Protestors throughout American history have a history of requiring medical care. Whether in response to physical violence from reactionary backlash–like the suffragists who were hospitalized when they marched on Washington, or Black protestors who were attacked in response to the Civil Rights movement–or from the mental health toll which we are still trying to understand, activists and those who are implicated in their movements need access to healthcare. Refusal to offer comprehensive mental and physical health assistance to people who are not only victims of racial discrimination, but also lead the charge to racial equality diminishes the positive outcomes of activism.

The Affordable Care Act provides states with the option to expand Medicaid coverage for most low-income adults to 138% of the federal poverty level, which means people making $17,600 per year or less as a single adult[330] would be eligible for this insurance.[331] Not all states have elected to expand Medicaid, however, if those remaining states chose to do so, the uninsured rates would lower drastically to provide coverage for millions of Americans.[332] As of March 31, 2021, Wisconsin, South Dakota, Wyoming,

325 NAT'L ACADS. OF SCIS, ENG'G, AND MED., COMMUNITIES IN ACTION: PATHWAYS TO HEALTH EQUITY 32 (James N. Weinstein et al. eds., 2017).

326 Burton, *supra* note 298; NAT'L ACADS. OF SCIS, ENG'G, AND MED., *supra* note 325.

327 Nelson, *supra* note 1, at 925.

328 *Id.* at 927.

329 *Id.* at 934–35.

330 *Status of State Action on the Medicaid Expansion Decision*, KAISER FAM. FOUND., https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited July 23, 2021).

331 *2021 Poverty Guidelines*, OFF. ASSISTANT SEC'Y FOR PLAN. & EVAL., https://aspe.hhs.gov/2021-poverty-guidelines#thresholds (last visited July 23, 2021).

332 Jesse Cross-Call & Matt Broaddus, *States that Have Expanded Medicaid Are Better Positioned to Address COVID-19 and Recession*, CTR. ON BUDGET & POL'Y PRIORITIES (July 14, 2020),

Kansas, Texas, Tennessee, Mississippi, Alabama, Georgia, South Carolina, North Carolina, and Florida have not expanded Medicaid.[333] With the exception of South Dakota, Wyoming, Kansas, and North Carolina, these states rank in the top half of states that have reported the highest amount of police killings of Black people between the years of 2013 and 2020.[334] One likely reason these states are omitted is because twenty-seven percent of the killings during this time frame were committed by police departments of the 100 largest cities.[335] Besides North Carolina and Kansas, these states do not have any cities with populations substantial enough to meet this threshold.[336] The overlap of states that have not expanded Medicaid with states that have significant police brutality instances illustrates how policies can worsen health disparities for people of color already experience stress induced by racism. Expanding Medicaid will increase the likelihood these individuals will have access to healthcare.[337]

Professor Ryan DeLapp at Albert Einstein College of Medicine in New York City emphasizes that the onus to alleviate the mental anguish that follows from exposure to images of Black violence and harm should be on inherently racist systems as opposed to individuals.[338] Expanding Medicaid would narrow racial health disparities for Black and Hispanic people by improving access to care and health outcomes.[339] However, additional

https://www.cbpp.org/research/health/states-that-have-expanded-medicaid-are-better-positioned-to-address-covid-19-and; *Status of State Medicaid Expansion Decisions: Interactive Map*, Kaiser Fam. Found., https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ (last visited July 23. 2021).

333 *Status of State Medicaid Expansion Decisions: Interactive Map*, *supra* note 332.

334 *State Comparison Tool*, Mapping Police Violence, https://mappingpoliceviolence.org/states (last visited July 23, 2021).

335 *Police Accountability Tool*, Mapping Police Violence, https://mappingpoliceviolence.org/compare-police-departments (last visited July 23, 2021); *see The Largest U.S. Cities: Cities Ranked 1 to 100*, City Mayors Stat., http://www.citymayors.com/gratis/uscities_100.html (last visited July 23, 2021).

336 *The Largest U.S. Cities: Cities Ranked 1 to 100, supra* note 335.

337 Julia Paradise & Rachel Garfield, *What Is Medicaid's Impact on Access to Care, Health Outcomes, and Quality of Care? Setting the Record Straight on the Evidence*, Kaiser Fam. Found. (Aug. 2, 2013), https://www.kff.org/report-section/what-is-medicaids-impact-on-access-to-care-health-outcomes-and-quality-of-care-setting-the-record-straight-on-the-evidence-issue-brief/.

338 Amy Norton, *High-Profile Police Brutality Cases Harm Black Americans' Mental Health: Study*, U.S. News (Apr. 20, 2021), https://www.usnews.com/news/health-news/articles/2021-04-20/high-profile-police-brutality-cases-harm-black-americans-mental-health-study.

339 *See The Effects of Medicaid Expansion Under the ACA: Studies from January 2014 to January 2020*, Kaiser Fam. Found. (May 17, 2020), https://www.kff.org/report-section/the-effects-of-medicaid-expansion-under-the-aca-updated-findings-from-a-literature-review-report/.

solutions should be provided to address the mental and physical impacts that protesting can have on Black communities, since an expansion of Medicaid by itself is not sufficient to eliminate health disparities.[340]

Despite the urgent nature of protests, particularly those led by Black individuals and women, it is important that legislators meet the demands of advocates and incorporate the need for expansive healthcare for these populations. There is a dearth of information on laws and policies that have been passed or even set forth to address the health disparities specifically attributed to activism. Given the health risk that activists subject themselves to, in order to fully address their grievances, their own well-being should be a priority in all policies designed to mitigate injustice and inequality.

340 *See id.*

"TRUMP GOT HIS WALL, IT IS CALLED TITLE 42"[1]; THE EVOLUTION AND ILLEGALITY OF TITLE 42'S IMPLEMENTATION AND ITS IMPACT ON IMMIGRANTS SEEKING ENTRY INTO THE UNITED STATES

By Sarah Rosen[*]

1 Maria Abi-Habib, *On Mexico's Border with U.S., Desperation as Migrant Traffic Piles Up*, N.Y. TIMES (Mar. 14, 2021) (updated July 16, 2021), www.nytimes.com/2021/03/14/world/americas/mexico-border-biden.html (quoting Ruben Garcia, the founder of Annunciation House, one of the largest shelter networks in the United States).

* Sarah Eve Rosen is a law student at Northeastern University with a concentration in Poverty Law and Economic Justice, class of 2022. She majored in International Relations and Spanish with a minor in Political Science at the University of North Florida. Sarah has worked with individuals in almost every stage of the U.S. deportation machine, including DACA recipients, individuals in deportation proceedings, immigrants forced to wait in Mexico under the Migrant Protection Protocols, and those illegally denied their right to seek asylum under Title 42. This note would have not been possible if it was not for all the amazing support that I received throughout the writing process. I am grateful for the helpful inputs from Linda Rivas and Professor Wendy Parmet, Professor Jeremy Paul, and Shalyn Fluharty. A special thanks to Daniel Wells, Professor Hemanth Gundavaram, Dara Garcia, Alan Dicker, Cindy Sue Woods, and Julie Dargus for their invaluable support and feedback. Finally, a big thank you to Elisabeth Spector and all the editors at Northeastern University Law Review who worked tirelessly on this note.

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INTRODUCTION

On March 24, 2020, the Centers for Disease Control and Prevention (CDC) released an order entitled "Order Suspending Introduction of Persons from Countries Where a Communicable Disease Exists."[2] The order relies on Sections 362 and 365 of the Public Health Services Act (PHSA) for the unprecedented authorization of border officials to enforce broad expulsions of people attempting to enter the United States from Mexico and Canada.[3] Approximately a month after publishing the order, the CDC extended it an additional thirty days, thus continuing to block individuals from entering the United States through the Mexico and Canada land borders without travel documentation.[4] In May 2020, the CDC extended the order indefinitely.[5] The order, known as "Title 42," claims its enforcement "is necessary to protect the public health" from an increase in the danger of the introduction of Coronavirus Disease 2019 (COVID-19) into the land ports of entry (POEs), and the Border Patrol stations between POEs, at or near the United States borders with Canada and Mexico.[6]

Title 42 is one of many anti-immigration policies implemented during the Trump administration. Since the beginning of Donald Trump's 2016 campaign for the Republican presidential nomination, he vowed to remove all avenues for immigrants seeking protection under the laws of the United States.[7] Immigrants have the right to seek protection under both international law and United States statute.[8] Within days of his inauguration

2 Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16,567 (Mar. 24, 2020) (to be codified at 42 C.F.R. pt. 71).

3 The Public Health and Welfare Act, 42 U.S.C. §§ 265, 268; Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, JUST SEC. (Apr. 13, 2020), https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/.

4 Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22,424, 22,425 (Apr. 22, 2020).

5 Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31,503, 31,504 (May 26, 2020) (explaining the May 20, 2020 order).

6 *Id.* at 31,503.

7 *Transcript: Donald Trump's Full Immigration Speech, Annotated*, L.A. TIMES (Aug. 31, 2016), https://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html.

8 *See id.*; *A Brief History of Civil Rights in the United States*, GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=592919&p=4170926 (Aug. 26, 2021); *Immigration & Migrants' Rights*, INT'L JUST. RES. CTR., https://ijrcenter.org/thematic-research-guides/immigration-migrants-rights/ (June 3, 2021) (listing and summarizing international

former President Trump began issuing executive orders to withhold funds from sanctuary cities and ordered the blockage of immigrants and refugees from predominantly Muslim countries.[9] Throughout the Trump administration, new policies were implemented or introduced for comment that chipped away at the pre-existing broken asylum and immigration framework.[10] Title 42 was among a multitude of anti-immigrant policies including Executive Order 13769, known as "the Muslim Ban," and the Department of Homeland Security's (DHS) Migrant Protection Protocols,

laws regarding immigrant protections).

9 Alan Berube, *Sanctuary Cities and Trump's Executive Order*, Brookings (Feb. 24, 2017), https://www.brookings.edu/blog/unpacked/2017/02/24/sanctuary-cities-and-trumps-executive-order/; Alan Yuhas & Mazin Sidahmed, *Is this a Muslim Ban? Trump's Executive Order Explained*, Guardian (Jan. 31, 2017), https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits. *See infra* note 12.

10 Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017). On January 27, 2017, one of the Trump Administration's first actions was to implement what is referred to as "the Muslim ban." Fox News Channel, *Rudy Giuliani Admits It Is a Muslim Ban*, YouTube, at 3:02 (Jan. 29, 2017), https://www.youtube.com/watch?v=aGOwEOTYfuE&t=175s. The first two executive orders banned travel to the United States "from seven predominantly Muslim countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—and suspended the resettlement of all Syrian refugees." *Muslim Travel Ban*, Immigr. Hist., https://immigrationhistory.org/item/muslim-travel-ban/ (last visited July 20, 2021). The order faced many legal challenges, resulting in injunctions by district courts, ruling that the plaintiffs challenging the Order would likely succeed on their claims that the Order violated the First Amendment and Immigration and Nationality Act. *See id.*; *Timeline of the Muslim Ban*, ACLU Wash., https://www.aclu-wa.org/pages/timeline-muslim-ban (last visited Aug. 9, 2021); *Muslim Ban Litigation*, Brennan Ctr. for Just. (Apr. 25, 2018) (updated Feb. 3, 2020), https://www.brennancenter.org/our-work/court-cases/muslim-ban-litigation. The Order went through multiple changes, the third iteration of which expanded the list of barred travelers to include nationals from Venezuela and North Korea. *Muslim Travel Ban*, *supra*. On June 26, 2018, the Supreme Court ruled on this third version of the executive order ban, ruling 5–4 that the President had the proper authority to issue the executive order. Trump v. Hawaii, 138 S. Ct. 2392, 2408–10 (2018). The five-justice majority disagreed with the lower courts, finding that the plaintiffs were not likely to succeed in their claim that the Order was unconstitutional, and reversed the preliminary injunctions of the lower courts, allowing the third iteration of the order to go into effect. *Id.* at 2423; Ernesto Sagás & Ediberto Román, *Build the Wall and Wreck the System: Immigration Policy in the Trump Administration*, 26 Tex. Hisp. J.L. & Pol'y 21, 28 (2020). For further information regarding how the asylum system is broken see David Frum, *America's Asylum System Is Profoundly Broken*, Atlantic (July 3, 2019), https://www.theatlantic.com/ideas/archive/2019/07/why-americas-immigration-system-is-broken/593143/; Shalini Bhargava Ray, *Optimal Asylum*, 46 Vand. J. Transnat'l L. 1215, 1229–31 (2013); *Asylum in the United States*, Am. Immigr. Council (June 11, 2020), https://www.americanimmigrationcouncil.org/research/asylum-united-states.

known as the "Remain in Mexico" policy.[11] According to Linda Rivas, the Executive Director and Managing Attorney of Las Americas Immigrant Advocacy Center in El Paso, Texas, prior to the implementation of these policies, the processing of arriving undocumented persons by land border was somewhat standardized, though varied in part depending on where the apprehension and processing occurred.[12]

This paper continues in four sections. Section I summarizes the relevant history of Title 42. Section II discusses the Trump Administration's implementation of the Title 42 expulsion process and its impact on immigrants seeking protection in the United States through land POEs at

11 *Migrant Protection Protocols*, U.S. DEP'T HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols. On January 24, 2019, Secretary of Homeland Security, Kirstjen Nielson announced the implementation of section 235(b)(2)(C) of the Immigration and Nationality Act (INA). *Id.* The policy forced certain asylum-seekers to wait in Mexico through the duration of their cases pending in the U.S. immigration court system. Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dept. of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs., Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., and Ronald D. Vitiello, Deputy Dir. & Senior Off. Performing the Duties of Dir., U.S. Immigr. & Customs Enf't 2 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; *see also* Ben Harrington & Hillel R. Smith, Cong. Rsch. Serv., LSB10251, "Migrant Protection Protocols": Legal Issues Related to DHS's Plan to Require Arriving Asylum Seekers to Wait in Mexico 1–2 (2019).

12 Telephone Interview with Linda Rivas, Exec. Dir. & Managing Att'y, Las Americas Immigr. Advoc. Ctr. in El Paso, Tex. (Aug. 23, 2021). In the early and mid-2010s, the Obama Administration built family detention facilities in Burkes County, Pennsylvania; Karnes City, Texas; and Dilley, Texas. *See Family Detention*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/family-detention (last visited Aug. 9, 2021); Caitlin Dickerson, *Border at 'Breaking Point' as More than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/us/border-crossing-increase.html. Some family units are sent to one of these facilities, which under law they are not meant to be at longer than twenty days; however, Immigration and Customs Enforcement (ICE) continues hold families for longer. *Family Detention*, *supra*; *US: Trauma in Family Immigration Detention*, HUM. RTS. WATCH (May 15, 2015), https://www.hrw.org/news/2015/05/15/us-trauma-family-immigration-detention-0; Caitlin Dickerson, *U.S. Expels Migrant Children from Other Countries to Mexico*, N.Y. Times (Oct. 30, 2020) (updated Mar. 15, 2021), https://www.nytimes.com/2020/10/30/us/ migrant-children-expulsions-mexico.html. It is not clear how ICE/CBP determines which family units will be detained and which will be released into the U.S. to continue their immigration court proceedings while living with family or friends. Telephone Interview with Linda Rivas, *supra*. More recently in 2019, when the number of arriving family units was extremely high, during just one week in February 2019, an El Paso shelter received 3,600 migrants, and had to scramble to secure housing for these families. *U.S. Expels Migrant Children from Other Countries to Mexico*, *supra*.

or near the United States borders with Canada and Mexico. Section II also summarizes the Trump Administration's and CDC's reasoning regarding why Title 42 should supersede codified asylum law, the Convention Against Torture (CAT), and Withholding of Removal. Section III outlines the illegality of Title 42 due to its bad faith implementation and violation of sections of the Immigration and Nationality Act (INA), the Convention Against Torture (CAT), and the United States Constitution. Finally, Section IV concludes this note with a discussion of Title 42 expulsions under the Biden Administration, the future of Title 42 and recommendations to policymakers.

I. History of Title 42

This Section discusses the development of sections 362 and 365 of the PHSA and the continuous transfer of quarantine power from state and local authorities to the federal government and its agencies. As mentioned above, the CDC cites to sections 362 and 365 of the PHSA for implementation of the immigration removals.[13] Yet, nowhere in the PHSA is the CDC or the Surgeon General permitted to override immigration law or implement immigration removals. The PHSA was established in 1944, and sections 362 and 365, the provisions at issue here, are now codified under 42 U.S.C. §§ 265 and 268, respectively.[14] Today, these sections are referred to simply as "Title 42." Section 362 of the PHSA states:

> Whenever the Surgeon General determines . . . by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, . . . the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.[15]

Section 365 of the PHSA, which is qualified by section 362, states:

13 U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention (CDC), Order Under Sections 362 & 365 of the Public Health Service Act (42 U.S.C. §§ 265, 268): Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists (Oct. 13, 2020), www.cdc.gov/coronavirus/downloads/10.13.2020-CDC-Order-Prohibiting-Introduction-of-Persons-FINAL-ALL-CLEAR-encrypted.pdf.

14 42 U.S.C. §§ 265, 268.

15 *Id.*

> (a) Any consular or medical officer of the United States, designated for such purpose by the Secretary, shall make reports to the Surgeon General, on such forms and at such intervals as the Surgeon General may prescribe, of the health conditions at the port or place at which such officer is stationed.
>
> (b) It shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations.[16]

Sections 362 & 365 were established on July 3, 1944, under the PHSA by President Franklin D. Roosevelt.[17] These provisions mostly consolidate a previous order which dates back to 1893, but also shifted authority from the President to the Surgeon General to "prohibit introduction."[18] In 1970, implementation authority shifted again, from the Surgeon General to the Secretary of Health and Human Services, who later delegated this authority to the CDC.[19]

Federal quarantine power has evolved around an "intermittent series of deadly epidemics" from the colonial era through the passage of the PHSA, and afterwards through the PHSA's continued modifications.[20] This evolving power to protect against external threats of communicable disease gradually transferred from state and local authorities to the federal government.[21] Records indicate that the federal government first became involved in quarantine measures in the 1790s, when it granted consent to the state of Maryland to impose a duty on vessels entering Baltimore's district from international ports in order to pay for the costs of a health officer at the Port of Baltimore.[22] Then, in 1891, Congress passed a law that provided for the exclusion of all "persons suffering from a loathsome or dangerous contagious disease," in order to prevent the ingress of immigrants potentially carrying yellow fever, cholera, and the plague.[23] Years later,

16 *Id.*

17 *Malaria*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/malaria/about/history/history_cdc.html (July 23, 2018); Katherine L. Vanderhook, A History of Federal Control of Communicable Diseases: Section 361 of the Public Health Service Act 56–60 (Apr. 30, 2002) (third year paper, Harvard University) (on file with Harvard Library), https://dash.harvard.edu/bitstream/handle/1/8852098/vanderhook2.pdf?sequence=2&isAllowed=y.

18 Guttentag, *supra* note 3.

19 *Id.*

20 Vanderhook, *supra* note 17, at 1.

21 *Id.*

22 *Id.* at 4–5.

23 Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084; Vanderhook, *supra* note 17, at 28.

the court affirmed the federal government's power over quarantine law.[24] In 1893, the court in *Minneapolis v. Milner* held that a state has the right to detain and inspect immigrants, even those from uninfected countries as "[t]he inconvenience resulting to emigrants and travelers from being halted and subjected to examination and detention at state lines is of trifling importance at a time when every effort is required and is being put forth to prevent the introduction and spread of pestilential and communicable diseases."[25] While states have the right to implement their own public health legislation, if that legislation conflicts with a Congressional provision that is passed in compliance with the Constitution, the federal law will have "unobstructed operation."[26]

Courts have previously deferred to agencies' discretion to assert authority over quarantine policy, such as Title 42. In *Louisiana v. Mathews*, the Food and Drug Administration (FDA) was challenged for an absolute ban it implemented pursuant to the PHSA on the sale and distribution of small turtles due to the turtles' potential spread of communicable disease.[27] The plaintiffs claimed that, because the FDA banned the interstate shipment of both infected and uninfected turtles, the FDA had exceeded its authority under the PHSA's scope as they were only "authorized to prohibit . . . the interstate shipment of turtles which may spread communicable disease."[28] But, the court upheld the FDA's ban because the plaintiffs failed to prove that the FDA's ban would not improve the spread of communicable disease.[29] In coming to this conclusion, the court also noted that federal health authorities are granted "broad, flexible powers" when implementing the PHSA.[30]

While the CDC has the power to implement the PHSA, legal scholars argue that the agency's present interpretation of the PHSA is unprecedented and is being applied as "a summary immigration expulsion process."[31] Theresa Cardinal Brown, the Managing Director of Immigration and Cross Border Policy at the Bipartisan Policy Center, stated:

> In general, it's been used in the past . . . to prevent entry, or to quarantine people after they arrive, but as far as I know, this is the first time it's been used very broadly to apply strictly to people

24 *Id.* at 88.
25 Minneapolis v. Milner, 57 F. 276, 279 (C.C.W.D. Mich. 1893).
26 Hennington v. Georgia, 163 U.S. 299, 309 (1896); Vanderhook, *supra* note 17, at 28. U.S. Const. art. VI, § 1, cl. 2.
27 Louisiana v. Mathews, 427 F. Supp. 174, 175–76 (E.D. La. 1977).
28 Vanderhook, *supra* note 17, at 71–72.
29 *See id.* at 72.
30 Louisiana v. Mathews, 427 F. Supp. 174 at 176; *see also* Vanderhook, *supra* note 17, at 72.
31 *See* Guttentag, *supra* note 3.

> entering between the Ports of Entry in the U.S.-Mexico land border.[32]

Research on similar implementation of the PHSA sections 362 and 365 has not been located, and there is no widely known previous instance of implementation equivalent to the broad expulsion of all asylum seekers trying to enter by land border due to an international communicable disease, nor has case law referring to its legality been found.[33]

II. THE TRUMP ADMINISTRATION'S USE OF TITLE 42

This Section discusses the development of sections 362 and 365 of the PHSA and the continuous transfer of quarantine power from state and local authorities to the federal government and its agencies. Prior to the implementation of Title 42, many immigrants seeking protections presented themselves at an authorized POE while many other arriving undocumented persons (including asylum seekers) entered the United States outside a POE for a variety of reasons, such as by accident or because they were forced by a human smuggler.[34] During the Trump presidency, most single adults were detained during the duration of their immigration proceedings, with some individuals being freed through bond, and very few others released

32 Reynaldo Leaños Jr., *COVID-19 at the Border: Unprecedented Use of Law Expels Migrants 'As Quickly As Possible*,' HOUS. PUB. MEDIA (July 28, 2020), https://www.houstonpublicmedia.org/articles/news/border/2020/07/28/378675/covid-19-at-the-border-unprecedented-use-of-law-expels-migrants-as-quickly-as-possible/.

33 Guttentag, *supra* note 3. While the PHSA §§ 362 and 365 has not been used to exclude broad swathes of people attempting to enter the United States prior to 2019, provisions of the Immigration and Nationality Act (INA) have long been used to exclude and stigmatize particular groups of people on health grounds. Leaños *supra*; April Thompson, *The Immigration HIV Exclusion: An Ineffective Means for Promoting Public Health in a Global Age*, 5 HOUS. J. HEALTH L. & POL'Y 145, 151–153 (2005). For example, in 1987 HIV-positive non-citizens were excluded from entrance to the U.S. on health-related grounds under the INA until 2010. Thompson *supra*, at 152–153; Susanna E. Winston & Curt G. Beckwith, *The Impact of Removing the Immigration Ban on HIV-Infected Persons*, 25 AIDS PATIENT CARE & STDS 709, 709 (2011).

34 David Yaffe-Bellany et al., *Asylum-Seekers Say They Cross the Border Illegally Because They Don't Think They Have Other Options*, TEX. TRIB. (Aug. 16, 2018), https://www.texastribune.org/2018/08/16/migrants-who-cross-border-illegally-say-theyre-unaware-alternatives/; *Why Do Some Asylum Seekers Cross the U.S. Southern Border Between Ports of Entry?*, HUM. RTS. FIRST (Nov. 2018), https://www.humanrightsfirst.org/sites/default/files/US-Southern-Border-Fact-Sheet.pdf; *see also infra* note 125 (defining "human smuggler").

on parole.[35] Some arriving family units were processed and released to complete their asylum process with their families in the interior of the country,[36] while others were detained in family detention facilities in Texas and Pennsylvania.[37] Lastly, unaccompanied noncitizen children (UNC)[38] were sent to facilities run by the Office of Refugee Resettlement (ORR) until their sponsors (the adults who planned to care for them in the United States) were vetted by ORR and deemed safe and competent to care for the child during their asylum process.[39] The two unprecedented polices, Remain in

35 *See* Yaffe-Bellany et al., *supra* note 34; *Immigration Detention in the United States by Agency*, Am. Immigr. Council (Jan. 2, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf; *see also infra* Section II.D.2.

36 Annie Rose Ramos & Suzanne Gamboa, *Shelters Step up to Aid more Immigrant Families Brought to Their Doors by ICE*, NBC News (Oct. 14, 2018), https://www.nbcnews.com/news/latino/shelters-step-aid-more-immigrant-families-brought-their-doors-ice-n919426.

37 *Detention Management*, U.S. Immigr. & Customs Enf't, www.ice.gov/detain/detention-management (Aug. 24, 2021).

38 Throughout this article, UNC will be used to refer both to the plural "unaccompanied noncitizen children" and the singular "unaccompanied noncitizen child." An unaccompanied child, referred to in this article as an "unaccompanied noncitizen child," is an individual "[with] no lawful immigration status in the United States[,] [i]s under 18 years of age[,] [and] [h]as no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody." *About the Program*, Off. of Refugee Resettlement, https://www.acf.hhs.gov/orr/programs/ucs/about (Apr. 29, 2021). Unaccompanied minors are referred to as Unaccompanied Alien Children (UAC) under Title 6 of the U.S. Code in section 279 on children's affairs. 6 U.S.C. § 279(g)(2); *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, Am. Immigr. Council (June 26, 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf; Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392, 44,415 (Aug. 23, 2019) (to be codified at 8 C.F.R. pts. 212, 236, 45 C.F.R. pt. 410). However, because of the xenophobic nature of the word "alien" the Biden Administration ordered immigration agencies to no longer use the term. *See* Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Laws*, NBC News (Jan. 22, 2021), www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350. It can be inferred that some courts are also incorporating the progressive language change, referring to unaccompanied migrant children as "unaccompanied minors," and "unaccompanied noncitizen children." *See, e.g.*, Flores v. Rosen, 984 F.3d 720, 726 (9th Cir. 2020); P.J.E.S. v. Wolf, 502 F. Supp. 3d 492, 501 (D.D.C. 2020); L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018). *But see* J.S.G. *ex rel.* Hernandez v. Stirrup, No. SAG-20-1026, 2020 WL 1985041, at *8 (D. Md. Apr. 26, 2020) (using "unaccompanied alien children").

39 *See J.S.G. ex rel. Hernandez*, 2020 WL 1985041, at 8; William A. Kandel & Lisa Seghetti, Cong. Rsch. Serv., R43599, Unaccompanied Alien Children: An Overview 8–10

Mexico and Title 42, entirely transformed this immigration process, thereby achieving the Trump Administration's goal of ultimately closing the border to immigrants seeking protection.

While DHS has not stated which countries of origin are meant to be included in the Remain in Mexico policy versus Title 42, the enforcement of the latter primarily impacted those from Mexico, Guatemala, Honduras, and El Salvador.[40] Such disparate implementation of these policies is a result of the agreement between the United States and Mexico to allow immigrants from Mexico and the three Central American countries to be pushed back into Mexico, rather than their home countries under Title 42.[41] The aforementioned countries were also likely targeted because they account for about eighty-five percent of all unauthorized border crossings.[42] While other immigrant nationalities, such as Haitians, are subject to Title 42, they are more likely to be flown to their home country rather than deported to Mexico, regardless of their preference.[43] While the government's official purpose for the varied treatment is unknown, immigration data and United States policy indicates that Black immigrants, such as Haitians, are regularly subjected to greater structural barriers to entering the United States.[44]

(2015).

40 Nick Miroff, *Under Coronavirus Immigration Measures, U.S. Is Expelling Border-Crossers to Mexico in an Average of 96 Minutes*, WASH. POST (Mar. 30, 2020), https://www.washingtonpost.com/immigration/coronavirus-immigration-border-96-minutes/2020/03/30/13af805c-72c5-11ea-ae50-7148009252e3_story.html; *see also Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (Aug. 12, 2021).

41 *See* Rafael Bernal, *US Border Agents Sending Unaccompanied Children from Other Countries to Mexico: Report*, HILL (Oct. 30, 2020), https://thehill.com/latino/523622-us-border-agents-sending-unaccompanied-children-from-other-countries-to-mexico-report; John Ruwitch, *Biden Moves to End Trump-Era Asylum Agreements with Central American Countries*, NPR (Feb. 6, 2021), https://www.npr.org/2021/02/06/964907437/biden-moves-to-end-trump-era-asylum-agreements-with-central-american-countries.

42 Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law*, PROPUBLICA (Apr. 2, 2020), https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law.

43 *See* Julia Ainsley, *Since Trump Restricted Flow at Border, More Migrants Trying to Sneak Through Undetected*, NBC NEWS (Mar. 1, 2019), https://www.nbcnews.com/politics/immigration/trump-restricted-flow-border-more-migrants-trying-sneak-through-undetected-n976356.

44 United States immigration policies, historically and currently discriminate against People of Color, and are especially invidious towards Black immigrants. DeArbea Walker, *Haitians Are Still Being Deported from the Border. Experts Say Their Plight Exposes Bias Against Black Refugees*, INSIDER (Oct. 1, 2021), https://www.insider.com/haitian-deportations-expose-disparate-treatment-of-black-immigrants-2021-10. An example

A. *The Center for Disease Control and Prevention and the Department of Health and Human Service's reasoning for the implementation of Title 42 expulsions*

As of March 20, 2020, Title 42 was reportedly enforced "to protect the public health from an increase in the serious danger of the introduction of [COVID-19] into the land POEs, and the Border Patrol stations between POEs, at or near the United Sates borders with Canada and Mexico."[45] Paying no regard to asylum seekers' congressionally-granted rights under United States treaty and ratified law, the order announced that particular arriving persons without permanent status or travel documents would be ineligible to enter the country.[46] On April 22, 2020, the CDC extended the order that was issued on March 20, 2020, to remain in effect until May 20, 2020.[47] On May 19, 2020, the CDC again amended the previous order by

of such anti-Black policy includes the expulsion of Haitian Immigrants seeking safety in the United States in the early 1990s. Haitian immigrant were intercepted by United States Immigration Enforcement before reaching land, and indefinitely detained at the Guantanamo Bay naval base, while others were quickly expelled to their home country, similar to Title 42. Brandt Goldstein, Storming the Court, How a Band of Law Students Fought the President and Won, 18–19, 129–130 (2006); A. Naomi Paik, *US Turned Away Thousands of Haitian Asylum-Seekers and Detained Hundreds More in the 90s*, Conversation (June 28, 2018), https://theconversation.com/us-turned-away-thousands-of-haitian-asylum-seekers-and-detained-hundreds-more-in-the-90s-98611; Carlos Ortiz Miranda, *Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 San Diego L. Rev. 673, 680–82 (1995); *see also* Aaron Morrison et al., *Haitians See History of Racist Policies in Migrant Treatment*, AP News (Sept. 24, 2021), https://apnews.com/article/immigration-race-and-ethnicity-mexico-haiti-asylum-seekers-a81ac1148118db38824d2d8f62139b87; *US: Treatment of Haitian Migrants Discriminatory*, Hum. Rts. Watch (Sept. 21, 2021), https://www.hrw.org/news/2021/09/21/us-treatment-haitian-migrants-discriminatory; Richard Fowler, *A Black Immigrant's Mission to Center Black Migrants at the Southern Border*, Forbes (July 29, 2021), https://www.forbes.com/sites/forbestheculture/2021/07/29/a-black-immigrants-mission-to-center-black-migrants-at-the-southern-border/?sh=3a464e3d2b93.

45 Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 26, 2020).

46 *See, e.g.*, Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102,703 (codified as amended at 8 U.S.C. § 1101(a)(42)); *The 1967 Protocol*, Kaldor Ctr. for Int'l Refugee L. (Mar. 31, 2020), https://www.kaldorcentre.unsw.edu.au/publication/1967-protocol ("[T]he United States . . . has ratified the 1967 Protocol. This means that it is bound to apply the Convention's provisions, which commit it to treating refugees in accordance with internationally recognized legal and humanitarian standards."); Order Suspending the Right to Introduce Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 65,806, 65,807 (Oct. 16, 2020).

47 Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22,424 (Apr. 22, 2020).

indefinitely extending the suspension of all covered persons.[48] Finally, on October 13, 2020, the CDC made minor modifications regarding Customs and Border Patrol's (CBP's) capacity to process asylum seekers.[49]

Title 42 applies to persons traveling from Canada or Mexico who do not have proper travel documents and would otherwise make contact with a POE or Border Patrol station at or near the United States borders with Canada and Mexico.[50] The government refers to all persons to whom Title 42 applies as "covered aliens," but out of respect of the humanity of those covered under Title 42, this article will refer to them hereafter as "covered undocumented persons."[51] The order does not apply to United States citizens, lawful permanent residents, and their spouses and children, members of the United States military and associated persons, and individuals in the visa waiver program who are not subject to other travel restrictions and arrive at a POE.[52] The order also claims that under the totality of the circumstances, DHS officers can exempt certain persons from expulsion, based on considerations including public safety, health interests, and humanitarian concerns.[53] However, evidence demonstrates a lack of such exemptions for impacted vulnerable populations. This includes, for example, the large-scale expulsion of young children as well as at least eleven women who gave birth in United States custody and were then expelled to Mexico border towns with their newborn children.[54] One mother even reported being deported to Mexico within minutes of being discharged from the hospital where she gave birth just a few days earlier.[55] A CBP spokesman, Mathew Dyman, also implied that humanitarian concerns are not a serious consideration. When

48 U.S. DEP'T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), *supra* note 13.

49 *Id.*

50 Order Suspending the Right to Introduce Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 65,807.

51 *Id.*

52 Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 22,425.

53 *Id.*

54 Tanvi Misra, *Revealed: US Citizen Newborns Sent to Mexico Under Trump-era Border Ban*, GUARDIAN (Feb. 5, 2021), https://www.theguardian.com/us-news/2021/feb/05/us-citizen-newborns-mexico-migrant-women-border-ban.

55 *Id.* In *National Immigration Litigation Alliance v. U.S. Customs and Border Protection*, No. 1:2021-cv-11094 (D. Mass. filed July 1, 2021), Plaintiffs filed suit on July 1, 2021, for CBP's failure to produce records "relating to policies, guidance, or statistics regarding the treatment of pregnant women in CBP custody," and "mothers in CBP custody who have given birth within the United States within the last six months." Complaint for Declaratory and Injunctive Relief at 1, Nat'l Immigr. Litig. All. v. U.S. Customs & Border Prot., No. 1:2021-cv-11094, ECF No. 1.

discussing Title 42's enforcement, Dyman "said the emergency order applies to everyone, 'no matter their disability or age.'"[56]

In the order notice, the CDC alleged that Title 42's application against covered undocumented persons, a particularly narrow population, is due to the lengthy processing procedures for covered undocumented persons and CBP's lack of resources to safely process them.[57] First, it refers to the prolonged processing time compared to United States citizens, lawful permanent residents, and other persons with travel documents.[58] The CDC asserts that covered undocumented persons may spend hours to days in congregate areas compared to those with the documentation, who move quickly into the United States after contact with CBP and other travelers.[59] The CDC believes that because of the lengthy processing time, there is greater risk of exposure to CBP personnel and fellow covered undocumented persons.[60] As further justification, the CDC refers to CBP's inability to perform proper infection control procedures for numerous immigrants.[61] These procedures include consulting with local health professionals about whether the individual should be tested for COVID-19, disinfecting transportation vehicles, and coordinating with ICE to contain the spread of COVID-19 by quarantining exposed or infected individuals in small areas used to process covered undocumented persons.[62] The CDC states that such infection control procedures would not be easy to scale for a large number of people, especially since only 46 out of 136 Border Patrol stations offer any medical services.[63]

B. *Implementation of Title 42 Against Single Adults and Family Units*

From the start of Title 42 in March 2020 until February 2021, CBP expelled more than 637,000 immigrants seeking entrance into the United States to Mexico or deported them to their country of origin.[64] Acting CBP

56 *See* Mimi Dwyer et al., *A Migrant Mother Saw Her Disabled Son Walk into the U.S. Then He Disappeared*, Reuters (Sept. 10, 2020), https://www.reuters.com/article/us-usa-immigration-children-insight/a-migrant-mother-saw-her-disabled-son-walk-into-the-u-s-then-he-disappeared-idUSKBN2611TB.

57 U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention (CDC), *supra* note 13, at 1–2.

58 *Id.* at 2.

59 *Id.*

60 *Id.* at 2–3.

61 *Id.* at 12.

62 *Id.* at 11–12.

63 *Id.* at 12.

64 Camilo Montoya-Galvez, *Under Trump-era Border Rule That Biden Has Kept, Few Asylum-Seekers Can Seek U.S. Refuge*, CBS News (Apr. 14, 2021), https://www.cbsnews.com/

Commissioner, Mark Morgan, claimed in August 2020 that within two hours of their apprehension, immigrants were removed from the United States back into Mexico or were on their way to their country of origin.[65] Morgan commented, "[w]e're trying to remove them as fast as we can to not put them in our congregate settings, to not put them into our system . . . ."[66]

CBP Officer and special operations supervisor, Rafael Garza, described the process for apprehensions in the borderland region of Laredo, Texas.[67] Garza explained that the entirety of the process is conducted remotely in the field, and immigrants subjected to the process never have to step foot in their station, claiming: "[w]e apprehend them, we give them a face mask and I ask them if they're feeling any symptoms, 'No I'm fine, this and that,' and then we process them remotely."[68] While less frequently reported, some families are detained in hotels by the private contractor company, MVM Inc. (MVM)—which the immigration authorities refer to as "transportation specialists"—and are then expelled to their country of origin.[69]

For example, Verty, an immigrant from Haiti, stated that MVM repeatedly told him and his family that they were going to be taking a flight to Florida to be reunited with their families, stating, "I understood it was a deportation when I saw people arriving in handcuffs."[70] The process which Verty and his family were subjected to was also applied against UNC.[71]

C. *Implementation of Title 42 Against UNC*

Due to noncitizen children's particular vulnerabilities and needs, their legal standard of care while in government custody is higher than that of single adults and family units.[72] The standard was first evaluated by the

news/refugee-asylum-seekers-immigration-limit-trump-biden/.

65 Quinn Owen & Kiara Brantley-Jones, *CBP Chief Defends Rapid Border 'Expulsions' as Unauthorized Crossing Attempts Grow*, ABC NEWS (Aug. 6, 2020), https://abcnews.go.com/US/cbp-chief-defends-rapid-border-expulsions-unauthorized-crossing/story?id=72223995.

66 *Id.*

67 Norma Martinez et al., *Fronteras: Denied, Deported and Abandoned — Assault on U.S. Asylum*, TEX. PUB. RADIO (July 24, 2020), https://www.tpr.org/show/fronteras/2020-07-24/fronteras-denied-deported-and-abandoned-assault-on-u-s-asylum.

68 *Id.*

69 Nomaan Merchant & Evens Sanon, *US Detaining More Migrant Children in Hotels Despite Outcry*, AP NEWS (Aug. 27, 2020), https://apnews.com/article/ae51966763a7d6ddf6a8a17d78cbc874.

70 *Id.*

71 *See id.*

72 WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN:

United States Supreme Court in 1993 in *Reno v. Flores*.[73] In *Reno v. Flores*, the Supreme Court rejected the Plaintiffs' challenge to the constitutionality of the Immigration and Naturalization Service's (INS) practices regarding the care of UNC.[74] However, while the case was on remand, the Clinton Administration and the plaintiff's class counsel settled and devised an agreed upon standard.[75] The settlement agreement established what is known as the "Flores Settlement," which secured a "nationwide policy for the detention, release, and treatment of UNC in the custody of the INS."[76] The Flores Settlement favors family reunification of UNC with vetted family members in the United States and "creates a presumption in favor of releasing UNC and requires placement of those not released in licensed, non-secure facilities that meet certain standards."[77] It also established the necessary level of care while in immigration detention and created specified regulations on "food, clothing, grooming items, medical and dental care, individualized needs assessments, educational services, recreation and leisure time, counseling, access to religious services, contact with family members, and a reasonable right to privacy."[78]

Prior to March 2020, and to the use of Title 42, Central American UNC crossing into the United States by land borders were generally sent to ORR facilities overseen by the Health and Human Services.[79] These facilities are required to be licensed, with schooling and maintenance according to the Flores Settlement standard.[80] In 2019, most UNC were eventually released

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An Overview 4–5 (2019).

73 507 U.S. 292 (1993).

74 *Id*. at 294, 315; Defendants' Response in Opposition to Plaintiffs' Motion to Enforce Settlement of Class Action at 4, Flores v. Barr, 407 F. Supp. 3d 909 (C.D. Cal. 2019) (No. CV 85-4544), 2015 WL 13648967.

75 Defendants' Response in Opposition to Plaintiffs' Motion to Enforce Settlement of Class Action, *supra* note 74, at 4; *The Flores Settlement*, Immigr. Hist., https://immigrationhistory.org/item/the-flores-settlement/ (last visited July 3, 2021); *see also* Ctr. for Hum. Rts. & Const. L., https://www.centerforhumanrights.org/ (last visited July 3, 2021).

76 Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016) (internal quotations omitted).

77 *Id.* at 901, 903.

78 *Id.* at 903.

79 *See* Danilo Zak, *Fact Sheet: Unaccompanied Migrant Children (UACs)*, Nat'l Immigr. F. (Nov. 2, 2020), https://immigrationforum.org/article/fact-sheet-unaccompanied-migrant-children-uacs/.

80 *Children Entering the United States Unaccompanied: Section 3, 3.3.5 Academic Educational Services*, Off. of Refugee Resettlement (Apr. 20, 2015) (updated Apr. 24, 2017), https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-3#3.3.5; Abbie Gruwell, *Unaccompanied Minors and the Flores Settlement Agreement: What to Know*, Nat'l Conf. of State Legislatures: NCSL Blog (Oct. 30, 2018), https://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-

from ORR care and placed with family or friends who served as sponsors while they awaited their day in court.[81]

Importantly, while the United States agreement with Mexico permits the return of Central American immigrants to Mexico under Title 42, it excludes the return of UNC, referred to as "single minors" by the Trump Administration.[82] Despite this accord, however, the Chief of Border Patrol's Rio Grande Valley sector acknowledged that non-Mexican minors were sent back alone into Mexico's border cities where the kidnapping and human trafficking of Central American immigrants is a grave issue.[83]

The more common expulsion procedure of UNC under Title 42 was to detain them in hotels—sometimes for weeks—until their deportation when they would return them to their country of origin by plane.[84] By holding the children in hotels, immigration authorities have made it basically impossible for lawyers or advocates to locate them before their return to the home countries from which they have fled.[85] Immigration and Customs Enforcement (ICE) relied on MVM, whose employees received a mere two days of training to care for the minors, to carry out this work.[86] CBP turned

settlement-agreement-what-to-know.aspx.

81 Zak, *supra* note 79.

82 *U.S. Expels Migrant Children from Other Countries to Mexico*, *supra* note 12. The Trump administration began referring to migrant children who cross the border alone differently in October 2020 referring to them as "single minors" rather than "unaccompanied alien children" — reinforcing the notion that while the pandemic-related border closure is in place, such children are not eligible for the legal protections that would otherwise have been available to them. *Id.*

83 Bernal, *supra* note 41.

84 Nomaan Merchant, *AP Exclusive: Migrant Kids Held in US Hotels, Then Expelled*, AP NEWS (July 22, 2020), https://apnews.com/article/u-s-news-arizona-only-on-ap-politics-immigration-c9b671b206060f2e9654f0a4eaeb6388.

85 Mary Jo Pitzl, *US Government Sued After Report of Detained Migrant Children at Hampton Inn Hotels*, USA TODAY (July 27, 2020), https://www.usatoday.com/story/news/nation/2020/07/27/arizona-rocky-history-shelters-detained-immigrant-kids/5517309002/.

86 The private federal contractor, MVM advertises their services as "solutions" for "customer challenges." *Our Services*, *Effective Solutions that Yield Real Results.*, MVM INC., www.mvminc.com/our-services/ (last visited July 29, 2021). MVM, a Virginia-based federal contractor has received contracts up to $248 million to transport immigrant minors since 2014. In 2018, MVM was under scrutiny for housing UNC in two Phoenix office buildings that had neither a kitchen nor shower, where children were said to bathe in sinks in the office building's bathroom. *See* Aura Bogado, *Immigrant Kids Held in Second Phoenix Office Seen Bathing in Sinks*, WORLD (July 17, 2018), https://www.pri.org/stories/2018-07-17/exclusive-immigrant-kids-held-second-phoenix-office-seen-bathing-sinks. Previous employees of MVM have also claimed that while providing security for CIA overseas the personnel were poorly trained and had unresponsive senior management regardless of multiple complaints of weapons going missing. Siobhan

away and expelled nearly 13,000 UNC, and an "independent monitor appointed by a federal court to oversee the government's compliance with the Flores Settlement agreement . . . revealed . . . that at least 577 UNC were detained . . . between March and July [2020]."[87] Some children were "sent to overcrowded government shelters in Central American countries like Guatemala, others [were] totally out of reach of legal service providers, who have not been able to find them."[88] Reports indicate that children have had to borrow cellphones when they arrived at airports to look for their family members who may be willing to house them.[89]

Elida, a Guatemalan mother who had been waiting for five months in the violent border city of Ciudad Juarez for her United States asylum hearing, decided to send Gustavo, her 12-year-old son with a disability, to cross into the United States alone out of desperation and fear for his safety in Mexico after a stranger attempted to take him from her.[90] Elida watched her son walk into the United States with the understanding that he would be temporarily detained and then released to his grandfather (who lived in the United States) because of his age.[91] Gustavo's grandfather was alerted that he was in the country, yet Gustavo effectively vanished for a week and his Mother was left in the dark about his whereabouts.[92] It was not until a Guatemalan news blog posted on Facebook stating that authorities were seeking to locate Gustavo's parents that she learned of his rapid deportation.[93] When Gustavo returned to live with his father, he refused to speak with his mother by phone, allegedly bursting into tears when his father gave him the phone, as Gustavo believed that his mother had abandoned him and forced

Gorman & August Cole, *Iraq Case Sheds Light on Secret Contractors*, Wall St. J. (July 17, 2008), https://www.wsj.com/articles/SB121485921602717113; Lauren Villagran, *A New El Paso Shelter for Migrant Children Opened Its Doors. But Where Are the Kids?*, El Paso Times (Oct. 16, 2020), https://www.elpasotimes.com/story/news/2020/10/16/el-paso-migrant-shelter-opens-few-children-trump-covid-policy/5924590002/.

87 *A Guide to Title 42 Expulsions at the Border*, Am. Immigr. Council 3, 6 (Mar. 29, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf; Camilo Montoya-Galvez, *ICE Held 660 Migrant Kids Set for Expulsion in Hotels, Independent Monitor Reveals*, CBS News (Aug. 27, 2020), https://www.cbsnews.com/news/migrant-children-hotels-expelled-ice-flores-agreement-monitor/.

88 Dara Lind & Lomi Kriel, *ICE Is Making Sure Migrant Kids Don't Have COVID-19 – Then Expelling Them to "Prevent the Spread" of COVID-19*, ProPublica (Aug. 10, 2020), https://www.propublica.org/article/ice-is-making-sure-migrant-kids-dont-have-covid-19-then-expelling-them-to-prevent-the-spread-of-covid-19.

89 *U.S. Expels Migrant Children from Other Countries to Mexico*, *supra* note 12.

90 Dwyer et al., *supra* note 56.

91 *Id.*

92 *Id.*

93 *Id.*

his return to Guatemala.[94] For many advocates, these inhumane practices called into question the validity of the Trump Administration's justification that Title 42 was necessary to protect public health.

D. *Advocates and health professionals work to pull back the curtain of the Trump Administration's claimed purpose of the Title 42 expulsions*

1. The science on COVID-19 transmission does not match the policy enforcement

Since the beginning of the COVID-19 outbreak in the United States, former President Donald Trump made false claims of the virus's level of dangerousness and its impact on the nation.[95] International public health expert, Dr. Anthony So, stated that Title 42 is based neither in evidence nor in science, but is rather a political initiative that may "endanger[] tens of thousands of lives and . . . amplify dangerous anti-immigrant sentiment and xenophobia."[96] A former FDA deputy commissioner called Title 42 expulsions "a profound dereliction of duty for a CDC director," adding that the policy "undermin[es] the purpose of having an agency that uses evidence to protect public health."[97]

According to Human Rights First, the assertions made by DHS that the CDC relied on as reasoning to enforce Title 42 contradict evidence released in unsealed documents in *Al Otro Lado v. Wolf*.[98] Human Rights First's accumulated evidence contradicts CBP's assertions by recognizing DHS's ability to expeditiously release the covered undocumented persons on parole while they await their immigration court proceedings within the United States.[99] The report by Human Rights First demonstrates that individuals do not need to be held in congregate settings for hours to days at a time.[100] The documentation shows that at the Brownsville, Texas POE, CBP was

94 *Id.*

95 *See* Corky Siemaszko, *Dr. Fauci Contradicts Trump's False Claim that Covid-19 Is As Deadly As Flu*, NBC NEWS (Oct. 6, 2020), https://www.nbcnews.com/news/us-news/dr-fauci-contradicts-trump-s-false-claim-covid-19-deadly-n1242340.

96 Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020), https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae.

97 *Id.*

98 952 F.3d 999 (9th Cir. 2020); *CDC Relied on False Assertions in Issuing COVID-19 Order Being Used to Illegally Override U.S. Asylum Laws*, HUM. RTS. FIRST 1 (June 2020), https://www.humanrightsfirst.org/sites/default/files/CDCReliedonFalseAssertionsinIssuingOrderUsedtoIllegallyOverrideAsylumLaw.pdf.

99 *Id.*

100 *Id.*

able to process asylum seekers within two and a half hours, and in Hidalgo, Texas within two to three hours.[101] Other POE demonstrated similar data.[102] Human Rights First also presented evidence that CBP has multiple holding areas, such as passport control lobbies, secondary inspection, and "overflow" processing spaces where individuals could likely safely social distance while waiting to be processed.[103]

As stated previously, the process for immigration processing of UNC is distinct from individuals over eighteen years old and family units.[104] In recognition of UNC's particular vulnerability, there is increased protection and regulation of UNC facilities.[105] Despite this, however, UNC were not only expeditiously deported to their home countries, but also were deported to Mexico even when the United States government knew Mexico was not their home country.[106] Deputy Director of the National Immigrant Rights Project at the ACLU, Lee Gelernt, stated that "[e]ven apart from the general illegality of Title 42, it is separately illegal under the immigration laws to expel a non-Mexican child to Mexico."[107] The acting CBP commissioner, Mark Morgan, stated that UNC cannot be housed at the standard ORR facilities while following social distancing measures because "[i]f we introduce these individuals to ORR, we're defeating the entire purpose of Title 42, . . . [w]e're still introducing these individuals into our system throughout and creating greater exposure risk to the American people."[108]

Further, court documentation and information given by ICE to congressional staff indicates that by the time UNC board their deportation flight, they have "virtually all" already tested negative for COVID.[109] All migrants that test positive for COVID-19, including UNC, are required to remain in the United States.[110] However, in November 2020, ICE officials stated that four children who were expelled to their country of origin,

101 *Id.*
102 *See id.*
103 *Id.* at 1–2.
104 *See supra* Section II.C.
105 *See U.S. Expels Migrant Children from Other Countries to Mexico*, *supra* note 12.
106 *Id.*
107 *Id.*
108 Owen & Brantley-Jones, *supra* note 65.
109 Lind & Kriel, *supra* note 88.
110 *Id.* The procedures of care for unaccompanied children that tested positive for COVID-19 were so unclear that fifty-eight Congress people included a question on the matter in a letter to Chad Wolf and Robert Redfield. Letter from Judy Chu, Member of Cong., et al. to Chad Wolf, Acting Sec'y of the Dep't of Homeland Sec., and Robert R. Redfield, Dir. of Centers for Disease Control and Prevention (Oct. 30, 2020), https://chu.house.gov/sites/chu.house.gov/files/documents/Final%20DHS%20CDC%20Letter%20on%20UAC%20Expulsions.pdf.

Guatemala, tested positive for COVID-19.[111] In May 2020, sixty-nine UNC in government custody tested positive for COVID-19 under the care of the Office of Refugee Resettlement, and the children were put into medical isolation.[112]

Government agents administer tests in accordance with agreements that the Trump Administration made with foreign countries which "require that children test negative for COVID-19 before being sent back."[113] ICE utilizes rapid testing, which can produce results within 15 minutes. The administration's testing policy seems to undermine the rationale that Title 42 is implemented to "'prevent the introduction' of COVID-19 into the United States," and among CBP employees.[114]

Lastly, an individual removed from the United States under Title 42 shared a statement regarding a procedure they witnessed by immigration officials that defies not only science, but also logic. As mentioned earlier, Verty, an immigrant from Haiti, was detained at a hotel with his family, including his one-year-old daughter.[115] He claims government contractors gave him and his family cups of ice and told them to eat it incase their temperature is checked.[116] It is likely that the immigration officers were pushing them to eat the ice in fear that if Verty or his family returned to Haiti with a temperature they would not be permitted into the country or could face other repercussions for causing an increased exposure risk to other Haitian nationals. Verty's experience exposes the hollow reasoning of the CDC's enforcement of Title 42 and the callous disregard the United States government is deploying against covered undocumented persons and their countries, by willingly deporting potentially sick asylum seekers to countries like Haiti that lack the healthcare and other infrastructure to adequately control the deadly pandemic. Importantly, the United States has played an integral role in the destabilization of Haiti's economy and government, which has facilitated the country's inability to meet such needs.[117] On September 22, 2021, Daniel Foote, the United States Special

111 Hamed Aleaziz, *ICE Expelled 32 Immigrant Children Back to Guatemala After a Judge Said They Couldn't*, BUZZFEED NEWS (Nov. 24, 2020), https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-children-guatemala-ice-flight.

112 Lauren Villagran, *The Trump Administration Is Turning Away Unaccompanied Children at the Border Because of Coronavirus*, AUSTIN AMERICAN-STATESMAN (June 15, 2020), https://www.statesman.com/story/news/2020/06/15/trump-administration-is-turning-away-unaccompanied-children-at-border-because-of-coronavirus/113967552/.

113 Lind & Kriel, *supra* note 88.

114 *Id.*

115 Merchant & Sanon, *supra* note 69.

116 *Id.*

117 *See* Ann Crawford-Roberts, *A History of United States Policy Towards Haiti*, MODERN

Envoy to Haiti, resigned in protest due to the treatment and expulsions of Haitian immigrants.[118] In Foote's resignation letter, he urged the United States Secretary of State to prioritize Haitian citizens' demands and halt the United States' ongoing interference in Haiti's election process stating, "[t]he hubris that makes us believe we should pick the winner – again – is impressive. This cycle of international political interventions in Haiti has consistently produced catastrophic results."[119]

a. The unanticipated consequences of Title 42 enforcement that may be promoting the spread of COVID-19 through the United States & globally

i. Title 42 rapid expulsions have caused increased recidivism and decreased regulation and oversight of entries by undocumented persons

As mentioned above, the implementation of Title 42 has forced immigrants attempting to enter the United States to be expelled expeditiously, sometimes in as little as two hours.[120] Many of those rapidly sent back to Mexico make multiple attempts to reenter the country.[121] This is due to the implementation procedures of Title 42, which reduce the risk of detention or criminal prosecution for covered undocumented persons attempting to enter the United States without inspection. Immigration Attorney, Taylor Levy, compared this phenomenon to the 1990s-era immigration policies that were in place prior to section 1325—a federal law that criminalizes crossing into the United States outside of a POE—as Title 42 has caused more immigrants who enter without inspection to eventually reach the interior of the United States undetected by immigration officials.[122] As of October 2020, data indicated that at least one-third of individuals taken into immigration custody were immigrants who were previously apprehended

Latin Am., library.brown.edu/create/modernlatinamerica/chapters/chapter-14-the-united-states-and-latin-america/moments-in-u-s-latin-american-relations/a-history-of-united-states-policy-towards-haiti/ (last visited Oct. 4, 2021).

118 Walker, *supra* note 44.

119 Jacqueline Charles & Michael Wilner, *U.S. Special Envoy to Haiti Resigns Over Repatriation of Haitians from U.S.-Mexico Border*, Miami Herald (Sept. 24, 2021), https://www.miamiherald.com/news/nation-world/world/americas/haiti/article254455828.html.

120 *See* Owen & Brantley-Jones, *supra* note 65.

121 Elliot Spagat, *Migrants Quickly Expelled by Trump Try Repeatedly to Cross*, AP News (Oct. 28, 2020), https://apnews.com/article/politics-virus-outbreak-san-diego-mexico-immigration-a108552c67d94597bf58afb9c791673a.

122 *See* Taylor Levy, Immigr. Att'y, Immigrant Just. Idaho, Speaker at Asylum and Border Turmoil Panel Discussion at the 2020 Fall Immigration Skills Conference (Nov. 5, 2020); Ainsley, *supra* note 43.

when attempting to enter the United States [123]

Title 42 also created a major shift of the migration patterns at the border. In 2019, the majority of the migrant population consisted of families, many of whom were willing to turn themselves in to border agents.[124] Due to Title 42, however, desperate migrants are now attempting to enter the United States undetected by hiring human smugglers, widely known as "Coyotes."[125] Levy stated that because there are more migrants seeking services to cross into the United States, Coyotes are selling what they call "unlimited attempts" (in Spanish, *intentos sin limites*) where they charge a rate for an unlimited number of attempts to enter the United States undetected until they are successful.[126] Law enforcement agencies in southern Arizona have documented dangerous cases of migrants packed tightly into vehicles, primarily due to the rise in attempts to enter.[127] Indeed, since the implementation of numerous enforcement policies put in place to curb the spread of COVID-19, including Title 42, CBP has observed a large uptick of human smuggling activity across the United States-Mexico border.[128] The rise of human smuggling into the United States will mean more vulnerable immigrants will likely die or be harmed due to the dangerous methods the smugglers use to cross them while attempting to evade detection by immigration officials.[129] Consequently, migrant deaths in 2021 will likely surpass those in fiscal year 2020. Border Patrol discovered 250 migrant bodies along the border in fiscal year 2020, and as of May of

123 Nick Miroff, *Immigration Arrests Along the Mexico Border Surged Again in October*, WASH. POST (Nov. 19, 2020), https://www.washingtonpost.com/immigration/border-arrests-surge-cctober-trump/2020/11/19/4155cf7a-2ab2-11eb-b847-66c66ace1afb_story.html.

124 *U.S. Expels Migrant Children from Other Countries to Mexico*, *supra* note 12.

125 Rafael Carranza, *As Border Wall Goes up, Southern Arizona Sees Spike in Human Smuggling*, AZCENTRAL (Nov. 30, 2020), https://www.azcentral.com/story/news/politics/border-issues/2020/11/30/border-wall-goes-up-southern-arizona-sees-spike-human-smuggling/3772462001/; *see also* Damià S. Bonmatí, *A Day in the Life of a Coyote: Smuggling Migrants from Mexico to the United States*, UNIVISION NEWS (Dec. 21, 2016), https://www.univision.com/univision-news/immigration/a-day-in-the-life-of-a-coyote-smuggling-migrants-from-mexico-to-the-united-states. When an immigrant or asylum seeker wants to enter the United States by a land POE through Mexico, they cannot simply walk to the bridge or landscape outside of a POE to enter the U.S. This is because drug cartels own different portions of the border and will only allow an immigrant or asylum seeker to cross their territory with a human smuggler, known as a "Coyote," after the Coyote has paid the cartel a bribe to cross the immigrant. If an immigrant attempted to cross without a Coyote, they may be kidnapped or killed. *Id.*

126 Levy, *supra* note 122.

127 *See* Carranza, *supra* note 125.

128 *Id.*

129 *Id.*

fiscal year 2021, 203 migrant bodies have already been found.[130] Further, due to more migrants entering the United States without inspection, it is more likely that they could expose more of the population to the virus due to the lack of regulation and inability to enforce quarantine precautions.

ii. Immigrants expelled to Mexico and their countries of origin are returning with COVID-19, spreading the virus throughout their home countries

The governments of at least eleven countries have confirmed that deportees from the United States returned with COVID-19.[131] The countries include Colombia, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Romania, and elsewhere.[132] Contrary to the almost universal testing of all UNC under Title 42, ICE stated that testing for COVID-19 is not a standard procedure, and not all immigrants are tested before being deported to their country of origin.[133]

Guatemala, which has been hit particularly hard by the coronavirus, suspended acceptance of deportation flights from the United States in March 2020 in an attempt to pressure the United States to implement stricter health measures to screen deportees.[134] Shortly after its implementation, however, Guatemala terminated the suspension due to pressure by the United States.[135] Between March and September 2020, at least 331 deportees tested positive for COVID-19 after arriving in Guatemala, however, it is likely that the actual number of positive cases of deportees is higher due to the Guatemalan government's testing limitations.[136] An analysis of data on United States

130 Alfredo Corchado, *Deaths Rise in the Desert as Migrants Try to Cross into the U.S. Again and Again Under Biden Policy*, Dall. Morning News (June 26, 2021), https://www.dallasnews.com/news/immigration/2021/06/26/deaths-rise-in-the-desert-as-migrants-try-to-cross-into-the-us-again-and-again-under-biden-policy/.

131 Emily Kassie & Barbara Marcolini, *'It Was Like a Time Bomb': How ICE Helped Spread the Coronavirus*, N.Y. Times (July 10, 2020) (updated Apr. 25, 2021), https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html.

132 It is likely that the number of countries that have received deportees from the United States is a grave undercounting because the data information regarding the amount of deportees from the United States that tested positive for COVID-19, are dependent on the testing procedures of the country to which individuals are deported. Nicole Phillips & Tom Ricker, *The Invisible Wall: Title 42 and Its Impact on Haitian Migrants*, Quixote Ctr. 22–23, https://www.quixote.org/wp-content/uploads/2021/03/The-Invisible-Wall.pdf (last visited Oct. 3, 2021).

133 *Id.* at 22.

134 Anna-Catherine Brigida & Morena Pérez Joachin, *The Coronavirus Pipeline*, Tex. Observer (Aug. 12, 2020), https://www.texasobserver.org/the-coronavirus-pipeline/.

135 *Id.*

136 Daniel Gonzalez, *'They Were Sending the Virus': Guatemala Reels After U.S. Deports Hundreds of Deportees with COVID-19*, azcentral (Oct. 28, 2020), www.azcentral.com/story/

deportations to Guatemala demonstrates that when there "were tens of thousands of cases in the U.S. but only a handful in Guatemala," and that United States deportations of Guatemalan nationals fueled the spread of the coronavirus in Guatemala.[137] According to Guatemalan Congresswoman Andrea Villagrán, sending deportees with COVID-19 to Guatemala—where many live in extreme poverty—has contributed to the spread of the virus, exacerbated by the country's pandemic conditions, and is likely to cause more people to emigrate to another country, including the United States [138] Meanwhile, other countries fully cooperated with accepting deportees due to pressure by former President Trump and his promises of humanitarian aid in exchange for compliance with United States immigration deportations and policies.[139]

b. Public health precaution or political strategic policy implementation?

Immigrant justice advocates, attorneys, and public health experts claim that the implementation of Title 42 expulsions was an enforcement beyond the PHSA's true statutory purpose. The purpose of the PHSA was to allow acts "in the interest of the public health."[140] However, the Trump Administration's acts are better understood as a political initiative in preparation of the 2020 Presidential Election. Morgan Russell, a staff attorney with the ACLU Immigrants' Rights Project, alleged that the Senior Advisor to former President Trump, Stephen Miller, had been looking into enforcing Title 42 even before the COVID-19 pandemic commenced.[141] Miller was notorious for his isolationist ideology, and Russell claims that he had been strategizing since 2019 about how to suspend immigration through the Southern border altogether.[142]

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news/politics/immigration/2020/10/28/hundreds-deported-by-us-to-guatemala-during-pandemic-had-covid-19/5902239002/.

137 *Id.*

138 *Id.*

139 *See* Tracy Wilkinson, *Trump's Message to Central America: Want Ventilators? Help Us with Immigration*, L.A. TIMES (Apr. 24, 2020), https://www.latimes.com/world-nation/story/2020-04-24/trumps-message-to-latin-america-want-ventilators-help-us-with-immigration.

140 *See* The Public Health and Welfare Act, 42 U.S.C. § 265.

141 Morgan Russell, Immigr. Rts. Project Immigr. Att'y, Immigrant Just. Idaho, Speaker at Asylum and Border Turmoil Panel Discussion at the 2020 Fall Immigration Skills Conference (Nov. 5, 2020); *see also Q&A: US Title 42 Policy to Expel Migrants at the Border*, HUM. RTS. WATCH (Apr. 8, 2021), https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border.

142 Russell, *supra* note 141; s*ee also* Sabrina Siddiqui, *Meet Stephen Miller, Architect of First*

In early March 2020, the Trump administration began to push the CDC's Division of Migration and Quarantine to implement Title 42.[143] However, Dr. Martin Cetron, who headed the Division of Migration and Quarantine, refused to do so because of a lack of a public health basis.[144] Meanwhile, public health experts urged the administration to focus on a national mask mandate, enforce social distancing requirements, and increase contract tracers to determine how many individuals were exposed to the virus.[145] Instead, former Vice President Mike Pence took matters into his own hands, and Pence's top aide at the time, Olivia Troye, coordinated the White House Coronavirus Task Force.[146] Vice President Pence, lawyers at Health and Human Services, and CBP directed the CDC director to close the United States' borders to stop the spread of COVID-19, in contravention of advice from the CDC's scientists who claimed "there was no evidence [doing so] would slow" the spread of the virus.[147] However, Pence's spokeswoman, Katie Miller, the wife of Trump's senior policy adviser, Stephen Miller, denied that Pence directed the CDC on the issue.[148]

According to Troye, the administration "placed politics above public health."[149] She stated, "[t]here was a lot of pressure on DHS and CDC to push this forward," and that it "was a Stephen Miller special. He was all over that."[150] Ms. Troye's view of the administration's priorities ultimately caused her to resign from her position.[151] Reports from a former health official support Ms. Troye's interpretation. A health official involved with the process claimed that, "[t]hey forced us," and "[i]t is either do it or get fired."[152] On March 20, 2020 during a coronavirus task force press briefing, Trump falsely stated that it was the CDC that exercised its authority to implement Title 42.[153]

After the commencement of the Title 42 expulsions, Trump himself made multiple statements regarding the true intent of the policy. He "highlighted the decision to shut down the border as an argument for

Travel Ban, Whose Words May Haunt Him, Guardian (Mar. 15, 2017), https://www.theguardian.com/us-news/2017/mar/15/stephen-miller-new-trump-travel-ban.

143 Dearen & Burke, *supra* note 96.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id*
150 *Id.*
151 *See id.*
152 *Id.*
153 *Id.*

his reelection in November" 2020.[154] He also stated, "[I]t's a great feeling to have closed up the border," adding, "[n]ow people come in, if they come in, through merit, if they come in legally. But they don't come in like they used to."[155] He repeatedly boasted his ability to entirely close the border but did little to explain how sealing the border will improve the spread of COVID-19, especially when United States citizens continued to travel back and forth to locations such as England, where a new variant of COVID-19 was discovered.[156] Lee Gelernt referred to the implementation of Title 42 as "what the Trump administration has been trying to do for four years and they finally saw a window."[157]

By contrast, the acting CBP commissioner, Mark Morgan, referred to Title 42 as a "safeguard" for CBP agents stating, "[t]here's no doubt that Title 42 has prevented more tragic loss among our workforce," but noted that ten CBP employees died after contracting COVID-19.[158] Evidence of CBP Officers violating the Texas-wide mask mandate which included a penalty of $250 for repeat violations, implied that CBP leadership may not have been focusing enough of its attention on ensuring that CBP officers follow basic safety guidance set out by the CDC.[159] A special operations supervisor with the CBP Sector in Laredo, Texas responded to allegations by Physicians for Human Rights, which claimed a lack of public health sense behind Title 42

154 *Id.*

155 *Id.*

156 *See* Isabella Grullón Paz, *The Week in Covid-19 News: Reassuring Data on the AstraZeneca Vaccine, 24 States Are Inoculating Teachers and More.*, N.Y. TIMES (Feb. 6, 2021) (updated Apr. 9, 2021), https://www.nytimes.com/live/2021/02/06/world/covid-19-coronavirus/the-week-in-covid-19-news-reassuring-data-on-the-astrazeneca-vaccine-24-states-are-inoculating-teachers-and-more; Priscilla Alvarez, *Health Experts Slam Trump Administration's Use of Public Health Law to Close Border*, CNN (May 18, 2020), https://www.cnn.com/2020/05/18/politics/border-closure-public-health/index.html.

157 Dearen & Burke, *supra* note 96.

158 Nomaan Merchant, *Seeking Refuge in US, Children Fleeing Danger Are Expelled*, AP NEWS (Aug. 6, 2020), https://apnews.com/article/virus-outbreak-ap-top-news-honduras-mexico-health-1144b498194cd6b6818acd04d7880e05; Erin Rodriguez, *Border Patrol Agent Remembered Who Died from Coronavirus*, KENS5 (Aug. 6, 2020) (updated Aug. 7, 2020), https://www.kens5.com/article/news/health/coronavirus/border-patrol-agent-remembered-who-died-from-coronavirus/273-d15ebe92-3be1-49c1-b5c3-0a314e5ba76f.

159 @taylorklevy, TWITTER (Jan. 12, 2021), https://twitter.com/taylorklevy/status/1349083632468701187; Patrick Svitek, *Gov. Greg Abbott Orders Texans in Most Counties to Wear Masks in Public*, TEX. TRIB. (July 2, 2020), www.texastribune.org/2020/07/02/texas-mask-order-greg-abbott-coronavirus; *See FAQs for Law Enforcement Agencies and Personnel*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 3, 2020), www.cdc.gov/coronavirus/2019-ncov/community/law-enforcement-agencies-faq.html.

by stating, "I think that question is more political. It's a matter of personal opinion, whether it's six experts or six Border Patrol agents. I mean who are you going to trust . . . Just because they have an expert title in front of their thing?"[160] The supervisor's statements encapsulate Title 42's impact as a harmful illusionary safeguard, which at its core is nothing more than a strategic political decision on the highly controversial matter of the right to seek asylum in the United States.

III. Illegality of Title 42 Implementation as Immigration Expulsions

This Section will discuss the illegality of Title 42 due to its violation of multiple sections of the Immigration and Nationality Act (INA), the Convention Against Torture (CAT), and the United States Constitution. This article does not purport to examine the full list of laws which Title 42 violates.[161]

A. *Immigration and Nationality Act*

The Immigration and Nationality Act (INA) establishes the legal procedures for processing undocumented persons who (1) arrive at a United States POE, (2) arrive outside of a POE, and (3) live in the interior of the United States undetected by ICE.[162] The INA was passed in 1952 and has been amended many times since.[163] The act was later codified under Title 8

160 Leaños, *supra* note 32.

161 This note does not discuss all the laws Title 42 violates in depth. Title 42 expulsions also likely violate the Trafficking Victims Protection Reauthorization Act of 2008, the Administrative Procedure Act and further constitutional law claims. See Azadeh Erfani, *The Latest Brick in the Wall: How the Trump Administration Unlawfully 'Expels' Asylum Seekers & Unaccompanied Children in the Name of Public Health*, Nat'l Immigrant Just. Ctr. (Apr. 15, 2020), https://immigrantjustice.org/staff/blog/latest-brick-wall-how-trump-administration-unlawfully-expels-asylum-seekers, for further reading on how the use of Title 42 to expel asylum seekers is violative of the Trafficking Victims Protection Reauthorization Act (TVPRA). See Complaint for Declaratory and Injunctive Relief at 32–33, Poe v. Mayorkas, 1:2021-cv-10218 (D. Mass. filed Feb. 8, 2021), ECF No. 1, for further reading on how the use of Title 42 to expel asylum seekers is violative of the Administrative Procedure Act Protection (APA). See Guttentag, *supra* note 3, for further reading on how the current use of the PHSA to expel asylum seekers is being wrongfully implemented.

162 Brief for the Petitioners at 2, Mayorkas v. Innovation Law Lab, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021), 2020 WL 7345489.

163 *Immigration Law (U.S.) Research Guide*, Geo. L. Libr. (June 3, 2021), https://guides.ll.georgetown.edu/c.php?g=273371&p=1824780; *Immigration and Nationality Act ("INA")*, Nat'l Paralegal Coll., https://nationalparalegal.edu/public_documents/

of the United States Code (U.S.C.) and incorporated into the Code of Federal Regulations (C.F.R.).[164] It is now the United States' primary immigration statute.[165] The Refugee Act of 1980, an amendment to the INA defines a refugee as a person "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[166] This definition was codified in a 1996 amendment to the INA under 8 U.S.C. § 1101(a)(42).[167]

The existing enforcement of Title 42 is in violation of various parts of the INA, in particular 8 U.S.C. §§ 1158 and 1231(b)(3). Section 1158(a) establishes that every migrant must be granted an opportunity to apply for asylum.[168] Known as the preeminent asylum law for arriving undocumented persons seeking protection, section 1158 states that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title."[169]Additionally, section 1231(b)(3), known as statutory withholding of removal, prohibits the removal of an undocumented person to a country where their "life or freedom would be threatened . . . because of [their] race, religion, nationality, membership in a particular social group, or political opinion."[170] By rapidly expelling immigrants who are seeking protection, Title 42 violates 8 U.S. Code §§ 1158 & 1231(b)(3). In *East Bay Sanctuary Covenant v. Trump*, the court held that "the Interim Final rule," which functioned as an asylum ban, is patently inconsistent with § 1158, and deemed it an "attempted . . . end-run around Congress" by the executive branch.[171] The United States Supreme

courseware_asp_files/DomRelImmig/IntroToImmig/INA.asp (last visited Sept. 1, 2021).

164 *Id.*

165 *See Immigration Law (U.S.) Research Guide*, *supra* note 163; *Immigration and Nationality Act ("INA")*, *supra* note 163.

166 8 U.S.C. § 1101(a)(42).

167 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601(a), 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1101(a)(42)).

168 8 U.S.C. § 1158(a)(1).

169 *Id.*

170 8 U.S.C. § 1231(b)(3)(A).

171 932 F.3d 742, 774 (9th Cir. 2018); Guttentag, *supra* note 3. The Interim Final Rule, also known as "the asylum ban," was a presidential proclamation by President Trump which barred asylum for individuals who entered the U.S. across the southern border outside a POE. East Bay Sanctuary Covenant v. Trump *(Amicus)*, NAT'L CTR. FOR LESBIAN RTS., https://www.nclrights.org/our-work/cases/east-bay-sanctuary-covenant-v-trump/ (last visited Feb. 17, 2021).

Court declined to stay the Ninth Circuit's holding.[172] Under the Interim Final Rule, individuals were able to apply for withholding of removal and CAT but not asylum.[173] However, under Title 42 no eligible individuals can apply for protection, except a select few who may qualify for CAT.[174]

As in *East Bay Sanctuary Covenant*, the executive branch worked around Congress's established immigration statutory framework to create what has caused another pseudo ban on asylum using Title 42. The Trump Administration did so by pressuring the CDC to wrongfully enforce the PHSA as "a shadow immigration enforcement power," which the Biden Administration continues to uphold as of the publishing of this article.[175] The implementation of Title 42 and its harmful effect is therefore more expansive than the Interim Final Rule, and thus should also be struck down due to its corresponding violation of the Refugee Act of 1980.

B. *The Convention Against Torture*

The Convention Against Torture (CAT) is one of the foremost international human rights treaties dealing specifically with the issue of torture.[176] The United Nations "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" obligates countries that have signed the treaty to prohibit and prevent the torture and "cruel, inhuman or degrading treatment or punishment" in all possible circumstances.[177] According to Article Three of CAT, "[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being

172 Guttentag, *supra* note 3.

173 Molly O'Toole, *Biden Promised Change at the Border. He's Kept Trump's Title 42 Policy to Close It and Cut Off Asylum*, LA Times (Mar. 19, 2021), https://www.latimes.com/politics/story/2021-03-19/a-year-of-title-42-both-trump-and-biden-have-kept-the-border-closed-and-cut-off-asylum-access.

174 *Id.*

175 Guttentag, *supra* note 3. Rebecca Morin, *CDC Extends Trump-Era Policy that Allows Migrants to Be Expelled Over COVID Concerns*, Silver City Sun News (Aug. 2, 2021) (updated Aug. 3, 2021), https://www.scsun-news.com/story/news/politics/2021/08/02/cdc-extends-title-42-policy-allowing-migrant-expulsion-covid-fears/5462849001/; *see also* Marcia Brown, *Deportation As Usual As Biden Struggles to Reshape Immigration Policy*, Am. Prospect (Feb. 18, 2021), https://prospect.org/justice/deportation-as-usual-biden-struggles-to-reshape-immigration-policy/.

176 *See* Hans Danelius, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Introductory Note*, Audiovisual Libr. Int'l L. (June 2008), https://legal.un.org/avl/ha/catcidtp/catcidtp.html.

177 *Id.*

subjected to torture."[178] On October 21, 1994, the United States ratified CAT.[179] The United States Constitution states that treaties are "the law of the land," and, therefore, the United States is obligated to comply with its provisions as it would for any domestic law.[180] Indeed, Congress implemented the procedures for CAT under 8 C.F.R. §§ 208.16-18.[181] The language in CAT is mandatory and binding, not simply a recommendation which the government can choose to follow at its discretion.[182]

According to CBP guidance on the processing of immigrants and asylum seekers under Title 42, CAT is the only protection for which asylum seekers may be eligible.[183] However, CBP officers are not to ask if arriving undocumented persons fear torture if returned to their country of origin or Mexico, rather, the onus lies on the asylum seeker to "make an affirmative, spontaneous and reasonably believable claim that they fear being tortured in the country they are being sent back to."[184] Border Patrol agents then have unilateral authority to determine if those claiming fear of torture should be referred for further assessment with an asylum officer.[185]

Since the Trump Administration's enforcement of Title 42 expulsions in March 2020, until April 2021, at least 637,000 immigrants were processed and expelled under the policy, and of those processed, only 1,897 asylum-seekers have been able to request protection under CAT.[186] In 2016, however, 408,870 immigrants were apprehended by CBP at the Southwest border, and of those apprehended, 37,060 were able to request protection under CAT.[187] The percentage differential is striking: in 2016 the percentage

178 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pt. I, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

179 MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 3 (2009).

180 *FAQ: The Convention Against Torture*, ACLU, https://www.aclu.org/other/faq-convention-against-torture (last visited Aug. 8, 2021).

181 GARCIA, *supra* note 179, at 7.

182 Nuru v. Gonzales, 404 F.3d 1207, 1216 (9th Cir. 2005); E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 845–46 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020), *and aff'd sub nom.* E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640 (9th Cir. 2021).

183 Lind & Kriel, *supra* note 88.

184 *Id.*; Arelis R. Hernández & Nick Miroff, *Facing Coronavirus Pandemic, Trump Suspends Immigration Laws and Showcases Vision for Locked-Down Border*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html.

185 *Q&A: US Title 42 Policy to Expel Migrants at the Border*, *supra* note 141.

186 Montoya-Galvez, *supra* note 64.

187 *DHS Releases End of Year Fiscal Year 2016 Statistics*, U.S. DEP'T HOMELAND SEC. (Dec. 30, 2016), https://www.dhs.gov/news/2016/12/30/dhs-releases-end-year-fiscal-year-

of immigrants who requested relief under CAT was roughly 9.0% while in 2020, during the government's implementation of Title 42, only 0.3% of covered undocumented persons did so.[188] While migration trends often fluctuate and vary year to year, data indicates that civil and political unrest in the countries of origin from which the majority of migrants arriving in the United States come from has not improved.[189] Rather, these countries have further destabilized, thereby likely increasing the number of persons that need to seek protection in the United States under CAT.[190] Based on the decreased percentage of arriving migrants granted the opportunity to seek asylum since the implementation of Title 42 in March 2020, and the broad discretion that CBP has under Title 42, advocates rightfully believe that migrants expressing their fear of return to their countries of origin are being illegally deported to their home countries or to Mexico.[191]

Additionally, firsthand accounts of deportees who likely qualified for protection under CAT but were expelled under Title 42 further evidences the United States' violation of CAT.[192] For instance, a Haitian immigrant who goes by "Roseline," fled Haiti after being raped and assaulted.[193] Nonetheless, she was expelled to Haiti under Title 42 upon arriving to the United States and expressing her fear of return.[194] Roseline was in such fear of returning to Haiti that she begged CBP agents not to return her, stating, "I begged [CBP agents] to be sent to Mexico . . . , but they said no

2016-statistics#; *FY 2016 Statistics Yearbook*, U.S. Dep't Just. 45 (Mar. 2017), https://www.justice.gov/eoir/page/file/fysb16/download.

188 *See id.*; Montoya-Galvez, *supra* note 64.

189 Amelia Cheatham, *Central America's Turbulent Northern Triangle*, Council on Foreign Rels. (July 1, 2021), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle.

190 Paul J. Angelo, *Why Central American Migrants Are Arriving at the U.S. Border*, Council on Foreign Rels. (Mar. 22, 2021), https://www.cfr.org/in-brief/why-central-american-migrants-are-arriving-us-border; Phillips & Ricker, *supra* note 132, at 31; Stef W. Kight & Russell Contreras, *Why Migrants Are Fleeing Their Homes for the U.S.*, Axios (Mar. 7, 2021), https://www.axios.com/migrant-surge-border-crossings-reasons-dd0c6171-df76-43a6-a12f-78eaa4df73d0.html; *Central African Republic: 200,000 Displaced in Less than Two Months*, UN News (Jan. 29, 2021), https://news.un.org/en/story/2021/01/1083332; Kira Olsen-Medina & Jeanne Batalova, *Haitian Immigrants in the United States*, Migration Pol'y Inst. (Aug. 12, 2020), https://www.migrationpolicy.org/article/haitian-immigrants-united-states-2018; Oriana Van Praag, *Understanding the Venezuelan Refugee Crisis*, Wilson Ctr. (Sept. 13, 2019), https://www.wilsoncenter.org/article/understanding-the-venezuelan-refugee-crisis.

191 *See Q&A: US Title 42 Policy to Expel Migrants at the Border*, *supra* note 141; O'Toole, *supra* note 173.

192 *See Q&A: US Title 42 Policy to Expel Migrants at the Border*, *supra* note 141.

193 Phillips & Ricker, *supra* note 132, at 31.

194 *Id.* at 31–32.

they were sending me to Haiti."[195] Since being expelled to Haiti, Roseline has been in hiding.[196] Assault and rape are both viable forms of recognized past torture, and although Roseline expressed her fear of future torture, she was deported by CBP without the opportunity to speak with an asylum officer.[197] A multitude of similar reports have been made.[198] Human Rights First tracked reports of Haitian deportees who fled Haiti after experiencing "violence, instability, and persecution."[199] By rapidly expelling numerous individuals in fear of torture back to their home or to Mexico, the United States is violating its legal obligations under CAT.

C. *Constitutional Law Violations*

The extent of constitutional due process rights accorded to arriving undocumented immigrants and asylum seekers continues to be substantially disputed.[200] However, "[r]epeatedly and consistently, the Supreme Court and the Ninth Circuit have held that non-citizens physically on U.S. soil have constitutional rights, including the right to due process of law."[201] This section will analyze the likely due process violations of covered undocumented persons expelled under Title 42 and the unconstitutionality of the executive's implementation of the PHSA as a shadow immigration policy.

195 *Id.* at 32.

196 *Id.* at 31–32.

197 Phillips & Ricker, *supra* note 132, at 39–40; Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015); *cf.* Lopez-Galarza v. Immigr. & Naturalization Serv., 99 F.3d 954, 959 (9th Cir. 1996) (listing both rape and sexual assault as forms of persecution for asylum purposes).

198 *Failure to Protect: Biden Administration Continues Illegal Trump Policy to Block and Expel Asylum Seekers to Danger*, HUM. RTS. FIRST (Apr. 20, 2021), https://www.humanrightsfirst.org/resource/failure-protect-biden-administration-continues-illegal-trump-policy-block-and-expel-asylum.

199 *New Report Finds Continued Use of Illegal Trump Border Policy Endangers Asylum Seekers*, HUM. RTS. FIRST (Apr. 20, 2021), https://www.humanrightsfirst.org/press-release/new-report-finds-continued-use-illegal-trump-border-policy-endangers-asylum-seekers.

200 *See* Katie Benner & Charlie Savage, *Due Process for Undocumented Immigrants, Explained*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/us/politics/due-process-undocumented-immigrants.html; Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS NEWS HOUR (June 25, 2018), https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have; Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 22 IMMIGR. & NAT'Y L. REV. 255, 257–58 (2001).

201 Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149, 1161 (S.D. Cal. 2018) (quoting Brief for Scholars of Immigr. and Const. Law as Amici Curiae Supporting Petitioners at 3, 302 F. Supp. 3d 1149 (No. 3:18-cv-00428), ECF No. 23-1.

1. Violation of Asylum Seekers' Due Process Rights

Asylum law grants undocumented persons who arrive to the United States claiming either "an intention to apply to asylum" or "a fear of persecution" upon return to their home countries the right to a credible or reasonable fear administrative interview by an asylum officer.[202] In this interview, the officer will determine whether the undocumented person "has a credible fear of persecution" and should, therefore, have the right to continue their application for asylum.[203] Title 42's current implementation against asylum seekers is unconstitutional because immigration officials expel immigrants claiming such fear of persecution in their home country without a credible or reasonable fear interview.[204]

Like United States citizens, other "person[s]" within the United States are entitled to the constitutional protection of the Due Process Clause of the Fourteenth Amendment.[205] The Supreme Court has staunchly held that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens," and that the Due Process Clause "applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent."[206] For undocumented immigrants who have barely set foot into the United States, however, these due process rights are inapplicable. Undocumented immigrants "on the threshold of initial entry" into the country are only entitled to those "rights regarding admission that Congress has provided by statute."[207]

In *Department of Homeland Security v. Thuraissigiam*, Thuraissigiam, an undocumented immigrant who was expelled from the United States after entering to seek asylum, argued that the federal statute under which he was expelled violated his due process rights.[208] Thuraissigiam was stopped twenty-five yards after his entry into the United States, and after an asylum officer found "no evidence" that he was eligible for asylum, he was removed from the country.[209] Finding that the respondent's right to due process was not violated, the Supreme Court reiterated that newly arrived undocumented persons were not protected by the Due Process Clause, but instead only had

202 8 U.S.C. § 1225(b)(1)(A)(ii); *Id.* § 1225(b)(1)(B)(ii).
203 *Id.*
204 Phillips & Ricker, *supra* note 132, at 8, 26.
205 *See* U.S. Const. amend. XIV, § 1.
206 Yick v. Hopkins, 118 U.S. 356, 369 (1886); Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
207 Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020).
208 *Id.* at 1967, 1981.
209 *Id.* at 1967–68.

those due process rights as conferred by Congress.[210] The Court noted that "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[211] The Supreme Court reversed the Ninth Circuit decision, finding that the Due Process Clause was inapplicable, and that Thuraissigiam did receive due process of law as provided by the statute.[212]

While *Thurassigiam* and its predecessors are generally against offering rights to arriving undocumented persons, the Court's holding that arriving undocumented persons are entitled to only those rights which Congress confers could work in favor of asylum seekers who may otherwise be expelled under Title 42. The INA is a statute conferred by Congress and affords certain qualified individuals a right to seek admission to the United States.[213] Under the *Thuraissigiam* rationale, then, it is possible that if Title 42 procedures were challenged as violating arriving immigrants' rights under the INA, that the court may find Title 42 violative of asylum seekers' "rights regarding admission that Congress has provided by statute."[214] Thus, Title 42 may violate asylum seekers' due process rights as conferred under the INA.

Further, Title 42 is unconstitutional due to its violation of the Fifth Amendment right to due process by wrongfully allowing CBP officers to conduct CAT screenings. CBP agents have unchecked authority to determine whether immigrants who fear torture in their country of origin qualify for CAT.[215] According to 8 U.S.C. § 208.16, an asylum officer has the authority to assess whether the individual seeking protection has a viable claim for CAT. In *A.B.-B. v. Morgan*, the court held that plaintiffs demonstrated a likelihood of success on the merits of their claim that allowing CBP agents to conduct asylum interviews violates the INA.[216] It was due to the CBP agents' lack of training and their inability to "conduct the interview in a non-adversarial manner," for which the court granted the motion for preliminary injunction to seize conducting asylum interviews.[217] When CBP agents conduct asylum interviews, asylum seekers are deprived of their right to due process of law as a result of CBP agents' inadequate training to conduct the screenings and their inherent adversarial position as law enforcement personnel.

210 *Id.* at 1982.
211 *Id.* (quoting Ekiu v. United States, 142 U.S. 651, 660 (1892)).
212 *Id.* at 1983.
213 *See supra* Section III.A.
214 *See Thuraissigiam*, 140 S. Ct. at 1983.
215 *Q&A: US Title 42 Policy to Expel Migrants at the Border*, *supra* note 141.
216 No. 20-cv-00846, 2020 WL 5107548, at *1 (D.D.C. Aug. 31, 2020).
217 *Id.* at *6–8.

Title 42 also likely violates expelled persons' due process right because of its arbitrary discriminatory implementation against asylum seekers and children.[218] In *Hampton v. Wong*, the United States Supreme Court ruled on a challenge to the validity of a regulation which "exclude[d] all persons except American citizens and natives of American Samoa from employment in most" federal employment positions.[219] The Court held that this regulation by the United States Civil Service Commission, a federal agency, deprived the plaintiffs of their liberty without due process of law by arbitrarily applying discriminatory rules based on someone's non-permanent resident status.[220] In Title 42, the CDC limits the "Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists," to an extremely narrow group of people by excluding:

> U.S. citizens and lawful permanent residents; members of the armed forces of the United States . . . and associated personnel, and their spouses and children; persons from foreign countries who hold valid travel documents and arrive at a POE; [and] persons from foreign countries in the visa waiver program who are not otherwise subject to travel restrictions and arrive at a POE.[221]

The CDC provides no information regarding how only applying the order against asylum seekers and children improves public health, when all other exempt parties are not subject to the same restrictions regardless of whether they, too, are traveling from a country where a quarantinable communicable disease exists.[222] Therefore, by the CDC discriminatorily targeting the "covered [undocumented persons]," it is depriving them an aspect of liberty, just as the CDC did against non-permanent residents in *Hampton*.[223]

Further, the *Hampton* court held that "due process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or . . . that it be justified by reasons which are properly the concern of that agency."[224] The CDC is neither at a comparable level of government to authorize immigration law, nor is the CDC justified by reasons that concern its agency to surpass the immigration law framework, and enforce the broad expulsion of asylum seekers. United

218 *See* Guttentag, *supra* note 3.
219 426 U.S., 88, 90–91 (1976).
220 *Id.* at 116–17.
221 U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention (CDC), *supra* note 13.
222 *See id.*
223 *See id.*; *Hampton*, 426 U.S. at 116.
224 *Hampton*, 426 U.S. at 116.

States immigration law, including the INA and CAT, were implemented by Congress, and the CDC's implementation of Title 42 as a federal agency is not a comparable level of government to Congress.[225] Further, evidence shows that the CDC is not justified to implement Title 42 as a superseding law based on the reasons stated *supra* in the Section II.A. and II.D.

2. Implementation of Title 42 Expulsions is an Act of Executive Overreach

The implementation of Title 42 expulsions is an act of executive overreach by the federal government. According to the United States Constitution, immigration matters are meant to be established by Congress, not a federal agency.[226] The PHSA lacks any language that designates the authority to supersede immigration law or grants the executive branch or a federal agency such power of expulsion.[227] In *Al Otro Lado v. Wolf*, the Ninth Circuit affirmed an injunction against the "metering" policy, in which asylum seekers were turned back at POEs regardless of having viable asylum claims.[228] There, the court promoted the important "weighty" public interest "in efficient administration of the immigration laws at the border," as well as "an interest in ensuring that 'statutes enacted by [their] representatives' are not imperiled by executive fiat."[229]

The court's point must not be overlooked. A proper balance of power among the three branches of government is a foundational principal of the United States Constitution.[230] As in *Al Otro Lado*, in implementing

225 *See Our History – Our Story*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/about/history/index.html (Dec. 4, 2018) (explaining that the CDC is an operation of the Health and Human Services agency, a government agency that focuses on "health promotion, prevention, and preparedness."). "An agency's powers are granted by Congress in an 'enabling act' . . . and in other specific legislative grants of power. . . . An agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Administrative Law: Federal Agencies*, FLA. STATE U. COLL. L. RSCH. CTR. (Apr. 6, 2021), https://guides.law.fsu.edu/administrativelaw/agencies. Thus, among the hierarchy of U.S. government power, the CDC's power stems from Congress.

226 U.S. CONST. art. I, § 8; *Artl.S8.C18.4.2 Implied Power of Congress Over Immigration*, CONST. ANNOTATED, https://constitution.congress.gov/browse/article-1/#I_S8_C18 (last visited July 9, 2021).

227 *See* Public Health and Welfare Act, 42 U.S.C. §§ 265, 268.

228 952 F.3d 999, 999 (9th Cir. 2020).

229 *Id.* at 1015; E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 779 (9th Cir. 2018) (quoting Maryland v. King, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)).

230 *See* Gerda Kleijkamp, *Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 307, 310 (2002).

Title 42, the executive branch has overstepped its power by surpassing the immigration statutory framework created by Congress to further its own political initiatives.[231] In order to address the executive's overreach of Title 42, the judiciary should step in to equalize the balance of powers.

Conclusion

The news of Joe Biden's presidential victory against Donald Trump brought hope and celebration among the immigrant tent camps established along United States-Mexico border towns.[232] These towns were filled with immigrants and asylum seekers who were expelled after seeking asylum in the United States under Title 42, returned to Mexico due to their placement into the Migrant Protection Protocols, and were awaiting their immigration hearing date in the United States.[233] On the night of

231 *See* Guttentag, *supra* note 3. *But see* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (holding that President Trump fulfilled the INA provision that delegates authority to the President to regulate immigration if such lack of regulation would be detrimental to the interests and security of the U.S.).

232 *See* Cat Cardenas, *Asylum Seekers in Matamoros Celebrated Joe Biden's Victory. But the Final Weeks of the Trump Administration Are Bringing Fresh Anxiety.*, Tex. Monthly (Dec. 14, 2020), https://www.texasmonthly.com/news-politics/matamoros-asylum-seekers-biden-victory/.

233 *See id.*; *Migrant Protection Protocols*, *supra* note 11 ("Migrant Protection Protocols are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico – illegally or without proper documentation – may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings . . . ."). On August 24, 2021, the Supreme Court declined the Biden Administration's application for a stay of the injunction issued by the district court, noting that "[t]he applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." Joseph R. Biden, Jr., President of the United States, et al., Applicants v. Texas, et al., Supreme Court Of The U.S. (Aug. 24, 2021), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a21.html. Consequently, the Administration must resume the Remain in Mexico policy. See *id.* The Biden Administration plans to reinstate the Remain in Mexico policy by mid-November 2021, so long as Mexico agrees. Hannah Albarazi, *Biden Admin. Says 'Remain In Mexico' May Restart Next Month*, LAW360 (Oct. 15, 2021), https://www.law360.com/articles/1431455/biden-admin-says-remain-in-mexico-may-restart-next-month. Immigrant Rights advocates call the Biden Administration's decision to reinstate the Remain in Mexico policy in November rather than terminate the program a "betrayal" that will cause "immense human suffering." Press Release, American Immigr. Council, The Reimplementation of MPP is Betrayal of President Biden's Campaign Promises (Oct. 15, 2021), https://www.americanimmigrationcouncil.org/news/reimplementation-mpp-betrayal-president-biden%E2%80%99s-campaign-promises?fbclid=IwAR0KE5b-XZzOqDkOs5JNSC-qqy6XDt1pss_nT-0I_-pp_mq_qb0nrbA8cjg; US Plans to Reinstate Trump-era 'Remain in Mexico' Asylum Policy,

President Biden's inauguration, he revoked Executive Order 13780, known as "the Muslim Ban," and has made strides to uphold his promises to end Migrant Protection Protocols, reunite the families that remain separated due to the Trump Administration's Zero Tolerance Policy, and slow the expulsion of minors under Title 42.[234] President Biden also suspended the implementation of a rule which would codify a statutory bar to eligibility for asylum and withholding of removal "based on emergency public health concerns generated by a communicable disease."[235] The rule was originally meant to be effective as of January 22, 2021, but the Biden Administration delayed its effective date to December 2021.[236]

While the Biden Administration is making strides to reverse many of Trump's anti-immigration policies, as of the publishing of this note, border officials continue to enforce Title 42 expulsions against single adults and families.[237] A report of Title 42's impact documents nearly 500 cases of violence against asylum seekers expelled under the Biden Administration.[238]

AL JAZEERA (Oct. 15, 2021), https://www.aljazeera.com/news/2021/10/15/us-plans-to-reinstate-trump-era-remain-in-mexico-asylum-policy.

234 Proclamation No. 10141, 86 Fed. Reg. 7,005 (Jan. 25, 2021); Ted Hesson & Mimi Dwyer, *Biden to Bring in Asylum Seekers Forced to Wait in Mexico Under Trump Program*, REUTERS (Feb. 12, 2021), https://www.reuters.com/article/us-usa-biden-immigration-asylum/biden-to-bring-in-asylum-seekers-forced-to-wait-in-mexico-under-trump-program-idUSKBN2AC113; Jacob Soboroff et al., *Biden Administration Will Let Migrant Families Separated Under Trump Reunite Inside U.S.*, NBC NEWS (Mar. 1, 2021, 12:00 PM) (updated 1:19 PM), https://www.nbcnews.com/politics/immigration/biden-admin-expected-let-migrant-families-separated-under-trump-reunite-n1259141; Office of the Spokesperson, *Restarting the Central American Minors Program*, U.S. DEP'T STATE (Mar. 10, 2021), www.state.gov/restarting-the-central-american-minors-program/; Arelis R. Hernández, *Fewer Migrant Families Being Expelled at Border Under Title 42, But Critics Still Push for Its End*, WASH. POST (June 13, 2021, 6:11 PM) (updated 6:46 PM), https://www.washingtonpost.com/immigration/fewer-migrant-families-being-expelled-at-border-under-title-42-but-critics-still-push-for-its-end/2021/06/13/422c702c-c7cc-11eb-81b1-34796c7393af_story.html.

235 Security Bars and Processing; Delay of Effective Date, 86 Fed. Reg. 15,069, 15,070 (Mar. 22, 2021) (to be codified at 8 C.F.R. pts. 208, 1208); *see also* Security Bars and Processing, 85 Fed. Reg. 84,160, 84,160 (Dec. 23, 2020) (to be codified at 8 C.F.R. pts. 208, 1208).

236 Security Bars and Processing; Delay of Effective Date, 86 Fed. Reg. at 15,070.

237 Maureen Meyer & Adam Isacson, *High Levels of Migration Are Back. This Time, Let's Respond Without a Crackdown*, WOLA (Aug. 5, 2021), https://www.wola.org/analysis/high-levels-of-migration-are-back-this-time-respond-without-a-crackdown/; *see also* Hernández, *supra* note 234.

238 Ryan Devereaux, *New Report Documents Nearly 500 Cases of Violence Against Asylum-Seekers Expelled by Biden*, INTERCEPT (Apr. 21, 2021), https://theintercept.com/2021/04/21/asylum-seekers-violence-biden-title-42/?fbclid=IwAR0YRT4xcMfVSkz12b_9ApD8VDDTw4zpPPaH7XTDDxvLEeXmlPoviHwJF70.

Haitian asylum seekers—a population that has been historically discriminated under United States immigration law[239]—continue to be particularly harmed by Title 42 under the new administration. In a few short weeks, the Biden Administration deported more Haitians than the Trump Administration did in an entire year.[240] Lastly, President Biden continues former President Trump's close dealings with Mexico by making an agreement that the United States will send Mexico surplus vaccines, and in exchange, Mexico has agreed to accept more families expelled from the United States under Title 42.[241] The American Civil Liberties Union (ACLU) has filed numerous suits to block Title 42's use to expel UNC and families.[242] On November 18, 2020, in the ACLU's case of *P.J.E.S. v. Wolf*, the District Court issued an order blocking the use of Title 42 to expel UNC.[243] On January 29, 2021, however, a D.C. Court of Appeals stayed the order, thus allowing the expulsions of UNC to continue until the Biden Administration ceased the expulsions discretionarily in mid-March 2021.[244] In *Huisha-Huisha v. Gaynor*, the D.C. District Court granted emergency orders prohibiting the deportation of several plaintiff families that were expelled under Title 42.[245] A motion for class certification in *Huisha-Huisha* and a motion for preliminary injunction are currently pending.[246]

The CDC's present implementation of Title 42 against covered undocumented persons furthers an illusion of a policy that stops the spread

239 Karolina Walters, *Discriminatory Treatment of Haitians Throughout History Informs Current Policy at the US-Mexico Border*, Immigr. Impact (Nov. 19, 2020), https://immigrationimpact.com/2020/11/19/haitian-immigrants-asylum-border/#.YIwuMehKiUk.

240 Julian Borger, *Haiti Deportations Soar as Biden Administration Deploys Trump-Era Health Order*, Guardian (Mar. 25, 2021), https://www.theguardian.com/us-news/2021/mar/25/haiti-deportations-soar-as-biden-administration-deploys-trump-era-health-order.

241 Nick Miroff et al., *Biden Will Send Mexico Surplus Vaccine, as U.S. Seeks Help on Immigration Enforcement*, Wash. Post (Mar. 18, 2021), https://www.washingtonpost.com/national-security/biden-mexico-immigration-coronavirus-vaccine/2021/03/18/a63a3426-8791-11eb-8a67-f314e5fcf88d_story.html.

242 *Title 42 Challenges*, Ctr. for Gender & Refugee Stud., https://cgrs.uchastings.edu/our-work/title-42-challenges (last visited July 9, 2021).

243 No. 20-2245 (D.D.C. Nov. 18, 2020); Press Release, ACLU, District Court Blocks Trump Administration's Illegal Border Expulsions (Nov. 18, 2020), https://www.aclu.org/press-releases/district-court-blocks-trump-administrations-illegal-border-expulsions.

244 P.J.E.S. v. Pekoske, No. 20-5357 (D.C. Cir. Jan. 29, 2021) (order granting motion for stay); Press Release, U.S. Dep't of Homeland Sec., Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border (Mar. 16, 2021), www.dhs.gov/news/2021/03/16/statement-homeland-security-secretary-alejandro-n-mayorkas-regarding-situation.

245 No. 21-cv-00100 (D.D.C. filed Jan. 12, 2021); *Title 42 Challenges*, *supra* note 242.

246 *Id.*

of COVID-19, but in actuality is only being used to offer a dangerous mirage of containment.[247] The United States government has a history of attaching anti-immigration policy with communicable disease, enacting these policies against a backdrop of xenophobia and "racist and eugenicist conceptions of disease."[248] There is a great deal of evidence that the CDC's implementation of Title 42 against the specified population was due to pressure by the Trump Administration to implement their anti-immigrant political ideology rather than establish safe public health measures.[249] The Biden administration continues to expel single adults and families under Title 42.[250] Furthermore, like the Trump Administration, the Biden Administration's actions conflict with the stated purpose of sections 362 and 365 of the PHSA.

In March 2021, ICE crammed a group of asylum seekers onto a plane from South Texas to El Paso after Mexican officials refused to accept the migrants expelled under Title 42. In response, United States authorities flew the asylum seekers to another section of the United States border and expelled them to a separate part of Mexico.[251] By flying to a separate part

247 *See* Wendy E. Parmet, *Reversing Immigration Law's Adverse Impact on Health*, *in* 2 COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 217 (2021), https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/60995942ea2dbf3f3bc31788/1620662599928/COVIDPolicyPlaybook-v2_May2021.pdf.

248 *See id.*; Caitlin Yoshiko Kandil, *Asian Americans Report Over 650 Racist Acts Over Last Week, New Data Says*, NBC NEWS (Mar. 26, 2020), https://www.nbcnews.com/news/asian-america/asian-americans-report-nearly-500-racist-acts-over-last-week-n1169821. Professor Erika Lee, at the University of Minnesota states: "It's a trope that dates back to the 1800s. During an outbreak of the bubonic plague in San Francisco in 1900, [Lee] said, Chinatown was blocked off and its residents were barred from leaving after the first case was traced to a Chinese immigrant living there. An outbreak of the plague similarly led to the quarantine of Chinatown in Honolulu." Yoshiko Kandil, *supra* (quoting Erika Lee, Professor at the University of Minnesota).

249 *See Q&A: US Title 42 Policy to Expel Migrants at the Border, supra* note 141*;* O'Toole, *supra* note 173; Russell, *supra* note 141.

250 Jihan Abdalla, *Rights Groups Decry 'Flawed' US Asylum Exemptions Process*, AL JAZEERA (June 17, 2021), https://www.aljazeera.com/news/2021/6/17/rights-groups-decry-flawed-us-asylum-exemptions-process; *see also* Julia Neusner, *"They Lied to Us": Biden Administration Continues to Expel, Mistreat Families Seeking Asylum*, HUM. RTS. FIRST (May 13, 2021), humanrightsfirst.org/blog/they-lied-us-biden-administration-continues-expel-mistreat-families-seeking-asylum; Arelis R. Hernández, *DHS Secretary Mayorkas Visits Border to Tout Progress in Processing Migrant Children*, WASH. POST (May 7, 2021), https://www.washingtonpost.com/immigration/dhs-secretary-mayorkas-visits-border-to-tout-progress-in-processing-migrant-children/2021/05/07/c75181a0-af64-11eb-acd3-24b44a57093a_story.html.

251 Angela Kocherga, *Rejected by 1 Mexican Port of Entry, Migrants Are Flown by U.S. to Another*, NPR (Mar. 26, 2021), https://www.npr.org/2021/03/26/981190646/rejected-by-1-mexican-port-of-entry-migrants-are-flown-by-u-s-to-another.

of the border it is likely that immigration officials and migrants were put at greater risk of COVID-19 due to the enclosed environment and recirculated airflow on the aircraft.[252] Further, in June 2021, the Biden Administration continued the implementation of Title 42, but established two narrow routes to acquire an exemption to expulsions under the Title.[253] The first track became available in late March 2021 and established a program which allowed thirty-five families to be let in daily.[254] Prompted by the ACLU's pending lawsuit against the Biden Administration for the continued use of Title 42, the program has the ACLU collect applications from organizations working with migrants and then submit them to CBP for consideration.[255] The second track became available in May 2021 and permits 250 individuals deemed to be the most "vulnerable" to cross into the United States and pursue their claims.[256] Six non-profit organizations were selected to work as a consortium to determine the most vulnerable cases to then be submitted to CBP for approval.[257]

Members of the consortium agreed to engage in the process based on the understanding that after July, Title 42 would be lifted.[258] However, on August 2, 2021, the CDC issued an order that Title 42 expulsions shall remain in effect "until the CDC Director determines that the danger of further introduction of COVID-19 into the United States from covered noncitizens has ceased to be a serious danger to public health."[259] In

252 *See* Mika Gröndahl et al., *How Safe Are You from Covid When You Fly?*, N.Y. Times (Apr. 17, 2021), https://www.nytimes.com/interactive/2021/04/17/travel/flying-plane-covid-19-safety.html.

253 Abdalla, *supra* note 250.

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.*

258 *Id.*

259 Press Release, Ctrs. for Disease Control & Prevention, CDC Extends Order at the Southern and Northern Land Borders (Aug. 2, 2021), https://www.cdc.gov/media/releases/2021/s080221-southern-northen-land-borders-order-extended.html. The Biden administration intends to ease COVID-19 restrictions for nonessential travelers at its land borders with Canada and Mexico in the beginning of November 2021. *Update on U.S. Travel Policy Requiring COVID-19 Vaccination*, U.S. Dep't of State – Bureau of Consular Affs. (Oct. 15, 2021), https://travel.state.gov/content/travel/en/News/visas-news/update-on-us-travel-policy-requiring-covid-19-vaccination.html; David Shepardson & Steve Holland, *U.S. to Lift Canada, Mexico Land Border Restrictions in Nov for Vaccinated Visitors*, Reuters (Oct. 3, 2021), https://www.reuters.com/world/us/us-open-border-with-canada-starting-early-november-buffalo-news-2021-10-13/?fbclid=IwAR3QTEPv2vVf5VRdfpsnL-ibeW8uuz5S61gAc0hEbv3IxUQAceldQBTGC9Q; Ken Thomas & Michelle Hackman, *Biden Administration to Ease Covid-19 Travel Restrictions at Canada and Mexico Land-Border Crossings*, Wall St. J. (Oct. 13, 2021), https://www.

protest, at the end of July 2021, two organizations from the consortium, International Rescue Committee and HIAS, halted their work with the government in an attempt to pressure the Biden Administration to end Title 42 expulsions.[260] Also, due to the ACLU's litigation challenging Title 42 restarting, the Administration announced the exemptions related to the lawsuit were ending.[261] As of August 23, 2021, Linda Rivas stated that other organizations involved in the consortium have begun to withdraw their assistance to process individuals under the exemption to Title 42, in hopes to pressure the Biden Administration to uphold their agreement to end the expulsions and because they do not want to be complacent in harm that is caused by the expulsions.[262]

Immigrant rights advocates refer to the Biden Administration's recent decision to indefinitely continue Title 42 expulsions—despite the government's ability to process asylum seekers quickly under the exemption programs—as further evidence of its true purpose: a shadow immigration strategy rather than a public health policy.[263] There are less inhumane measures that the Biden Administration must take immediately in order to uphold ratified international treaties, to uphold asylum law, and, in President Biden's own words, to preserve our country's "national conscience," including "our long history of welcoming people of all faiths and no faiths at all."[264]

The following are several recommendations that can be implemented to ensure public health regulations are upheld to the highest standard while also meeting the United States' legal duties owed to asylum seekers. First,

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wsj.com/articles/biden-administration-to-ease-covid-19-travel-restrictions-at-canada-and-mexico-land-border-crossings-11634095283. Non-United States nationals must be vaccinated and will be required to show proof of vaccination in order to enter. *Update on U.S. Travel Policy Requiring COVID-19 Vaccination*, *supra*; Shepardson & Holland, *supra*; Paul Vieira & Kim Mackrael, *Canada-U.S. Border: Everything You Need to Know About Reopening Travel*, WALL ST. J. (Oct. 15, 2021), https://www.wsj.com/articles/canada-u-s-border-open-11628539364; Thomas & Hackman, *supra*. The amended restrictions will not impact covered undocumented persons affected by Title 42. Shepardson & Holland, *supra*; Thomas & Hackman, *supra*; *Press Briefing by Press Secretary Jen Psaki, October 13, 2021*, WHITE HOUSE (Oct. 13, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/13/press-briefing-by-press-secretary-jen-psaki-october-13-2021/. The Biden administration has provided no information as of the writing of this note regarding whether asylum seekers will continue to be prohibited from requesting asylum at legal ports of entry.

260 Elliot Spagat & Julie Watson, *Advocates End Work with US to Pick Asylum-Seekers in Mexico*, AP NEWS" (July 30, 2021), https://apnews.com/article/health-mexico-immigration-coronavirus-pandemic-b503c2f87e4c7582c97d3383a3f03b20.

261 Meyer & Isacson, *supra* note 237.

262 Telephone Interview with Linda Rivas, *supra* note 12.

263 Borger, *supra* note 240; Abdalla, *supra* note 250.

264 Proclamation No. 10141, *supra* note 234.

THE IRAQI JEWISH ARCHIVE IN EXILE: A LEGAL ARGUMENT FOR EQUITABLE RETURN PRACTICE

*By Leila Selchaif**

* Leila Selchaif is a law student at Northeastern University, class of 2022. She majored in English Literature and Classical Studies at Swarthmore College. She would like to thank Sharon Persons, Bruce Montgomery, Michael Brill, Rebecca Whiting, and the staff of Northeastern University Law Review for their help on this Note.

ABSTRACT

In 2003, U.S. troops raiding Saddam Hussein's secret police headquarters recovered the Iraqi Jewish Archive (Archive), a collection of tens of thousands of books and historical documents. The Ba'th party had removed these materials from Iraqi Jews beginning in the 1950s, when most of the country's Jewish population fled the country and left behind their property. Since the Archive's 2003 recovery, the U.S. National Archives and Records Administration has digitized, restored, and housed the collection. Although the U.S. is bound by written obligation to return the Archive to Iraq, over the eighteen years that it has remained in America, Iraqi Jews have publicly called for its return instead to their own community. There has recently been increased public interest in, and institutional willingness to, repatriate historically looted cultural heritage, and the Iraqi Jewish Archive is poised to offer a powerful blueprint for further action, particularly because its situation is so complicated. Unlike in the case of Nazi-looted artwork, which often has a clear owner and path to restitution, the Archive is currently in the possession of one country and facing a claim for ownership from another, as well as from people, estranged from that country, that counter that claim. Furthermore, returning the Archive to Iraqi Jews is far from a simple prospect—there are arguments against splitting the Archive, significant barriers to identifying property owners, and the looming question of where the Archive would best be housed. Additionally, the traditional process by which Jewish ownership of the Archive might be recognized—through the courts—is not likely to be successful, and would surely have deep financial and temporal costs. While this Note discusses legal strategies, it ultimately recommends utilizing restorative justice practices to reach an equitable and forthright solution. A collaborative approach should be attempted, because the Iraqi Jewish Archive has the power to set a strong example for future equitable return practice. This power does not come from the value of its collection, which contains phonebooks and college applications among a smaller number of older and more valuable religious texts. The Archive's power lies in how it symbolizes the persecution of the Jewish people, not only in Iraq but throughout the world and its history. Equitably returning the Archive provides an opportunity to put into practice a form of recognition and reconciliation that should be implemented in future cultural heritage negotiations.

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INTRODUCTION

The Iraqi Jewish Archive is a collection of materials—records, books, religious texts, and antiques—that U.S. troops recovered from Iraq during the Iraq War.[1] The collection brought to light photographs and letters that marked a time when Jews once thrived in Iraq, as well as a once-beautifully decorated Torah housing and a Venetian text printed in the Renaissance period.[2] Most of the materials appear to share one common trait—they had been gathered by the Iraqi government from Iraqi Jews.[3] Once the Archive arrived in America, many hoped that the U.S. would return the Archive to those from whom it had been taken many decades prior.[4] The U.S., however, had agreed to return the Archive to the new Iraqi government, once restoration was completed.[5] Over the nearly twenty years since it was brought to America, selections of the Archive have been exhibited at times, but mainly it has been kept in storage—freeze-dried, rebound, and boxed up.[6]

When recovered in May 2003, the materials were moldy because

1 *Recovery of Artifacts*, PRESERVING IRAQI JEWISH ARCHIVE, https://ijarchive.org/project/recovery-artifacts (last visited June 14, 2021); *Notes on the Scope of the Iraqi Jewish Archive (IJA)*, PRESERVING IRAQI JEWISH ARCHIVE (Sept. 27, 2013), https://ijarchive.org/sites/default/files/page-images/content/1.0/ScopeNotesWebsite.pdf.

2 *Notes on the Scope of the Iraqi Jewish Archive (IJA)*, *supra* note 1; *Tiq for Torah Scroll*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/ija/content/3841 (Jan. 6, 2015); *Ketuvim*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/ija/content/1525 (Dec. 16, 2014).

3 Bruce P. Montgomery, *Rescue or Return: The Fate of the Iraqi Jewish Archive*, 20 INT'L J. CULTURAL PROP. 175, 188 (2013); Kate Fitz Gibbon, *US Rescue of Iraqi Jewish Archives Imperiled*, CULTURAL PROP. NEWS (Oct. 2, 2017), https://culturalpropertynews.org/us-agreements-with-iraq-libya-egypt-beyond-rescuing-the-iraqi-jewish-archives/; Michael R. Fischbach, *Claiming Jewish Communal Property in Iraq*, MIDDLE E. REP., Fall 2008 at 5, 6, https://merip.org/paupress/download/UFIoGAltf9fkfA8u1513223454/MER%20248%20final.

4 *See, e.g.*, Alice Fordham, *Iraqi Jewish Documents Remain in Limbo*, L.A. TIMES (Oct. 31, 2010), https://www.latimes.com/archives/la-xpm-2010-oct-31-la-fg-iraq-museum-20101031-story.html; Carole Basri & David Dangoor, Opinion, *The Iraqi Jewish Archive Is Stolen Property that Should Go Back to Its Original Owners*, HILL (Apr. 27, 2018), https://thehill.com/opinion/international/385072-the-iraqi-jewish-archive-is-stolen-property-that-should-go-back-to-its.

5 Agreement between The Coalition Provisional Authority and The National Archives and Records Administration (Aug. 20, 2003), http://www.dcoxfiles.com/cpanara2003.pdf at 2. [hereinafter NARA-CPA MOU].

6 *The Iraqi Jewish Archive Preservation Report*, PRESERVING IRAQI JEWISH ARCHIVE (Oct. 2, 2003), https://ijarchive.org/sites/default/files/page-images/content/1.0/Iraqi%20Jewish%20Archive%20Report.pdf.

they had been sitting in a flooded state building's basement in Baghdad.[7] By June, U.S. conservators had flown to Iraq and determined that the materials needed to undergo mold remediation, which could be best completed at U.S. facilities.[8] Iraq did not possess conservation facilities, and furthermore, was just beginning to transition from the Ba'th government to U.S.-appointed leadership, making its national stability tenuous.[9] The State Board of Antiquities and Heritage of Iraq (SBAH) agreed to allow loan of the materials to the U.S. National Archives and Records Administration (NARA) for conservation.[10] In August 2003, the Archive was loaded into metal boxes and flown to the U.S.[11]

The mold growth was stabilized by freeze-drying, but NARA found the materials too fragile to handle.[12] NARA was limited in what resources it could use for the Archive. It could provide its lab and storage space but could not direct any of its funds to actively work on conserving the Archive.[13] Alternately, organizations could fund the restoration, but the millions of dollars required was difficult to drum up, as organizations rightfully feared the restored Archive's future inaccessibility when returned to Iraq. From this early stage, it is clear that ownership was a concern—philanthropists hesitated to shell out for restoration while it was unclear where the Archive would ultimately reside.[14] In 2005, conservators received nearly $100,000 in federal funding to continue restoration.[15] However, they still struggled to gain access to the materials due to the state of the water and mold damage. They began identifying and cataloging the materials from their cover information.[16] Years passed, and conservation efforts seemed slow going. The Archive lay inventoried, but not fully preserved or digitized.[17] In 2011, the government claimed it had allocated approximately $3 million for NARA

7 *Recovery of Artifacts*, *supra* note 1.
8 Montgomery, *supra* note 3.
9 *Recovery of Artifacts*, *supra* note 1.
10 Montgomery, *supra* note 3, at 176, 178.
11 *Id.; Recovery of Artifacts*, *supra* note 1.
12 *The Iraqi Jewish Archive Preservation Report*, *supra* note 6, at 3; U.S. Dep't of State, Agreement No. 4490NEA141801, Interagency Acquisition Agreement Between the U.S. Department of State and the National Archives and Records Administration to Complete the Preservation of the Iraqi Jewish Archive 1 (2011) [hereinafter Interagency Acquisition Agreement], https://ijarchive.org/sites/default/files/page-images/content/1.0/IAA%20State%20-%20NARA_0.pdf.
13 Montgomery, *supra* note 3, at 182.
14 Carl Hartman, *Fate of Rare Jewish Artifacts from Iraq Remains Uncertain*, L.A. Times (May 28, 2004).
15 Interagency Acquisition Agreement, *supra* note 12, at 19–26.
16 *Id.*
17 *Id.* at 1.

to begin serious restoration.[18] In 2010, a group of experts identified notable materials that should be restored enough to be digitized, and a smaller number of especially valuable materials that should be fully restored and physically exhibited.[19] However, by this point, SBAH was tired of waiting and in 2010, asked for the Archive's return.[20] NARA responded in June 2011 with a plan for return once conservation was completed.[21] In October 2011, Iraq's Deputy Culture Minister publicly called on the U.S. to return the Archive and threatened to sue.[22] By November 2013, NARA apparently had prepared the Archive sufficiently to display select artifacts, and put on an exhibit at the National Archives, eventually launching a tour of the Archive that exhibited in New York, Missouri, California, and Florida over the course of the next three years.[23] In May 2014, ahead of an anticipated June return date, the Iraqi Ambassador to the U.S., Lukman Faily, announced that the Archive's stay in the U.S. would be extended.[24] However, in June 2014 ISIL/Daesh proclaimed itself a world caliphate and massacred thousands of Iraqi cadets at Camp Speicher in Tikrit.[25] This geopolitical development, while unrelated to the Archive negotiations, overshadowed plans for the extension, and the agreement was never formalized in writing.[26]

The Archive continued to remain in the U.S., its return date murky. The 2013 tour continued until 2016 and then the Archive rested for nearly two years.[27] The Archive toured again in late 2017 through 2018, exhibiting in Texas, Georgia, and Maryland.[28] While the Archive toured, the State Department disclosed that when the $3 million fund that had been set aside to conserve the Archive expired in September 2018, it planned to return the

18 Rebecca Santana, *Tug-of-war over Iraqi Jewish Trove in US Hands*, NBC NEWS (July 10, 2011).

19 INTERAGENCY ACQUISITION AGREEMENT, *supra* note 12, at 22.

20 Montgomery, *supra* note 3, at 184.

21 INTERAGENCY ACQUISITION AGREEMENT, *supra* note 12, at 1.

22 *Iraqi Official Urges U.S. to Return Archives*, RADIO FREE EUR. RADIO LIBERTY (Oct. 19, 2011), https://www.rferl.org/a/iraq_united_states_archives/24364123.html.

23 *Discovery and Recovery: Preserving Iraqi Jewish Heritage*, PRESERVING IRAQI JEWISH ARCHIVE, https://ijarchive.org/exhibit/exhibit (last visited Apr. 25, 2021).

24 Jewish News Syndicate, *Iraqi Jewish Archive's U.S. Exhibition Extended*, ALGEMEINER (May 15, 2014), https://www.algemeiner.com/2014/05/15/iraqi-jewish-archive%E2%80%99s-u-s-exhibition-extended/.

25 Taif Alkhudary, Opinion, *Five Years On, Still No Justice for Iraq's Camp Speicher Victims*, AL JAZEERA (June 12, 2019), https://www.aljazeera.com/opinions/2019/6/12/five-years-on-still-no-justice-for-iraqs-camp-speicher-victims.

26 Confidential State Department source with knowledge of the Iraqi Jewish Archive and relevant negotiations.

27 *Discovery and Recovery: Preserving Iraqi Jewish Heritage*, *supra* note 23.

28 *Id.*

Archive to Iraq.[29] Apparently in response, a bipartisan group of lawmakers introduced a resolution in July 2018, raising concerns that Iraq was not the right place to send the Archive, and urging the government to renegotiate the date of return.[30] Though never enacted, there was a flurry of public support for the resolution.[31] Before the return date SBAH and NARA reached an agreement that extended the Archive's stay, allowing for continued efforts to preserve and increase access to it.[32] In 2020, attention was again given to the matter of the Archive's repatriation after the release of a short documentary, and the news that a separate archive of Ba'th Party documents that had also been seized in 2003 had been quietly repatriated in August 2020.[33] Where before there was a clamor, there has recently arisen only a murmur: what will happen to the Archive, and what should happen? There are many stakeholders in this situation, and each argues for a different solution.

One stakeholder group are the 'Iraqi Nationalists,' who argue that the Archive belongs to and in Iraq. [34] Supporters of this group say that—however unfairly or unfortunately—legally, morally, or pragmatically, the

29 Josefin Dolstein, *Despite Protests, State Department Says it Will Return Trove of Jewish Artifacts to Iraq*, Jewish Tel. Agency (Sept. 8, 2017), https://www.jta.org/2017/09/08/politics/despite-protests-state-department-says-it-will-return-trove-of-jewish-artifacts-to-iraq. Most of the funding had, at this point, been used. Confidential State Department Source, *supra* note 26.

30 S. Res. 577, 115th Cong. (2018).

31 *See, e.g.*, *Orthodox Union Praises Bipartisan Group of U.S. Representatives for Recommending Renegotiation of Iraqi Jewish Archives Scheduled Return to Iraq*, Orthodox Union Advoc. Ctr. (Mar. 10, 2014), https://advocacy.ou.org/orthodox-union-praises-bipartisan-group-u-s-representatives-recommending-renegotiation-iraqi-jewish-archives-scheduled-return-iraq/; Basri & Dangoor, *supra* note 4; Talya Zax, *Exclusive: The Iraqi Jewish Archive Could Reshape Foreign Policy. But Its Future Is Uncertain.*, Forward (July 17, 2018), https://forward.com/culture/405697/iraqi-jewish-archive-could-change-foreign-policy-linkage-mou-future/.

32 Confidential State Department Source, *supra* note 26. This extension was never publicized, and to author's knowledge, has never been reported on in any way.

33 Michael P. Brill, Commentary, *Setting the Records Straight in Iraq*, War On Rocks (July 17, 2020), https://warontherocks.com/2020/07/setting-the-records-straight-in-iraq/; Lyn Julius, *Return to Iraq of Ba'ath Archives Raises Fears for Jewish Archives*, Algemeiner (Oct. 12, 2020), https://www.algemeiner.com/2020/10/12/return-to-iraq-of-baath-archives-raises-fears-for-jewish-archives/; Andrew Blum, *D-Squared Media Announces Production and Release of "Saving the Iraqi Jewish Archives,"* AP News (July 10, 2020), https://apnews.com/press-release/news-direct-corporation/bf6f235cf2acecfcf7ad29d6c18a09fa.

34 *Will Iraqi Jewish Heritage Stay in US?*: *Senate Resolution 577 Recommends Renegotiation of US - Iraq Agreement*, Cultural Prop. News (Aug. 10, 2018), https://culturalpropertynews.org/will-iraqi-jewish-heritage-stay-in-us/. The moniker "Iraqi Nationalists" has been designated for identification purposes by the author, and is not meant to implicate any extant political party.

Iraqi Nationalist stakeholders have the strongest claim to the Archive.[35]

In direct opposition to the Iraqi Nationalists are the Jewish Community stakeholders, who argue that the Archive deserves to be with the people from whom it was stolen. Those people, the Iraqi Jewish diaspora, are not in Iraq, nor are they aligned with a research institution. From this perspective, the Archive is cultural property that represents great community wealth and suffering, and is not simply research material to be mined.[36]

A third group of stakeholders are the Archivists. They value the Archive for its contribution to scholarship. They argue that the Archive must be somewhere accessible to researchers, not split apart into private keepings or sequestered far from metropolitan hubs.[37] Additionally, there is some overlap in stakeholder stance with the Jewish Community, who point to the Archive's informational value as a factor in why either their or U.S. ownership and access is important.[38]

The final stakeholder, quite simply, is the general public, the audience of this Note. Public outcry has consistently been a powerful force keeping the Archive from being relinquished to Iraq. The public is affected by equitable return practice, and how it may set a powerful example for future returns. While the principle of justice demands action, it is less clear what a just outcome might look like.

To consider alternative paths to restitution beyond keep-or-return, we must understand some theories of cultural heritage. A basic model pits nationalism against internationalism. Cultural nationalism argues that cultural property belongs to the nation of origin and usually should stay there.[39] Source nations, such as Iraq, and archeologists often fall into this

35 Sylvia Westall & Jonathan Saul, *Tug-of-War Erupts Over Planned Return of Jewish Archives to Iraq*, REUTERS (Nov. 26, 2013), https://www.reuters.com/article/us-iraq-jews/tug-of-war-erupts-over-planned-return-of-jewish-archives-to-iraq-idUSBRE9AP0VR20131126.

36 *Will Iraqi Jewish Heritage Stay in US?*, *supra* note 34; Montgomery, *supra* note 3, at 189.

37 *See, e.g.*, Montgomery, *supra* note 3, at 194–95. "It should now rely on the advice of international Jewish groups to find an appropriate home for the cultural materials where they may be made freely accessible to the Iraqi Jewish diaspora and other researchers." *Id.* at 194.

38 *Id.* "If such cultural property is considered part of the heritage of 'all mankind' or 'every people' as asserted broadly under international humanitarian law, it follows that it must be made universally available. Ironically, if the materials were to be returned to Iraq, as the U.S. State Department has said it intends to do, its availability would be denied to the very people whose culture and religion it represents. Moreover, such denial would be animated by the same chauvinism and anti-Semitism that resulted in the destruction of the Iraqi Jewish community and the official looting of their cultural property in the first place." *Id.* at 194–95.

39 Douglas Cox, *Archives and Records in Armed Conflict: International Law and the Current Debate*

camp.[40] The Iraqi Nationalist stakeholders reside here. By contrast, cultural internationalism argues that cultural property should be accessible to the public and should be housed where it is best able to be maintained and studied.[41] Collectors and museums often fall into this camp.[42] The Archivist stakeholders reside here. The U.S. government also largely takes an internationalist stance.[43]

The Archive being *Jewish* cultural heritage clutters up this paradigm. Where do the Jewish Community stakeholders reside? Does a nationalist understanding mean that the Archive belongs in Iraq because it belonged to Iraqi Jews? Not only might there be a reason for it to return from whence it came, geographically speaking, but its presence could serve as a powerful reminder of the past wrongs of the government and as a continuing commitment to reckon with those wrongs.[44] It might even operate as a gesture of goodwill to usher in a new peace and welcoming of Jews back to Iraq.[45]

However, the only Jewish culture now present in Iraq is what can be traced in the archeology of crumbling Jewish Quarters in Iraqi cities.[46] In the face of this fact, the argument that the best location for the Archive is its motherland loses some power. After a mass exodus in 1950, and further decline through the remainder of the twentieth century, there remain, at most, three aged Iraqi Jews living as unobtrusively as possible in one small sector of Baghdad.[47] Due to intense antisemitism from the populace and

Over Iraqi Records and Archives, 59 Cath. U. L. Rev. 1001, 1049–50 (2010).

40 Lauren Baker, Note, *Controlling the Market: An Analysis of the 1970 UNESCO Rule on Acquisition and the Market for Unprovenanced Antiquities*, 52 Stan. J. Int'l L. 321, 332 (2016).

41 *Id.* at 333.

42 *Id.* at 332.

43 *See* discussion *infra* Sections I.C., II.A. (exploring how laws like FSIA and IFSA prioritize the exchange and display of cultural property over repatriation claims).

44 *E.g.*, *Will Iraqi Jewish Heritage Stay in US?*, *supra* note 34.

45 In a similar example, Western countries have recently begun repatriating Benin Bronzes looted from Nigeria. Germany stated that the return of their collection was done to "address[] Germany's colonial past." Press Release, Fed. Foreign Off. of Germany, Statement on the Handling of the Benin Bronzes in German Museums and Institutions (Apr. 30, 2021), https://www.auswaertiges-amt.de/en/newsroom/news/benin-bronze/2456788.

46 *See, e.g.*, Judit Neurink, *Jewish Heritage Survived 'Islamic State' in Iraq*, Deutsche Welle (Apr. 14, 2019), https://www.dw.com/en/jewish-heritage-survived-islamic-state-in-iraq/a-48296515.

47 Lyn Julius, *Jews Vanish from Iraq, but Still Have No Closure*, Jewish News Syndicate (Mar. 21, 2021), https://www.jns.org/opinion/jews-vanish-from-iraq-but-still-have-no-closure/; Stephen Farrell, *Baghdad Jews Have Become a Fearful Few*, N.Y. Times (June 1, 2008), https://www.nytimes.com/2008/06/01/world/middleeast/01babylon.html; *cf.* U.S. Dep't of State, 2019 Report on International Religious Freedom:

the government, the flow of Jews has only gone one way—out. If there are any Jews left in Iraq, they struggle to even keep their personal Jewish observation and tradition alive.[48] The Archive, if it were permanently housed in Iraq, would be stewarded by foreigners, not to mention foreigners whose predecessors caused the separation of the property from the peoples to whom it rightfully belonged.

In an Iraq nearly devoid of Jews, cultural nationalism might mean repatriation elsewhere, in a current location of the Iraqi Jewish diaspora. That location is entirely unclear. The U.S. currently has physical possession of the Archive, but many more Iraqi Jews live in Israel. There are 600,000 Jews of Iraqi descent in Israel, and an estimated 15,000 in the U.S.[49] If the prevailing argument is that the Archive should rest where its people reside, then Israel appears to be the strongest contender. However, Israel is not involved in the current U.S.-Iraq agreement, and the enmity between Israel and Iraq is so deep that reaching an agreement on this issue seems unlikely.[50] This thorny situation displays the difficulty with a nationalist theory of cultural heritage.

Treating the materials as an archive allows the discussion to skirt the confusion of nationalism by relying on an internationalist theory. Internationalism would argue that the Archive should go wherever it would be best accessed.[51] Some have suggested that the Babylonian Jewry Heritage Center outside of Tel Aviv is a fitting spot.[52] Internationalists also argue that the instability and constant violence in Iraq makes it an unsafe place to keep

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IRAQ 4 (2019) https://www.state.gov/wp-content/uploads/2020/06/IRAQ-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf. However, there are estimated to be 400 Jewish families in the Iraqi Kurdistan Region, which exists in Iraq but is autonomous from the Iraqi government. Qassim Khidir, *In Erbil, Iraq's Few Remaining Jews Cling to a Fading Heritage*, TIMES ISR. (Sept. 7, 2020), https://www.timesofisrael.com/in-erbil-iraqs-few-remaining-jews-cling-to-a-fading-heritage/.

48 Farrell, *supra* note 47.

49 Maher Chmaytelli et al., *With Jews Largely Gone from Iraq, Memories Survive in Israel*, REUTERS (Apr. 18, 2018), https://www.reuters.com/article/us-israel-independence-iraq-jews/with-jews-largely-gone-from-iraq-memories-survive-in-israel-idUSKBN1HP1ID; Maurice Shohet, *Iraqi Jews in the USA*, IRAQI JEWS (Mar. 30, 1998), http://www.iraqijews.org/usa.html#statistics.

50 *Iraq vs. Israel*, PEACE RSCH. CTR. PRAGUE, https://www.prcprague.cz/fcdataset/iraq-israel (last visited June 14, 2021); Ariel Kahana, *US Lawmakers Push Trump to Keep Iraqi Jewish Archive in America*, ISR. HAYOM (Sept. 3, 2018), https://www.israelhayom.com/2018/09/03/us-lawmakers-push-trump-to-keep-iraqi-jewish-archive-in-america/.

51 *E.g.*, Cox, *supra* note 39, at 1051.

52 Montgomery, *supra* note 3, at 183–84; *About Us*, BABYLONIAN JEWRY HERITAGE CTR., https://www.bjhcenglish.com/about-us (last visited Sept. 21, 2021); *cf.* Fordham, *supra* note 4.

the Archive.[53] However, this argument is somewhat fraught because similar arguments have long been employed to keep countries from reclaiming their cultural heritage; Western museums protest that countries of origin lack the capacity to safely maintain collections.[54]

The situation features a web of potentialities and consequences that must be addressed holistically and collaboratively. To begin, the nationalist-internationalist discourse does not completely fit the framework of the stakeholders, thus making it harder to understand who might be right or wrong. Both sides are also tainted by ethics issues: colonialist, patronizing attitudes dog the internationalists and a bloody and continuing history of cultural cleansing plague the nationalists.[55] A responsive solution must take in these complexities through a restorative justice praxis.

This Note urges that the issue be resolved through restorative justice. Restorative justice is a framework for dealing with conflicts outside of the traditional justice system. Rather than solely focusing on what a perpetrator's punishment should be, it considers how to repair a harm.[56] This focus is not centered on the victim alone.[57] While restorative justice is

53 Westall & Saul, *supra* note 35 ("Nothing is safe, no shrine or holy place let alone a site where Jewish artifacts are stored. There is a complete breakdown in safety and security in Iraq now.") (quoting Cynthia Kaplan Shamash, World Organization of Jews from Iraq); *see also* Fordham, *supra* note 4.

54 *See* Alex Marshall, *A New Museum to Bring the Benin Bronzes Home*, N.Y. Times (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/arts/design/david-adjaye-benin-bronzes-museum.html. The Edo Museum of West African Art is poised to provide a home for the Benin Bronzes looted from Nigeria in 1897. *Id.* One of the goals of this museum is to create infrastructure for display by home countries. *Id.* The designer, David Adjaye, has said that it is the job of the Western museums to support the creation of this infrastructure to foster repatriation. *Id.*

55 Laura C. Mallonee, *A Patronizing Argument Against Cultural Repatriation*, Hyperallergic (Apr. 20, 2015), https://hyperallergic.com/198798/a-patronizing-argument-against-cultural-repatriation/. In the case of Nazi-looted art, Germany has at times argued that the pieces should remain under German ownership because the sales were not coerced. *See e.g.*, Spencer S. Hsu, *Germany to Appeal First Ruling Allowing Nazi-Looted Art Claim Against it in U.S. Court*, Wash. Post (Apr. 19, 2017), https://www.washingtonpost.com/local/public-safety/germany-to-appeal-first-ruling-allowing-nazi-looted-art-claim-against-it-in-us-court/2017/04/14/478df4ae-2065-11e7-be2a-3a1fb24d4671_story.html; discussion *infra* Section II.A. (exploring the dispute over the Guelph Treasure recently litigated in *Fed. Republic of Ger. v. Philipp*, 141 S. Ct. 703 (2021)).

56 David B. Wilson et al., Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis 7 (2017), https://www.ojp.gov/pdffiles1/ojjdp/grants/250872.pdf.

57 *Lesson 1: What Is Restorative Justice?*: *Inclusion*, Ctr. for Just. & Reconciliation, http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/#sthash.ab6n3AcK.dpbs (last visited June 14, 2021).

difficult to define, Tony Marshall provides a good description: "[a] process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future."[58] Stakeholders—victims, perpetrators, and all those who are invested in the community implicated—must become involved in repairing the harm done.[59] The work of restorative justice seeks not only to right a current wrong but to cast a wider net: to repair relationships and prevent future harm.[60]

This Note situates the dispute over the Archive in historical context. Part I sketches the history of Iraqi Jews, the U.S.'s recovery of the Archive, and related legislation and litigation. Part II then considers what "return" might look like and how stakeholders might bring it about, first proposing a legal path that the dispute could take; then engaging with alternative resolutions, and recommending a shared compromise, the practice of which could repair past harm and serve as an example for future repatriation efforts.

I. HISTORICAL BACKGROUND

> "O sons of Zion dwelling in Babylonia, flee."
> *- Iraqi Jewish leadership proclamation, April 8, 1950.*[61]

Although Jews have lived in Iraq for over two thousand years, there may never be a Jewish community in Iraq again. The vast majority of a population of 180,000 at its height, emigrated from Iraq under intense antisemitism in the second half of the twentieth century.[62] As part of this exodus, the cultural heritage—not to mention material wealth—of the Iraqi Jews was expropriated. The Jewish Archive is comprised of materials that the government acquired through this expulsion and expropriation. The rescue of the Archive is also the story of the imperilment of the Archive, beginning with the flooding of its basement, and continuing through its misclassification both as an archive and as Iraqi government property. For nearly twenty years, Iraqi Jews and their allies have called for the Archive's repatriation. It is difficult to repair the harm done to the Iraqi Jewish people;

58 Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 359 (2005).

59 Ted Wachtel, *Defining Restorative*, INT'L INST. FOR RESTORATIVE PRACS. 3–4 (2016), https://www.iirp.edu/images/pdf/Defining-Restorative_Nov-2016.pdf.

60 *See id.* at 4.

61 ESTHER MEIR-GLITZENSTEIN, ZIONISM IN AN ARAB COUNTRY: JEWS IN IRAQ IN THE 1940S 202 (2004).

62 ORIT BASHKIN, NEW BABYLONIANS: A HISTORY OF JEWS IN MODERN IRAQ 22 (2012).

however, compromising and collaborating to attempt such restoration through the return of the Archive is an important act to further justice and remedy past wrongs.

A. *History of Jews in Iraq*

Jews have been in Iraq longer than in any other geographical area outside of Israel. Jewish lineage in the area that is now Iraq can be traced back to sixth century BCE, making it the oldest settlement of Jews outside of what is now Israel.[63] The Biblical history traces the "Babylonian captivity," during which King Nebuchadnezzar II of Babylon besieged Jerusalem and took many Jews captive, in the sixth century BCE.[64] Archeological findings confirm the presence of Jews in Babylon, or modern Iraq, at this time.[65] Jews remained a notable minority in Iraq for 2,300 years. In the nineteenth century, Jews grew from three to thirty-five percent of Baghdad's population.[66] This growth continued into the twentieth century: in 1919, there were a recorded 87,488 Jews, and by 1949 there were 180,000.[67] But the twentieth century brought violence as well as growth. The Iraqi state and Arab nationalism emerged, and as a result, Jews faced extreme discrimination.[68] In the 1930s, an Iraqi government inspired by German Nazis discriminated against their Jewish populace, including discharging them from their jobs.[69] In 1941, Arab mobs raped and murdered Baghdadi Jews and looted their homes in a pogrom known as the *Farhoud*.[70] By the late 1940s, Jews were facing ever-increasing violence.[71] Israel had just been formed, but emigration was forbidden.[72] Despite this prohibition, many Iraqi Jews clandestinely fled, as

63 Adhid Miri, *The Jewish Community of Iraq- History, Influence, and Memories*, Chaldean News (May 28, 2021), https://www.chaldeannews.com/features-1/2021/5/26/the-jewish-community-of-iraq-history-influence-and-memories.

64 *Jeremiah* 52:28–30.

65 Luke Baker, *Ancient Tablets Reveal Life of Jews in Nebuchadnezzar's Babylon*, Reuters (Feb. 3, 2015), https://www.reuters.com/article/us-israel-archaeology-babylon-idUSKBN0L71EK20150203.

66 Bashkin, *supra* note 62.

67 *Id.* at 22.

68 Shmuel Moreh, *Introduction* to Iraq's Last Jews: Stories of Daily Life, Upheaval, and Escape from Modern Babylon 1, 7 (Tamar Morad et al. eds., 2008); Dana Ledger, Note, *Remembrance of Things Past: The Iraqi Jewish Archive and the Legacy of the Iraqi Jewish Community*, 37 Geo. Wash. Int'l L. Rev. 795, 807 (2005).

69 Montgomery, *supra* note 3, at 187.

70 Moreh, *supra* note 68, at 6.

71 *Id.* at 7.

72 Ledger, *supra* note 68, at 809–10.

persecution increased at home.[73]

By 1949, the Iraqi government was making concerted efforts to rid the country of the Jewish population. They proposed a population transfer: 100,000 Iraqi Jews for the same number of Palestinian Arab refugees.[74] This proposal went nowhere.[75] Indeed, the government had no intention of simply pushing the Jews out—expulsion was also a political threat and a means of acquiring Jewish assets.[76] The government cracked down on illegal emigration at the same time as it increased its antisemitic actions, including prosecution for Zionism.[77] A short-lived change in law reduced the punishment for crossing the border into Iran, prompting a mass outflow of Jews and their wealth.[78]

In response, the Iraqi government passed a bill in 1950 allowing Jews to emigrate within one year, so long as they renounced their Iraqi citizenship.[79] The government did not expect many Jews to take the opportunity to leave, and at first many were indeed hesitant, because it was unclear whether they could retain ownership of their property in Iraq.[80] Nonetheless, Jews from around the country convened in Baghdad, through expulsion or voluntarily, as they waited for transportation out of Iraq.[81] Living conditions deteriorated as the number of would-be emigrees swelled and waiting continued.[82] During this time, antisemitic bombers targeted and killed Jews in Baghdad, increasing the urgency of the emigrants.[83]

As the Denaturalization Act of 1950 expired in 1951, Iraq extended the emigration period, adding a new condition: Jews had to leave nearly all their assets behind.[84] Even if they liquidated assets, the Act only allowed Jews to bring the equivalent of $150—denominated in 2021 USD—and 66 pounds of luggage upon their departure.[85] The economic motivation

73 MEIR-GLITZENSTEIN, *supra* note 61, at 180–81.

74 *Id.* at 163.

75 *Id.*

76 Ledger, *supra* note 68, at 810–11; Yehouda Shenhav, *Arab Jews, Population Exchange, and the Palestinian Right of Return*, *in* EXILE AND RETURN: PREDICAMENTS OF PALESTINIANS AND JEWS 225, 228–35 (Ann M. Lesch & Ian S. Lustick eds., 2005).

77 Montgomery, *supra* note 3, at 187.

78 *Id.* at 195.

79 *Id.*

80 Mordechai Ben Porat, Firsthand Recollection, *in* IRAQ'S LAST JEWS: STORIES OF DAILY LIFE, UPHEAVAL, AND ESCAPE FROM MODERN BABYLON, *supra* note 68, at 110, 115; Ledger, *supra* note 68, at 811.

81 MEIR-GLITZENSTEIN, *supra* note 61, at 203–04.

82 *Id.* at 204.

83 *Id.* at 201.

84 *Id.* at 206.

85 *Immigration to Israel: Operation Ezra & Nehemia - the Airlift of Iraqi Jews*, JEWISH VIRTUAL

behind this requirement is clear: the Iraqi government would profit off its discrimination by taking the property of the Jews it drove out.[86] Additionally, the Prime Minister of Iraq hoped that offloading tens of thousands of newly-poor Jews into Israel would weaken Israel's economic status.[87]

Many more Iraqi Jews responded to the new law than expected.[88] Understanding that no better deal would be made to protect their property and legal status, over 100,000 Jews registered to emigrate.[89] However, the registrants were processed slowly. They had left jobs, sold homes, and relinquished citizenship, but Iraq had not expected so many Jews to sign up and failed to create a sufficient system for physically getting the registrants to Israel.[90] Israel, too, held up the process because it was unable to handle the rate of refugee absorption from Iraq and many other countries, and had imposed a quota of accepting only 3,000 Iraqi Jews per month.[91] Israel was, at the same time, taking in Eastern European Jews displaced in the aftermath of the Holocaust, and therefore lacked the infrastructure to shelter the over-100,000 people coming from Iraq.[92] However, Israel ultimately conceded to an airlift. With a U.S.-based airline, the Israeli government launched an emergency rescue operation.[93] It was codenamed Operation Ezra and Nechemiah, named for the biblical figures who led the Jews out of Babylon and back to Judea after their first exile.[94] From 1951 to 1952, the Israeli government airlifted 120,000 Jews out of Iraq and into Israel.[95] These Jews

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Libr., https://www.jewishvirtuallibrary.org/operation-ezra-and-nehemia-the-airlift-of-iraqi-jews (last visited Apr. 25, 2021). The 1951 allowance was five dinars, which would have converted to $14 USD in 1951. In 2021, the value is approximately $150 USD. *See* Letter from Walter Eytan, Dir. Gen., Ministry of Foreign Affs. of Isr., to the Chairman of the Conciliation Comm'n (Mar. 19, 1951) (on file with the United Nations Conciliation Commission for Palestine), https://www.un.org/unispal/document/auto-insert-211728/. By contrast, in 1950, emigrants were allowed to bring fifty dinars with them. That converts to $140 USD in 1951, or approximately $1,500 USD in 2021. Prior to 1951, Jews were also allowed to retain and use their remaining assets within the borders of Iraq. *Id.*

86 Ledger, *supra* note 68, at 811.

87 Moshe Gat, The Jewish Exodus from Iraq, 1948–1951, at 119 (2013) (ebook).

88 Ledger, *supra* note 68, at 811.

89 Meir-Glitzenstein, *supra* note 61, at 198.

90 *Id.* at 198.

91 *Id.* at 205.

92 Ben Porat, *supra* note 80, at 115; Shlomo Hillel, Firsthand Recollection, *in* Iraq's Last Jews: Stories of Daily Life, Upheaval, and Escape from Modern Babylon, *supra* note 68, at 80, 92; *Immigration to Israel: Operation Ezra & Nehemia - the Airlift of Iraqi Jews*, *supra* note 85.

93 Hillel, *supra* note 92, at 92–93.

94 *Id.* at 94.

95 *Immigration to Israel: Operation Ezra & Nehemia - the Airlift of Iraqi Jews*, *supra* note 85.

left nearly all their possessions behind.[96]

Jews faced continued persecution in Iraq after this initial exodus. The roughly 6,000 Jews who remained in Iraq, concentrated in Baghdad, entered a short period of peace and reprieve until the late sixties.[97] The government was somewhat permissive, and Jewish public presence was greatly reduced.[98] However, the Ba'th party (led in reality, if not in name, by Saddam Hussein) came to power in 1968, and immediately cracked down on the Jewish population in Baghdad.[99] In retaliation for Israel's victory in 1967 in the Six-Day War, the Iraq government arrested and publicly hanged Jews, declaring a national holiday.[100] Jews were required to wear yellow armbands, they were fired from their jobs, their travel was restricted, their bank accounts frozen, and their phone lines disconnected.[101] This new wave of discrimination prompted a final mass emigration. Jews were prohibited from leaving the country until 1972, although many fled with the help of the Kurdish Peshmurga and Israeli Mossad.[102] By the mid-1970's, there were only a few hundred Jews left in Iraq.[103]

By 2003, when the U.S. invaded and brought down the Ba'th party, only a few dozen Jews remained, all elderly and grouped in one Baghdad neighborhood.[104] The few who continue to live on know that they are the last members in Iraq of a people that existed there for thousands of years.[105] All other Iraqi Jews are diasporic, and many have assimilated into new cultures, often leaving behind their cultural heritage.[106] The final stage of genocide is to deny that it happened and to erase all traces of its presence.[107] The Iraqi Jewish Archive offers a hope of reviving the memories and attesting to the presence of a once thriving culture, which even violence and persecution could not completely extinguish.

96 *Id.*; Moreh, *supra* note 68.
97 Moreh, *supra* note 68, at 8.
98 *Id.* at 7–8; Ledger, *supra* note 68, at 812–13.
99 Moreh, *supra* note 68, at 8.
100 *Id.*
101 *Id.*; Montgomery, *supra* note 3, at 188.
102 Moreh, *supra* note 68, at 8.
103 *Id.*
104 *See supra* note 47.
105 James Glanz & Irit Pazner Garshowitz, *In Israel, Iraqi Jews Reflect on Baghdad Heritage*, N.Y. TIMES (Apr. 27, 2016), https://www.nytimes.com/2016/04/28/world/middleeast/in-israel-iraqi-jews-reflect-onbaghdad-heritage.html.
106 *Id.*
107 Gregory H. Stanton, *The Eight Stages of Genocide*, GENOCIDE WATCH (1998), https://www.keene.edu/academics/ah/cchgs/resources/educational-handouts/the-eight-stages-of-genocide/download/.

B. *History of the Archive*

The 'Archive,' as it is often referred to, is a disordered collection of far-ranging materials, gathered without intent to display or study, but rather to oppress, humiliate, and erase. It is not what a layperson would generally think an archive is—it was not carefully collected and grouped to document a people. The Iraqi Jewish Archive was collected over the course of the latter half of the twentieth century, but it contains not only twentieth century materials, but also family heirlooms and treasured valuables, including antiquities that can be dated as far back as the sixteenth century.[108] The Archive likely began to form as Jews who departed Iraq during and prior to 1951 entrusted their property to friends, families, and synagogues.[109] Because they were stripped of their property when they left, this reassignment kept their private keepsakes and valuables from reaching government hands. As Jews from around Iraq came to Baghdad to depart through Operation Ezra and Nechemiah, their property likely ended up in Baghdadi synagogues. In the 1960s and 1970s, most of the remaining Jews fled clandestinely and without baggage to avoid suspicion, and it is possible that their property eventually made its way to safekeeping in synagogues and cultural centers. As the population dwindled, so did the synagogues, further concentrating the cache.[110] There are accounts that in 1969, Saddam Hussein's secret police collected the Jewish community's cultural property, and that again in 1984, they went to the single remaining synagogue in Baghdad and took everything else that was collected there.[111] The Ba'th party likely also increased surveillance and the systematic harvesting of documents that now make up the Archive.[112] The history of the collection of the Archive makes clear that the material was taken without the consent of the original owners, and maintained for the purpose of continued oppression of the Iraqi Jewish community.

The scope of the Archive is far ranging, encompassing two categories. The first category is administrative, containing school materials from the

108 *Notes on the Scope of the Iraqi Jewish Archive (IJA)*, *supra* note 1; *Search the Collection*, Preserving Iraqi Jewish Archive, https://ijarchive.org/search (last visited Aug. 12, 2021).

109 Michael R. Fischbach, Jewish Property Claims Against Arab Countries 56, 107 (2008).

110 *Id.* at 223–24.

111 Sandi Fox, *Who Owns the Jewish Treasures that Were Hidden in Saddam Hussein's Basement?*, PBS News Hour (Apr. 29, 2014), https://www.pbs.org/newshour/world/stolen-treasures-iraqi-jewish-community; Jerusalem Center for Public Affairs, *Documentary: The Discovery and Rescue of Iraqi Jews' Patrimony in Baghdad. Will it Now Be Lost?*, YouTube, at 5:30 (Sept. 28, 2017), https://www.youtube.com/watch?v=lJq0XNqBMnM.

112 Ledger, *supra* note 68, at 828–29.

1920s-1975, including class rosters, exam scores, and invoices; community records from the 1910s-1960s, including correspondence between rabbis and community chairs, business ledgers, property leases, and marriage certificates; Jewish hospital records from the 1920s-1960s, reports on the legal issues surrounding Iraqi citizenship for Jews from the 1940s-1960s, the time in which the greatest number of Jews emigrated from Iraq; British colonial correspondence from the 1920s-1930s; bound limited-published dissertations, largely on the Palestinian-Israeli conflict from the 1980s-2000s; Arabic newspaper clippings focused on Jewish issues from the 1950s-1960s and 1990s; and Iraqi government material that likely got incidentally added in the rescue mission.[113] The second category in the archive is literary: prayer books, Haggadot, Talmuds and other rabbinic literature, Tanakhs, school-related textbooks, telephone books, and an assorted miscellany.[114] Perhaps the most well-known book in the Archive is a Ketuvim printed in 1548 in Venice.[115] Additionally of note, is a Babylonian Talmud from 1793, and a Zohar from 1815.[116]

Some of the contents of the Archive have been the subject of scholarship as well as personal connection. Scholars also discovered hand-written notes by the author of an important piece of rabbinical scholarship, the *Ben Ish Hai*, which have since been published.[117] Scholars hope to utilize other marginalia and notes found in the pages of recovered Archive texts.[118] An expert in Arab affairs has compiled a list of Iraqi-Jewish surnames, and consulted records in the Archive as one of his sources.[119] Iraqi Jewish families

113 *Notes on the Scope of the Iraqi Jewish Archive (IJA)*, *supra* note 1.

114 *Id.* The Haggadah (pl. Haggadot) is the text that is read during the Passover Seder, recounting the Exodus of the Jews out of Egypt. Jamie Rubin, *The Haggadah*, My Jewish Learning, https://www.myjewishlearning.com/article/the-haggadah/ (accessed Dec. 17, 2021). The Talmud is the central rabbinic Jewish text for theology and religious law. *What Is the Talmud?*, My Jewish Learning, https://www.myjewishlearning.com/article/talmud-101/ (accessed Dec. 17, 2021). The Tanakh is the canonical collection of Jewish scriptures. It has three sections: the Torah, Nevi'im, and Ketuvim. *Hebrew Bible: Torah, Prophets and Writings*, My Jewish Learning, https://www.myjewishlearning.com/article/hebrew-bible/, (accessed Dec. 17, 2021).

115 *See Ketuvim*, *supra* note 2 (describing the Ketuvim as the final section of the Tanakh, also known as the Hebrew Bible).

116 *Notes on the Scope of the Iraqi Jewish Archive (IJA)*, *supra* note 1. The Zohar is a foundational Kabbalistic text of scholarship on mystical aspects of Judaism. Hila Ratzabi, *The Zohar*, My Jewish Learning, https://www.myjewishlearning.com/article/the-zohar/ (accessed Dec. 17, 2021).

117 Saving the Iraqi Jewish Archives: A Journey of Identity (D-Squared Media NYC 2020).

118 *Id.*

119 Benjamin Weinthal, *Ex-Israel Envoy Publishes New List of Baghdadi Jewry Surnames*, Jerusalem Post (Aug. 31, 2020), https://www.jpost.com/middle-east/ex-israel-envoy-

have recognized their pictures on display from the Archive, and have spoken about how much of an impact the Archive has made in allowing them to show their families parts of their lives had to be left behind, undocumented.[120]

Just as the deal to bring the Archive to the U.S. and to recognize its owner as Iraq was ill-considered, so was its classification as an archive. Instead, the collection should have been recognized as looted cultural property and the U.S. should have established a repatriation campaign. However, the Archive is not unsuited for archive status because it is disorganized, but rather because of the significance of its contents. The Iraqi Jewish Archive, as it has been dubbed, might benefit from being split up, because it holds great personal value to a culture. Archives, on the other hand, are kept together because they hold educational value.[121] While many archives are the product of duress, looting, and malicious intent, and many are also the product of unintentional grouping, the Archive's emotional value sets it apart. Archivists choose to keep materials collected together despite any miscellany because the collection as a whole can provide useful context and information.[122] Thus, there are two closely connected core principles of archival science: provenance and original order.[123] Provenance traces the history of the ownership of the materials and of the collection to understand the context of the contents.[124] Original order keeps the order and contents of the Archive as they were originally collected.[125] Archivists view collections comprehensively.[126] The materials that make up an archive are not understood as individual items, but as a web of relationships that provide information about the people and groups that used and created them.[127] These principles aid the researcher, but in this case, they pose a significant bar to repatriation efforts.

Recategorizing the Archive as cultural heritage affects the identification of the rightful owners. Because the collection was recognized as the Iraqi government's archive, the U.S. drew up an agreement with Iraq to rehabilitate and return it. But many who currently seek the Archive's

publishes-new-list-of-baghdadi-jewry-surnames-640494.

120 Saving the Iraqi Jewish Archives: A Journey of Identity, *supra* note 117.

121 The Nat'l Archives, Archive Principles and Practice: An Introduction to Archives for Non-Archivists 8 (2016), https://www.nationalarchives.gov.uk/documents/archives/archive-principles-and-practice-an-introduction-to-archives-for-non-archivists.pdf.

122 *Id.* at 7–8.

123 *Id.*

124 *Id.* at 7.

125 *Id.* at 8.

126 *Id.*

127 *Id.*

repatriation view the contents of the Iraqi Jewish Archive as cultural heritage, and not necessarily archival material.[128] They argue that the rightful owners of the Archive's contents are not the Iraqi government, but the individuals and their heirs who were forced to relinquish their possessions.[129] Additionally, the materials that cannot be traced to an individual are viewed as communal cultural property of the Iraqi Jewish diaspora, and not of Iraq.[130] As Kwame Anthony Appiah, noted philosopher and cultural theorist, put it, "cultural property [should] be regarded as the property of its culture."[131] To minimize complication, this Note defines cultural property and cultural heritage in the context of the Archive as "all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific, or technical value and interest."[132] These religious texts, community records, personal papers, and other materials are the "expression and testimony" not only of Iraqi Jews, but of their persecution.

The story of how the U.S. Army rescued the Archive from the flooded basement of the Mukhabarat in 2003 displays one more facet of that historical trauma. There were many things that went wrong in the recovery of the Archive, which is not unexpected in the context of war and the lack of trained archeological specialists. U.S. troops, searching for weapons of mass destruction, bombed the Mukhabarat building, which held the Iraqi military intelligence organization.[133] One bomb did not explode—if it had, the Archive would not have survived.[134] The bombing left the building on shaky foundations, with the plumbing burst and the basement flooded.[135] A Mukhabarat official had tipped off the Iraqi opposition leader, Ahmed Chalabi, that the basement held troves of information collected on Israel and on Iraqi Jews.[136] There was even, Chalabi was told, a very rare seventh

128 *See, e.g.*, Basri & Dangoor, *supra* note 4.

129 *Id.*

130 *Id.* ("The Iraqi Jewish Archive should return to the private and communal Iraqi Jewish owners . . . .").

131 KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 118 (Henry Louis Gates Jr. ed., 2006).

132 U.N. Educational, Scientific and Cultural Organization Res. vol. 1, annex I, at 11 (Nov. 28, 1978), http://portal.unesco.org/en/ev.php-URL_ID=13137&URL_DO=DO_TOPIC&URL_SECTION=201.html (providing "Recommendation for the Protection of Movable Cultural Property").

133 Montgomery, *supra* note 3, at 177.

134 Miriam Kresh, *The Soldier in the Mukhabarat: Saddam Hussein's Trove of Jewish Artifacts*, JERUSALEM POST (Feb. 21, 2016), https://www.jpost.com/metro/the-soldier-in-the-mukhabarat-443108.

135 *Id.*

136 Fox, *supra* note 111.

century Talmud.[137] Chalabi took the information to Harold Rhode, the U.S. liaison to the opposition, and an Orthodox Jew.[138] Rhode and a small team of soldiers from the Mobile Exploitation Team Alpha group, specialists in weapons of mass destruction, ventured into the flooded basement to search for the Talmud.[139] Up to their waists in sewage, with dead animals floating past, they began to take out the materials they found.[140] The interpreter on the mission, Tewfik Boulenouar, describes seeing menorahs.[141] Although Boulenouar states that the team found the Talmud they had come for, no other source catalogs it among the Archive.[142] In fact, it seems that some of the contents of the basement were looted or intentionally destroyed in the two days between discovery and continued excavation, as the team waited for water pumps to begin emptying the basement.[143] Iraqi workers and the small team of soldiers, trained in dealing with extremely dangerous weapons, but not with extremely degraded historical material, pulled sodden books from the basement for days.[144] Eventually, the U.S. government got involved and arranged to have the water pumped from the basement to aid the recovery, which continued for six weeks.[145]

137 Montgomery, *supra* note 3, at 177.

138 *Id.*

139 *Id.*; Kresh, *supra* note 134.

140 Kresh, *supra* note 134.

141 *Id.*

142 *Id.*; *see also* Edward Rothstein, *The Remnants of a Culture's Heart and Soul*, N.Y. Times (Nov. 10, 2013), https://www.nytimes.com/2013/11/11/arts/design/iraqi-jewish-documents-at-the-national-archives.html. Although the article refers to a Torah scroll and most other accounts refer to a Talmud, it is likely that both refer to the same item which was misclassified in one telling or the other. This Note refers to the missing item as a Talmud.

143 Judith Miller, *Aftereffects: Missing Documents; G.I.'s Search, Not Alone, in the Cellar of Secrets*, N.Y. Times (May 9, 2003), https://www.nytimes.com/2003/05/09/world/aftereffects-missing-documents-gi-s-search-not-alone-in-the-cellar-of-secrets.html. Judith Miller's accounts must be taken with a grain of salt, as she later was accused of fabricating and trumping up claims of weapons of mass destruction. *See From the Editors; The Times and Iraq*, N.Y. Times (May 26, 2004), https://www.nytimes.com/2004/05/26/world/from-the-editors-the-times-and-iraq.html (the original letter from the editors apologizing for the inaccuracy of articles authored by her). However, she was present as a journalist at the recovery of the Archive and provided one of the few firsthand accounts at the time of the find. Montgomery, *supra* note 3, at 177.

144 Miller, *supra* note 143; *Profile: Mobile Exploitation Team Alpha*, Hist. Commons, http://www.historycommons.org/entity.jsp?entity=mobile_exploitation_team_alpha__1 (last visited July 5, 2021). Very few accounts give a specific timeline of the recovery. As described between these two dispatches from the journalist accompanying MET Alpha, a day was spent on discovery and initial recovery. A couple days later, the team came back with water pumps to finish salvaging the basement. Miller, *supra* note 143.

145 Saving the Iraqi Jewish Archives: A Journey of Identity, *supra* note 117.

The sodden materials were laid out to dry in the hot Baghdad sun, but this only served to spur mold growth that further deteriorated the papers until they resembled a pile of oatmeal.[146] Days passed before Rhode was able to get refrigerated trailers and electricity to keep them on, which were needed to slow the spread of the mold.[147] The refrigeration was a product of U.S. interest, as well. Rhode enlisted the aid of the Lehman Brothers investment banker Harvey Krueger, and was also able to pass along a plea that reached the ears of Donald Rumsfeld, then Secretary of Defense, as well as Dick Cheney, then Vice President.[148] This attention is what summoned NARA conservators to Baghdad for an assessment and recommendation that the Archive be treated in America.[149] The cost, estimated at between $1.5 and 3 million, would have to be covered largely by private sources because NARA did not have a mandate to cover the cost of conserving non-U.S. government property.[150] Nevertheless, the U.S. made an agreement with Iraq that recognized Iraqi ownership and promised to restore and then return the materials, and the Archive was airlifted out of Iraq.[151]

C. *The Archive's U.S. Visa*

The Archive's journey to the U.S. was facilitated by agreements between the U.S. and Iraq, and by novel use of a U.S. law, the Immunity From Seizure Act (IFSA).[152] Enacted in 1965, IFSA was designed to allow objects of cultural significance to be temporarily exhibited in the U.S. by granting the objects immunity from suit.[153] Its protection could assure lending nations, even ones that were on unstable or unfriendly terms with the U.S., that their items would not be seized by U.S. courts.[154] In 2003, SBAH

146 Talya Zax, *Exclusive: In Exile, Iraqi Jews Are Desperate to Reclaim Their Artifacts — but So Is Iraq*, FORWARD (July 16, 2018), https://forward.com/culture/405607/iraqi-jews-in-exile-claim-iraqi-jewish-archive-so-does-iraq/; Montgomery, *supra* note 3, at 178.

147 Jerusalem Center for Public Affairs, *supra* note 111, at 7:00; Montgomery, *supra* note 3, at 178.

148 Montgomery, *supra* note 3, at 177–78.

149 *Id.* at 178.

150 *Id.* at 178, 182.

151 *Id.* at 178.

152 *See* NARA-CPA MOU, *supra* note 5, at 4; Immunity from Seizure Under Judicial Process of Cultural Objects Imported for Temporary Exhibition or Display Act (IFSA), 22 U.S.C. § 2459(a).

153 Montgomery, *supra* note 3, at 179.

154 Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 310 (D.D.C. 2005) ("Section 2459 was passed to address this 'threat to cultural exchange' and specifically to address situations in which '[a]s a condition to the loan, [a foreign nation] insisted on a grant of immunity from seizure as protection against [its] former . . . citizens who had valid

acknowledged that the Archive could not be conserved in Iraq at the moment and should therefore be sent to the U.S. with the understanding that it be returned within two years.[155] This memorandum of understanding (MOU) with the Coalition Provisional Authority (CPA) (the U.S.-led transitional Iraqi government) is the basis on which all legal arguments against Iraq rest.[156] The CPA then formed an agreement with NARA that the Archive would be returned when restored or upon request, and described a plan for exhibition, thus allowing IFSA to take effect and provide immunity from seizure.[157] The actual U.S. exhibition of the Archive, which began in 2013, solidifies the Archive's protection by IFSA. Using IFSA, NARA was able to bring the Archive to the U.S., leaving Iraq confident that it would be protected from suit contesting ownership.

The 2003 CPA-NARA agreement allowed the original transfer of the Archive to U.S. soil, but it had only anticipated a stewardship of two years, and further agreements had to be made to enable the Archive to remain abroad.[158] The restoration efforts continued on, and in 2011, the U.S. Department of State formed an Interagency Agreement with NARA.[159] NARA would finish conservation, digitization, and exhibition within three years, at which point it would send the Archive back to Iraq.[160] The agreed date of return was extended in 2014 and again after 2018.[161] This continued lack of return may mean a near-infinite U.S. possession within a murky legal space. Perhaps the Archive will be forgotten and can quietly be returned, just as a separate Archive of Ba'th party records was returned in August 2020.[162] On the other hand, perhaps the patience of SBAH will run out at some point. The battle may even be taken to the courts. Alternately, an Iraqi

claims to the title of the works.'" (quoting a statement of interest filed by the U.S.)).

155 NARA-CPA MOU, *supra* note 5.

156 *See* Montgomery, *supra* note 3, at 180 (discussing how the U.S. used IFSA as basis for the MOU).

157 NARA-CPA MOU, *supra* note 5, at 2–4.

158 Confidential source, *supra* note 26.

159 Interagency Acquisition Agreement, *supra* note 12.

160 *Id.*

161 Josefin Dolsten, *Despite Protests, State Department Says It Will Return Trove of Jewish Artifacts to Iraq*, Jewish Telegraphic Agency (Sept. 8, 2017), https://www.jta.org/2017/09/08/politics/despite-protests-state-department-says-it-will-return-trove-of-jewish-artifacts-to-iraq?_ga=2.15181494.1060951520.1628299901-1043584871.1628299901. It was repeated and generally believed that after the 2014 extension, the Archive would be returned in 2018—however, there does not seem to have been a date set for return. *Id.* A confidential source reports that the agreement was extended at some point after 2018, and it is undisputed that the Archive still remains in U.S. custody. Confidential source, *supra* note 26.

162 Brill, *supra* note 33.

Jewish party may sue, although no one has yet challenged Iraqi ownership in U.S. court (some threatened to do so in the early years).[163] It remains to be seen whether there is a legal case to be made, but the only legal basis to bring suit is through IFSA.

The MOU and later agreements and extensions mean that the Archive remains in the U.S. under the agreement of Iraq, which maintains their claim of ownership. The MOU did not protect Iraq from private claims that Iraqi Jews might bring upon its arrival in the U.S. IFSA, however, does, and it is through legal challenge to IFSA that the struggle for ownership could be resolved.

II. RESOLUTION PATHS

"Have you murdered and also taken possession?"
- 1 Kings 21:19

"Divide the living child in two, and give half to the one and half to the other."
- 1 Kings 3:25

The traditional option to resolve the ownership dispute of the Archive would be through litigation. A lawsuit on the question of ownership, however, faces numerous hurdles. If plaintiffs challenge ownership of the Archive in court, they will have to find a way through Iraq's claim of sovereign immunity.[164] Previous suits for repatriation have successfully used an exception to immunity based on a claim of expropriation, but this exception has become ever more tenuous in recent years.[165] The litigation would be certain to drag on for many years, and the odds are not particularly in the plaintiffs' favor. After discussing the legal case, this Note argues for use of restorative justice and alternative dispute resolution as the more successful, equitable, and adaptive solution.

163 Naim Dangoor and Edwin Shuker are two claimants most willing to litigate. *See, e.g.*, Daniel Sugarman, *How I Became an Artefact: The Story of Iraq's Jewish Archive and Its Restoration*, JC (Jan. 4, 2019), https://www.thejc.com/news/features/how-i-became-an-artefact-the-story-of-iraq-s-jewish-archive-and-its-restoration-1.478080; Joel Millman, *Londoner Claims Ancient Title, a Lost Fortune for Iraqi Jews*, WALL ST. J. (June 30, 2003), https://www.wsj.com/articles/SB105692136915051400.

164 22 U.S.C. § 2459.

165 *See, e.g.*, Republic of Aus. v. Altmann, 541 U.S. 677, (2004) (applying the expropriation exception of the FSIA was applicable in an action to recover the Austrian *Portrait of Adele Bloch-Bauer* by Gustav Klimt where it was being displayed in the U.S.).

A. *The Case for Litigation*

The legal route to challenging ownership of the Archive is treacherous, but possible. Since the Archive is currently in the U.S. through a formal agreement with Iraq, U.S. citizens with a claim to the Archive can sue through the U.S. courts. Although international law prohibits expropriation of cultural property, and theoretically a claim could be brought through an international court of law, the U.S. legal system is also poised to handle this dispute. Statutes governing the U.S.'s stance on sovereign immunity, and the subject-matter jurisdiction that can be established by American-Iraqi Jewish plaintiffs, position the dispute within U.S. federal courts.[166] Through litigation, the question of who owns the Archive might be established in a court of law and the Archive physically turned over to Iraqi Jews. The lawsuit might never make it to trial, but the commencement of litigation might finally prompt action from Iraq, either in settlement negotiations, or a more general decision to turn over ownership. In order to sue for possession of the Archive, plaintiffs must make a claim for restitution under replevin—a legal remedy for stolen property—by proving title, or legal ownership.[167] Before plaintiffs can make that claim, which has its own difficulties, they must get around Iraq's defense of sovereign immunity.[168] Although IFSA provides sovereign immunity to the lending nation, a similar act, the Foreign Sovereign Immunities Act (FSIA), creates a very narrow exception to immunity, through which plaintiffs may bring suit.[169]

This case is not without precedent. The restitution of the Iraqi Jewish Archive would be built on the shoulders of restitution cases for Nazi-looted art. In fact, the very first restitution case of its kind won in the U.S. had a fact pattern that would likely be similar to a claim arising about the Archive. In *Menzel v. List*, the Menzels, facing persecution by the Nazis, had fled their home in Belgium and left behind a Marc Chagall painting, which the Nazis later took for "safekeeping."[170] The Menzels searched for it after the war,

166 *See* 22 U.S.C. § 2459; Foreign Sovereign Immunities Act (FSIA) of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1602–11); E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297, 1302–03 (10th Cir. 2001) ("Tribal sovereign immunity is a matter of subject matter jurisdiction . . . which may be challenged by a motion to dismiss under [Fed. R. Civ. P.] 12(b)(1) . . . .") (citations omitted).

167 William R. Ognibene, *Lost to the Ages: International Patrimony and the Problem Faced by Foreign States in Establishing Ownership of Looted Antiquities*, 84 Brooklyn L. Rev. 605, 608, 624–23 (2019).

168 Mark B. Feldman, *Cultural Property Litigation and the Foreign Sovereign Immunities Act of 1976*, 3 A.B.A. Section of Int'l L. Newsletter, No. 2 2011 at 9, 9.

169 28 U.S.C. § 1605.

170 Menzel v. List, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *appealed*, 279 N.Y.S.2d 608 (App. Div.

finally discovering it in 1962 in the collection of Albert List, who had bought it in good faith from the Perls Galleries.[171] Mrs. Menzel sued for replevin and won in 1966. The court held that the Menzels had not abandoned their property, because they had fled for their lives.[172] The opinion compared their relinquishment to a handover in a stickup.[173] The court also held that the statute of limitations had not run although over twenty years had passed since the theft—the statute of limitations only began tolling when, upon demand for return, the demand was denied.[174] Further, the court dismissed any claim to sovereign immunity, given that "the underlying transaction was the looting, plunder and pillage by the Nazis, which was of the very essence of evil."[175] These same defenses could likely be made in a suit to recover the Archive, and these same responses might well be used in reply.

Mrs. Menzel had to combat the defense of abandonment, which stems from the larger issue of title. Mrs. Menzel successfully established title by proving that she had not abandoned her property, but had been robbed of it.[176] Similarly, Iraqi Jews will have to prove that they did not abandon the contents of the now-Archive when they emigrated. Iraq claims ownership of the Archive, and unlike in *Menzel*, where the U.S. did not acknowledge Nazi title to the property, the U.S. acknowledged Iraq's ownership of the Archive in the NARA-CPA MOU.[177] However, the strength of the MOU's acknowledgement could reasonably be challenged. It was made under intense time pressure, given the Archive's deteriorating state. The U.S. government had not inventoried the contents, nor queried their provenance. Had it the time to complete that due diligence, it may not have as readily acknowledged title.

Further, Iraq's own claim to title is not bulletproof. Iraq would likely apply its Law No. 55 of 2002, the Antiquities and Heritage Law, which provides that the state owns all movable antiquities, including ancient manuscripts.[178] However, the Archive arguably does not fall under this

1967), *rev'd*, 246 N.E.2d 742 (N.Y. 1969). Subsequent appellate history concerned only the measure of damages awarded.

171 *Id.* at 807.

172 *Id.* at 810.

173 *Id.*

174 *Id.* at 809.

175 *Id.* at 820. This reasoning was later adapted in exceptions to sovereign immunity created by FSIA.

176 *Id.* at 810–11.

177 NARA-CPA MOU, *supra* note 5. Iraq's Prime Minister said, in 2014, "This is Iraqi legacy owned by all of the Iraqi people and belongs to all generations." Fox, *supra* note 111.

178 Antiquities and Heritage Law No. 55 of 2002, art. 17 (Iraq), https://en.unesco.org/sites/default/files/ir_law55200_engtno.pdf. Ancient means over 200 years old. *Id.*

umbrella, since most of its materials are modern.[179] The law is meant to protect antiquities that were excavated from Iraqi soil from looting and expropriation.[180] The antiquities in the Archive's collection—the Venetian Ketuvim, for example—are not the patrimony of Iraq. Nonetheless, Iraq can claim legal title for many of the materials through a series of laws that began with the Denaturalization Act of 1950, which stripped emigrating Jews of citizenship.[181] This law led to a law passed in 1951 that retroactively froze the emigrants' assets and empowered the government to take ownership.[182] Because this transfer of property made to the state by Iraqi Jews was coercively done in violation of international law, plaintiffs could theoretically challenge Iraq's claim to legal title in U.S. court.[183] However, so much time has passed since the Archive was recognized by the U.S. as Iraqi property that it would be quite difficult to establish alternate title.

If Iraqi Jews can establish title, they are then faced with a secondary issue of identifying the members of the class (or identifying the specific property of the individual claimant). Identifying who the original owners of the stolen materials are is exceedingly difficult. Few materials can be traced to their original owners, and many materials, such as records of addresses, birth certificates, and report cards, belonged to organizations rather than individuals. Recognizing an Iraqi Jewish claim to title of the Archive would likely require a community representative organization, such as Jews Indigenous to the Middle East and North Africa or World Organization of

art. 4.

179 These materials would likely be classified heritage materials, which must be registered with the state, but which can be privately owned. *Id.* art. 17.

180 *Id.* art. 1; *see id.* arts. 38–44 (listing penalties for looting and trafficking, including up to fifteen years in prison and execution).

181 Supplement to Ordinance Canceling Iraqi Nationality, Law No. 1 of 1950 (Iraq).

182 Law No. 5 of 1951 (Iraq) (also called "A law for the Supervision and Administration of the Property of Jews who have Forfeited Iraqi Nationality"); Law No. 12 of 1951 (Iraq). *See also* Letter from Walter Eytan, *supra* note 85; Edwin Black, *Jews in Islamic Countries: The Sudden End of Iraqi Jewry*, Jewish Virtual Libr., https://www.jewishvirtuallibrary.org/the-sudden-end-of-iraqi-jewry (last visited Aug. 19, 2021). The Denaturalization Act of 1950 was followed by the 1951 act that stripped emigrating Jews of their possessions as well as their citizenship. Black, *supra*. In 1968, in retaliation for Israel's victory in the Six Day War, Iraq passed an act that expropriated most of Jewish citizen's property and transferred it to government ownership. Carole Basri, *The Jewish Refugees from Arab Countries*, 26 Fordham Int'l L. J. 656 at 685-86 (2003).

183 *See 2009 Terezin Declaration on Holocaust Era Assets and Related Issues*, U.S. Dep't State (June 30, 2009), https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/ (clarifying that the Washington Conference Principles on Nazi-Confiscated Art applied to sales of property under duress); *see also Washington Conference Principles on Nazi-Confiscated Art*, U.S. Dep't State (Dec. 3, 1998), https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.

Jews from Iraq to claim ownership. That organization might then decide to find a home for the Archive, or to do the work of repatriation by tracing ownership of the materials, as possible.

But again, before the plaintiffs can get to the question of equitable distribution, they must first counter claims of immunity from the would-be defendant.[184] IFSA, which was used to bring the Archive to the U.S., seems to protect the Archive from forfeiture.[185] However, there are three arguments for why immunity should not be applied. Two challenge the applicability of IFSA; one locates an exception to IFSA through another law. Douglas Cox, a scholar of international legal protections for cultural property and captured documents, argues that the invocation of IFSA is invalid because the State Department did not do its required due diligence to uncover any "potential for competing claims of ownership" before applying immunity.[186] Cox's other potential argument is that the exhibition of the material, necessary for application of IFSA, was pretextual and should not be allowed to incur protection.[187] This argument is deeply weakened by the actual exhibition of the works that began in 2013; the argument would have been stronger if raised early in the U.S.'s holding. However, there may be another chink in IFSA's armor that would allow a suit against Iraq in U.S. court—the Foreign Sovereign Immunity Act.

The FSIA was passed in 1976 to provide immunity for foreign states from U.S. litigation, but unlike an act with a similar purpose, IFSA, FSIA provides exceptions to immunity.[188] Under customary international law, the courts of one state do not have jurisdiction over a foreign state.[189] However, the FSIA provides exceptions to this protection in order to hold foreign states to some level of accountability.[190] Courts have repeatedly interpreted FSIA's exceptions to pierce IFSA's protection.[191] One of these exceptions might be of use in an attempt to bring suit against Iraq. The expropriation exception,

184 Feldman, *supra* note 168.

185 22 U.S.C. § 2459.

186 *Blueprint for Litigation Over the Iraqi Jewish Archives*, DOCUMENT EXPLOITATION (Nov. 25, 2013), http://www.docexblog.com/2013/11/blueprint-for-litigation-over-iraqi.html (quoting State Department due diligence checklist).

187 *Id.*

188 28 U.S.C. §§ 1602-1611. "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." *Id.* at § 1602.

189 Arthur Lenhoff, *International Law and Rules on International Jurisdiction*, 50 CORNELL L. Q. 5, 5 (1964); *see also* Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 309 (D.D.C. 2005) (discussing history of sovereign immunity in U.S.).

190 28 U.S.C. § 1605.

191 Montgomery, *supra* note 3, at 181.

§ 1605(a)(3), revokes immunity if (1) the suit concerns property that was stolen in violation of international law and (2) the foreign state is engaged in commercial activity in the U.S. in connection with that stolen property.

A case decided in 2005, *Malewicz v. City of Amsterdam*, used the FSIA in this way to get around IFSA.[192] An artist's heirs sued Amsterdam for return of illegally taken artwork after it was loaned to the U.S. for exhibition.[193] § 1605(a)(3) of the FSIA requires that the property at issue is "present in the United States in connection with a commercial activity" carried out by the foreign state.[194] The loan of the art for exhibition, the D.C. District Court held, was sufficient commercial activity.[195] The works were protected by IFSA.[196] Rather than try to seize the art, the plaintiffs sued the owner, the foreign city of Amsterdam, and requested monetary damages or return of the works.[197] They used the brief presence of the art in the U.S. not only to establish jurisdiction, but also to establish commercial activity, circumventing the seizure protection of the IFSA.[198] The shield had become the sword. Amsterdam settled with the descendants, returning five of the paintings in their collection.[199]

Time has not been kind to the expropriation exception, however. In 2016, the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (FCEJICA) banned the use of the exhibition of a "work of art or other object of cultural significance" as the proof of commercial activity needed to sue over the item.[200] However, the FCEJICA does provide an exception if the property was taken after 1900 "in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group."[201] Thus, a case involving the Archive can still satisfy the commercial activity prong of § 1605(a)(3) with the exhibition of the Archive.[202] However,

192 *Malewicz*, 362 F. Supp. 2d. 298.

193 *Id.* at 303.

194 28 U.S.C. § 1605(a)(3).

195 *Malewicz*, 362 F. Supp. 2d at 314 ("There is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign.").

196 *Id.* at 310 ("It is undisputed that the Malewicz Heirs could not seek to seize the artwork while it was in this country under a grant of such § 2459 immunity.").

197 *Id.* at 309–10.

198 *Id.* at 310 ("The Court concludes that Plaintiffs' filing of the complaint while the artworks were physically present in this country was sufficient to meet the 'present in the United States' factor of FSIA without regard to later service of the complaint.").

199 Nout van Woudenberg, State Immunity and Cultural Objects on Loan 181 (2012).

200 *See* Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016).

201 *Id.*

202 Alternately, § 1605(a)(3) allows suit if the state agency or instrumentality (here, SBAH)

there is a second, very recent snag concerning the interpretation of what would satisfy the international law violation prong of § 1605(a)(3).

The current issue with the international law violation prong has to do with geographic locations of the violation and the violator. In *Malewicz,* the plaintiffs alleged that the Dutch state violated international law by taking property owned by a Russian citizen.[203] In *Menzel*, the German state violated international law by taking property owned by a Belgian citizen.[204] In the case of the Archive, the Iraqi state took property from Iraqi Jews—that is, rather than taking foreign property, it took domestic property. In February 2021, the U.S. Supreme Court held that § 1605(a)(3) could not be applied to a domestic taking of property by a state against its own people, because that type of taking was not a violation of international law.[205] In the case, *Federal Republic of Germany v. Philipp*, descendants of art dealers sued for restitution of the Welfenschatz (in English, the Guelph Treasure), which they alleged was sold by German Jewish citizens under duress to the German state of Prussia.[206] The Court found that because the state had not deprived "an alien" of property, it was not "wrongful under international law."[207]

The heirs to the Guelph Treasure argued that, if the taking was not a violation of international law, then genocide, which includes cultural cleansing, and thus the taking of the Guelph Treasure, violated international law.[208] The Court declined to accept this argument, holding, "the expropriation exception is best read as referencing the international law of expropriation rather than of human rights."[209] The Court held that to read § 1605(a)(3) otherwise would improperly weaken immunity, allowing it to be revoked any time "a violation of international human rights law is accompanied by a taking of property."[210] This decision strikes a blow to the viability of the Archive's suit. However, all is not lost—the Archive might still thread the needle of international takings into the loophole of the expropriation exception.

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that owns the property is engaged in commercial activity in the U.S.

203 *Malewicz*, 362 F. Supp. 2d at 310.

204 Menzel v. List, 267 N.Y.S.2d 804, 807 (Sup. Ct. 1966).

205 Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703, 715 (2021).

206 *Id.* at 708.

207 *Id.* at 712.

208 *Id.* at 709. On the idea of cultural cleansing as genocide, see Jamie B. Perry, *Cultural Carnage: Considering the Destruction of Antiquities Through the Lens of International Laws Governing War Crimes*, U.S. ATT'YS' BULL., March 2016, at 57, 59 (explaining that "crimes constituting cultural cleansing are inseparable from atrocity crimes against people and communities").

209 *Philipp*, 141 S. Ct. at 712.

210 *See id.* at 713.

When the property that became the Iraqi Jewish Archive was claimed by the Iraqi state as their own, the rightful owners were no longer citizens of Iraq, or at least not all of them were. The Denaturalization Act of 1950 allowed Jews to emigrate, so long as they renounced Iraqi citizenship and left their property in Iraq.[211] The property was still nominally theirs, and could be used in Iraq, but not outside it.[212] But in 1951, on the day after the year-long offer expired, Iraq secretly forced into law an even more egregious bill: the Law for the Control and Administration of Property of Jews Who Have Forfeited Nationality.[213] This law froze the assets of Jews that had chosen to be denaturalized and to leave the country.[214] It also transferred ownership of those assets to the state.[215] The law was structured to shield Iraq from international liability by making lawful its expropriation. However armored, perhaps Iraq may not prevail. What the 1951 law makes clear is that when Iraq took property from the Jews, it took the property from Jews that were no longer citizens of that sovereignty. And thus, plaintiffs may argue that the taking of the Archive was in violation of international law because it deprived "aliens" of property.[216] Therefore, plaintiffs may be able to use the expropriation exception to get around Iraq's sovereign immunity and sue for restitution of the Archive.[217]

The path is far from clear, and far from speedy. For comparison, the *Philipp* case was filed in 2015, and five years later, after reaching the U.S. Supreme Court, has been remanded for further proceedings.[218] A similar fate

211 Law No. 1 of 1950 (Iraq); Black, *supra* note 182.

212 Black, *supra* note 182.

213 Law No. 5 of 1951 (Iraq). *See generally* Black, *supra* note 182.

214 Law No. 12 of 1951, art. 1 (Iraq) ("The funds of Iraqi Jews who left Iraq with a passport shall be frozen from the date this law comes into force.").

215 *Id.* art. 2, § B ("The Department of the General Secretariat is established to monitor and manage the funds of persons whose nationality has been revoked, headed by the Secretary-General, according to a staff decided by the Council of Ministers." (Google translation).

216 The term "alien" is used by Chief Justice Roberts in the *Philipp* decision, and so I use it here to make clear that I refer to the same class of people. However, the term itself is dehumanizing, and the author would prefer the term "noncitizen." Notably, Justice Sotomayor refuses to use the term "alien" in her Supreme Court opinions. Benjamin Mueller, *For Immigration Lawyers, a Surprise Speaker Who Asks Them to Change Lives*, N.Y. Times (Sept. 4, 2014), https://www.nytimes.com/2014/09/05/nyregion/for-immigration-lawyers-a-surprise-speaker-justice-sonia-sotomayor-of-the-supreme-court.html.

217 Some of the Archive was likely taken after 1951, from property that was left to synagogues by Jews fleeing the country clandestinely. However, it seems likely that at least some of the Archive was taken from Jews that had been denaturalized. *See* Fitz Gibbon, *supra* note 3.

218 Philipp v. Fed. Republic of Ger., 248 F. Supp. 3d 59 (D.D.C. 2017), *vacated*, 141 S. Ct.

likely awaits an Archive suit, extending an uncertain situation that has now existed for nearly twenty years, not counting the previous fifty during which the Archive was held by the Ba'th party and its governing predecessors. Perhaps, as in *Malewicz*, and in so many other cultural restitution cases, the suit would ultimately settle out of court. As the saying goes, however, in a good settlement no one wins. Perhaps only part of the Archive would be returned, or ownership shared. Or perhaps, there would be no settlement. Perhaps the lawsuit would not be decided in plaintiff's favor, and the Archive would return to Iraq with U.S. authorization. The next section considers some outcomes that could dispose of the need for a lawsuit entirely.

B. *The Case for Non-Legal Resolution*

Beginning, let alone winning, a legal suit for restitution of the Archive is difficult, expensive, and lengthy. In addition, the outcome of a successful suit may not accomplish what Iraqi Jews might wish for, because the Archive is made up of so many disparate materials which pose an array of difficulties to successful return. Furthermore, it is possible that enforcement might become an issue.[219] In this situation, a non-litigious strategy might be to the benefit of the Iraqi Jewish community, as well as to relationships between Iraq and other stakeholders.[220] The use of a restorative justice practice to negotiate the return of the Archive could also set a transformative precedent for future equitable restitutions.

Part of the difficulty with devising a restitution for the Archive

703, 716 (2021).

219 For example, in the case of Chabad v. Russian Federation, a Jewish organization sued Russia for return of an archive of 12,000 Rabbinic works. Agudas Chasidei Chabad v. Russian Fed'n, 466 F. Supp. 2d 6, 10–12 (D.D.C. 2006); Irina Tarsis & Elizabeth Varner, *Reviewing the* Agudas Chasidei Chabad v. Russian Federation, et al. *Dispute*, AM. SOC'Y INT'L L. (Mar. 19, 2014), https://www.asil.org/insights/volume/18/issue/8/reviewing-agudas-chasidei-chabad-v-russian-federation-et-al-dispute. Although a U.S. Court found for plaintiffs in 2010, Russia did not comply with the judgment. Tarsis & Varner, *supra*. It faced huge financial sanctions, but did not comply and even brought suit in Russia for part of the Archive held on long term loan in New York. Tarsis & Varner, *supra*; Spencer S. Hsu, *U.S. Judge Fines Russia $43.7 Million in Diplomatic Feud Over Jewish Collection*, WASH. POST (Sept. 13, 2015), https://www.washingtonpost.com/local/crime/us-judge-fines-russia-437-million-in-diplomatic-feud-over-jewish-collection/2015/09/13/c6fce4f6-589e-11e5-abe9-27d53f250b11_story.html.

220 At a minimum, the pursued strategy should not make litigation the end goal. There are arguments for beginning with restorative justice, and bringing suit as a last resort, but another strategy could aim to bring suit to raise publicity and put pressure on Iraq, offering restorative justice and diplomacy as a carrot to the suit's stick. Indeed, there is an argument that it is in Iraq's best interests in terms of international business to seem welcoming to other communities.

stems from the need for different treatment of different materials within the Archive. It is confusing to try to apply one set of reasoning to a sixteenth century Bible and to surveillance records from the 1990s. The materials and objects in the Archive are not of universal value. The public takes up the cause of the Archive, thinking of the wedding certificates and the report cards, and they argue that the individuals whose names are on those documents should have a say in where the documents go.[221] Whether or not those materials are of greater value in the hands of private individuals or in the libraries of researchers should be decided by those owners. But what about official correspondences, local laws, and mass-produced prayer books? Those were not people's keepsakes, but a representation of the community. They were held communally in synagogues.[222] They cannot be doled back out to rightful owners. Who decides where these objects should go? It may be possible to bypass this impossible question by seeking a compromise between the nationalist and internationalist theories of restitution.

We can look to other restitutions for guidance. The Archive is not unique in its situation. In March 2021, Iraq returned eight tons of archived files that it had stolen from Kuwait in 1990.[223] This return was part of an extended reconciliation arising from the Gulf War that involved returning Kuwaiti bodies found in a mass grave in Iraq, and paying $51 billion dollars in restitution to Kuwait.[224] The U.S. has also recently quietly returned an archive taken from Iraq during the Iraq War. [225] The Ba'th party in Iraq compiled an archive that documented abuses of Kurds during the Anfal.[226] Unlike the Iraqi Jewish Archive (Archive), which is constituted of stolen property, the Ba'th Party created this archive, and its return to Iraq is part of an acknowledgment of past atrocities. Previously, a digital copy had

221 *See, e.g.*, Sugarman, *supra* note 163.

222 Fitz Gibbon, *supra* note 3.

223 Mustafa Shilani, *Tons of Kuwaiti Archives, Stolen by Former Iraqi Regime, Arrive Home*, Kurdistan 24 (Mar. 28, 2021), https://www.kurdistan24.net/en/story/24170-Tons-of-Kuwaiti-archives,-stolen-by-former-Iraqi-regime,-arrive-home.

224 *Id.*

225 Michael R. Gordon, *Baath Party Archives Return to Iraq, with the Secrets They Contain*, Wall St. J. (Aug. 31, 2020), https://www.wsj.com/articles/baath-party-archives-return-to-iraq-with-the-secrets-they-contain-11598907600. The Anfal was a Ba'th campaign that from 1986 to 1989 killed, at minimum, 50,000 and possibly as many as 182,000 Iraqi Kurds. Hum. Rts. Watch, Genocide in Iraq: The Anfal Campaign Against the Kurds 3–19 (1993), https://www.hrw.org/reports/pdfs/i/iraq/iraq.937/anfalfull.pdf; *Anfal Campaign and Kurdish Genocide*, Kurdistan Reg'l Gov't, https://us.gov.krd/en/issues/anfal-campaign-and-kurdish-genocide/ (last visited Apr. 27, 2021); Moreh, *supra* note 68, at 8.

226 Brill, *supra* note 33.

symbolically and ceremoniously been handed to an Iraqi institution.[227] The U.S. institution that previously housed the Archive now retains its own digital copy.[228] The physical documents are currently kept in a secure location without access to the public due to their sensitive contents.[229] When news of this return broke, some feared that the Archive's return to Iraq would similarly be announced, and that it might become similarly (physically) inaccessible, despite digital copies of most materials currently being available online.[230] On the other side, these types of acceptances of guilt and attempts to repair harms show an interest from Iraq of engaging with the Archive in a way that could also recognize past persecution and future goodwill.[231] Plans for some form of return of the Archive can take note of these returns and how the Archive could be treated similarly and differently. The Archive represents an opportunity to continue restitution, publicly, while setting an example.

The idea that long-stolen cultural heritage should now be returned has been gaining global recognition in recent years, and current claims are rife and far-ranging. They are also encountering some of the same difficulties in imagining repatriation that the Archive does. In the summer of 2020, the University of Pennsylvania's Penn Museum announced that it would begin attempts to repatriate the skulls it has in its collection that belonged to Black people who were enslaved.[232] However, a lack of records in the collection itself as well as in the genealogical records of the descendants of enslaved people pose huge problems to accurate and complete repatriation, leading activists to call for transparency in the decision-making and a total dissolution of the Morton collection, numbering over 1,000 skulls.[233] Across the world in Amsterdam, the Rijksmuseum has been attempting to return Southeast Asian art seized during colonial rule, but have struggled to figure out if the objects should go to the current governments of Indonesia and Sri Lanka, or to the descendants of the rulers at the time the objects were stolen.[234]

227 Ferdinand Hennerbichler & Bruce P. Montgomery, *U.S. Restitution of the Iraq Secret Police Files from Saddam Hussein's Regime Regarding the Kurds in Iraq*, 5 ADVANCES ANTHROPOLOGY 31 (2015), https://www.scirp.org/pdf/AA_2015021014524303.pdf.

228 Gordon, *supra* note 225.

229 *Id.*

230 Julius, *supra* note 33.

231 Western nations' current efforts to repatriate Benin Bronzes is a similar example of goodwill and repair efforts. *See supra* note 45.

232 Hakim Bishara, *Activists Renew Calls for Penn Museum to Repatriate Skulls of Enslaved People*, HYPERALLERGIC (Apr. 7, 2021), https://hyperallergic.com/635918/activists-renew-calls-penn-museum-repatriate-skulls-morton-collection/.

233 *Id.*

234 Toby Sterling, *Dutch Ready to Give Back Seized Colonial Art - but to Whom?*, REUTERS (Oct. 13, 2020), https://www.reuters.com/article/us-netherlands-colonial-artwork/dutch-

The Archive has particular aspects that make it a good opportunity to set an example for future restitution efforts. It was originally taken from a people who are largely unable to trace ownership claims. The contents were then secondly taken by another country that has no legal ability or intention to redistribute it, but that has arguably rescued it from certain misuse and destruction. Its preservation and conservation were incredibly expensive, and its monetary valuation, besides a few objects, is likely low. Its cultural value is high, however, and it is a powerful reminder of great injustice and persecution. The public has clamored for its return to its rightful owners, but what would justice look like? Using concepts of restorative and transitional justice, the return of the Archive can offer a template for reconciliation and growth in the Iraqi community, and for repatriation of other cultural heritage worldwide.

Restorative justice practices are utilized in the United States most often in the context of criminal justice.[235] Often, the parties meet in a circle, a non-hierarchical practice that allows the victim some agency and closure, and requires that the perpetrator take responsibility and recognize the harm their actions have caused.[236] However, the context of cultural heritage conflict calls for a different type of practice within the restorative justice framework. While modern restorative justice grew out of a theory of restitution, it extends beyond giving back what was taken.[237] Restorative justice requires the parties in conflict to meet and understand each other.[238] Often, the meeting brings about a more complex outcome beyond satisfying the demands of the victim.[239] Because the Archive presents a complex problem, with numerous stakeholders and no clear "just" solution, restorative justice is well-suited to

ready-to-give-back-seized-colonial-art-but-to-whom-idUSKBN26Y1A8.

235 *See, e.g.*, Ian D. Marder, *Developing Restorative Justice in Law, Policy and Practice: Learning from Around the World*, Penal Reform Int'l: Blog (Jan. 10, 2019), https://www.penalreform.org/blog/developing-restorative-justice-in-law-policy-and-practice/; *RJ in the Criminal Justice System*, Ctr. for Just. & Reconciliation, http://restorativejustice.org/restorative-justice/rj-in-the-criminal-justice-system/#sthash.zQ0VQHAM.dpbs (last visited July 5, 2021).

236 *Lesson 1: What Is Restorative Justice?*: *Amends*, Ctr. for Just. & Reconciliation, http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/amends/#sthash.RWvJrQ5k.dpbs (last visited June 14, 2021); *see also* Wachtel, *supra* note 59, at 3–4, 7–8.

237 John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 Crime & Just. 1, 2–3 (1999).

238 *Lesson 1: What Is Restorative Justice?*: *Encounter*, Ctr. for Just. & Reconciliation, http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/encounter/#sthash.oSrZP0pe.dpbs (last visited July 5, 2021).

239 *Lesson 1: What Is Restorative Justice?*: *Amends*, *supra* note 236.

the issue. It is not easy to return the Archive. Some protest any attempt to split it apart, but it seems inappropriate to choose a single entity to own it. For swaths of the Archive, there is no clear individual owner. Where and how (and if) it would be displayed are all in contention. Restorative justice can create an informed and equitable solution.

Restorative justice is already used in cultural heritage conflicts, albeit not widely. Moira Simpson has considered its use in the context of museums seeking to rectify their long history of seizing and displaying the art and artifacts of indigenous populations.[240] She ties participation in repatriation to respecting and valuing the culture and its ability to thrive:

> To ignore, dismiss or reject requests from indigenous peoples who seek the return of cultural objects . . . would suggest that museum professionals are more concerned with preserving artefacts than supporting communities in their efforts to perpetuate the distinct cultures, beliefs and practices that led to the creation of the artefacts.[241]

By engaging in restorative justice, the Iraqi government can take steps towards atoning for a long-unacknowledged wrong. It can allow the Iraqi Jewish community to properly care for the Archive and to display it in the context the community feels is best.

Indeed, some of that care does not include display. Already, damaged Torah fragments taken from the Mukhabarat have been ritually buried according to Jewish practice.[242] Jewish sacred writings must not be destroyed, so when they are damaged and can no longer be used, the practice is to bury them.[243] There is no prohibition against displaying these fragments, and one of the fifty Iraqi Jewish Archive Torah fragments reviewed by rabbinical authorities was retained for exhibition.[244] The remaining forty-nine were buried in a coffin in 2013 in the New Montefiore Cemetery in West Babylon, New York.[245] The official press release describes "representatives from all groups with a stake in the Iraqi Jewish Archive" as well as the Iraqi ambassador and other Iraqi representatives, and U.S. Department of State and NARA representatives were in attendance.[246] The Iraqi ambassador

240 Moira Simpson, *Museums and Restorative Justice: Heritage, Repatriation and Cultural Education*, MUSEUM INT'L, 2009, at 121.

241 *Id.* at 128.

242 *Ritual Burial of Parchment Fragments*, PRESERVING IRAQI JEWISH ARCHIVE, https://ijarchive.org/project/burial (last visited Apr. 27, 2021).

243 *Ask the Expert: Burying the Genizah*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/ask-the-expert-burying-the-genizah/ (last visited Apr. 27, 2021).

244 *Ritual Burial of Parchment Fragments*, *supra* note 242.

245 *Id.*

246 *Id.*

had reviewed the fragments and approved their burial.[247] In this action, we see a willingness to engage in restorative justice.

A restorative justice practice in the context of the Iraqi Archive conflict should be nestled into a larger agenda of transitional justice. The United Nations defines transitional justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[248] The Ba'th regime was a brutal era of cultural cleansing and genocide inflicted not only upon Jews, but most notably upon Kurds.[249] Engaging in work to repair past harm caused by the exile of Jews and the rounding up of their property can open a door to further transitional justice. While continuing to maintain a property right in the Archive and a plan to exhibit it in Iraq, the current ambassador to the U.S., Fareed Yasseen, has also expressed the desire to mend relationships with the Iraqi Jewish diaspora.[250] It is possible that using restorative justice practices and diplomatic incentives could finally bring the conflict to a resolution.

The ending for the Archive could be the beginning for continuing transitional justice. Iraq is still deeply hostile towards Jews. A 2003 fatwa ordered the killing of any Jews attempting to buy real estate in Iraq.[251] The then-director of the Gilgamesh Center for Antiquities and Heritage Protection—not Jewish himself, but who showed an interest in preservation of Mosul's Jewish quarter—was arrested and interrogated for two months by Iraqi police under suspicion of spying for Israel.[252] There are at most three Jews remaining in Iraq in 2021.[253] There is a great need for reconciliation and reopening of Iraq towards the Jewish community.

An alternative to litigation—its cost, uncertainty, and adversarial nature—might look like this: stakeholders in the Archive (including representatives in Iraq) would engage in dialogue. In recognizing the history

247 *Id.*

248 Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice 2 (March 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

249 *See* Brill, *supra* note 33.

250 Zax, *supra* note 24 ("We cannot and will not relinquish ownership of the archive."(quoting Fareed Yasseen, Iraq's ambassador to the U.S.)); Zax, *supra* note 24 ("I still cling to the hope that the relationships will be restored and that the Jews that left Iraq would find opportunity to visit." (also quoting ambassador Yasseen)).

251 Esmat Salaheddin, *Jews Buying Land in Iraq Face Death, Cleric Says*, Globe & Mail (June 28, 2003), https://www.theglobeandmail.com/news/world/jews-buying-land-in-iraq-face-death-cleric-says/article1018100/.

252 Neurink, *supra* note 46.

253 *See* Farrell, *supra* note 47.

of Jews in Iraq, the cultural contributions as well as the persecutions, this conversation could open a door to renewed community and credible contrition. What could come out is the way that the Archive represents the much greater and far-ranging harm done to a once-enormous community. The conversation could address how best to remedy the harm. Perhaps the stakeholders might agree that collaboration would be possible and desired.

There are many ways to devise a "restitution" of sorts that would not be a simple renunciation of claim to title. For example, The University of Maine signed an MOU with the Penobscot Nation in 2018 to collaboratively manage their collection of archeological heritage in a way that respectfully integrates traditional knowledge in the presentation of the collection.[254] There may be a similar way to involve members of the Iraqi Jewish diaspora that can be identified in decision-making and curation of the Archive. As for physical logistics, Iraq could provide the Archive on long term loan, although that option may be distasteful to Iraqi Jewish stakeholders, given that it does not achieve symbolic return. The Archive's digitization could be used, with symbolic digital copies of the Archive distributed to Iraq and in areas of Iraqi-Jewish diaspora, as was done with the Ba'th party archives.[255] The Archive could be split and housed at numerous locations, perhaps some of it in private collection and others in research institutions and museums. The Archive could also assume a rotation schedule, the better to maximize its outreach, recognize the diasporic nature of its owners, and to share the burden of its conservation and housing. Although these ideas are dependent on voluntary participation of both Iraqi Jews and Iraqi state officials, they are powerful options. New ideas for resolution must be raised, or else we face continued inaction from the U.S. that will result, sooner rather than later, in the return of the Archive to Iraq and the loss of a window for claimants to regain their cultural property. There exists now an opportunity to change the fate of the Archive. A collection that represents such suffering and injustice has the potential to be remade into something of recognition, respect, and restoration.

CONCLUSION

For the reasons above, concrete steps should be taken to resolve the fate of the Archive. The U.S. government should allow Iraq the opportunity to express willingness to work diplomatically with Iraqi Jewish stakeholders to collaboratively come to a solution that makes right the wrong of confiscating

254 *UMaine and Penobscot Nation to Sign MOU Focused on Managing Tribe's Cultural Heritage*, U. ME. (May 4, 2018), https://umaine.edu/news/blog/2018/05/04/umaine-penobscot-nation-sign-mou-focused-managing-tribes-cultural-heritage/.

255 *See* Gordon, *supra* note 225.

the cultural property of Iraqi Jews throughout the twentieth century. In the event that a lawsuit is necessary and a plaintiff apparent, there is a possibility that a challenge would yield results—and at the very least, it would pressure the U.S. and Iraqi governments to take action to address the remarkable collection of cultural heritage that currently sits, like the Jews sent to Babylon two thousand years ago, in exile.